Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-11-121

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Neil Cohen** **Ms Janet Frohlich**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Ken Kalturnyk of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.**
HEARING DATE:	**June 5 and June 6, 2013**
ISSUE(S):	**1. Whether the Appellant had a reasonable excuse for the late filing of her Application for Review.** **2. Whether the Appellant's Income Replacement Indemnity benefits were correctly terminated on February 20, 2009.**
RELEVANT SECTIONS:	**Sections 110(1)(c) and 172 of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant was injured in a motor vehicle accident on June 25, 2008 when she struck a pole backing out of a parking lot. At the time of the accident the Appellant was employed at [text deleted] as a payroll clerk on a part-time basis. She was classified as a part-time earner under the MPIC Act and on the 181st day following her accident was determined (pursuant to Sections 106(1) and 106(2) of the MPIC Act) as an "Accounting Clerk", and received Income Replacement Indemnity ("IRI") benefits on this basis.

The Appellant underwent a four week reconditioning program at the [Rehabilitation (Rehab) Clinic]. On February 25, 2009, she was discharged from her [Rehab Clinic] program with a summary recommending she continue with her home-based exercise program and indicating that the Appellant had demonstrated physical activity tolerance consistent with being able to return to sedentary work.

The Appellant's case manager wrote to her on March 23, 2009 indicating that medical information on her file confirmed that she had the capacity to hold her determined employment as of the end of her reconditioning program with [Rehab Clinic]. As such, the Appellant no longer qualified for Income Replacement Indemnity ("IRI") benefits beyond February 20, 2009, in accordance with Section 110(1)(c) of the MPIC Act.

The Appellant's file was then reviewed by a consultant with MPIC's Health Care Services team. The consultant was of the opinion that the medical evidence did not indicate that the Appellant had developed a condition as a result of the accident that would prevent her from performing light sedentary work as an accounting clerk. The case manager wrote to the Appellant again on April 8, 2009 confirming that there was no new medical information which would justify a fresh decision on the issue of entitlement and confirming the decision outlined in the case manager's letter of March 23, 2009.

On March 25, 2011 the Appellant sought an Application for Review of the case manager's decision.

On September 2, 2011, an Internal Review Officer for MPIC considered whether MPIC should extend its 60 day time limit for the filing of an Application for Review, as the Appellant's

application was more than 22 months out of time. The Internal Review Officer considered whether the Appellant had provided a reasonable excuse for failing to apply for a review within the time period provided by the legislation, and found that the Appellant had not put forward a reasonable excuse.

The Internal Review Officer then went on to consider the merits of the Appellant's claim that her accident related injuries precluded her from holding her determined employment as an accounting clerk. The Internal Review Officer noted that there was documentation on the Appellant's file of low back pain prior to the motor vehicle accident. The Internal Review Officer agreed with the opinion of Health Care Services consultant, [MPIC's Doctor], that the medical evidence did not indicate that the Appellant developed a condition as a result of the minor motor vehicle accident which prevented her from performing light sedentary work. The Application for Review was dismissed.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal. She provided medical reports from her physiotherapist, [Appellant's Physiotherapist], who testified for the panel via teleconference. She also provided reports and chart notes from her physician, [Appellant's Doctor #1], and reports from [Appellant's Neurologist #1], [Appellant's Doctor #2] and [Appellant's Chiropractor].

The Appellant described the motor vehicle accident and the injuries which followed, including a feeling of tightness in her body, stiffness in her muscles and some pain. She explained that she

continued to work at her position at the [text deleted] payroll department. Her job involved sitting at a desk and entering and verifying data, mostly using a computer. After the motor vehicle accident, she had difficulty looking at papers, and suffered from neck pain as well as low back pain. She went for chiropractic treatments with [Appellant's Chiropractor], took medication and iced her back at work, stretching when she could.

Her employment, which had been on a probationary basis, was terminated on July 25, 2008.

However, she testified that she was still prevented from working between October 3, 2008 and January 2009, due to problems arising out of the motor vehicle accident injuries. She described the difficulty she was having during that period, doing things for herself at home. The pain was getting worse and she was not even able to sit on the sofa. She continued going for chiropractic treatment until the end of November, but the relief was not lasting. She attended for physiotherapy as well as for Reike treatment and reflexology. She was taking large amounts of medication and having some difficulties with her stomach.

The Appellant described her experience with the rehabilitation program at [Rehab Clinic]. She explained that the lifting and testing which she had to do there aggravated her injury, making her afraid to continue. When she expressed these concerns to [Rehab Clinic's Doctor] at [Rehab Clinic], he had encouraged her to continue, so she did the best she could. However, she did not improve. During the final testing prior to her discharge, she had to pull and lift things. She had to lift a heavy crate and walk with it, before setting it down, and she believed this caused spasms. She believed this incident added to the aggravation of her back and she was not able to complete any further exercises at [Rehab Clinic].

The Appellant disagreed with [Rehab Clinic's] recommendation that she was able to perform sedentary work upon her discharge from the program. She indicated that she was in so much pain after the discharge that some days she was not able to walk and had to crawl around her house in tremendous pain. She had a lot of difficulty sitting and since her job involved mostly sitting, she would not have been able to return to work.

The Appellant explained that she did not receive the case manager's decision dated March 23, 2009. Although the case manager's decision dated April 8, 2009 stated that it had a copy of the March 23, 2009 decision attached to it, she does not recall receiving or seeing that attached letter or the original letter on March 23, 2009.

However, although the April 8, 2009 decision letter stated that she would not be receiving further benefits, she had still been hopeful that she would receive those benefits because she had received another letter (on April 4, 2008) requesting tax information regarding the calculation of her benefits.

Because the April 8, 2009 letter did not contain the standard 60 day appeal notice paragraph at the end of the letter, the Appellant believed that she was not able to appeal that letter due to the absence of the notification paragraph. So, on April 29, 2009, she wrote to the case manager asking if there were any time restrictions on her ability to submit new information for her claim and have it reviewed again. She received a phone call in reply which led her to believe the issue was still open and she could submit new or additional evidence at any time. The Appellant believed that this meant that if she submitted new information she could appeal. She indicated that she waited another two years before filing an Application for Review because at the time she did not believe that, without the notification paragraph, she was allowed to appeal. She pursued

other issues with MPIC and sought review regarding those. This was the only issue she did not pursue, because she was confused about her ability to appeal it.

The Appellant also described physiotherapy treatments which she pursued with [Appellant's Physiotherapist]. She indicated that he helped her a lot but that her condition did not completely resolve. She continues to go for physiotherapy, Reike and reflexology therapy when she is able and has improved to some degree. She has not attempted a return to work, although she has been retraining herself, taking a course to become a life coach. She was also referred to the [text deleted] and is on a waiting list to take a course at [text deleted].

The Appellant indicated that the most difficult activity for her is sitting. She still takes anti-inflammatories and Tylenol 3 for the pain. On cross-examination, the Appellant admitted that she had remained at work (part-time) for her entire term at [text deleted], even following the motor vehicle accident. She confirmed that she had been embarrassed that she had been in a motor vehicle accident and did not tell anybody at her workplace about it. She had even indicated at a pre-placement assessment that she had no physical health problems and disclosed no need for any accommodation. The Appellant explained that this was because she really wanted to work so she said she could work and did work as long as she could.

The parties agreed that [Appellant's Physiotherapist] was qualified as an expert physiotherapist witness. In his evidence, [Appellant's Physiotherapist] referred to a report he had provided dated November 1, 2012. This report indicated that, based on a balance of probabilities, likely some, but not all of the Appellant's problems during 2009 were related to injuries incurred during the June 25, 2008 motor vehicle accident. Although he had not seen her prior to November 26, 2008, the Appellant reported having adequate function prior to the motor vehicle accident,

lending probability, he indicated, to the exacerbation of lumbar spine disc problems with the accident. [Appellant's Physiotherapist] reported the following objective findings in 2009:

i. "Left convex rotoscoliosis – apex =T7
ii. Left L4, L5 myotomal weakness
iii. Muscle spasm at L5 with central P/A pressures, mechanical dysfunction L5
iv. Positive strait leg raises bilaterally ranging from 40° - 65° throughout 209 treatment period
v. Positive dural tension signs
vi. Right psoas muscle tone, right SI joint stiffness, upper gluteal muscle wasting
vii. Pelvic inbalance – right anterior inominate, left posterior inominate – anterior tilt to pelvis
viii. Decreased segmental flexion and extension L5-S1
ix. Significant limitation lumbar spine range of motion
x. Significant limitation cervical spine range of motion
xi. Mechanical dysfunction C3-C6
xii. Mechanical dysfunction T3-T4, T5-T7
xiii. Movement dysfunction right atlanto-occipital joint
xiv. Right temporal bone stiffness, right temporalis muscle tightness"

He noted that in March 2009 she had an acute exacerbation of an L4, L5 disc protrusion/herniation that would have prevented her from working and that given the reactive nature of her disc injuries prior to that exacerbation, performing light sedentary work would likely delay her recovery. The report noted that in his view, the Appellant had recovered to the point that she might consider a gradual return to work.

At the hearing, [Appellant's Physiotherapist] provided extensive evidence regarding the biomechanics of the motor vehicle accident and the Appellant's injuries. He described and explained his views regarding the effect of the high levels of the Appellant's dural tension, with the Appellant's pre-existing spinal condition lessening the flexibility of her spine and increasing the strain of the impact.

[Appellant's Physiotherapist] also testified that in his view the exacerbation that the Appellant suffered during her [Rehab Clinic] program stalled her return to work, which she had previously been close to.

He also indicated that although the Appellant was now ready for light sedentary work, the work which would be preferred for her would not involve a lot of sitting, but rather some sitting, some standing and some walking. He felt that a gradual return to work over a fairly lengthy period would be most prudent.

[Appellant's Physiotherapist] was also cross-examined extensively regarding his views on the biomechanics of the accident, the dural tension and myotomal weakness of the Appellant and the effect of the Appellant's pre-existing spine condition.

Counsel for the Appellant made submissions regarding the issues of the Appellant's late filing of her Application for Review and the issue of her entitlement to IRI benefits subsequent to February 20, 2009.

In regard to the late filing of the Application for Review, counsel submitted that the Appellant had not received or seen the case manager's decision of March 23, 2009. She did receive and review the April 8, 2009 decision, but it did not include the advisement that she had 60 days to request an Internal Review, and this confused the Appellant. She testified that she inquired as to why there was no section stating that she had 60 days to appeal the decision and was left with the understanding and conclusion that this issue was still open. She had gone to the effort of emailing her case manager, on April 29, 2009 to ask if there were time limits for submitting new

medical evidence in order to have her claim reviewed again, and she understood that there were no time limits.

Counsel submitted that the Appellant was seriously confused by the April 8, 2009 decision and honestly believed that she could not appeal that issue, so an extension of time limits should now be accepted. Furthermore, there was no prejudice to MPIC as the Appellant continued to actively seek care at her own expense and attempted to mitigate her situation by pursuing treatment and other employment training. Accordingly, counsel submitted that the Commission should allow the Appellant an extension of time for filing her Application for Review.

In regard to the issue of entitlement to IRI benefits subsequent to February 20, 2009, counsel for the Appellant reviewed the chart notes of the Appellant's doctor, [Appellant's Doctor #1], in detail. These contained references, beginning on March 25, 2009, to intolerable back pain. [Appellant's Doctor #1] provided a referral to a neurologist, [Appellant's Neurologist #1] who noted that the Appellant had a small prolapsed disc on the left side with a completely degenerated disc.

Another neurologist, [Appellant's Neurologist #2] reported to [Appellant's Doctor #1] on April 13, 2009 noting a likely left S1 radiculopathy as well as significant mechanical back pain.

Counsel for the Appellant reviewed an MRI report dated February 24, 2009 which indicated:

> "At the L4-5 level there is shallow posterior disc bulging without focal disc herniation, spinal stenosis or focal nerve root compression. There is a fairly large annular tear involving the posterior annular fibres in the midline.
>
> At the L5-S1 level there is a small or most small-to-moderate-sized left paracentral disc herniation. There is no significant central spinal stenosis. The disc material contacts the left S1 nerve root without definite evidence of displacement or compression of the left S1

> nerve root but I cannot exclude a very mild degree of compression or irritation of the left S1 nerve root by the disc material. Clinical correlation is recommended. No other significant lumbar spinal abnormality is identified."

Counsel also extensively reviewed the evidence of the physiotherapist, [Appellant's Physiotherapist], who began treating the Appellant on November 26, 2008. On December 31, 2008 he estimated her walking and standing tolerance of 5 to 10 minutes, with a sitting tolerance of 15 to 20 minutes, noting that she was not ready for a graduated return to work.

[Appellant's Physiotherapist] then indicated that by January 2009 the Appellant was not doing too badly and was close to being able to return to work. However, exacerbation (when she was hurt at [Rehab Clinic]) prevented this from occurring.

In February 2009, [Appellant's Physiotherapist] noted irritated low back pain and the return of myotomal weakness which had resolved during treatment.

In his report dated November 1, 2012, [Appellant's Physiotherapist] listed 14 objective findings during 2009. He opined that on a balance of probabilities the Appellant had exacerbated her lumbar spine condition in the motor vehicle accident of June 25, 2008. He provided a rationale for why the Appellant was not capable of returning to even sedentary work in March of 2009, noting that the acute exacerbation of an L4, L5 disc protrusion/herniation would have prevented her from working. Sitting or standing postures would not have been tolerated very well during this period and given the reactive nature of her disc injuries prior to the March 2009 exacerbation, performing light sedentary work would likely have delayed her recovery.

Counsel for the Appellant described [Appellant's Physiotherapist's] explanation for why the Appellant suffered a relatively serious spinal injury in a relatively minor motor vehicle accident as well reasoned. The Appellant's prior disc problems, documented in an MRI of February 2006, would have, in all probability, resulted in high dural tension. This tension would have reduced the flexibility of the spine, making it more prone to injury. In addition, the twisting of the spine at the time of the impact would have further reduced the spine's ability to absorb the impact without injury.

Further, counsel emphasized that [Appellant's Physiotherapist] did not witness any significant pain avoidance behaviour during his several months of treating the Appellant and that this, accordingly, should not be considered a factor.

Counsel noted that the 2006 MRI did not show any evidence of a disc herniation prior to the motor vehicle accident and that the herniation at L5-S1 was a consequence of the June 25, 2008 motor vehicle accident. There was also an increase in symptoms following the accident and the mechanism of the accident. Then, there was a further exacerbation of these disc problems during the February 18, 2009 Functional Capacity testing at [Rehab Clinic]. The chronicity of the low back pain between June 25, 2008 and February 18, 2009 would indicate that a relatively serious injury occurred as a direct result of the motor vehicle accident, with a setback on February 18, 2009 with the result that her condition appears to have plateaued for much of the rest of 2009, with slight improvement during physiotherapy treatments.

The [Rehab Clinic] Intake Assessment noted the Appellant's low sitting tolerance, but upon discharge, no retesting was done of her sitting tolerance. Pre-work simulations to increase sitting tolerance were assigned but the Appellant did not complete them. Therefore, counsel submitted

that the conclusion of the Discharge Summary that the Appellant was fit to return to her pre-accident sedentary work was suspect.

Counsel also submitted that the amount of damage to the Appellant's car (resulting in only a $260 bill for replacement parts) was not relevant. The impact was sufficient to damage steel parts and physical injuries do not always correspond directly to mechanical damage.

Counsel submitted that on a balance of probability the Appellant suffered an exacerbation of a pre-existing disc problem during the motor vehicle accident of June 25, 2008, with a possible enhancement of this condition on February 18, 2009, as the 2009 MRI showed a disc herniation at L5-S1 which was absent in the 2006 MRI.

The problems in the Appellant's lower spine made it extremely painful for her to sit for more than a few minutes at a time and she had to frequently stand and stretch, walk and (in extreme cases) lie down or ice her back to relieve the spasms. Therefore, as was opined by [Appellant's Physiotherapist], it was detrimental to her recovery to return to work where she would be required to sit for lengthy periods of time, a common feature of most sedentary jobs. Therefore, counsel submitted that MPIC erred in determining that the Appellant was capable of returning to a sedentary job as of February 20, 2009. Counsel requested that the Commission reverse this decision and reinstate the Appellant's IRI benefits subsequent to February 20, 2009.

Evidence and Submission for MPIC:

Counsel for MPIC relied upon several reports from MPIC's Health Care Services team on the Appellant's medical file, as well as the evidence of [MPIC's Doctor], who testified at the appeal

hearing. Following a review of information on the Appellant's medical file, [MPIC's Doctor] provided reports dated May 26, 2009, April 1, 2009, September 28, 2009 and December 6, 2012

In these reports, [MPIC's Doctor] advised that it was not medically probable that the Appellant sustained a significant musculoskeletal injury as a result of the incident in question or that she would have been exposed to any significant trauma as a result. He noted the Appellant's past history of low back problems and that any limitations in a Level of Function Report dated September 24, 2007 were mostly the result of back problems. He indicated there was no plausible medical explanation for the functional limitations the Appellant reported or her inability to perform work duties. Radiological findings of degenerative disc disease at the L5-S1 level as well as the L1-2 and L2-3 levels were also noted. [Appellant's Physiotherapist's] reports were reviewed.

[MPIC's Doctor] commented:

> "The information indicates [the Appellant] was involved in a minor motor vehicle incident that would not expose her to any significant level of trauma which in turn might lead to a significant musculoskeletal and/or neurologic injury. Based on the documentation of [the Appellant] having pre-existing back problems that date back to 1996, it is possible that a pre-existing condition involving her back might have been exacerbated to some extent. Based on the absence of any documentation of clinical findings for nine days in conjunction with information indicating [the Appellant] was able to perform her work duties until July 14, 2008, it is reasonable to conclude that any exacerbation that might have occurred of her pre-existing low back condition was minor.
>
> From an objective standpoint, the majority of medical information does not indicate that [the Appellant] was noted to have findings suggestive of a significant muscular and/or neurologic disorder that in turn would account for her various symptoms... It is not medically probable that the incident in question resulted in the large annular tear at the L4-L5 level or the disc herniation at the L5-S1 level. It is not possible to determine when these abnormalities developed but based on the presence of degenerative changes involving multiple levels of the cervical and lumbar spine it is reasonable to conclude the abnormalities developed over the passage of time and not secondary to the minor collision [the Appellant] was involved in on June 25, 2008."

[MPIC's Doctor] was of the view that the Appellant may have developed a mild exacerbation of her pre-existing back symptoms as a result of the incident in question, which in all probability fully resolved. The evidence did not indicate that the Appellant developed a condition as a result of the incident that would prevent her from performing light sedentary work as an accounting clerk.

[MPIC's Doctor's] reports described the Appellant's motor vehicle accident related medical conditions as in keeping with a mild musculo-tendonous strain or possible mild exacerbation of a pre-existing condition.

[MPIC's Doctor] also opined regarding the explanations set out in [Appellant's Physiotherapist's] reports regarding how the motor vehicle accident could have contributed to the Appellant's symptoms. He noted:

> '...Based on the results of my previous reviews of [the Appellant's] file, it is my opinion the explanation [Appellant's Physiotherapist] put forth is not medically plausible or probable. [Appellant's Physiotherapist] did not provide any objective medical evidence or scientific evidence that would indicate torsional, flexion/extension or compressive forces applied to [the Appellant's] spine would have been amplified through the neuro-meningeal system or that the adverse mechanical tension in the central nervous system coupled with the mechanical factors (outlined in the report) might account for the significance of her injuries..."

At the appeal hearing, the parties agreed that [MPIC's Doctor] was qualified as an expert witness in sports medicine with experience in forensic review. [MPIC's Doctor] described his previous experience, and also the time he had spent reviewing the Appellant's file. He reviewed his understanding of the mechanics of the Appellant's motor vehicle accident, noting that the force that may have been transferred to the Appellant was not significant, such that he did not expect any new injuries would occur. A review of reports from the initial assessments of the Appellant's healthcare providers found only symptoms of strain with no subjective evidence of

significant injuries. The Appellant continued to work at her normal duties after the accident. The functional limitations reported in September were extensive, and [MPIC's Doctor] could not see how these could have resulted five months after this minor incident.

[MPIC's Doctor] reviewed the various degenerative changes found at various levels in the Appellant's back, noting that these probably predated the motor vehicle accident. He also reviewed [Appellant's Physiotherapist's] reports and the symptoms listed therein.

[MPIC's Doctor] did not agree with [Appellant's Physiotherapist's] interpretation regarding the Appellant's condition. It failed to explain how the Appellant's condition changed from a minor exacerbation of a pre-existing condition to a neurological condition with possible spinal stenosis, disc lesions and nerve involvement. There was no radiological evidence and no incident which suggested any trauma to the spine leading to disc lesion.

[MPIC's Doctor] noted that the Appellant had displayed some pain focused behaviours and somatic complaints at a high level. A Functional Assessment showed that she was capable of performing a job at a sedentary or light level. [MPIC's Doctor's] opinion took into account a minor incident which would not be expected to result in injury as well as an initial minor clinical presentation to the chiropractor and to the employer. The Appellant continued working, there were no radiological changes to her spine and there were pre-existing problems shown on the CT and MRI. The Appellant exhibited multiple pain behaviours affecting the ability to assess her condition at various times, and these were noted by a variety of caregivers. With passage of time, the ill effects of the motor vehicle accident should have long since passed and been resolved. [MPIC's Doctor] could not provide an explanation as to how these could transform into a significant disc injury with neurological findings. Rather, he saw an exacerbation of a pre-

existing condition which had long since resolved and an Appellant who was capable of performing light level work, more than what her sedentary duties would have required.

[MPIC's Doctor] also explained that, to him, [Appellant's Physiotherapist's] explanations did not make sense from a medically scientific perspective. He reviewed this in some detail. He identified difficulties in measuring dural tension as well as the difficulty of confirming myotomal weakness due to nerve injury when the Appellant's results were unstable and varied over time and different examinations. The Appellant's difficulties, in his view, were a natural progression of her degenerative condition and it was not likely that significant injuries resulted from the motor vehicle accident. There were minimal findings when initially assessed by the chiropractor.

[MPIC's Doctor] also concluded that any condition arising out of the motor vehicle accident would not have precluded the Appellant from sitting. The disc herniations evident on the MRI were not a by-product of the incident in question, but rather were a natural progression of the degenerative process. Therefore, there were no injuries from the motor vehicle accident preventing the Appellant from returning to employment.

Counsel for MPIC addressed the question of whether the Appellant had a reasonable excuse for the late filing of her Application for Review. She emphasized that it was clear that the Appellant had received the March 23, 2009 case manager's letter, if not in March 2009, then on April 8, 2009 when it was received as an Appendix. Counsel submitted that it was clear that the Appellant had the letter in her possession, and so it doesn't matter whether she looked at it or not. She was familiar with MPIC's processes and knows or should have known that if she was not receiving benefits she should ask for a review. For two years, the Appellant did not receive

IRI benefits and did not comment upon that. It pushes the boundaries of reason to expect anyone not collecting IRI to fail to make any objection over a two year period. Two years is a lengthy period of time and is beyond reasonable. Further, the Appellant has not offered a reasonable excuse and counsel for MPIC asked that the appeal be dismissed on that basis.

In regard to the Appellant's appeal for further IRI benefits, counsel urged the Commission to review another Internal Review decision dated March 10, 2009, regarding the issue of the Appellant's dismissal from [text deleted]. Counsel advised that this would be useful in reviewing the facts surrounding the Appellant's employment.

The evidence was clear, counsel submitted, that the Appellant had never disclosed to [text deleted] that there was anything wrong with her health.

In fact, she submitted, this was consistent with [Appellant's Chiropractor's] early findings after the motor vehicle accident of a soft tissue WAD (Whiplash Associated Disorder) with some pre-existing lower back pain. The chiropractor did not advise her to take time off work and the Appellant continued to work.

The Appellant then began to collect regular Employment Insurance benefits, which would require her making a representation to Employment Insurance officials that she was willing and able and looking for work.

Counsel emphasized that this case involves a minor rear-end collision in a parking lot with some whiplash symptoms. As recognized by [MPIC's Doctor], the Appellant did not suffer debilitating or disabling lower back pain following the motor vehicle accident. Then later, we

begin to see a progression of the Appellant's degenerative disc disease, which first was evident in an MRI in 2006 showing disc protrusions and annular tears. [MPIC's Doctor] explained that although the Appellant had some findings of myotomal weakness, this was noted by only some caregivers and, by its nature, myotomal weakness does not come and go, but rather exists consistently.

Counsel addressed the Appellant's allegation that she had had an exacerbation of her injury at [Rehab Clinic]. However, counsel noted that a review of the [Rehab Clinic] program done by [MPIC's Doctor] showed that there were no heavy weights used, as they were not preparing the Appellant to return to a heavy job, but rather a sedentary or a light job.

The Appellant admitted that she was afraid to do certain things, and this was consistent with the findings of pain behaviour and guardedness in the Appellant's test results. Findings at [Rehab Clinic] showing that the Appellant believed she was in a crippled or bedridden range.

In spite of this, [Appellant's Doctor #2] found no objective organic evidence, and [Appellant's Doctor #3], in October 2008 saw only an acute lumbosacral sprain.

Counsel pointed to reports from [Independent Doctor #1] and [Independent Doctor #2], who did thorough reviews of the Appellant's file from an objective standpoint and were unable to point to any lasting injuries arising out of the motor vehicle accident.

Counsel submitted that [Appellant's Physiotherapist], as the Appellant's caregiver, was an advocate for the Appellant, but that his theories were shown not to make sense, according to [MPIC's Doctor's] evidence. [MPIC's Doctor] explained that there was no real or valid dural

tension measurement test and [MPIC's Doctor] explained why [Appellant's Physiotherapist's] theories in this regard were invalid.

[MPIC's Doctor] noted that the Appellant had become dependent upon passive care and recommended that she become more active.

The radiological evidence, such as MRI and CT scans, show the natural progression, over time, of the Appellant's degenerative back condition. The ill-effects of the motor vehicle accident, through a possible whiplash exacerbation, had long since passed.

Counsel submitted that any injuries from the motor vehicle accident had long since resolved, and that the Appellant's IRI benefits were correctly terminated on February 20, 2009. She submitted that the Appellant's appeal should be dismissed and the decision of the Internal Review Officer dated September 2, 2011 should be upheld.

Discussion:

The MPIC Act provides:

> **Events that end entitlement to I.R.I.**
>
> 110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident;
>
> (b) the victim is able to hold the employment referred to in subsection 82(1) (more remunerative employment);
>
> (c) the victim is able to hold an employment determined for the victim under section 106;
>
> **Application for review of claim by corporation**

> 172(1) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

The onus is on the Appellant to show, on a balance of probabilities, that she had a reasonable excuse for failing to file her Application for Review within the time limits set out under the MPIC Act, and that MPIC erred in finding that she was not prevented from returning to work by injuries related to the motor vehicle accident, by February 20, 2009.

The panel has reviewed the evidence in the Appellant's indexed file, the testimony of the Appellant, [Appellant's Physiotherapist] and [MPIC's Doctor] at the appeal hearing, and the submissions of counsel.

In regard to whether the Appellant has submitted a reasonable excuse for failing to adhere to time limits, the panel has reviewed the submission of counsel for the Appellant that, in the months following the case manager's letters of March 23, 2009 and April 8, 2009, the Appellant exhibited an intention to challenge this decision, but as a result of her confusion failed to properly pursue this.

On the other hand, counsel for MPIC noted that two years then went by without the Appellant receiving any IRI benefits and yet she failed to act.

In considering whether to extend the time limits, the Commission considers factors such as:

1. the actual length of the delay compared to the 60 day time period set out in s. 172 of the MPIC Act;
2. the reasons for the delay;

3. whether there has been any prejudice resulting from the delay;

4. whether there was any waiver respecting the delay; and

5. any other factors which argue to the justice of the proceeding.

In a letter to the case manager dated April 20, 2011, the Appellant stated:

> "I am replying to your letters of April 8, 2011, regarding MPI's decision to discontinue my IRI benefits back in 2009. This decision was expressed by two different 'decision letters', one dated March 23 '09, which I did not receive until early 2011, and the other dated April 8, 2009; this one DID NOT include the 'standard paragraph' you mentioned in your letter…
>
> As stated in my application for review, I received another letter dated April 4, 2009 (copy was attached with application for review), which completely contradicts the March 23, 2009 letter. This whole thing was confusing even to the person who provided me with all the letters attached to my application. I do realize it has been two years since this transpired and want to assure you that if I knew I was able to appeal this decision I would most certainly have done so. Please believe me."

The panel finds that the Appellant has provided an explanation which accounted for her failure to act over a period of two years, until she obtained proper legal advice from the Claimant Adviser Office.

While the panel has concerns that the Appellant failed to act over the ensuing two year period, we find that the confusion resulting from the failure to receive the letter dated March 23, 2009 and the lack of a 60 day notice provision at the bottom of the letter dated April 8, 2009 contributed to the Appellant's failure to meet the time limits. When this is considered in conjunction with the evidence of the Appellant's inquiries of MPIC, which clearly exhibited an intent to pursue the matter, the Commission finds that the Appellant has provided sufficient and reasonable explanation for the cause of her delay. The Commission will exercise its discretion to allow the Appellant to seek an Internal Review and appeal of the case manager's decisions.

However, a review of the evidence in the Appellant's indexed file and the testimony at the appeal hearing have led us to conclude that by February 20, 2009, the Appellant was no longer suffering from a condition preventing her from working, as a result of the motor vehicle accident.

Rather, the panel finds that following the motor vehicle accident the Appellant suffered a temporary exacerbation of her pre-existing back condition. This took the form of a whiplash type disorder that was initially not very significant. The Appellant was able to work until July 11, 2008, reporting to both MPIC and her employer that she was still able to work.

After the motor vehicle accident, the Appellant went back to work at her sedentary job, only seeing a chiropractor nine days later. One week later, she signed a health assessment at work indicating that there was nothing wrong with her.

Her chiropractor documented minor findings at this time, indicating a normal neurological assessment and concluding that the Appellant was still able to work. The diagnosis was one of a whiplash associated disorder with pre-existing lower back pain.

When the Appellant filed her claim with MPIC, on September 18, 2009, she indicated that she had no need for personal care assistance or for IRI benefits. Then, one week later she sought IRI benefits. MPIC provided her with some IRI and treatment benefits for her temporary soft tissue injury, which was super-imposed upon her pre-existing degenerative condition.

The evidence of the pre-existing degenerative condition can be seen in the MRI from 2006, as well as documentation of the condition by [Appellant's Doctor #1] and [Appellant's Neurologist

#1]. Although [Appellant's Physiotherapist], [text deleted], recognized that the Appellant suffered from a pre-existing condition, he was of the view that many of her problems were related to the motor vehicle accident. However, this assessment was not specific, and was also based heavily upon the Appellant's accounting of her history, subjective reporting and pain complaints. When weighed against the contrary evidence of [Appellant's Neurologist #1], [Appellant's Doctor #1] and [MPIC's Doctor], all of which give much greater weight to the Appellant's pre-motor vehicle accident degenerative disc disease, the panel cannot prefer [Appellant's Physiotherapist's] less specific opinion, which relied upon the Appellant's subjective complaints and report of her history.

In [Appellant's Physiotherapist's] letter of November 1, 2012, he confirmed that:

> "…Given that I had never seen [the Appellant] prior to **November 26th, 2008** her physician would be best qualified to confirm her pre-accident function…"

Her physician, [Appellant's Doctor #1], then reported on December 1, 2011:

> "Having met and assessed [the Appellant] after her MVA in June 2008 it is impossible for me to state whether the chronic back pain and leg pain for which she sought my treatment was related to the injuries incurred during the accident. I have no reason to doubt [the Appellant's] report that the onset of acute back pain and leg symptoms developed following the 2008 MVA. However, it is important to note that when I met [the Appellant] in 2009 she did indicate that in addition to her acute back injury she had previous chronic lower back pain. It would be difficult to speculate in terms of what portion of her symptoms were/are attributed to her acute versus chronic back problem. As you can see from my chart notes there are few objective clinical findings supporting major musculoskeletal or neurological impairment. Nonetheless, pain from soft tissue injuries can be significant and distressing for patients."

The panel finds that the evidence shows that the Appellant's condition on February 20, 2009 was more likely a result of the natural progression of her pre-existing degenerative back condition.

As [MPIC's Doctor] noted in his report of April 1, 2009:

> "The information indicates [the Appellant] was involved in a minor motor vehicle incident that would not expose her to any significant level of trauma which in turn might lead to a significant musculoskeletal and/or neurologic injury. Based on the documentation of [the Appellant] having pre-existing back problems that date back to 1996, it is possible that a pre-existing condition involving her back might have been exacerbated to some extent. Based on the absence of any documentation of clinical findings for nine days in conjunction with information indicating [the Appellant] was able to perform her work duties until July 14, 2008, it is reasonable to conclude that any exacerbation might have occurred of her pre-existing low back condition was minor.
>
> From an objective standpoint, the majority of medical information does not indicate that [the Appellant] was noted to have findings suggestive of a significant muscular and/or neurologic disorder that in turn would account for her various symptoms. The information indicates [the Appellant's] reluctance to return to work after September 15, 2008 was a byproduct of symptoms in the absence of any objective evidence of a physical abnormality that might account for her reported symptoms. Based on documentation of pre-existing back problems as well as an understanding that minor disc and degenerative changes in the lumbar spine are quite common in the asymptomatic population, it is medically probable that the changes noted on the CT scan developed from the incident in question..."

The Commission finds that the evidence presented on behalf of the Appellant fails to meet the onus upon her of showing, on a balance of probabilities, that she was unable to work by February 20, 2009, due to a condition arising out of the motor vehicle accident. Accordingly, the decision of the Internal Review Officer dated September 2, 2011 is hereby upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 13th day of August, 2013.

LAURA DIAMOND

NEIL COHEN

JANET FROHLICH