Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-159

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms Jean Moor** **Ms Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATES:	**November 27, 28, 29 and 30, 2012**
ISSUE(S):	**Entitlement to further Income Replacement Indemnity benefits.**
RELEVANT SECTIONS:	**Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

[The Appellant] was involved in a motor vehicle accident on January 30, 1997 while she disembarked from the front door of a transit bus holding two packages and her purse. At the same time she was holding on to the bars of the bus at the door while attempting to step off the bus onto the curb. She stepped off with her left foot but her right foot slipped and she fell, striking her tailbone at the bottom of the stair of the bus and then landed on the ground between the bus and the snow. She reported that she strained her right shoulder and arm as she held onto

the bar of the door when she slipped off the stair of the bus. She was able to get up and walk away, complaining of pain to her right lower back and upper buttock region. She also had pain in the right shoulder, arm and forearm region.

The initial physiotherapy report which is undated and unsigned noted that the Appellant attended for treatment on February 7, 1997 as a result of a referral from [Appellant's doctor #1], the Appellant's personal physician. The report stated that the Appellant wrenched her right shoulder, injured her right forearm and was having pain in her tailbone.

At the time of the accident the Appellant was self-employed in computer work from her home. Using a computer, she [text deleted] by contract work and worked 20 to 30 hours per week and also worked for [text deleted] between contracts. She did not return to work after her accident as she could not tolerate working several days in a row of full time work due to her overall pain symptoms and difficulty sitting. She also had a sleep disorder and woke up feeling un-refreshed and fatigued.

[Appellant's chiropractor #1], a chiropractor, treated the Appellant 43 times prior to the motor vehicle accident. On January 31, 1997, one day after the accident, the Appellant attended at [Appellant's chiropractor #1's] office for treatment. [Appellant's chiropractor #1] diagnosed reduced ranges of cervical and lumbar motion, right upper thoracic spasm, bruising and muscle spasm affecting the left forearm, spasm and tenderness affecting the right forearm, reduced grip strength, right lumbosacral pain, spasm, and dysfunction, and right piriformis spasm. [Appellant's chiropractor #1] diagnosed bilateral forearm strain, right lumbosacral strain (with some coccygeal pain), and right upper back, trapezius, and cervical strain. He recommended treatment at the rate of 2-3 per week for 6 to 8 weeks.

Case Manager's Decision, February 26, 1997 – IRI benefits:

On February 26, 1997 MPIC advised the Appellant that she would be entitled to Income Replacement Indemnity ("IRI") benefits.

In his report of June 12, 2012 [Appellant's chiropractor #1] indicated that the Appellant had 43 treatments in his office until June 10, 1997. In a report dated June 16, 1997 [Appellant's chiropractor #1] stated that after advising the Appellant that she should do more walking (especially stairs) and that she should not rely on taxicabs to attend appointments, the Appellant left his office without making another appointment.

The Appellant began seeing [Appellant's chiropractor #2], a chiropractor, on June 13, 1997. In [Appellant's chiropractor #2's] report of June 24, 1997 [Appellant's chiropractor #2] noted the Appellant's complaints of pain in the right sacroiliac, right forearm and right anterior shoulder areas, along with extreme point tenderness in all involved areas and stated "*Perhaps somewhat exaggerated?? seems overly sensitive*." Treatments were recommended at the rate of 3 per week for 3-4 weeks at which time an assessment would be made as to further treatment.

In his report dated August 11, 1997, [Appellant's chiropractor #2] noted:

> "As I have indicated to this [patient], it is almost impossible to fully ascertain her actual condition due to her extreme reaction to any light stimulus over any of the involved areas. I feel she either has the lowest pain threshold I have seen (she feels she has an extremely high pain threshold) or she is significantly embellishing/exaggerating. Certainly the patient's weight & lack of conditioning must be considered a factor.
>
> I can't understand how this [patient] could still be disabled so long after a less than severe injury." (Underlining added)

[Appellant's chiropractor #2], in his report, noted that the Appellant had a significant degree of improvement in her right shoulder and forearm with the treatments he had provided.

The Appellant did not return to receive further treatment from [Appellant's chiropractor #2].

On August 15, 1997 the case manager wrote to the Appellant advising her that her IRI benefits were suspended because she did not attend an independent chiropractic examination scheduled for her.

On October 30, 1997, [independent chiropractor] wrote to MPIC advising that he had conducted an independent examination on October 22, 1997 and provided a report to MPIC. In his report [independent chiropractor] stated that:

1. "The Appellant's shoulder ranges of motion and forward flexion were tested and represented a symmetrical range of motion for the left and right shoulders and during the course of movement of the arms and shoulders a normal scapular humeral rhythm was noted and there was no muscular wasting of the mid biceps and mid forearm."

2. "Anterior and posterior stability of the shoulder, the right shoulder was noted to be within reason and there was no excessive glide noted in the joint."

3. In his opinion the Appellant had full range of motion for the cervical spine, with no pain or discomfort noted.

4. The injuries the Appellant sustained in the accident consisted of a "mild lumbosacral muscular ligamentous strain/sprain type of injury" and a "mild strain type of injury" to the right shoulder.

5. "...I do not believe there is any rotator cuff involvement as the various testing procedures for rotator cuff were negative and without pain. There is no impingement signs in the right shoulder and I believe the best approach for the right shoulder would be basic stretch activity."

6. "I find no reason for her not to being able to move up and down stairs on resisted muscle testing of the various groups of muscles of the lower extremity there were equal responses and there was no specific discomfort from left to right sides."

7. "Currently [the Appellant] has abnormal pain behaviour which is noted on various testing procedures for which she was describing an extraordinary amount of discomfort and she

would not allow certain movements of (sic) occur which, in my opinion, were inconsistent with the expected norms..."

8. The Appellant had reached maximum therapeutic benefits with regard to manipulative therapy.

As a result of the Appellant attending for an examination with [independent chiropractor], MPIC reinstated her IRI benefits.

MPIC's case manager requested that [MPIC's doctor] review the Appellant's file to determine if the medical information supported the opinion that the Appellant was physically capable of returning to her previous work as [text deleted]. [MPIC's doctor] reviewed the reports of [Appellant's chiropractor #2], [Appellant's doctor #1], [independent chiropractor] and [Appellant's chiropractor #1] and stated:

1. That as a result of chiropractic treatments received from [Appellant's chiropractor #2], the Appellant reported an improvement in her right shoulder and forearm symptoms to a "significant degree".
2. [Appellant's chiropractor #2's] statement contradicted the report submitted by [Appellant's doctor #1] on September 12, 1997 wherein [Appellant's doctor #1] indicated that it was her understanding that the Appellant had not obtained any improvement from the chiropractic treatments at that time.
3. A physiotherapy report based on an assessment dated February 7, 1997 documented full function with symptoms and that the Appellant was capable of working modified duties but that prolonged sitting at the computer increased her symptoms.
4. A report from [Appellant's chiropractor #1] dated May 26, 1997 in which she documented that the Appellant had returned to work on April 23, 1997.

5. That the medical information on the Appellant's file did not outline if and when she did discontinue work following her return to work attempt.

[MPIC's doctor] reported:

> "Considering the mechanism of injury, the symptoms [the Appellant] developed, her objective response to treatment as documented by the physiotherapist and chiropractors who provided care to her, her overweight issue and the assumed demands of her [text deleted] position, it is my opinion that the symptoms [the Appellant] developed following the accident would not have limited her with regards to her working capabilities after April 28, 1997. Considering the normal healing time of soft tissue symptoms similar to that [the Appellant] developed, I would have to agree with [independent chiropractor] in that [the Appellant] would not develop any permanent impairment of function as a result of the symptoms stemming from her accident. Based on my experience in dealing with patients with back problems as well as my understanding of the literature pertaining to contributing factors to back pain, it is my opinion that [the Appellant's] overweight condition will lead to symptoms in her back from time to time, in all probability. There is no documentation that [the Appellant's] accident on the bus adversely affected her overweight condition." (Underlining added)

[MPIC's doctor] concluded his report by stating that:

1. The Appellant was capable of returning to work as [text deleted] as of April 28, 1997 and that the medical information on her file did not support an impairment of function preventing her from working at the position after that date.
2. The Appellant would benefit from a formal stretching and strengthening program over a six week period and that no further treatment should be provided after that time.

Case Manager's Decision, March 12, 1998:

On March 12, 1998 the case manager wrote to the Appellant advising that MPIC was terminating her IRI benefits as the Appellant was able to hold gainful employment which she held at the time of the motor vehicle accident. In arriving at this decision, the case manager stated:

> "From the information provided by [Appellant's chiropractor #2], dated August 11, 1997, he could not, "understand how this patient could still be disabled so long after a less than severe injury." He had also documented you had reported improvement in your right shoulder and forearm symptoms to a "significant degree". This contradicted the report submitted by [Appellant's doctor #1], dated September 12, 1997, where you had

> indicated to her there had been no improvement from the chiropractic treatments you had received. The physiotherapy report based on an assessment dated February 7, 1997, documented "full function with symptoms", and capable of working modified duties. [Appellant's chiropractor #1's] report also indicated you were capable of working modified duties. It was [independent chiropractor's] opinion that you were not disabled from your previous work and based on little objective physical findings and abnormal pain behaviour that you had reached maximum therapeutic benefit with regard to manipulative therapy.
>
> Upon review of all medical information on file, there are no objective physical findings supporting an inability to function in your previous type of employment therefore, no further Income Replacement Indemnity benefits will be processed."

On May 14, 1998 the Appellant applied for a review of the case manager's decision.

The Appellant was subsequently seen by [Appellant's rheumatologist], a rheumatologist, and by [Appellant's physiotherapist], a physiotherapist. [MPIC's doctor] was again requested to review the Appellant's medical file and submitted an inter-departmental memorandum on June 10, 1998. [MPIC's doctor] detailed why exercises involving strength should be continued and he opined that massage therapy would not enhance the Appellant's recovery from her motor vehicle accident injuries.

On January 4, 1998, [Appellant's doctor #2], from the Health Sciences Centre Pain Clinic, wrote a note to [Appellant's doctor #1] wherein she indicated:

> "This obese patient visited our clinic with a two year history of pain in the shoulder, neck, arm, low back in her right side, following a fall out of a bus.
>
> Her symptomatology appears to have been that of myofascial pain syndrome i.e. fibromyalgia."

Internal Review Officer's Decision – IRI benefits – September 8, 1999:

The Internal Review Officer held a hearing on March 24, 1999 and issued a decision on September 8, 1999 confirming the case manager's decision and dismissing the Appellant's Application for Review.

The Internal Review officer stated that:

1. He agreed with the case manager's decision that there was no objective evidence to support the Appellant's inability to carry out her previous employment which she held at the time of the motor vehicle accident.
2. The only physician who accepted the idea that the Appellant was disabled from returning to her sedentary work was [Appellant's doctor #1].
3. [Appellant's doctor #1] offered no reasonable objective basis for her opinion.
4. Any of the findings that the Appellant offered as her reasons for being unable to work had been refuted by medical reports provided by other caregivers, including [Appellant's physiatrist].

The Internal Review Officer reviewed the complaints that the Appellant made to [Appellant's doctor #1], [Appellant's doctor #3] and [Appellant's physiatrist], which upon examination were not substantiated. The Internal Review Officer noted that:

1. [Appellant's doctor #1] asserted that the Appellant`s illness was compounded by hypoglycaemia which had been exacerbated by her chronic pain and lack of sleep. The Appellant reported that [Appellant's doctor #3] would substantiate this complaint. [Appellant's doctor #3] never did substantiate this complaint and there seemed to be no medical basis whatever for this theory.
2. [Appellant's physiatrist] rejected the Appellant`s complaint that she was suffering from hypoglycaemia. This complaint was also rejected by [Appellant's doctor #3].

3. The Appellant also complained about thyroid problems. [Appellant's doctor #3] confirmed that her thyroid condition had been resolved spontaneously sometime after July 1996.
4. [Appellant's physiatrist] rejected the Appellant`s claim that she had a platelet dysfunction, which he confirmed by examining the haematologist's reports.

The Internal Review Officer also reported that [Appellant's chiropractor #2`s] comment that ``she either has the *lowest* pain threshold I have ever seen (she feels she has an extremely *high* pain threshold) or she is significantly embellishing/exaggerating``.

The Internal Review Officer further stated that:

1. Both [Appellant's physiatrist] and [independent chiropractor] did not advocate passive modalities of treatment and prescribed an active exercise program.
2. The Appellant had reported extreme side effects with Amitriptyline and Zopiclone for the treatment of her sleep disorder, but the doctors made no comment on these side effects.
3. However, [Appellant's doctor #4], in his report of October 9, 1998, indicated that the Appellant was doing well on Cyclobenzaprine and that this medication was helping her sleep.
4. He rejected the Appellant's submission that the sleep disorder, aggravated by her physical condition, left her so fatigued that her memory and her concentration were affected and rendered her unable to do her work.
5. It was the Appellant's submission that she was physically unable to work because she was in too much pain.

The Internal Review Officer determined that he was unable to make a causal connection between the motor vehicle accident and the circumstances the Appellant was inviting him to make. For these reasons the Internal Review Officer rejected the Appellant's Application for Review and confirmed the case manager's decision.

A CT scan of the lumbosacral spine performed on January 14, 1999 was essentially normal.

[Appellant's doctor #1] provided a report dated March 19, 1999 wherein she reports that there are objective losses of muscle mass in the Appellant's right arm and right thigh and objective decreases in right arm strength based on the hand grip test results reported by the physiotherapist. The report concluded that a consultation with [Appellant's physiatrist], a physiatrist, was scheduled for May 6, 1999.

[Appellant's physiatrist] provided a report on July 23, 1999 and indicated that at the Appellant's initial visit on May 6, 1999 she reported pain in her right shoulder, right lower back, arm and forearm region and right upper buttock areas. [Appellant's physiatrist] conducted an examination and he noted:

> "Her diagnosis was and remains myofascial pain syndrome involving multiple muscles as documented in my physical examination."

In his report, [Appellant's physiatrist]:

1. Ruled out the diagnoses of fibromyalgia, lumbar disc herniation, and lumbar nerve root compression.
2. He expected that effective treatment of the myofascial trigger points in the right shoulder area would restore the Appellant's normal hand grip function.

3. Recommended a program of trigger point injections and stretching, possibly followed by a short course of physiotherapy for overall muscle strengthening and physical conditioning.

Subsequently, [Appellant's physiatrist] submitted a form report to MPIC dated October 19, 1999 indicating that he anticipated the duration of the in-clinic care would be 8 to 12 visits.

The Appellant filed a Notice of Appeal on December 3, 1999.

The relevant Section of 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;

Case Manager's Decision, December 14, 1999:

On December 14, 1999 the case manager wrote to the Appellant's legal counsel advising that MPIC would process payment of [Appellant's physiatrist's] initial report of five trigger point injections, but rejected any further treatment proposed by [Appellant's physiatrist]. The case manager reported that based on the advice of MPIC's Medical Services Team there was insufficient medical evidence identifying that there was a medical necessity for any subsequent treatment.

[MPIC's doctor] was asked to review the request for further treatments by [Appellant's physiatrist]. In his report dated March 9, 2000 [MPIC's doctor] stated that:

1. He disagreed with the treatment proposed by [Appellant's physiatrist].
2. He indicated that the diagnosis of active trigger points by [Appellant's physiatrist] did not constitute an "objective physical finding".
3. He was of the view that [Appellant's physiatrist's] theory about how the Appellant developed myofascial pain syndrome from acute muscle strain was possible, but not scientifically validated.

[Appellant's physiatrist] provided a response on December 23, 2002 and indicated that the Appellant would benefit from an eight week treatment period combining trigger point injections including the buttock and thigh region in conjunction with a stretching program supervised by a physiotherapist.

In subsequent memos from [MPIC's doctor] on February 10, 2003 and April 4, 2003, [MPIC's doctor] reiterated his belief that there was insufficient evidence to establish a causal relationship between the accident and the myofascial pain syndrome diagnosed by [Appellant's physiatrist]. He was also of the view that the proposed treatment program did not meet the test of medical necessity.

Application for Review:

The Appellant filed an Application for Review of the case manager's decision to reject further treatments proposed by [Appellant's physiatrist].

Internal Review Officer`s Decision, April 13, 2003:

On August 13, 2003 the Internal Review Officer issued a decision and stated:

> ‘Two consistent themes emerge from a dispassionate review of the totality of the medical evidence:
>
> 1. [The Appellant] has a number of significant medical problems which have nothing whatsoever to do with the accident. The conditions were not caused, or even exacerbated in any way, by the accident.
>
> 2. Her complaints of pain in the right shoulder and right lower back have been consistent throughout the life of the claim.
>
> While early and consistent reporting of symptoms does not necessarily establish a causal link, I am prepared to find that, on a balance of probabilities, the required link has been established in this case.
>
> I share many of the concerns expressed by [MPIC’s doctor] – and some of those concerns have considerable merit – but I nevertheless feel that sufficient evidence exists to establish a probable causal link between the ongoing symptoms and the accident. The evidence is by no means overwhelming, but it does meet the “balance of probabilities” standard.”

The Internal Review Officer also stated that MPIC would fund an 8 week program proposed by [Appellant’s physiatrist] and that MPIC would not reimburse the Appellant for any further treatment. The Appellant did not file an appeal in respect of this decision.

In a report to MPIC dated February 10, 2003, [MPIC’s doctor] disagreed with [Appellant’s physiatrist’s] diagnosis. [MPIC’s doctor] stated that [Appellant’s physiatrist] did not provide documentation identifying a limitation of function and noted that the Appellant had full spinal and shoulder range of motion despite being identified as having myofascial trigger points. In conclusion, he stated that the medical evidence provided by [Appellant’s physiatrist] did not identify a specific condition that is causally related to the January 30, 1997 motor vehicle accident.

On April 4, 2003 [MPIC's doctor] wrote to the Internal Review Officer and stated that myofascial pain is very common in the general population and is not indicative of underlying pathology involving the muscle and/or fascia in most situations.

A questionnaire for disability benefits with [text deleted] dated August 20, 2003 was filed by the Appellant. In this questionnaire the Appellant was requested to respond to certain questions as set out as follows:

> "*State the illnesses or impairments that prevent you from working. If you do not know the medical names, describe in your own words.*
> Myofascial pain syndrome with multiple trigger points; hypoglycaemic; hypothyroid; osteoarthritis of knees, shoulders & elbows, injury to right side of body, including tailbone.
>
> *Describe how these illnesses or impairments prevent you from working.*
> Constant pain – reactive to whatever I attempt to do. Can't walk much, sit very long. My right arm & hand much weaker now as a result of transit accident, preventing me from doing normal activities."

The Appellant was also asked to explain any difficulties/functional limitations and the Appellant responded as follows:

> "*Sitting/Standing (How long?)*
> Can sit max ½ hour then have to move around, get up due to pain & stiffness. Can stand maximum 10 mins then need to sit.
>
> *Walking (How long and how far?)*
> About 2 blocks max when feeling good then need to rest. Don't attempt to walk at all when in pain. Can't walk outside much in winter.
>
> *Lifting/Carrying (How much and how far?)*
> Can lift 10 – 15 lbs but can't carry at all. Have dropped things unexpectedly as arm/hand muscles give out so have to be very careful lifting.
>
> *Reaching*
> Can move my arms but can't pick things up – have no strength in arms etc. Use a grabber to reach things. Also my back goes into spasms.
>
> *Bending (How much?)*
> No bending with knees – lower back easily aggravated. Limited bending from waist. Use the grabber."

On October 26, 2004 [Appellant's physiatrist] provided a report to the Appellant's counsel and stated that:

1. As a result of treatment the Appellant had a progressive and major recovery.
2. His clinical findings and treatment were provided in his report of May 10, 2004.
3. Progressive improvement occurred with elimination of symptoms originating from the specific trigger point treated.
4. Along with the elimination of pain symptoms, there was objective evidence of disappearance of abnormal objective physical findings and improvement in physical functioning and ability.
5. The improvement in overall functioning related to an eradication of the previously symptomatic myofascial trigger points.
6. Based on the balance of probabilities there was a direct causal relationship between the condition and symptoms experienced by the Appellant and the injuries she sustained in the motor vehicle accident of January 30, 1997.

In an interdepartmental memorandum to the Internal Review Officer dated January 26, 2005, [MPIC's doctor] stated that:

1. [Appellant's physiatrist] outlined the Appellant's improvement in overall function as a result of the eradication of the previously symptomatic myofascial trigger points.
2. [Appellant's physiatrist] also went on to document that the Appellant had not returned to gainful employment since January 30, 1997.
3. "...I am uncertain as to how [the Appellant] could experience what appears to be a good functional recovery but yet not have the physical ability to perform even sedentary to light level work. Based on my previous reviews of [the Appellant]s] file, it was determined that she was provided various forms of treatment in order to address symptoms arising from the incident in question. <u>It is noted that she progressed to the stage where she did not have a physical impairment of function that precluded her from performing gainful employment</u>. Based on this, I am uncertain as to how she

> could functionally improve yet at the same time regress from a disability (occupational) standpoint." (Underlining added)

[MPIC's doctor] concluded his report by indicating that the Appellant had experienced major improvement with the treatments provided by [Appellant's physiatrist] and it was reasonable to conclude that she did not have a physical impairment of function that would preclude her from performing gainful employment.

On December 8, 2006, [Appellant's doctor #5] of [text deleted] provided a report to the Appellant's legal counsel indicating that in view of the Appellant's X-rays and MRI, he had determined that the Appellant's injuries included a partial supraspinatus tear, anterior labral tear with paralabral cyst and a defect in the anterior glenoid. [Appellant's doctor #5] stated:

> "Physical restrictions and limitations would be related to the right shoulder and would include restrictions involving overhead activity, repetitive use or heavy lifting with right shoulder. I am not sure if this would prevent her from performing her pre-accident type of work."

[MPIC's doctor] also reviewed [Appellant's doctor #5]'s report of December 8, 2006 wherein [Appellant's doctor #5] diagnosed the Appellant as having an anterior labral tear with a paralabral cyst and he stated that:

1. [Appellant's doctor #5's] documentation indicating specific abnormalities on the MRI were possibly a byproduct of the motor vehicle accident.
2. The information reviewed did not specifically identify the Appellant as having a physical impairment of function as a result of the motor vehicle accident.

On September 10, 2007 [Appellant's doctor #5] wrote to the Appellant's legal counsel and indicated that the balance of probabilities would suggest that the Appellant's injuries, including a

partial supraspinatus tear, anterior labral tear with paralabral cyst, and defect in the anterior glenoid were the result of her fall from a bus.

In a report to MPIC's legal counsel dated June 25, 2008, [MPIC's doctor] stated:

> "It is noted that when [Appellant's physiatrist] assessed [the Appellant] on January 22, 2002, she had full pain free range of motion of cervical spine and good range of motion in both shoulders bilaterally. It is documented that assessment of lumbosacral spine revealed forward flexion of distal tibia (within normal limits) and a slight decrease in extension. Based on this, it appears that [the Appellant's] physical examination on this date did not identify a physical impairment of function that in turn might negatively affect her ability to perform gainful employment." (Underlining added)

In a report dated July 6, 2010, [MPIC's doctor] reviewed surveillance DVDs at MPIC's request to provide his comments on the Appellant's observed functional capabilities and how these correlate with her reported level of function as outlined in the documents presently contained in her file. [MPIC's doctor] noted that the Appellant was placed under surveillance on the following dates:

- May 17, 2010
- May 18, 2010
- May 19, 2010

[MPIC's doctor] reported that on May 17, 2010 the Appellant was observed performing the following activities:

- "Entering and exiting vehicle
- Opening and closing vehicle door with left hand
- Putting on seat belt with left hand
- Shopping
- Walking
- Pushing shopping cart
- Using upper extremities to sort through various store items
- Flexing right arm above head in order to reach store items
- Standing
- Looking up and down to examine store items
- Lifting small items out of shopping cart
- Carrying purse and small bag with upper extremities

- Reaching up with right arm to press button to close hatch of van
- Lifting stepladder into cart"

[MPIC's doctor] indicated that during these activities the Appellant was capable of performing the following:

1. "Walk with a normal gait
2. Rotate her cervical spine fully in both directions
3. Perform repetitive neck flexion and extension
4. Perform full forward flexion with her right shoulder
5. Lift light objects with either upper extremity
6. Rotate trunk in a normal manner to her left
7. Perform left shoulder adduction, extension and internal rotation at one time in order to put on a seat belt
8. Push light weight
9. Perform repetitive movements with her upper extremities

Interim Assessment No. 1

The activities [the Appellant] performed on May 17, 2010 and the method by which she performed them are in keeping with an individual that does not have a specific physical impairment per se. On one occasion, it appeared that she swung her leg into her van in order to enter the van. At no time did she demonstrate any other functional problems or abnormal movement patterns as relates to her lower extremities. [The Appellant] was not observed performing any compensatory-type movements that might indicate she was experiencing a physical impairment from a musculoskeletal standpoint."

[MPIC's doctor] noted the Appellant was observed performing the following activities on May 18, 2010:

- "Walking
- Bending at waist
- Pulling object from ground
- Carrying object in left hand
- Carrying garden hose in left hand
- Untangling garden hose
- Plugging garden hose into wall with right hand
- Bending forward to pick up bottles and garden hose
- Pulling garden hose with right hand through her left hand in order to untangle garden hose
- Bending forward at waist to attach garden hose to a container
- Using container and hose to spray tree (the container held in right hand) spraying tree with container and right hand above shoulder height
- Performing repetitive upper extremity movements in order to spray tree

- Spraying tree, container held in left hand
- Looking up in order to view areas to spray
- Connecting garden hose to container to spray lawn
- Spraying lawn, container in either left or right hand
- Pulling container and hose across lawn
- Remove hose from wall tap
- Windup hose with both hands
- Enter and exit vehicle
- Driving vehicle
- Backing vehicle up
- Pushing sign post into ground
- Bending forward to place objects on what appears to be small posts stuck in ground
- Bending forward at waist in order to use right upper extremity to dig through soil
- Repetitive and at times forceful digging with right upper extremity
- Lifting objects off ground
- Shoveling topsoil
- Throwing topsoil with shovel (use left hand low and right hand low at different times)
- Sweeping walkway (left hand low) and using quick, sweeping strokes
- Carrying power drill in right hand
- Drilling into wall with power drill using right hand
- Using right hand to unscrew lattice from wall (hand at shoulder and waist levels and on occasion required elbow to be higher than shoulder).
- Using two hands to forcibly unscrew lattice from wall"

[MPIC's doctor] stated that during the above activities the Appellant was capable of performing the following:

1. "Walk with a normal gait
2. Stand for extended periods of time
3. Forward flex trunk to 90° on a repetitive basis and maintain the position for sustained periods
4. Forward flex right shoulder to above 90°
5. Fully rotate cervical spine to left and right
6. Extend cervical spine to what appears to be normal limits
7. Lift light to moderate weight
8. Perform repetitive movements with right and left upper extremities
9. Perform repetitive movements with left and right upper extremities away from body
10. Perform trunk rotation and flexion in a smooth and normal manner
11. Lift, carry and throw mild to moderate weight with upper extremities away from body (i.e. throwing soil with shovel)
12. Pull against at least light resistance

Interim Assessment No. 2

The activities [the Appellant] performed on May 18, 2010 and the method by which she performed them are in keeping with an individual that does not have an underlying musculoskeletal impairment. The movements she performed were smooth and at no time did she show any compensatory movements that might indicate she was having difficulties performing a particular task. The ability to forward flex her spine in order to access lower objects as well as perform various activities at ground level indicates she was not experiencing any significant problem with her lower back at the time she was performing the activities. The posture she used to perform the activities placed an increased demand on the lower back (her positioning was not ergonomically correct as it relates to the lower back). The ability to move her upper extremities in a repetitive and quick manner and above shoulder height would indicate she was not experiencing difficulties with her arms on this date. It is noted that [the Appellant] was digging with her right arm for an extended period of time and at no time showed any signs of discomfort, loss of function or the need to change and use her left hand instead. It is noted that [the Appellant] was able to lift and carry light to moderate weight with no apparent difficulties.

On May 19, 2010, [the Appellant] was observed performing the following activities:

- Entering van
- Closing van door with left hand
- Sitting
- Pushing shopping cart
- Driving
- Walking
- Lifting seat into van with assistance

During the above activities, [the Appellant] was observed to be capable of performing the following:

1. Walk with a normal gait
2. Lift mild to moderate weight
3. Sit for a sustained period of time
4. Pushing light weight
5. Fully rotate cervical spine to both sides (shoulder checking)
6. Performing trunk flexion and rotation in conjunction with hip flexion in order to enter vehicle.

Interim Assessment No. 3

Activities [the Appellant] performed on May 19, 2010 and the method by which she performed them are in keeping with an individual that does not have an underlying musculoskeletal impairment. At no time was [the Appellant] noted to perform any compensatory movements or demonstrate any mannerism that might indicate she was experiencing some level of pain or discomfort.

CONCLUSION

> Based on information obtained from the surveillance DVD, it is my opinion [the Appellant] is quite functional from a physical standpoint. It is noted that she was capable of performing various basic day-to-day activities as well as strenuous activities over a sustained period of time. As noted previously, the activities she performed and the method by which she performed them are in keeping with an individual that does not have an underlying physical impairment, in my opinion."

[MPIC's doctor] indicated that when comparing the information on the Appellant's MPIC medical file to the information obtained on the surveillance DVD's, it was difficult to comprehend how the information obtained from these two sources were about the same individual. [MPIC's doctor] stated:

> "In the majority of individuals that have structural abnormalities involving the shoulder, functional limitations develop as a result of abnormalities. The more abnormalities that develop in the shoulder, the more functional limitation one might encounter. It is noted that [the Appellant]'s MRI identified numerous abnormalities in the right shoulder. Each abnormality by itself could create some functional difficulties but in combination could lead to significant shoulder impairment. Information obtained from the surveillance DVD does not indicate [the Appellant] has any physical impairment as relates to her right shoulder. Based on the activities [the Appellant] performed with her right upper extremity and the manner by which she performed them, it is my opinion surgical interventions are not required to address the structural abnormalities identified on the MRI. One must always keep in mind that diagnostic tests such as an MRI provide information that might not be accurate (i.e., false positive results). It is my opinion performing invasive treatment (e.g. surgery) on a patient with an abnormal MRI in the absence of functional limitations that correlate with the MRI usually results in a poor outcome."

[MPIC's doctor] further stated that an examination of the surveillance DVD does not indicate that the Appellant had any physical impairment as it relates to her right shoulder.

Appeal Hearing – November 27, 28, 29 and 30, 2012:

[Appellant's chiropractor #1], the chiropractor, testified at the hearing that he commenced treating the Appellant in respect of the injuries she sustained in the accident on January 31, 1997 (one day after the accident). In his testimony, he indicated that he noted a decreased range of

motion in her right shoulder, swelling in her arm, and acute pain in the hip/buttocks. [Appellant's chiropractor #1] further testified, after treating the Appellant, that she was making progress and that he concentrated in the area where she complained most, that being her buttocks area.

[Appellant's chiropractor #1] further testified that:

1. The Appellant advised him that she was having difficulty walking stairs. He reported that he told the Appellant to try to do more walking and specifically stairs.
2. The Appellant responded by stating that she did not appreciate his comments and walked out of his office without making any further appointments, leading him to assume that she had chosen to discontinue treatments with him.
3. The Appellant was not fully recovered but she was able to return to work subject to certain restrictions.
4. Having regard to the Appellant's complaints of buttock pain, he recommended that she would be able to work if she limited sitting to four hours per day.

The Appellant, in her testimony, disagreed with [Appellant's chiropractor #1's] reason for why she left his office and stated:

1. [Appellant's chiropractor #1] advised her that she had reached maximum treatment with her and she decided to seek an opinion from another chiropractor.
2. As a result, she attended upon [Appellant's chiropractor #2] for treatment.
3. After the motor vehicle accident, having regard to her inability to have full range of her arms and shoulder, difficulties walking up and down stairs, and her difficulties in sitting due to her buttock pain, she was unable to return to her previous employment.

4. She was unable to sit for a short period of time, had a limited ability to walk or climb stairs, had limited flexibility in bending and reaching and had a sleep disorder.
5. She had sleeping problems and as a result, she woke up feeling fatigued.
6. She did not agree with the reports of [Appellant's chiropractor #1] or [Appellant's chiropractor #2] that as a result of the chiropractic treatment she was improving and she confirmed she was unable to return to work.
7. She saw [Appellant's physiatrist] who advised her that she developed a myofascial pain syndrome as a result of the motor vehicle accident and commenced receiving treatments from him.
8. She disagreed with [Appellant's physiatrist's] opinion that she was improving as a result of his treatment.

In response to questions from MPIC's legal counsel about the video surveillance that took place on May 17, 18 and 19, 2010, the Appellant testified that she did have good days and bad days and what was observed on the video was when she was having good days.

Submissions:

MPIC's legal counsel submitted that:

1. The Internal Review Officer was correct in stating that there was no objective evidence to support the Appellant's inability to work and carry on with the employment she held at the time of the motor vehicle accident.
2. The Internal Review Officer was correct in indicating that neither [Appellant's chiropractor #2], [Appellant's chiropractor #1] and [Appellant's physiatrist] found that she was disabled as a result of the injuries she sustained from the motor vehicle accident which would prevent her from returning to her sedentary employment.

3. The only exception to this was [Appellant's doctor #1's] opinion and she offered no reasonable objective basis for her opinion. MPIC's legal counsel submitted that the Appellant acknowledged that she had a number of significant medical problems which were unrelated to the motor vehicle accident and which were not substantiated by the medical practitioners, including [Appellant's physiatrist].
4. The Appellant was diagnosed by [Appellant's physiatrist] with a myofascial pain syndrome, however he did not find that the Appellant was disabled from performing her pre-accident sedentary employment.
5. The reports of [MPIC's doctor] indicated there was no objective evidence to support the Appellant's claim that she was unable to return to work.
6. The video surveillance demonstrated that the Appellant was able to carry out every day duties such as walking, lifting, sitting, and rotating her body without any difficulties and were inconsistent with the Appellant's admission that she was incapable of returning to her sedentary employment.
7. The Appellant had failed to establish on a balance of probabilities that the injuries she sustained were caused by the motor vehicle accident.

The Appellant's legal counsel submitted that the Appellant was a credible witness and that the Commission should accept her testimony where it is in disagreement with the opinions of her caregivers, [Appellant's chiropractor #1], [Appellant's chiropractor #2] and [Appellant's physiatrist].

The Appellant's legal counsel further submitted that:

1. [Appellant's physiatrist], a physiatrist, diagnosed the Appellant with a myofascial pain syndrome which was caused by the motor vehicle accident.

2. This myofascial pain prevented the Appellant from returning to her previous employment.
3. The Appellant also suffered a rotator cuff injury as a result of the motor vehicle accident which also rendered her unable to return to her previous employment.
4. In respect of the video surveillance, the Appellant testified that there were occasions where she had good days when she was able to do a variety of activities without any pain and there were other days that she could barely function due to the pain.
5. The video surveillance demonstrated days where the Appellant had no pain.

The Appellant's legal counsel therefore submitted that the Appellant had established, on a balance of probabilities that as a result of the injuries sustained in the motor vehicle accident she was disabled from her previous employment and that she should be entitled to be in receipt of IRI benefits.

DISCUSSION:

The Commission rejects the submission made by the Appellant that as a result of the injuries sustained in the motor vehicle accident she was unable to carry out her pre-employment sedentary work.

The medical reports from [Appellant's chiropractor #1], [Appellant's chiropractor #2], [independent chiropractor] and [Appellant's physiatrist] do not establish that as a result of any injuries sustained in the motor vehicle accident the Appellant was unable to continue her pre-accident sedentary employment.

[Appellant's chiropractor #1] initially treated the Appellant and reported that:

1. The Appellant had a decreased range of motion in her right shoulder, swelling in her arm and an acute pain in her hip/buttocks.
2. He recommended that she continue working and limit her sitting and that she would require chiropractic treatment for a period of three months, two times per week.
3. He felt the chiropractic treatments he was providing the Appellant resulted in her making slow progress.
4. Her major complaint was not the right shoulder but the buttocks area.
5. The Appellant had not made a full recovery when he stopped treating her, she was able to return to work with certain restrictions and she should limit her sitting to 4 hours at a time.

The Commission found [Appellant's chiropractor #1] to be credible and accepts his testimony that:

1. The Appellant became upset with him when he recommended that she try to do more walking, and specifically to try stairs.
2. Because she did not appreciate his comments, she walked out of his office without making any further appointments.

The Commission further notes that the Appellant's complaints to [Appellant's chiropractor #1] had no relationship to any pain of a rotator cuff injury, and that her only complaint was of pain to her hip/buttocks area.

The Commission, having regard to the testimony of the Appellant which was contradicted by the reports of [Appellant's chiropractor #1] and [independent chiropractor], accepts [Appellant's chiropractor #2`s] statement that:

1. It was impossible to determine the actual condition of the Appellant due to her extreme reaction to any light stimulus over any of the involved areas.
2. The Appellant either had the lowest pain threshold he had ever seen or that she was significantly embellishing or exaggerating her symptoms.

The Commission notes that:

1. The Appellant did not complain to [Appellant's chiropractor #1] when he treated her between 1991 and 1997 of any extreme reaction to any stimulus, light or otherwise.
2. [Appellant's chiropractor #2] concluded the Appellant was either consciously or unconsciously embellishing or exaggerating her responses.
3. Contrary to the Appellant's testimony, he reported improvement in the Appellant's right shoulder and forearm to a significant degree.

The Commission finds that [Appellant's chiropractor #2's] report is inconsistent with the Appellant's testimony that she continued to have pain in her right shoulder and forearm without any improvement from the date of the motor vehicle accident. The Commission gives greater weight to the report of [Appellant's chiropractor #2] than it does to the testimony of the Appellant.

The Appellant was initially reluctant to attend an independent examination and only when her IRI was suspended did she agree to see [independent chiropractor].

Notwithstanding the reports from [Appellant's chiropractor #1] and [Appellant's chiropractor #2] that the Appellant was improving, she advised [independent chiropractor] that she was in

constant pain and any walking activity would aggravate her lumbosacral spine on the right side and cause a shooting type of pain extending down the right leg calf.

[Independent chiropractor] reported that:

1. The Appellant's shoulder range of motion and forward flexion were tested and represented a symmetrical range of motion for left and right shoulder and during the course of movement of her arms and shoulders, there was a normal scapular humeral rhythm.
2. The interior and posterior stability of the right shoulder was noted to be within reason and there was no excessive glide noted in the joint.

The Commission finds that this assessment is inconsistent with the Appellant's complaint that she suffered from a rotator cuff injury in the motor vehicle accident. The Commission gives greater weight to the report of [independent chiropractor] than it does to the testimony of the Appellant

[Independent chiropractor] further reported that:

1. The Appellant had a full range of motion for the cervical spine with no pain or discomfort.
2. In his opinion, as a result of the motor vehicle accident, the Appellant suffered from a mild lumbosacral ligamentous strain/sprain type of injury and further noted that there was a mild strain type of injury to her right shoulder.

The Commission finds [independent chiropractor`s] diagnosis is contrary to the Appellant's testimony about the nature of the injuries she suffered in the motor vehicle accident.

[Independent chiropractor], in his report, stated:

1. Like [Appellant's chiropractor #2] and [Appellant's chiropractor #1], he found there was abnormal pain behaviour to the various testing procedures as described by the Appellant and the extraordinary amount of discomfort she was suffering.
2. Contrary to the Appellant's testimony, that there was no reason for the Appellant not to move up and down stairs on resisted muscle testing of the various groups of muscles of the lower extremity, there were equal responses and there was no specific discomfort from the left to right sides.
3. There was no rotator cuff involvement following the various testing procedures and that the Appellant's rotator cuff was negative and without pain.

The Commission finds that [independent chiropractor] saw the Appellant approximately 10 months after the motor vehicle accident and tested her for rotator cuff involvement and concluded that there was none.

[Independent chiropractor] concluded his report by saying that the Appellant was not disabled and that he did not believe there was any permanent injury with regard to the motor vehicle accident related injuries. [independent chiropractor's] comments are consistent with the reports of [Appellant's chiropractor #1] and [Appellant's chiropractor #2] based on their treatment and observation of the Appellant.

[Appellant's physiatrist], a physiatrist, who treated the Appellant over a period of time concluded that she suffered from a myofascial pain syndrome as a result of the motor vehicle accident. The Commission accepts [Appellant's physiatrist's] diagnosis but notes that [Appellant's physiatrist] did not state that the Appellant was disabled from returning to her pre-accident employment.

The Commission therefore concludes that although the Appellant suffered from a myofascial pain syndrome, this would not have prevented her from returning to her pre-accident employment. The Commission finds that the only doctor that concluded the Appellant was disabled from returning to work was [Appellant's doctor #1]. The Commission agrees with [MPIC's doctor] that [Appellant's doctor #1] provided no objective evidence to substantiate this assessment.

The Commission notes that the Appellant`s complaint that she was suffering from hypoglycaemia, thyroid problems and a platelet dysfunction were respectfully rejected by [Appellant's doctor #3] and [Appellant's physiatrist]. The Commission can only conclude that the Appellant`s complaints of these conditions were based on her self-diagnosis.

The Appellant's credibility was also significantly affected by the contradiction between her responses to the [text deleted] questionnaire of August 20, 2003 and the video surveillance of May 17, 18, and 19, 2010. In the [text deleted] questionnaire the Appellant complained that hypoglycaemia and hypothyroid affected her myofascial pain syndrome, which is not supported by medical evidence. The Commission finds there is no substance to these alleged medical conditions.

The Appellant also complained of:

1. Constant pain and the inability to walk much, sit very long and a weakness in her right arm due to the motor vehicle accident.
2. She could not stand more than 10 minutes and could not sit for more than a half hour; she could only walk for 2 blocks maximum, could only lift 10 to 15 pounds, could not move

her arms to pick up things, had no strength in the arms, and used a grabber to reach things.

3. She was unable to bend her knees and her lower back was easily aggravated.

The Appellant complained that because of these injuries, which were sustained in the motor vehicle accident, she was unable to return to her pre-accident employment. The Commission finds that on examination of the video surveillance, it is in total agreement with [MPIC's doctor`s] report of his observations of the video surveillance of May 17, 18 and 19, 2010 and the comments he made in respect of the Appellant`s activities on these three days.

The Commission agrees with [MPIC's doctor`s] conclusion that the Appellant was capable of performing various basic day to day activities, as well as strenuous activities, over a sustained period of time. The Commission further agrees with [MPIC's doctor`s] statement that the activities performed by the Appellant during this period of time clearly indicate that she does not have an underlying physical impairment, or that she had any physical impairment as it relates to her right shoulder. The Commission agrees with [MPIC's doctor`s] statements that when one compares the information of the Appellant on MPIC's medical file to the information obtained in the surveillance DVDs, it was difficult to comprehend how the information obtained from these two sources were about the same individual.

The Commission concludes, having regard to the testimony of the Appellant, the medical reports of [Appellant's chiropractor #1], [Appellant's chiropractor #2], and [MPIC's doctor], the [text deleted] questionnaire completed by the Appellant and the video surveillance, that little weight can be given to the Appellant's testimony that she was unable to continue her pre-accident sedentary employment as a result of the motor vehicle accident injuries.

In a decision of the British Columbia Court of Appeal, Mr. Justice O'Hallaran, commented on the credibility of interested witnesses as follows in *Faryna v. Chorny*:

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

The Commission finds the testimony of the Appellant is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. The Commission finds that the Appellant's testimony is inconsistent with the probability that surround the current existing conditions.

In conclusion, the Commission finds that:

1. The Appellant did suffer from a chronic pain syndrome as a result of the motor vehicle accident, but the medical evidence has not established on a balance of probabilities that the chronic pain syndrome prevented the Appellant from carrying out her pre-accident sedentary employment.
2. The Appellant failed on a balance of probabilities to establish that she suffered from a rotator cuff injury as a result of the motor vehicle accident. The Appellant did not complain of a rotator cuff injury when first examined by [Appellant's chiropractor #1] and there is no reference in [Appellant's chiropractor #2's] report of a rotator cuff injury. [independent chiropractor] noted there was a mild injury to the Appellant's right shoulder. [independent chiropractor] tested the Appellant 10 months after the motor vehicle accident to see if there was a rotator cuff involvement and concluded there was

not. The Appellant has failed to produce any evidence to challenge the opinion of [independent chiropractor] on this issue.

For these reasons, the Commission therefore finds that the Appellant has failed to establish on a balance of probabilities that as a result of the motor vehicle accident she was prevented from returning to work in her pre-accident sedentary employment. The Commission therefore dismisses the Appellant's appeal and confirms the Internal Review Officer's decisions dated September 18, 1999 and August 13, 2003.

Dated at Winnipeg this 21st day of January, 2013.

MEL MYERS, Q.C.

JEAN MOOR

SANDRA OAKLEY