Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File Nos.: AC-12-177 and AC-14-019

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Leona Barrett** **Ms Susan Sookram**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Dan Joanisse of the Claimant Advisor Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Trevor Brown.**
HEARING DATES:	**March 22, August 2, 3 and 4, 2016**
ISSUE(S):	**1. Whether the Appellant was able to hold the employment she held at the time of the accident as of December 8, 2011.** **2. Whether the Appellant's Personal Injury Protection Plan benefits were correctly terminated pursuant to Section 160(a) of the MPIC Act.** **3. Whether the Appellant is responsible for reimbursing MPIC $11,119.58 pursuant to Section 189(1) of the MPIC Act.**
RELEVANT SECTIONS:	**Sections 110(1)(a), 149, 160(a), and 189 of The Manitoba Public Insurance Corporation Act ('MPIC Act'), and Section 8 of Manitoba Regulation 37/94**

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

Background:

The Appellant was injured in a motor vehicle accident ("MVA") on May 11, 2010. She advised that she struck her mouth on the steering wheel, developed symptoms in her neck, right shoulder and lower back and aggravated her pre-existing fibromyalgia.

At the time of the accident, the Appellant worked six to eight hours per day, five days a week as a hairstylist in a salon. She had a pre-existing history of fibromyalgia. The Appellant was in receipt of MPIC funded physiotherapy treatment and Income Replacement Indemnity ("IRI") benefits.

On July 25, 2011, the Appellant's case manager advised her that the medical information on her file had been reviewed by MPIC's Health Care Services ("HCS") who opined that it was not medically probable that her remaining symptoms were solely the by-product of the MVA. There was a greater medical probability that her symptoms were a by-product of her pre-existing condition. The case manager concluded that the information on file did not provide objective supporting evidence of a physical impairment of function developing as a result of the accident which would prevent the Appellant from working. The case manager ended her entitlement to further IRI benefits.

The Appellant sought an Internal Review of this decision. On September 27, 2011 an Internal Review Officer for MPIC overturned the decision, concluding that the medical evidence on file did not support ending her entitlement to IRI as of July 21, 2011. The Internal Review Officer found that the Appellant had not necessarily been provided with adequate tools (such as a multi-disciplinary/reconditioning program) to allow for a successful outcome. Accordingly, she was provided with a multi-disciplinary assessment and program at [rehab clinic #1].

As a result of an incident at [rehab clinic #1] involving an accident on a treadmill, the Appellant's work hardening/rehabilitation program was moved to [rehab clinic #2].

MPIC asked an occupational therapist to assess the duties of the Appellant's employment as a hairstylist in a salon. The job was assessed at a light or limited demand level, with sedentary weight demands but a light rating, due to the need for continued standing.

The Appellant reported to MPIC and to caregivers that she was unable to work due to pain and headaches and could barely get out of bed. MPIC provided the Appellant with standard Daily Activity Logs for completion as well as Level of Function forms. However, the information the Appellant provided in the logs, forms and reports to MPIC and caregivers differed from information MPIC obtained through video surveillance of her activities.

[Appellant's rehabilitation specialist], of [rehab clinic #2], provided an opinion that the Appellant had the physical capability to return to her employment via a graduated return to work program. Further, after viewing the Appellant's videotaped activities he concluded that she would be capable of returning to full-time work and would have been able to resume her job as a hairdresser, stating that:

> "The observations in clinic and under surveillance would indicate no findings that indicate a full return to work at her job is not possible."

On June 28, 2012 the Appellant's case manager provided her with a decision terminating her entitlement to benefits (pursuant to Section 160(a) of the Act) for knowingly providing MPIC with false or inaccurate information with respect to the extent of her injuries and functional abilities. The letter advised that the Appellant was also responsible for reimbursing MPIC for the IRI benefits she had received, as a result of her failure to notify and provide accurate

information concerning her functional ability (in accordance with Section 189(1) of the MPIC Act).

The case manager also advised that there was no impairment of function preventing the Appellant from returning to her employment, thereby ending her entitlement to IRI benefits in accordance with Section 110(1)(a) of the MPIC Act.

The Appellant sought an Internal Review of this decision.

At the Internal Review level, the Appellant was assisted by a Rehabilitation Case Specialist. The Appellant explained that she suffered from gambling and alcohol addictions which she used as a way of coping with high levels of stress. She indicated that she had not reported these addictions due to embarrassment, but maintained that she was not physically capable of working as a hairstylist.

On November 2, 2012, an Internal Review Officer for MPIC upheld the case manager's decision that the application of Section 160(a) and 189(1) of the MPIC Act was justified in the termination of the Appellant's benefits and the recovery of benefits to which she was not entitled. The Internal Review Officer stated:

> "I reviewed the investigation of your activities of December, 2011, January, 2012 and February, 2012, which shows you functioning at a much higher level than what you informed your case manager you were capable of. I agree that a medical explanation that might account for your marked discrepancy between your reported level of function and that you were observed performing does not exist. You provided information to MPI and your health care professionals as it relates to your level of function that was not an accurate reflection of what your were capable of performing at the times you were assessed."

On January 7, 2014, an Internal Review Officer considered the case manager's conclusion that the Appellant was capable of holding her pre-accident employment as of December 8, 2011. Following a review of the Appellant's submissions, as well as the Daily Activity Logs, video surveillance and medical evidence, the Internal Review Officer upheld the case manager's finding that the medical evidence on file supported the conclusion that the Appellant was able to return to her pre-accident employment on a full-time basis as of December 8, 2011.

It is from these decisions of the Internal Review Officer that the Appellant has now appealed.

Issues:

The issues before the Commission were:

- Whether the Appellant's Personal Injury Protection Plan ("PIPP") benefits were correctly terminated pursuant to Section 160(a) of the MPIC Act.
- Whether the Appellant is responsible for reimbursing MPIC $11,119.58 pursuant to Section 189(1) of the MPIC Act.
- Whether the Appellant was able to hold the employment she held at the time of the accident, as of December 8, 2011.

Having considered the documentary evidence on the Appellant's file, the testimony heard at the appeal hearing and the submissions of counsel, the Commission finds that the Appellant's IRI benefits were correctly terminated pursuant to Section 160(a) of the MPIC Act and that the Appellant is responsible for reimbursing MPIC pursuant to Section 189(1) of the MPIC Act. Further, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that she was not able to hold the employment she held at the time of the accident, as of December 8, 2011.

Evidence for the Appellant:

The Appellant provided medical reports in support of her appeal. These included Job Demands Analysis ("JDA") and Percentage of Duties ("POD") reports prepared by the occupational therapist, physiotherapy reports, reports and chart notes from her family physician, and reports from a doctor at the [text deleted] Pain Clinic, a neurologist, a psychiatrist, a specialist in addictions and the Addictions Foundation of Manitoba.

Evidence of the Appellant:

The Appellant testified at the Appeal hearing. She described her job as a hairstylist and her health prior to the MVA. She had a little bit of trouble with fibromyalgia, which had been diagnosed about 15 years before the MVA, and she described some nerve pain affecting her shoulders and arms, and the medications which she took to control it. She had flare-ups every once in a while when she was fatigued, but she was still able to work and do her job on a day to day basis. Her pain was well controlled. She was self-employed within a salon working approximately nine to five every Tuesday to Saturday. She had been a hairstylist for about 19 years and loved her job.

The Appellant described the typical duties and physical requirements of the hairstylist position which involved a lot of standing and working with her hands and arms, often above her shoulders using tools to cut, blow dry, colour hair, etc.

The Appellant then described the MVA of May 11, 2010 and the pain and symptoms which followed. She described chronic pain in her head, bad headaches, neck and back pain, problems with her mouth and grinding of her jaw, difficulty lifting her arm and an aggravation of her

fibromyalgia symptoms. She described the medication which she took and still takes, indicating that because she suffers from alcohol addiction she tries to avoid taking opiates.

The Internal Review Decision ("IRD") noted the Appellant's report that she hit her mouth on the steering wheel. Dental treatment consistent with such an injury was provided. However, at the hearing the Appellant testified that she had not hit her mouth, but rather had hit her forehead on the steering wheel and that this had caused headache pain.

The Appellant attended for physiotherapy for eight months following the MVA. She received treatment from her family physician, [text deleted], [Appellant's doctor #2] (who she had been seeing regarding her fibromyalgia), [text deleted] (a pain specialist at [text deleted] Clinic who diagnosed her with severe depression), [text deleted] (neurologist), and two psychologists. Finally, she saw [text deleted] who is a specialist in addictions and the psychiatrist [text deleted] in regard to her alcohol addiction. This led to her attending a residential treatment centre.

The Appellant described receiving the case manager's decision in July of 2011 which terminated her IRI and medication benefits. She did not agree with the decision and fell into a deep depression. She could not afford medication and turned to alcohol. The Appellant described a difficult period in her life where she was depressed and anxious, was drinking to excess and attempted suicide. She tried to hide her drinking, but until the decision of MPIC to reinstate her benefits on September 27, 2011, she had difficulty dealing with her pain and continued drinking.

Once her benefits were reinstated, the Appellant began going to a program at [rehab clinic #1] on weekday mornings. She described the exercises she did there but testified that although she was able to participate in the program, her pain levels were still very high, at a 9 out 10 or 10 out of

10 level. She testified that she still had headaches but pushed herself because she wanted to get back to work.

The Appellant also described how pain after the MVA affected her ability to work. She met several times with the occupational therapist, [text deleted], at the salon to assess the requirements of the job. She discussed the difficulties which she had with position tolerance, both standing and lifting her arms, with the occupational therapist. The Appellant felt that the resulting assessment might not be an accurate representation of the demands of full-time work as a hairdresser, but rather of just the days when they met. She explained that she had a lot of difficulty holding up a blow dryer, standing for long periods of time and with fatigue and pain overall. She found that even the reduced schedule provided for her return to work program was very hard on her and she became depressed.

The Appellant testified that she could not recall whether she had told the occupational therapist that her pain levels were at 10 out of 10. However, when [Appellant's occupational therapist's] reports were reviewed with her and the reports of 10 out of 10 pain levels were noted, she said that she guessed she had been in a lot of pain that day. When asked how she was able to participate in a two hour assessment at that pain level, she indicated that the pain level was reported after the assessment and that she had not been exaggerating. This is the pain she goes through all the time. In later testimony, [Appellant's occupational therapist] advised that the reports of 10 out of 10 pain levels by the Appellant were made prior to participating in the activities involved in her assessment.

On November 22, 2011, an incident occurred at [rehab clinic #1] while the Appellant was on the treadmill. She described this incident in detail, noting that she was on a treadmill which was

close to another treadmill. The participant on the next treadmill fell and grabbed her arm, pulling her down so that she hit her head on the bar of her treadmill. Therapists who were on the other side of the room came running after she hit her head and tried to catch her fall. They grabbed her, but she had already hit her head and was in shock.

The Appellant gave detailed evidence, both on direct and upon cross-examination regarding this incident and was referred to both photographs and hand drawn diagrams of the treadmills and the gym space where the incident occurred. The Appellant's description of the treadmills, where people were located in the room, and whether she hit her head on the treadmill handles or rails were challenged in cross-examination. She maintained that the therapist in the room, [text deleted], was at a computer rolling desk some distance from the treadmill and that she was not close enough to catch the Appellant or prevent her fall.

The Appellant was shown a coloured photograph taken of the treadmills at a later date and indicated that these photos were of a different model of treadmill and that the treadmill she fell on was an older model with longer handrails. She explained that as a result of this treadmill fall she suffered a concussion, leading to migraines and light sensitivity. She had to wear sun glasses to protect herself from these problems. The Appellant's description of the incident differed quite significantly, in a number of respects, from testimony later provided by the therapist from [rehab clinic #1].

The Appellant went on to explain that after this incident and [rehab clinic #1's] denial of responsibility, she could not go back there. She was too upset. On the afternoon of the incident, she went to [text deleted] to drink and play VLT's because, she testified, she needed a dark place

with low lights. The program was discontinued and she later started another program at [rehab clinic #2].

The Appellant reviewed portions of the videotape surveillance for the panel. On cross-examination, she was asked to explain the lack of pain behaviour, grimaces or stretching on the videotapes. In many instances she was not wearing sunglasses. She was walking easily, quickly and bending into her car. She showed no evidence of dizziness and sat for long periods in front of the flashing lights of a VLT machine. The Appellant indicated that she was in pain on the videotapes but often drunk. She explained that it was very dark inside the restaurants and that the VLT's were not bright, in spite of the flashing lights. No matter what the videos showed she felt dizzy and in pain all of the time.

The Appellant was asked about many conversations and the resulting file notes which were recorded by her case manager regarding instructions given to her on how to fill out the Daily Activity Logs and Level of Function forms. The Appellant, in regard to several of these reports of conversations and notes on the indexed file, testified that she did not recall the conversation because she had not been in a good frame of mind. She acknowledged that she knew at the time that it was important to be honest with MPIC and report to them if her condition improved. She knew the forms were important but she was so intoxicated, depressed and confused that she doesn't remember what she wrote in them. She took full responsibility for the inconsistency but said that she was not intentionally trying to mislead. She was in a dark place, ashamed, taking medication, drinking and making bad choices. She said that she was a blackout drunk who would get so drunk she couldn't remember so she just wrote stuff down on the forms, not really remembering what she had done or what she had written. She just wrote down the same thing every day, not necessarily what she actually did. She was sorry for that. She was not trying to

hide her activities but was just depressed and making a lot of bad decisions. She did not report her drinking or her gambling but the two go together. She was intoxicated and suffering from anxiety and depression. She now takes full responsibility and admits she wrote false information on the logs.

The Appellant acknowledged that she did not tell caregivers at [rehab clinic #1] or [rehab clinic #2] that she was having a problem with alcohol. There were no references in their reports that she attended drunk or smelling of alcohol. Nor did she mention these difficulties to [Appellant's doctor #3] or, for a long time, to [Appellant's doctor #1]. She acknowledged that she tried to hide her alcoholism until she saw [Appellant's psychiatrist] (who reported on November 5, 2012) who made the Appellant acknowledge that alcohol had become a significant problem in her life.

Evidence for MPIC:

MPIC relied upon evidence from and regarding the Appellant, such as her Level of Function forms, Daily Activity Logs, reports documented by and letters prepared by her case manager and the videotaped surveillance of the Appellant's activities. MPIC also relied upon reports from its Health Care Services team, the occupational therapist, staff at [rehab clinic #1] and [rehab clinic #2] and from [Appellant's rehabilitation specialist].

The Commission also heard testimony from the occupational therapist, from [text deleted] [Appellant's rehab and exercise specialist], a rehabilitation aide and exercise specialist at [rehab clinic #1] and from [Appellant's rehabilitation specialist].

Evidence of [Appellant's occupational therapist]:

[Appellant's occupational therapist] provided reports for the Appellant's file dated August 19, 2010, January 21, 2011, October 18, 2011, October 28, 2011, and February 3, 2012. She was qualified as an expert in occupational therapy with special expertise in JDA and POD reports.

The occupational therapist explained that she had been engaged by MPIC to meet with and assess the Appellant and provide reports regarding the physical demands of her job (JDA) and the ability or work capacity of the Appellant to perform it (POD).

She explained the process of preparing these assessments, which involved both interviewing and physical testing with the Appellant. She also explained the measures used to define the qualities of the job; the DOT (an American measure) and the NOC (a Canadian measure). Her assessments were largely based upon the hairstylist job in a salon, but she also updated the demands to more closely reflect the slight changes involved when the Appellant moved to her home salon. She did this so that the updated information would be of assistance to the Appellant's rehabilitation team.

The occupational therapist described her time spent with the Appellant in preparing these assessment reports. Right at the beginning of the assessment, during the interview phase and prior to beginning any tasks or exercises, the Appellant was asked to rate her pain on a scale of 0 to 10. She was provided with a standard explanation that a score of 10 represents "the worst imaginable pain requiring emergency hospitalization". During the first assessment, the Appellant rated her pain at 9½ out of 10. As the Appellant did not match the presentation the occupational therapist had previously encountered with other patients who were at such a high level of pain, this raised a red flag for her that perhaps something else was going on not fully

explained by physical problems and that there might be psycho social barriers to a return to work.

At a second meeting, the Appellant rated her pain at 10 out of 10. She also told her that she had been referred to the [text deleted] Clinic and the occupational therapist found this encouraging. Following the assessments, the occupational therapist reached the conclusion that the strength requirements for the hairstylist job would match that of a sedentary occupation. However, due to the position tolerances for standing and working with arms elevated, she concluded that the job should be classified as light.

The therapist was asked to review a report from an occupational therapist at [rehab clinic #1] and to compare that with her own findings. She noted that there were some similarities and some differences between the two reports, but overall both came to a similar conclusion, arrived at independently, to assess the job demands as light or limited.

She explained the process she used for assessing the Appellant's ability to perform the demands and requirements of the job. When she first assessed the Appellant in August of 2010, she concluded that the Appellant was able to perform 20% of the job. Although it was hoped that her capacity would improve with rehabilitation therapy, no improvement was seen. In fact, the Appellant's ability decreased, first to less than 7% and then finally (by the final assessment of February 13, 2012), the Appellant's work capacity had reduced to 0 and she was not able to work at all. The therapist had hoped that since the Appellant had been attending a program at [rehab clinic #2] for three hours daily, three times a week, she would increase her work capacity, but this did not happen. When asked for the reason why there was no improvement or ability to work, the therapist said that it was based on the Appellant's reports of pain.

On cross-examination, the occupational therapist agreed that the Appellant did meet the strength requirements for the hairstylist position, but did not meet the position tolerances for working with her arms elevated or standing for extended periods of time.

Evidence of [Appellant's rehab and exercise specialist]:

[Appellant's rehab and exercise specialist] testified that she is a rehabilitation aide and exercise specialist who has worked at [rehab clinic #1] since January 2011. She explained that she creates and introduces exercises for clients that come into the [rehab clinic #1]'s program to rehabilitate injuries or get back into work hardening programs. She designs exercise programs and demonstrates them for the client. She also ensures that the clients are doing the exercise correctly by supervising their efforts.

[Appellant's rehab and exercise specialist] worked with the Appellant while she was attending [rehab clinic #1] and described the November 22, 2011 incident where the Appellant stumbled or lost her footing on a treadmill after being grabbed by another patient.

[Appellant's rehab and exercise specialist] explained that there were two treadmills in the room. Both clients were walking on the treadmills and she recalled conversing with them. She did not recall what they were talking about. The Appellant was walking at a medium-paced stroll. [Appellant's rehab and exercise specialist] was standing towards the rear of the Appellant's treadmill so that they could converse. She was looking towards both clients and had a clear view of them. As they were talking, the other client, who was on the treadmill to the right, turned to say something to the Appellant. His left arm went out and grabbed the Appellant's right arm. The Appellant stumbled, but [Appellant's rehab and exercise specialist] placed her hand at the Appellant's back and kept her from falling down. The Appellant did not come in contact with

anything as there were no obstructions around the treadmill and [Appellant's rehab and exercise specialist] was able to get her arm on the Appellant's back and keep her from going down.

[Appellant's rehab and exercise specialist] was shown diagrams and photos of the gym room where the incident occurred and used these when explaining the location of the treadmills and the Appellant. She identified colour photographs of the treadmills in a picture taken in December of 2015. She said that the location of the treadmills has changed but they were the same treadmills that [rehab clinic #1] has had since they opened.

When asked whether the Appellant hit her head on the handle of the treadmill as she had told the Commission, [Appellant's rehab and exercise specialist] indicated that the treadmill handles are very short and toward the front of the machine. The Appellant had fallen towards the back of the machine before [Appellant's rehab and exercise specialist] caught her and she could not have hit her head on the short handles of the treadmill at the front of the machine. She confirmed that she was very close to the Appellant and looking at her but had not seen her hit her head.

The staff then took the Appellant into a meeting room a couple of meters away and had her sit in a chair. The Appellant said that she had pain in her shoulder and neck due to the incident, and the staff applied ice. The Appellant then thanked [Appellant's rehab and exercise specialist] for preventing her from hitting her head.

Evidence of [Appellant's rehabilitation specialist]:

[Appellant's rehabilitation specialist] provided reports dated December 28, 2011, January 30, 2012, March 8, 2012, March 13, 2012, March 16, 2012, April 26, 2012, April 27, 2012, May 22, 2012, August 6, 2014 and March 10, 2016.

He testified at the hearing into the Appellant's appeal and was qualified as an expert in physical medicine and rehabilitation. He explained his experience in the field of rehabilitation as well as his certification as an independent medical examiner and qualification to conduct Functional Capacity Evaluations

[Appellant's rehabilitation specialist] described the Appellant's rehabilitation program at [rehab clinic #2], which was a ten week program with a two week extension. The goal was to help the Appellant increase and restore function in order to be able to return to work.

The program started with a multi-disciplinary assessment summarized in a report dated December 28, 2011. This assessment began with an interview and patient history, questionnaires and a physical examination. The interview also addressed the requirements of the hairstylist job and an examination of the job description in order to determine the strength levels required for the job. Also taken into consideration, along with other sources, was the JDA completed by the occupational therapist. [rehab clinic #2]'s assessment concluded that the hairstylist job should be classified as sedentary in regards to strength, but that the standing and walking requirements increased this to a light level. [Appellant's rehabilitation specialist] believed that these conclusions were in line with the conclusions of the occupational therapist.

Reports were provided throughout the [rehab clinic #2] rehabilitation program and [Appellant's rehabilitation specialist] referred not only to the multi-disciplinary assessment report of December 28, 2011, but also to logs, diaries and progress reports such as those from January 27, 2012, January 30, 2012, March 8, 2012 and a discharge report of March 16, 2012. [Appellant's rehabilitation specialist] noted that throughout these reports there were unreliable reports of pain,

invalid testing results and invalid presentation. These led to the conclusion that the Appellant was providing a low, limited or marginal effort in her program.

He reviewed pain diagrams reporting pain in almost every body part, revised Oswestry scores which translated to a "crippled" level, reported pain levels at 9 or 10 out of 10 (which translated to the most excrutiating or severe pain imaginable), failure to achieve a bell curve result on grip strength testing (suggesting that the test results were not valid) and elevated COV score (suggesting excessive variability). Similar results were found in the progress reports of testing done on February 7, 2012.

In spite of the Appellant's high levels of perceived disability (approaching the crippled range) the Appellant continued to attend at the clinic and perform some of the exercises and tests, although with a limited effort.

In reviewing the Discharge Report of March 16, 2012, [Appellant's rehabilitation specialist] explained that although the Appellant's subjective reports of pain complaints had not changed, even with the lack of effort disclosed by the reliability tests, the Appellant's strength testing showed that she matched the job requirement for a hairstylist. Her ability to reach, both overhead and immediate, was rated at frequent and he concluded that she met the position tolerance for working with her hands elevated. [Appellant's rehabilitation specialist] also testified that the Appellant met the test for frequent walking. When combined with direct observations of her standing in clinic this meant that she met the position tolerance for frequent standing as well.

Based upon these results, [Appellant's rehabilitation specialist] felt that the Appellant could manage a full return to work at that time. However, due to the difficulties posed by the Appellant's fibromyalgia as well as her lengthy absence from working, it was concluded that, as is often the case, the Appellant might have more success in returning to work if she underwent a graduated return to work program.

[Appellant's rehabilitation specialist] also explained that no one in his clinic had ever noted observing the Appellant attending under the influence of alcohol. She was not impaired and did not smell of alcohol, although it is common for staff to look out for such signs.

[Appellant's rehabilitation specialist] was also asked to review the video surveillance evidence of the Appellant's activities and he provided reports dated April 26, 2012 and August 6, 2014 commenting on the differences and similarities between the videotaped activities and the Appellant's presentation in the clinic. Generally, he noted that the Appellant's presentation on the video was quite active. She moved easily without physical impairments and without the hat or sunglasses that she often wore in clinic. The videotaped activities confirmed a correlation to the Appellant's ability to go back to her job. In his view, the activities depicted on the first videotape, December 8, 2011, gave the impression that she could have returned to work at that time and that the Appellant was capable of working at a sedentary and light level.

[Appellant's rehabilitation specialist] also commented upon reports he had reviewed from [text deleted], a neurologist, and [text deleted], the Appellant's family physician, which concluded that the Appellant suffered from concussion, post-concussion syndrome and post-traumatic stress disorder which totally disabled her from any occupation as a result of the MVA. He noted that [Appellant's neurologist's] reports were brief and generally reflected a lack of detail. He also

queried the diagnosis of concussion or post-concussion syndrome causing the Appellant's migraine headaches. [Appellant's neurologist] appeared to base his conclusion upon evidence received from the Appellant since the reports which [Appellant's rehabilitation specialist] had reviewed had not indicated that a concussion was suffered as a result of the MVA. Nor was he aware of any diagnostic criteria, beyond the Appellant's subjective reports, which would lead to a diagnosis of post-traumatic stress disorder, or alcoholism. In [Appellant's rehabilitation specialist's] view there were no objective correlations to support these conclusions.

Submission for the Appellant:

Counsel for the Appellant acknowledged that she had provided false or inaccurate information to MPIC. She had acknowledged this in her evidence during the course of the hearing and understands that she must accept an appropriate penalty. However, counsel noted that both MPIC and the Commission have the discretion, in applying Section 160 of the MPIC Act, to reduce the severity of the consequence to the claimant. In this regard, counsel listed a number of mitigating factors in this appeal which called for a measured and proportional response to the Appellant's actions. These mitigating factors included pre-existing fibromyalgia, increased pain in neck, shoulders and back, chronic migraine headaches, increased reliance on prescription medications, premature termination of IRI and prescription medication coverage in July 2011, the fall on the treadmill at [rehab clinic #1] on November 22, 2011, major depressive and pain disorders, alcohol dependence and an absence of clear warning to the Appellant that her PIPP benefits could be terminated.

Counsel for the Appellant reviewed the evidence in relation to each of these factors and how in his view they should impact upon the penalty for the Appellant's false reporting. He concluded that the Appellant desperately needed and felt she was genuinely entitled to PIPP benefits but

had felt compelled to embellish her symptoms in order to ensure continued support from MPIC until she was capable of resuming her pre-accident employment. While this behavior was regrettable and a violation of Section 160(a), it did not mean that the Appellant was pain free or migraine free. He submitted that when properly considered, the mitigating factors identified, combined with the Appellant's relatively young age and remaining work years before retirement, should have prompted MPIC to recognize the true extent of her difficulties and to provide her with appropriate supports to assist in her rehabilitation rather than invoking Section 160(a). Counsel asked the Commission to substitute a time limited suspension of the Appellant's PIPP benefits, suggesting that a period of two years could be appropriate in the circumstances.

Counsel also submitted that, should the Commission conclude that MPIC was correct in terminating the Appellant's benefits as of December 8, 2011, her ongoing work disability and minimal income from CPP disability should result in the amount being considered "not recoverable", pursuant to Section 189(3)(a) of the MPIC Act, which provides:

> **Cancellation or deduction of debt**
>
> 189(3) Subject to the regulations, the corporation may, in respect of the amount to which it is entitled to be reimbursed,
>
> (a) cancel it or any part of it, where the corporation considers it is not recoverable;

Counsel addressed the IRD dated January 7, 2014 which relied on the reports and opinions of [Appellant's rehabilitation specialist] to conclude that the Appellant had regained the ability to resume her pre-accident employment on a full-time basis as of December 8, 2011. This conclusion was reached due to her functioning at a light strength demand level. However, he urged the Commission to consider the evidence of the Appellant that the job required "constant"

standing and working with hands elevated (80% of an eight hour day). Even working with light tools, these requirements resulted in the job being physically demanding.

The JDA conducted by the occupational therapist confirmed this and the final POD assessment performed in February of 2012 noted that while she met the strength requirements for the job she did not have the position tolerance for standing and working with arms elevated.

Reports from [Appellant's doctor #1] and [Appellant's neurologist] confirmed that the Appellant was not able to return to work at the end of her rehabilitation program and was totally disabled from any occupation due to her symptoms.

Counsel also questioned the accuracy of the [rehab clinic #2] assessment report which rated the standing and walking requirements of the job as occasional and noted that the immediate reach requirement had only been classified by [rehab clinic #2] as frequent. The discharge report and the evidence of [Appellant's rehabilitation specialist] were flawed because both concluded that the Appellant met the strength requirements for her pre-accident employment and recommended a graduated return to work program, in spite of her having missed significant time in the program due to pain and migraines and having relied heavily upon heat, ice and medication to help manage her pain.

The surveillance evidence, it was submitted, did not show the Appellant functioning at a level compatible with performing the essential duties of a hairstylist as it did not show her standing for extended periods or working with her arms and hands elevated for extended periods.

While counsel agreed that the correct strength rating for the hairstylist position was light, this had little significance because the Appellant's employment did not involve any significant demand for lifting, carrying, pushing and pulling. It was submitted that [Appellant's rehabilitation specialist] and MPIC relied too heavily on the strength rating when considering the Appellant's work capacity and failed to adequately take into account the position tolerances required on a constant basis.

In summary, counsel submitted that the Appellant's pre-accident employment as a hairstylist required significant positional tolerances for standing and working with arms elevated, and these body positions tended to aggravate her pain and migraine headaches. There was little evidence indicating that the Appellant met the position tolerances required to work as a hairstylist as of December 8, 2011 or at any point thereafter. Despite the Appellant's sincerest efforts to rehabilitate and return to the job she had enjoyed prior to the MVA, she was never able to return to a level of function that would be considered compatible with the ability to work full-time as a hairstylist. As a result, the Commission should conclude that the Appellant was entirely or substantially unable to perform the essential duties of the hairstyling position as of December 8, 2011.

Submission for MPIC:

Counsel for MPIC emphasized that the Appellant had provided false and inaccurate information on numerous occasions in various aspects of her claim. This was not a case of one isolated incident, but rather a pattern of behavior extending over four months from November 2011 to February 2012. He reviewed and examined eight examples of the Appellant's failing to accurately report activities on her Daily Activity Logs and Level of Function forms. He went on

to review 14 examples of the Appellant making false statements to MPIC and medical professionals.

He concluded this review by submitting that credibility is a key consideration in this appeal. For any issues which the Commission is trying to determine, it cannot put weight on what the Appellant says, due to her complete lack of credibility. The Appellant provided so many conflicting versions of events that her evidence simply cannot be believed. He submitted that her demeanour on the witness stand supported this. She was unable to answer many of the questions put to her and often provided confusing answers, changing her story. There was no consistency.

The Appellant admitted that she knew the information she was providing was important and at least four letters from her case manager instructed her on how to fill out the logs and other records. Conversations explaining how to fill them out were documented.

Counsel submitted that the Appellant's embellishment and exaggeration of her pain experience were particularly egregious. All her reports of inability to function due to pain, reliance on medication and other supports, and reports of the highest imaginable pain can be contrasted with the activities shown on the videotape surveillance. Her false reports of the treadmill incident at [rehab clinic #1], clearly contradicted by the staff, were motivated by her desire to delay her rehabilitation program and extend PIPP benefits.

Counsel also addressed the various mitigating circumstances advanced by counsel for the Appellant. He submitted that many of these, such as memory problems, reliance on prescription medication, psychological diagnosis and even problems with alcohol, had not been established by the evidence. Nor should the Appellant's admissions and apologies upon cross-examination

go towards reducing the termination of benefits to a suspension. When one considers the extent of the Appellant's lies, these alleged mitigating factors should not be accepted towards a reduction of this penalty. Termination was the appropriate remedy due to the scope of the false and inaccurate information provided by the Appellant as well as the extent of the lies which, he submitted, were motivated not by the mitigating factors advanced, but by greed.

In regard to the Appellant's contention that she was not able to return to work, counsel noted that her job as a hairdresser had been assessed by the occupational therapist as requiring a limited or light strength level. [Appellant's rehabilitation specialist] confirmed that this was an accurate assessment, and [rehab clinic #1] had independently come to the same conclusion. The Appellant had not provided any persuasive evidence to challenge these conclusions regarding the strength required to be a hairdresser. Physical testing at [rehab clinic #2] showed that she met all the physical and positional tolerances to return to full-time work, even though she was clearly not putting in a full effort. Video surveillance confirmed that she was operating at a higher level than she had presented in clinic. [Appellant's rehabilitation specialist] testified and provided his opinion that the Appellant met all of the strength and positional tolerances for the position and could have returned to work on December 8, 2011. The testing results at [rehab clinic #2] supported this position, and the Appellant had not provided any medical reports which objective testing to refute these conclusions.

Accordingly, counsel submitted that the Appellant had failed to establish on a balance of probabilities that the Internal Review decisions were in error. Counsel submitted that both appeals should be dismissed.

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;

Claimant to advise of change in situation

149 A person who applies to the corporation for compensation shall notify the corporation without delay of any change in his or her situation that affects, or might affect, his or her right to an indemnity or the amount of the indemnity.

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(a) knowingly provides false or inaccurate information to the corporation;

Corporation to be reimbursed for excess payment

189(1) Subject to sections 153 (payment before decision by corporation), 190 and 191, a person who receives an amount under this Part as an indemnity or a reimbursement of an expense to which the person is not entitled, or which exceeds the amount to which he or she is entitled, shall reimburse the corporation for the amount to which he or she is not entitled.

Manitoba Regulation 37/94 provides:

Meaning of unable to hold employment
8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The onus is on the Appellant to show on a balance of probabilities that her PIPP benefits were not correctly terminated, she is not responsible for reimbursing MPIC, and she was not able to hold her employment as of December 8, 2011.

Counsel for MPIC submitted that in this case the Appellant had not simply provided a single instance of false and inaccurate information. Rather, false and inaccurate information permeated her entire file. Instances of her dishonesty, embellishment and exaggeration could be found in her Daily Activity Logs and Level of Function forms, her reports to and dealings with her case manager and medical professionals, and her testimony on the witness stand.

The panel has reviewed the documentary and videotape evidence on the Appellant's indexed file as well as the testimony of the witnesses and submissions of counsel. There are two separate IRDs under appeal. The first, dated November 2, 2012 concerns the termination of benefits for providing false information and reimbursement to MPIC. The second, dated January 7, 2014, deals with the Appellant's ability to return to her employment. The evidence reviewed, and the resulting findings of credibility and weight impacted upon our findings regarding both IRDs. Therefore, we have set out, at length, the examples of false reporting and false information provided to MPIC and medical professionals which the panel has taken into account in arriving at our conclusion that both of the Appellant's appeals should be dismissed.

<u>False Reports to MPIC</u>

Examples of false information and statements which the panel took into consideration include:

- Daily Activity Log for December 8, 2011 (the Appellant describes waking up with a headache, taking hot baths and medication, stretching and staying in bed) compared with

the video surveillance of the same date (depicting the Appellant driving and at various locations such as a gas station, [text deleted] Clinic, bank, gambling at [text deleted] , picking up pizza and driving children).

- Daily Activity Log of December 9, 2011 (where she describes waking up achy, having a bath, trying to do laundry, lying down with heat for the pain, stretching, having another bath and going to bed) compared with video surveillance of the same date (showing the Appellant driving, walking with no difficulty, attending [rehab clinic #1], attending [text deleted] to drink a beverage and play VLT machines, and then attending [text deleted] Clinic).
- Failure to report activity on the Daily Activity Log dated January 9, 2012 compared with video surveillance showing the Appellant doing errands that day, attending at [text deleted] and going to [text deleted] in the evening.
- Level of Function form dated January 18, 2012 (reporting that she cannot bend), compared with video surveillance taken on January 9 and 10, 2012 (showing her freely kneeling into her car and bending).
- Daily Activity Log of January 12, 2012 (where she describes being in bed after taking medication at 2:00 p.m., rising only to take a hot bath and medication), compared with video surveillance from that date (which show her driving her son to and from school, going to the bank and driving others).
- Daily Activity Log of January 25, 2012 (where she describes taking her son to school, going to the clinic and spending the rest of the day using heat and ice, doing stretches, taking meds and a bath and resting in bed) compared with video surveillance (which shows her attending [text deleted] for three hours in the afternoon and [text deleted] to play VLT's in the evening).

The Appellant admitted in her testimony that she knew the importance of being honest on the Daily Activity Logs and Level of Function Reports. Her case manager explained to her and she understood that these documents were important to MPIC and that if there was any change in her condition it was important to report that. The Appellant also admitted, upon viewing the videotapes during her cross-examination, that the information she had provided in those reports was not correct and did not reflect her actual activity on the days in question.

False Statements to MPIC and Caregivers

The panel considered several more examples of the Appellant making false statements to MPIC and to medical professionals involved with her care. These examples include:

- The Appellant maintained before the Commission that on November 22, 2011 she fell on the treadmill at [rehab clinic #1] and hit her head, causing concussion, extreme pain and headaches. However, the evidence did not support this claim. Evidence from staff at [rehab clinic #1] clearly contradicted the Appellant's version of events, describing her stumbling towards the rear of the treadmill and being caught by staff who was standing nearby talking to her. Photographs of the gym, equipment, positioning and layout of the treadmills showed very short hand rails on the treadmills which did not support the Appellant's claim to have fallen and hit her head on the handrails.

  The Appellant's accounts of this incident to medical professionals varied. For example, she told [Appellant's doctor #4] that she landed and fell on the right side of her body but her Daily Activity Log from that time says that she had bruises all over her left side and that her whole body was bruised. She told others that she had suffered a concussion.

The panel found the evidence of [Appellant's rehab and exercise specialist], the [rehab clinic #1] staff member who testified, to be credible. We give more weight to her evidence describing the incident than we do to the Appellant's various reports of the incident, which lacked consistency and credibility. We find that the Appellant's claim that she fell and hit her head on the treadmill, causing her pain and headaches, contributed to her misleading MPIC in regard to her condition.

- Statements made by the Appellant to her case manager on December 6, 2011 and to staff at [rehab clinic #1] on December 9, 2011 claiming that she could barely get out of bed or out of the house, compared with over seven hours of activity depicted on videotapes on December 8, 2011.

- On January 9, 2012 the Appellant told staff at [rehab clinic #2] that a significant increase in pain over the last few days required her to be bedridden for most of the time. This was compared with significant activity later that day shown on the videotapes, where the Appellant attended at [text deleted] and the [text deleted].

- On January 12, 2012 the Appellant told staff at [rehab clinic #2] that she had a migraine headache and couldn't get out of bed. Video surveillance from later that day showed her driving and running errands.

- On January 27, 2012 the Appellant told her case manager that she had a bad migraine, could not get out of bed and could not drive. Video surveillance from that day show the Appellant driving.

- On October 11, 2011, the Appellant told the occupational therapist, [Appellant's occupational therapist], that her pain was at a 10 out of 10 level, representing the worst pain imaginable requiring immediate hospitalization. She then went on to participate in a two hour assessment that day.

- On December 23, 2011 the Appellant told the staff at [rehab clinic #2] that her pain was at a 9 out of 10 level. She then participated in a three hour assessment that day.

- Documentation from [rehab clinic #1] and from [rehab clinic #2] show that the Appellant did not give a full effort in participating in their rehabilitation and therapy programs. [Appellant's rehabilitation specialist's] testimony pointed to several test results which he could not explain without a conclusion of invalidity and inconsistent effort.

- The Appellant repeatedly reported that she had very bad, debilitating headaches or migraines throughout the administration of the claim. However, video surveillance taken on December 8, 2011, December 9, 2011 and January 25, 2012 depicted her outside in the daylight and inside playing VLT's without using sunglasses or other protection from the sunlight or flashing lights of the VLT's.

- On Level of Function forms dated November 29, 2011 and January 18, 2012 the Appellant reported that she was dizzy. Video surveillance taken on December 8, 2011, December 9, 2011, January 9, 2012, January 10, 2012 and January 25, 2012 did not show any behaviour that would suggest dizziness or unsteadiness on her feet. [Appellant's rehabilitation specialist] also reviewed these videotapes in his testimony and confirmed that he saw no evidence of dizziness.

- On February 4, 2012, the Appellant reported to the occupational therapist that after the [rehab clinic #2] program she would be in so much pain she needed to go home and lie down. Video surveillance taken on January 9 and January 25, 2012 show the Appellant leaving [rehab clinic #2] and then attending at [text deleted] , [text deleted] and [text deleted].

- [Appellant's rehabilitation specialist] described the Appellant's presentation to him at [rehab clinic #2] as being far different than the presentation which he viewed on the videotape surveillance. It was his evidence that she appeared as far more functional on the videotapes with far less range of motion issues and restrictions than she demonstrated at the clinic.

- There were variations in the Appellant's accounts of her participation in rehabilitation programs. On her first day of testimony before the panel she stated that pain and headaches did not limit her ability to participate in these programs and that she gave them her full effort. The records of both facilities showed many instances of her absenteeism and leaving early. Many of the reports that she made to [rehab clinic #1] and [rehab clinic #2], as well as to her case manager, stated that she could barely get out of bed.

The Appellant admitted upon cross-examination that the videotape surveillance showed her moving, walking, kneeling and bending without difficulty. She admitted that she knew the information she submitted on the Level of Function forms and Daily Activity Logs was inaccurate. She also admitted that many of the statements that she had provided to her case manager and to the staff at [rehab clinic #1] and [rehab clinic #2] were inaccurate.

Nor could the panel rely upon the Appellant's reports of pain. She reported to medical professionals that her pain was at a level of 9 out of 10 or 10 out of 10, with 10 out of 10 representing excruciating pain requiring hospitalization. The panel acknowledges that the experience of pain is subjective, but we find that based on the overall evidence of the Appellant's participation in assessments and rehabilitation programs, activities depicted on the videotapes and her testimony at the hearing, the Appellant has failed to establish that she was accurately expressing her levels of pain when she estimated them at 9 or 10 out of 10, regardless of her level of activity. Such reporting negatively impacts upon the Appellant's credibility and makes it difficult to arrive at a reliable assessment of the Appellant's reports of symptoms or pain.

The panel finds that all of these examples provide a clear picture of invalid reporting and a lack of credibility on the part of the Appellant.

Mitigating factors

Counsel for the Appellant submitted that termination is too harsh a penalty for the Appellant's admittedly providing false and inaccurate information. He submitted that the Commission should substitute the lesser penalty of a suspension, suggesting that two years would be an appropriate length for such a suspension. A substitution of remedies should be accorded to the Appellant, based upon mitigating factors identified. These mitigating factors include:

- Pre-existing fibromyalgia
- Increased pain in neck, shoulders and back
- Chronic migraine headaches
- Increased reliance on prescription medications
- Premature termination of IRI and prescription medication coverage in July 2011
- Fall on treadmill at [rehab clinic #1] on November 22, 2011

- Major depressive disorder and pain disorder
- Alcohol dependence
- Absence of clear warning PIPP benefits could be terminated

Counsel for MPIC submitted that many of these mitigating factors have not been factually established. Further, none provided an excuse for the Appellant's dishonest behaviour.

The Commission has the discretion to determine that the Appellant suffered from extenuating personal circumstances which mitigate her behavior in the provision of false or inaccurate information. However, in this case, we do not find that the weight of evidence establishes such mitigating circumstances, or their connection to the Appellant's actions.

The panel agrees with counsel for MPIC that not all of the mitigating factors listed above were factually established by the evidence. For example, it was asserted that a fall on a treadmill at [rehab clinic #1], when the Appellant claims to have hit her head, was a mitigating factor. However, the panel does not accept the Appellant's claim that she hit her head on the treadmill in the way she described, preferring instead the testimony of [Appellant's rehab and exercise specialist] in that regard.

In other instances, the mitigating factors advanced by the Appellant were not shown to be connected to or a reason for the Appellant's dishonesty. For example, the Appellant did not testify or provide any evidence that her reliance upon prescription medications led her to lie about her activities or her physical condition. Other mitigating factors put forward, such as dependence on alcohol, depression and chronic pain condition, were advanced without further

supporting evidence from a medical expert or professional to establish a connection between the Appellant's illness and the instances of dishonest behaviour which occurred.

[Appellant's doctor #3] was not aware of the Appellant's alcohol addiction. [Appellant's addictions specialist], in a report dated February 5, 2014 confirmed the active alcohol addiction, and went on to provide information regarding generalized tendencies or common features of active addiction, without specifically stating whether these behaviours applied to or influenced the Appellant. The evidence before us did not establish that [Appellant's addictions specialist] knew or treated the Appellant at the relevant time period in late 2011 and early 2012. Accordingly, [Appellant's addictions specialist's] report does not provide sufficient background information regarding the Appellant's addiction or its connection to her behaviour, simply stating that "these common features of active addiction may have contributed to inaccurate reporting to MPIC". The panel finds that this falls short of the onus upon the Appellant to establish that alcohol addiction contributed to her dishonest behaviour and should be considered as a mitigating factor in this case.

Nor has the Appellant provided any psychological /psychiatric reports or expert evidence, in spite of her treatment for depression by [Appellant's doctor #1] or her sessions with [Appellant's doctor #3], which would establish a connection between the Appellant's dishonest behaviour and depression or chronic pain disorder. Although reports were provided from the psychiatrist [Appellant's psychiatrist] and from [Appellant's doctor #3], the panel agrees with counsel for MPIC that no psychological diagnosis explaining her pattern of deception was established.

Nor does the panel find that there was an absence of clear warning to the Appellant regarding possible consequences of failing to report truthfully to MPIC and medical professionals. There

were many examples in the evidence where the Appellant's case manager explained how to fill out the relevant forms and how important it was to do so with accuracy. The panel was referred to many notes of meetings and conversations between the Appellant and her case manager on this very topic. These included the case manager's file note of a conversation with the Appellant where the case manager advised her that there had been discrepancies in her Daily Activity Logs and reminding her of the importance of completing the logs on a daily basis. In addition to these conversations and file notes, letters were sent to the Appellant, such as the one sent by the senior case manager dated January 5, 2012 which noted that Daily Activity Logs have to be filled out daily for two weeks and to be returned and noting that if MPIC does not receive these forms by a certain date it might affect the Appellant's entitlement to benefits as set out under Section 160 of the MPIC Act (with a copy of that Section enclosed).

Several other examples were found in documents on the Appellant's indexed file providing instructions to her regarding the importance of filling out forms regularly and correctly. Therefore, the panel does not agree that MPIC failed to provide the Appellant with insufficient warning that her PIPP benefits could be affected or that this should be considered as a mitigating factor to reduce termination of the Appellant's benefits.

Overall, the panel finds that there is a lack of corroborating evidence to establish and support the Appellant's evidence regarding the mitigating factors listed by her counsel. The panel finds that the Appellant has failed to establish, on a balance of probabilities, that the mitigating factors relied upon should lead the Commission to reduce the termination of the Appellant's benefits to a suspension.

Termination and Repayment of Benefits

Accordingly, the panel finds that the Appellant knowingly provided false information to MPIC and finds that the mitigating factors cited by the Appellant do not apply to reduce her termination of benefits to a suspension. The termination of the Appellant's IRI benefits is upheld from December 8, 2011, the first date when it was established that the Appellant's reports vastly varied from the activities in which the Appellant was engaged, as reflected in the videotape surveillance.

Further, as a result, the panel finds that the Appellant is responsible for reimbursing MPIC in the sum of $11,119.58, pursuant to Section 189(1) of the MPIC Act.

Ability to Hold Employment

Although we have found that the Appellant's IRI benefits were correctly terminated pursuant to s.160 of the Act, the Commission has also reviewed the second IRD and the Appellant's position that she was not able to hold the employment she held at the time of the accident as of December 8, 2011.

In this regard, the panel has examined the documentary evidence on the Appellant's file as well as the testimony of the Appellant, the occupational therapist and [Appellant's rehabilitation specialist].

The Appellant's former job as a hairdresser was assessed as requiring a limited or light strength level. [Appellant's rehabilitation specialist] confirmed that this was an accurate assessment.

Evidence was provided by the Appellant from medical professionals who reported that she was not able to work, for a variety of reasons.

A report from [Appellant's pain specialist] dated November 16, 2012 noted the Appellant's headaches and fibromyalgia pain as well as an emergency visit requiring a psychiatric consult . He wrote that "…the patient suffers both physically and emotionally at the moment and is not appropriate for return to work for the time being until her depression is under better control…" [Appellant's pain specialist] did not record objective testing performed and does not appear to have had the opportunity of viewing the video surveillance or other reports on the Appellant's file.

The neurologist, [text deleted], also provided reports outlining the Appellant's difficulties with headaches, finding that the Appellant was unable to work due to injuries suffered in the MVA. After carefully reviewing his reports, the panel notes that [Appellant's neurologist] does not refer to objective testing. His reports are brief, containing no review of chart notes or reports from other caregivers, notes from [rehab clinic #2] or [rehab clinic #1] or the videotaped surveillance. There is no attempt to analyse causation. He appears to rely upon the Appellant's subjective reports of pain and difficulty but it is not clear that the Appellant was truthfully and accurately reporting what happened in the MVA and her injuries to [Appellant's neurologist]. Even her description to him of striking her face on the steering wheel contradicted her earlier reports of hitting her mouth on the wheel.

[Appellant's doctor #1] opined, on November 26, 2013 that due to the Appellant's pain and depression she was not able to perform any type of work. [Appellant's doctor #1] does not describe any objective testing performed .There is no indication that she reviewed the videotaped

surveillance in which the Appellant appears to present quite differently from the description of the Appellant set out in her reports.

The occupational therapist, [text deleted], provided reports which indicated that the Appellant did not have the position tolerance to work full time as a hairdresser.

The panel has considered the reports of these caregivers alongside the evidence of [Appellant's rehabilitation specialist], the testimony of the Appellant and the other evidence on the indexed file.

Questions did arise regarding [Appellant's rehabilitation specialist's] assertion that the Appellant's walking ability translated into an ability to meet the standing tolerances for the hairstylist position. The occupational therapist's assessment that the Appellant did not meet the tolerances for elevated arms and standing was also noted.

However, the panel finds that these factors, in the face of our findings regarding the Appellant's lack of credibility and reliable reporting, are not of sufficient weight for us to conclude that, on the balance of probabilities, the Appellant was unable to work as a hairstylist.

We find that due to the lack of honest reporting by the Appellant and the invalid results this produced it is difficult to establish with any certainty what the Appellant's actual abilities were and are. Her admitted embellishment, pattern of dishonesty and inaccurate reporting make it too difficult to determine that she was not capable of returning to work. It is simply not possible for the Commission to rely upon her statements and presentation in that regard.

We find that this means there is a lack of objective, verifiable evidence to support, on a balance of probabilities, the Appellant's position that she was unable to work as a hairdresser either full time or part time, during the relevant period. Because of her lack of credibility and the numerous invalid test results which this produced, the panel is unable to find, based on the evidence, that she was unable to work. The Appellant has therefore failed to meet the onus upon her of establishing, on a balance of probabilities, that she could not work at the relevant time as a result of her MVA injuries and that the Internal Review Officer erred in his decision.

Accordingly, the decisions of the Internal Review Officer dated November 2, 2012 and January 7, 2014 are upheld by the Commission and the Appellant's appeals are dismissed.

Dated at Winnipeg this 16th day of September, 2016.

LAURA DIAMOND

LEONA BARRETT

SUSAN SOOKRAM