Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File Nos.: AC-11-056, AC-13-033, and AC-13-034

PANEL:	**Ms Karin Linnebach, Chairperson** **Dr. Sharon Macdonald** **Mr. Brian Hunt**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf;** **Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Andrew Robertson**
HEARING DATES:	**December 5, 6 and 7, 2017**
ISSUE(S):	**Entitlement to further Income Replacement Indemnity ("IRI") benefits, Personal Care Assistance ("PCA") benefits, and physiotherapy treatments and funding for a gym membership;**
RELEVANT SECTIONS:	**Subsections 70(1), 110(1)(c), 131(1), 136(1), of The Manitoba Public Insurance Corporation Act ("MPIC Act"); Section 2(3) and Section 5 of Manitoba Regulation 40/94; 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 INFOMRATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL, IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons for Decision

Background:

The Appellant, [text deleted], was injured in a motor vehicle accident ("MVA") on May 22, 2003 ("the 2003 MVA"). Following the 2003 MVA, the Appellant received Personal Injury Protection

Plan ("PIPP") benefits, including physiotherapy treatments. A dispute arose with MPIC as to whether the Appellant was entitled to receive funding for chiropractic treatments. In a decision dated April 3, 2007, the Commission directed MPIC to reimburse the Appellant for the cost of chiropractic treatments for a period of time it took until the chiropractic treatments were no longer medically necessary pursuant to Section 5 of Manitoba Regulation 40/94.

The Appellant was injured in a second MVA on December 19, 2009 and a third MVA on January 1, 2010 ("the 2009/10 MVAs"). The 2009/10 MVAs were considered together by MPIC for the purposes of PIPP benefits. Following the 2009/10 MVAs, the Appellant received PIPP benefits, including IRI and PCA benefits and physiotherapy treatments. She requested further physiotherapy treatments and funding for a gym membership, but was denied this request in a decision letter from her case manager dated November 12, 2010. She filed an Application for Review of the case manager's decision to the Internal Review Office. In a decision dated February 15, 2011, the Internal Review Officer confirmed the case manager's decision, finding that further physiotherapy treatment and a gym membership were not medically required. The Appellant filed a Notice of Appeal to the Commission on August 14, 2011 ("the first appeal"). The issue on the first appeal is whether the Appellant is entitled to further physiotherapy treatment and funding for a gym membership as a result of the 2009/10 MVAs.

In a decision letter dated December 18, 2012, the Appellant's case manager advised her that she was no longer entitled to further PIPP benefits, specifically IRI, PCA and medication expenses, effective December 13, 2012. The case manager held that the Appellant's symptoms at that time were a by-product of a pre-existing condition. The Appellant sought review of this decision to the Internal Review Office, who issued three separate decisions all dated February 26, 2013 and all upholding the case manager's decision of December 18, 2012. The Appellant filed a Notice of

Appeal received by the Commission on April 30, 2013 ("the second appeal") of all three decisions issued by the Internal Review Office on February 26, 2013. On June 15, 2017, the Appellant filed a notice of withdrawal of her appeal of the February 26, 2013 Internal Review Decision concerning [temedication expenses. As such, the issues on the second appeal are entitlement to further IRI benefits and PCA benefits.

The parties agreed that the Appellant's two appeals would be heard together. Accordingly, the issues on these appeals are entitlement to further IRI benefits, PCA benefits and physiotherapy treatments, and funding for a gym membership.

Decision:

For the reasons set out below, the panel finds the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further IRI benefits, PCA benefits and physiotherapy treatments, and funding for a gym membership.

Evidence for the Appellant:

The Commission heard evidence from the Appellant and her mother, [text deleted].

The Appellant

The Appellant testified that at the time of the 2009/10 MVAs, she had just received a job offer to work as a server at a restaurant, but was not able to start working due to the 2009/10 MVAs. The restaurant held the job for her, but when she returned to work, she was only able to work part-time due to her injuries. MPIC paid IRI benefits covering the income she lost because she was only able to work part-time at the restaurant.

After termination of her benefits at the end of 2012, she continued to work at the restaurant, went for massage as long as she could afford it, saw her chiropractor from time to time and did her home exercises as recommended by the physiotherapist. She continued to work part-time at the restaurant until the end of 2014. She stated that by the time she quit working at the restaurant, she was in charge of running the bar. She was required to check inventory, carry cases of beer, open the bar, and serve tables. She stated that she couldn't carry the cases of beer and the most she could carry at a time was a plate and a cup. She left this job because she found the work too hard. She acknowledged on cross-examination that she worked 30 hours per week as a server after her IRI benefits were terminated. She acknowledged that she had learned strategies to be able to work with her pain symptoms. However, she asserted that she quit working as a server because she couldn't do her job fully.

After leaving the restaurant she obtained part time employment at [text deleted]. She greeted customers at the front of the store and handled the till on occasion. While she was classified as part-time, she stated that she was able to take extra shifts and therefore worked between 24 and 39 hours per week depending on her availability to pick up extra shifts. On cross-examination, she acknowledged that she generally worked between 30-39 hours per week. She also acknowledged that the job required her to stand for long periods of time, but asserted that she was able to move around a lot, take breaks and apply her heat bags when needed.

She was initially hired at [text deleted] as a summer seasonal employee and was one of four workers that were kept on after the seasonal layoff. She stated that she "had to fight a lot of people to get the job" as there were 60 other employees wanting to be kept on. Despite this, she quit the job in the fall of 2015. She stated that [text deleted] wanted her to rotate through positions that she felt were too physically demanding for her so she quit. She had an exit interview and was told that

she could come back to work for the company if her physical abilities improved. After leaving [text deleted], she worked for a friend doing paperwork for her cleaning company. She did the biweekly payroll for a few months. This also ended in 2015 and she didn't return to work in 2016. She became pregnant in late 2016 and now has a three month old baby.

The Appellant stated that after she had to quit working in 2015, she lived off her savings. Once that ran out, she had no choice but to go on social assistance. She stated that she worked her entire life except for taking time off for maternity leave. She stated that her physicians don't know when and if she can return to work due to her MVA related injuries. Her physicians can't guarantee that she will ever go back to work. She is currently awaiting laser treatment, but this treatment may only be effective for 3-4 months. There are risks to this treatment and she isn't sure if she wants to take the risks. She will have ongoing discussions with her physicians about this treatment.

The Appellant stated that she now lives with chronic pain and has been diagnosed with myofascial pain syndrome. She suffered from soft tissue damage in the 2009/10 MVAs that turned into chronic pain that is never going away. She now continues to attend the pain clinic for treatment. The Appellant described her pain as chronic pain in her shoulders that goes into her neck. It is constant pain that worsens with any repetitive motion. She is required to take pain medication and there are days when she can't move her arms at all. She requires help in doing household tasks and asserts that she is unable to work because of the pain. She stated that her quality of life has gone down since the 2009/10 MVAs. She can barely blow dry her hair. She can't shovel snow and can't do the dishes properly. She needs help from her older son, mother and other family members to take care of her baby. She has to wear loose clothing because of the pain and even wearing a bra and carrying a purse irritates her. The Appellant stated that she has suffered depression at different times because of what she is going through.

The Appellant stated that she was referred to different specialists to get an opinion on what is wrong with her, but that she didn't get into the pain clinic until 2015. She has continued to attend the pain clinic and they have diagnosed her with myofascial pain syndrome due to soft tissue damage. She stated that her 2003 MVA and 2009/10 MVAs gave her chronic pain that is never going away. She asserted that her treating physicians have told her that her chronic pain "stems from the car accidents".

The Appellant stated that she initially received IRI benefits, PCA benefits and physiotherapy treatments after the 2009/10 MVAs. When MPIC terminated her IRI and PCA benefits, she eventually had to stop working because she wasn't getting the proper treatment. She maintains that she was able to work while receiving physiotherapy treatments and termination of her physiotherapy resulted in her condition worsening. However, when asked on cross-examination whether it is her position that she couldn't work because her physiotherapy benefits were terminated, she stated that she continued to work after her benefits were cut off.

The Appellant was questioned regarding an event that occurred sometime in January 2011 which was documented by a neurologist and described as follows: "3 weeks ago she developed pain in both upper limbs, around the shoulder region, more marked on the left side, with left-sided chest pain, vomiting and subsequent headaches". While she indicated she did not have any recollection of the event, she remembered being diagnosed with neuralgic amyotrophy. On cross-examination, the Appellant denied that she had any new symptoms after the January 2011 event. In response to questions about the pain she reported in 2010, she stated that she could barely remember what she did last week and simply continued to assert that she has had pain since the 2009/10 MVAs that has worsened over time. In response to questions about whether the pain she was experiencing in

January 2011 was different than the pain she had after the 2009/10 MVAs, she stated that she had no idea and is not a doctor. In response to questions about inflammation and weakness before and after the January 2011 event, she stated that she currently has weakness in both arms and has had inflammation that comes and goes since the 2009/10 MVAs.

The Appellant could not remember if she had attended to hospital for her pain prior to the January 2011 event. She asserted she has been hospitalized many times for being in pain as a result of her MVA injuries but acknowledged that there are no records of these visits in her MPIC file. She acknowledged that she often attended to hospital to obtain pain medication or to increase the dosage of her pain medication. She acknowledged that she first started getting Cortisone injections after the January 2011 event.

The Appellant was asked about a pre-existing condition referenced in her family physician's chart notes in early 2009, before the 2009/10 MVAs. In response, the Appellant stated that she had a different injury to her neck as a result of the 2003 MVA and that this developed into a curve in her neck.

In response to questions about when she first began seeing her family physician, the Appellant was unsure when she first started seeing him, but indicated that he is no longer her family physician. She indicated that her family physician didn't know what was wrong with her "because he is just a GP" and he referred her to the neurologist and to the pain clinic. She stated that it took several years for her to be able to see a physician at the pain clinic.

The Appellant couldn't remember when she was first prescribed pain killers/opioids. She asserted that she has difficulties retaining a physician because they don't want to prescribe pain killers. She

was unable to continue to see her family physician because he "doesn't prescribe opioids anymore" so the pain clinic is managing her care. She indicated she takes 120-240 percocets per month to cope with her myofascial pain. She also gets monthly injections for the pain and takes lidocaine and xylocaine.

In response to questions about whether she had fully recovered from the 2003 MVA at the time of the 2009/10 MVAs, the Appellant was unsure. She stated that she recovered to the point where she was able to have a functional life and work, but also claimed she was told she would never be 100% after the 2003 MVA and could always need some form of treatment. She acknowledged that she was not in receipt of PCA benefits after the 2003 MVA and did not have problems with chores around the house as a result of the 2003 MVA.

When questioned about the accuracy of the Commission's conclusion that she had essentially recovered from the 2003 MVA at the time of the 2007 hearing, the Appellant stated that she didn't know as she was being asked questions of events that occurred 10 years ago. She did remember that she continued to go for chiropractic treatment from time to time after the 2007 hearing. It was pointed out to the Appellant on cross-examination that the Commission's 2007 decision ordered reimbursement of chiropractic treatment as long as it was medically required and that her chiropractor marked her chart as "MPIC discharge" next to the November 23, 2005 appointment. The Appellant could not remember why this notation was placed in her chart, but acknowledged that MPIC did not cover the costs of chiropractic treatment after November 23, 2005. She acknowledged that her chiropractor did not have any discussions with her about MPIC covering treatments after November 23, 2005.

It was pointed out to the Appellant on cross-examination that her physiotherapist, in his initial therapy report dated December 21, 2009, had checked off "no" in response to the question whether she had experienced any significant health problems requiring ongoing care. In response, she indicated that she didn't remember answering this question and asserted the physiotherapist would have known about the 2003 MVA.

It was pointed out to the Appellant on cross-examination that there is no mention in the history portion of the FCE that the Appellant had an MVA in 2003. She asserted that she would have told the physician that she had an MVA in 2003. The Appellant also acknowledged that the neurologist she saw in early 2011 made no mention of the 2003 MVA in his reports, but asserted that he would have known about the 2003 MVA.

With respect to physiotherapy treatment and her request for ongoing physiotherapy, the Appellant again stated that she was able to work when she was getting physiotherapy and physiotherapy helped her to function better. On cross-examination, the Appellant denied that physiotherapy provides relief but stated that it "was helping a lot". When asked how it was helping, she stated that the reconditioning program in which she participated in 2010 helped her build up muscle strength and core structure. She couldn't remember whether she was getting physiotherapy treatment in addition to the reconditioning program. She acknowledged that she continued to feel pain when receiving physiotherapy treatment as her pain is always present.

The Appellant was questioned about the physiotherapy reports and her visits to the physiotherapist after the 2009/10 MVAs. Despite having the reports of the visits, she stated that she did not remember these visits. She did acknowledge that her pain symptoms did not improve with long

term physiotherapy but asserted that when receiving physiotherapy she "could do a lot more things".

Regarding her request for a gym membership, the Appellant indicated that she would benefit from a gym membership because there are different machines she could access. In response to whether any practitioner had told her to get a gym membership, she acknowledged that her physiotherapist wanted her to get exercise equipment for home use. She purchased the home exercise equipment herself and was counselled by the physiotherapist as to what exercises she should do at home. When asked on cross-examination whether she submitted her receipts to MPIC for reimbursement of the home exercise equipment, the Appellant said she did not because she was told by her case manager that MPIC was not going to cover these costs.

The Appellant stated that the difference between in-clinic physiotherapy and her home-based program is that in the clinic she receives manual manipulation of approximately 20 minutes. She asserted that every movement she does affects how she feels and affects how long she continues to feel benefit from the manual manipulations. However, she acknowledged on cross-examination that the benefits of the manual manipulations were short-lived, only lasting between one to three days.

[Appellant's mother]

[Appellant's mother] testified that over the last 7 years she has watched her daughter struggle with chronic pain on a daily basis in her neck, shoulder and back. Her daughter cooperated with MPIC, completing every request they asked of her, but MPIC was never happy with the outcome.

[Appellant's mother] stated that after her daughter's chiropractic treatments and PCA benefits were removed, her condition worsened. Her daughter was beginning to improve with her chiropractic treatments and once MPIC would no longer fund these treatments, her pain increased. On cross examination, [Appellant's mother] clarified that the chiropractic treatment of which she spoke took place after the 2003 MVA. With respect to the issue of physiotherapy treatments, [Appellant's mother] stated that the physiotherapy treatments after the 2009/10 MVAs didn't really help her daughter at all.

[Appellant's mother] testified that her daughter now lives with pain on a daily basis. She has difficulty playing with her 11 year son. If she shoots baskets with him, she suffers with pain afterwards. She has difficulty holding and feeding her baby because it causes her pain. Washing dishes causes shoulder pain. Carrying laundry causes shoulder pain. Vacuuming hurts her shoulder, neck and back. Her daughter can't even sit and hold a book. [Appellant's mother] stated that she needs to help her daughter with house work, yard work and snow shoveling because of the pain. She never had to help her daughter with these activities before the MVAs. [Appellant's mother] is afraid to hug her daughter because of all the pain that she has.

[Appellant's mother] stated that her daughter currently is receiving Cortisone shots through the pain clinic. While there have been some other treatment options, there are significant risks with these treatments, including potential paralysis. [Appellant's mother] understands that the next treatment step is for her daughter to undergo laser treatment to kill the nerve endings in her neck and shoulder. [Appellant's mother] believes this will be ongoing treatment because the nerve endings will grow back.

[Appellant's mother] was questioned on cross-examination about the incident in January 2011. She recalled her daughter attending to hospital to receive a Cortisone treatment but doesn't know when that happened. She did not know whether her daughter had received injections prior to January 2011.

Submission for the Appellant:

The Appellant stated that MPIC has not been consistent on whether or not it is asserting she has a pre-existing condition. She asserted that MPIC is saying two different things – that she has no long term effects from her previous condition caused in the 2003 MVA and that she has a pre-existing condition at the time of the 2009/10 MVA.

Regarding the diagnosis of neuralgic amyotrophy, she pointed out that after her visit with the neurologist on April 27, 2011, he wrote in a letter to her general practitioner that she had mild neuralgic amyotrophy, but had recovered. He suggested that she attend to an orthopedic surgeon regarding her left shoulder joint pain. The Appellant submitted that this letter shows her ongoing left shoulder complaints were not caused by the neuralgic amyotrophy as the neurologist stated she had recovered from that despite her left shoulder pain. The Appellant asserted that the ongoing pain that she suffers is due to the 2009/10 MVAs.

The Appellant indicated that, in preparing for closing argument, she noticed that the calculation of her scores on the various PCA assessments do not make sense to her and that she believes an error was made in the calculation of her PCA entitlement when MPIC was providing PCA benefits. The Appellant asserted there were significant discrepancies in the PCA assessment and calculations that should be corrected. In addition, she should have been receiving PCA benefits from January 2010 without break until the last assessment and continuously after that. The Appellant noted that

at the last PCA assessment the score values were the same as the PCA assessment completed in June 2012, but the score was adjusted to 0 rather than 14.5 because MPIC's Health Care Services (HCS) consultant had determined that her functional limitations were not due to the 2009/10 MVAs. She asserted her PCA benefits should not have been terminated. The Appellant submitted she is owed the difference between what she was paid and what the calculations should have been from January 2010 until the last PCA assessments and ongoing PCA benefits since the termination of benefits.

With respect to IRI, she submitted that she is owed the top-up between the wages she earned and her full IRI entitlement for the periods of time she continued to work after the termination of IRI. She asserted she is owed full IRI benefits ongoing from the time she was unable to work at all until she is able to return to work. She asserted that it is her MVA related injuries that keep her from returning to work and her physicians are unsure when she will be able to return to work.

With respect to ability to work, the Appellant submitted that she was unable to perform fulltime duties once back to work after the MVA and ultimately wasn't able to work at all. She asserted she is not able to perform at the demands of her determined employment of retail sales person. The Appellant referred the panel to an activity rating chart of the functional capacity evaluation (FCE) completed by the [rehabilitation consultant]. The Appellant asserted that this chart shows that all she can do is walk or stand and therefore it is impossible for her to find employment as a retail sales person. She disputed the conclusion in the FCE that she has the physical abilities to perform the required demands of a waitress, cashier and retail sales person.

The Appellant submitted that there was benefit to her participating in the reconditioning program as documented in the reports during the program. She submitted that she should continue to be

provided physiotherapy and a gym membership as participation in the reconditioning program enabled her to be able to work. Without ongoing reconditioning, her condition deteriorated to the point she cannot work at all.

The Appellant submitted that there is not enough documentation showing that her ongoing problems are not related to the MVAs. The Appellant noted the MPIC HCS consultants use the words "probable" and "most likely" when opining that her symptoms are unrelated to the MVAs. She submitted there is no solid evidence that her injuries are not MVA related.

Submission for MPIC:

Regarding the Appellant's submission on the calculation of PCA benefits, counsel for MPIC submitted that the Commission does not have jurisdiction on this appeal to consider whether her PCA was currently paid before termination. The Appellant's PCA benefits were terminated in late 2012 and this is the issue currently before the Commission. The Appellant received decision letters on the amount of PCA she had received before the termination of PCA. Each time the amount of her PCA benefit changed, a decision was issued. The Appellant received these decision letters and, had she not agreed with them, she could have sought an Internal Review and she did not. The Commission does not have jurisdiction to consider past scoring of PCA benefits on this appeal.

Counsel notes that the occupational therapist entered a score of 0 on the last PCA assessment scoring sheet even though the assessment showed limitations resulting in a score of 14.5. Counsel submitted this was because the symptoms the Appellant reported were determined to be not causally related to the 2009/10 MVAs. The only basis for the termination of PCA benefits was the Appellant's condition not being causally related to the 2009/10 MVAs.

Counsel submitted that there must be a causal connection between the Appellant's symptoms and the 2009/10 MVAs. In this case, there are two broad issues on the question of causation – whether the Appellant had a pre-existing condition at the time of 2009/10 MVAs and whether the Appellant's neuralgic amyotrophy is the cause of her symptoms.

Regarding the issue of a pre-existing condition, counsel referred the panel to the Commission's 2007 decision concerning chiropractic treatment as a result of the Appellant's 2003 MVA. Counsel noted that the Appellant testified that she had "essentially recovered" from her 2003 MVA at the time of 2007 hearing. The Appellant was successful on that appeal and MPIC was ordered to pay for chiropractic treatment as long as it was medically required. Counsel submitted the evidence shows that, as a result of the Commission's 2007 decision, the Appellant's chiropractor was paid for medically required treatment up until November 23, 2005 at which point he indicated "MPIC discharge" in his chart notes. MPIC never received any other request for further payments or treatment as a result of 2003 MVA after November 23, 2005. The Appellant admitted she paid out of pocket for treatments after November 23, 2005 and that she had never requested MPIC to pay for treatments after November 23, 2005. Further, her chiropractor never took the position that MPIC should continue paying for treatments after November 23, 2005, the date he marked as "MPIC discharge". Counsel submitted that this all suggests that the Appellant had recovered from the 2003 MVA at least by the time of the Commission's decision in 2007.

The chart notes from the Appellant's general practitioner dated February 15, 2009 show that the Appellant had neck, back and shoulder pain over the region of the trapezius muscle. She was diagnosed with myofascial pain syndrome which she was treating with medications and was referred for physiotherapy. The May 25, 2009 chart note shows that the physician contacted the physiotherapist regarding the Appellant's "problems with her shoulders".

Counsel submitted that the pain that is reported in the chart notes is different than what was reported after the 2003 MVA. The Appellant testified at the 2007 hearing that her injuries from the 2003 MVA resulted in neck pain, headaches and sleep disturbances. There is no reference that the Appellant suffered from shoulder or back pain like she reported to her physician in 2009. Further, when the Appellant was asked about the 2003 MVA in this hearing, she stated that the 2003 MVA resulted in a different injury, an injury to her neck.

Between the reports of her recovery from the 2003 MVA, the lack of any firm statement connecting the 2003 MVA and the 2009 reports of pain, and the different reported symptoms in 2009 from the symptoms reported from the 2003 MVA, it is more probable than not that the Appellant's 2009 pain symptoms are not related to the 2003 MVA. Therefore, the Appellant was suffering from non-MVA related pain symptoms by the time of the 2009/10 MVAs.

MPIC accepted that the 2009/10 MVAs caused a temporary exacerbation of the Appellant's non-MVA related condition and benefits were paid to her on that basis. However, the event in January 2011, diagnosed as neuralgic amyotrophy, showed a change in the symptoms experienced by the Appellant. The neurologist to which the Appellant attended in February 2011, indicated that the Appellant had reported she had developed pain in both upper limbs, around the shoulder region, with left-sided chest pain, vomiting and subsequent headache. The Appellant had inflammation in her shoulder joint for which she received an injection. The Appellant continued to complain of pain in the left shoulder region and weakness in her left arm. On examination, the neurologist noted "no abnormality except winging of the left scapular, the left biceps jerk and the left supinator jerks were absent while the right were brisk". The neurologist diagnosed the Appellant with neuralgic amyotrophy and stated that this condition is "usually due to a virus".

A few months after testing was completed, the neurologist indicated that the MRI, EMG and nerve conduction testing showed no abnormalities. The neurologist opined that the Appellant had had mild neuralgic amyotrophy, but had recovered. The neurologist noted that the Appellant "now locates her pain directly over the left shoulder joint". The Appellant's family physician, based on his file review and physical examination of the Appellant, accepted the diagnosis of neuralgic amyotrophy.

Counsel submitted that the neurologist is a specialist who obtained evidence based testing to diagnose the Appellant and concluded that she suffered from neuralgic amyotrophy. When asked the Appellant's current diagnosis as at September 11, 2012, the Appellant's family physician, who had been treating her for some time and was familiar with her condition, indicated that her diagnosis was neuralgic amyotrophy. As such, counsel submitted that there is strong evidence for neuralgic amyotrophy as explanation for the Appellant's symptoms.

Counsel submitted that the Appellant's file contents show distinction in her condition before and after the diagnosis of neuralgic amyotrophy. In the FCE report dated November 23, 2010, the physical medicine and rehabilitation physician documented shoulder discomfort and tingling early in the FCE process. Despite increasing symptoms, the Appellant was able to participate in the functional testing and coped satisfactorily. The report notes that after the 2009/10 MVAs, she experienced pain in her shoulders, upper back between the shoulder blades, and neck. There is no notation of inflammation. The Appellant then attended to an athletic therapist on December 28, 2010 who documented that the Appellant's condition had slightly improved and the Appellant had no restrictions on her ability to work.

By contrast, the neurologist's report identified pain, weakness in the left arm, and inflammation which required a hospital attendance. While the Appellant testified that she had been hospitalized many times, she couldn't remember if she had been hospitalized before the event in January 2011. However, she confirmed that this was the first time she received injections and the first time her family physician had referred her to a specialist for these symptoms. Counsel submitted that these facts suggest that the event of January 2011, which resulted in the diagnosis of neuralgic amyotrophy was something outside the ordinary with respect to the symptoms she had been experiencing to that time.

MPIC's medical consultant reviewed the Appellant's medical information in September 2012 and concluded that the Appellant's current symptoms were not caused by the 2009/10 MVAs. The consultant noted that there is an absence of documentation that identifies a probable cause for the Appellant's neck, shoulder and back symptoms that one could casually link to the 2009/10 MVAs. The consultant also noted that the Appellant had a pre-existing pain condition at the time of the 2009/10 MVAs and there is an absence of documentation indicating that the 2009/10 MVAs enhanced this pre-existing pain condition. Regarding the neuralgic amyotrophy, the consultant indicated that this is a condition where idiopathic inflammation develops and the exact cause is unknown. The consultant found that if the neuralgic amyotrophy is contributing to the Appellant`s symptoms, then the evidence indicates that this condition developed after the reconditioning she was provided resulted in significant improvement in her condition. In other words, it is not medically probable that this condition, which is of unknown etiology, is a by-product of the 2009/10 MVAs.

MPIC's chiropractic consultant reviewed the Appellant`s medical information in January 2013 and concluded that it was clear from the Appellant's medical records that she had a pre-existing history

of chronic recurrent pain which was exacerbated for some time following the 2009/10 MVAs. However, it is the consultant's view that the event of January 2011, which was eventually described as neuralgic amyotrophy, is not only more temporally related to the claimant's current condition, but also provides a compelling explanation for the claimant's current signs and symptoms.

MPIC's medical consultant reviewed the Appellant's medical information again in January 2016. Since the last review, the Appellant had attended to a specialist who was not able to identify a structural or anatomic cause for her pain. The file information showed that the Appellant developed minor symptoms after the 2009/10 MVAs involving the cervical spine in keeping with an exacerbation of pre-existing condition. No medical evidence has been identified indicating that the pre-existing condition was enhanced from the 2009/10 MVAs.

Counsel submitted that overall reliance should be placed on MPIC's HCS consultant reports. The consultants reviewed the medical information and were able to cross reference and synthesize all the information on the file. They are therefore well placed to discuss issues of causation that have been looked at by multiple practitioners. Taking the information on the Appellant's pre-existing condition, the symptoms reported, the change in the Appellant's condition resulting in the diagnosis of neuralgic amyotrophy and the consultants conclusions that the 2009/10 MVAs did not enhance the Appellant's pre-existing condition, the Appellant's current condition is not related to the 2009-10 MVAs, on a balance of probabilities, and the Appellant has not met her burden to establish the Internal Review Decisions were incorrect.

Counsel was clear that his main argument on these appeals is that the Appellant's symptoms that resulted in the termination of her benefits are not related to the 2009/10 MVAs, However, counsel

argued that should the Commission not accept the arguments on causation, the Internal Review Officer was still correct to deny the specific benefits claimed by the Appellant. With respect to physiotherapy, the file evidence shows that physiotherapy treatment only provides transient temporary relief of the Appellant's symptoms rather than contributing to a demonstrable objective improvement in function towards a resolution of her symptoms. Further physiotherapy is therefore not medically required.

Despite receiving physiotherapy treatments, the file evidence shows general overall continuity in pain levels. Four days after the 2010 MVA, the Appellant reported pain in her head, neck, upper back and shoulders as well as reduced cervical spine range of motion. The numeric pain rating scale was entered as 9/10 with 45/50 on the neck disability index. By April 2, 2010, the Appellant reported pain with all cervical movements and pain to her neck. The numeric pain rating scale was 9/10 with a neck disability rating of 39/50. On April 9, 2010, the Appellant reported pain and tightness in her neck and shoulders that went tingling down her arms depending on activity. The numeric pain rating scale was 8 and the neck disability index rating was 38.

The Appellant then entered the reconditioning program. Over the course of the program, the reports show some improvement in the Appellant's symptoms and this was confirmed by the Appellant's testimony. However, the effect of this improvement was short lived and inconsistent. The final report at the end of the reconditioning program showed that, after 6 weeks of attending 3 days per week for reconditioning, the Appellant's pain was still present, but reduced to 6/10. However, a few months after the completion of reconditioning, the Appellant reported neck pain of 7/10 and pain between her shoulders of 9/10.

Despite the use of various treatments, such as physiotherapy, chiropractic, athletic therapy and the reconditioning program, the Appellant's pain remains relatively consistent. This suggests that the various treatments, including physiotherapy, are not progressing the Appellant towards resolution of her symptoms and therefore are not medically required. This is also supported by the MPIC physiotherapy consultant who reviewed the Appellant's file. The consultant noted that there was some improvement in the Appellant's symptoms after the reconditioning program and therefore indicated that the Appellant receive up to 6 physiotherapy sessions for a physiotherapist to review and monitor a home exercise program so that the Appellant could perform exercises independently. This was reiterated in a later physiotherapy consultant report where it was concluded that the Appellant could maintain and improve her condition with adherence to an appropriate home exercise program. Ultimately, the physiotherapy consultant opined that supportive physiotherapy treatment is not medically required nor even advisable because of the nature of the Appellant's condition. She has a chronic or persistent pain condition and it is unlikely, on balance, that the claimant will ever be completely symptom-free. In the consultant's view, continuing reliance on in-clinic treatment has the potential to reinforce the illness or patient role, contributing to further disability. The current focus in treating chronic or persistent pain is on patient education and promotion of independence via self-management strategies and appropriate exercise/activity guidelines. It is for this reason that the consultant had previously recommended physiotherapy sessions in education on a home-based program.

Counsel submitted that the Appellant, in cross-examination, asserted that in-clinic physiotherapy was different from what she could perform at home as she would be given manual manipulations. However, when describing relief of symptoms, she acknowledged that relief from in-clinic treatment only lasted until her muscles tightened up again. She stated that how long her relief lasted depended on her activity levels, but generally between one day and a couple of days.

[Appellant's mother] testified that, from her observations, physiotherapy didn't help the Appellant very much.

Counsel submitted that the track record of extensive treatments demonstrates that physiotherapy only provides temporary transient relief of symptoms for the Appellant and is therefore not medically required.

Regarding the Appellant's request for a gym membership, the physiotherapy consultant was of the view that a formal gym membership was not medically required as the Appellant would be able to maintain an appropriate home exercise program. To facilitate this, the consultant stated that some small equipment purchase may be reasonable for the Appellant. Counsel submitted that the PCA assessment report of June 21, 2012 shows that the Appellant obtained a membership at the YMCA at her own expense. Despite having a gym membership, her reported symptoms remained essentially the same. The gym membership had no impact on her symptoms and is therefore not medically required.

With respect to IRI benefits, counsel confirmed that it is MPIC`s position that any inability to perform her job duties is not causally related to the 2009/10 MVAs. However, even if there was a causal relationship, the medical evidence does not support the Appellant's inability to hold employment as a retail sales person. The Appellant participated in an FCE, which is based on objective criteria and is the most extensive examination of ability to work that was undertaken. The physical medicine and rehabilitation physician who conducted the FCE determined that, overall, the Appellant demonstrated ability to meet the demands of the light strength category of work of her determined employment. The physician did not note any deficits in strength other than a slight deficit in grip and grasping strength.

The Appellant has argued that the activity rating chart supports her inability to work. However, this chart is simply a chart of the Appellant's perception of her ability, not objective evidence of ability to work. Rather, the conclusion of the physician who completed the FCE was that the Appellant was capable of holding her determined employment. Counsel submitted that there is no objective evidence on file that the Appellant has a physical impairment that would leave her unable to perform her work duties. Counsel submitted there is limited information from the Appellant's care providers on ability to work near the time of the termination of IRI benefits. The Appellant's athletic therapist checked off "no" in response to the question whether the Appellant's clinical condition resulted in an inability to perform her required work tasks. In June 2011, the Appellant's physician stated that he was unsure about the Appellant's ability to return to work.

The Appellant's evidence was that she worked at [text deleted] as a seasonal employee and was one of 4 employees out of 60 who were kept on after the season. Counsel submitted this fact suggests strongly that the Appellant was able to work. She was one of a few employees kept on out of so many after a competitive process. She was required to stand for long periods of time, and was able to do this because her work was split between various tasks. In addition, she was able to take breaks and to use heat as needed. All this suggests that with appropriate accommodations the Appellant would be able to hold her determined employment. Counsel submitted that there is limited information on inability to work beyond the Appellant's self reports. What information that is available suggests that the Appellant had the capacity to work in her determined employment and therefore that the Internal Review Decision should be upheld.

The Appellant's Reply Submission:

The Appellant argued that while she was diagnosed with neuralgic amyotrophy, it was only present from February 2011 to April 2011. The neurologist stated that, after her visit with him on April 27, 2011, she had recovered from the neuralgic amyotrophy.

Her family physician then referred her to an orthopaedic surgeon and to the pain clinic, which took many years to get into. These reports document that she has chronic pain. The Appellant submitted that this pain stems from her 2003 MVA and her 2009/10 MVAs as there is no indication that anything else caused her pain. She never had pain prior to the 2003 MVA. She had no shoulder pain before the 2009/10 MVAs, but had shoulder pain after. The Appellant submitted that she had myofascial pain syndrome before and after the 2009/10 MVAs. This pain doesn't go away and she's being treated for that right now.

The Appellant submitted that with myofascial pain syndrome all they can do is manage her pain. She is learning how to live with her pain every day and how to do things differently. Her goal is to return to work, but she doesn't know when that is. Because this is a muscle injury, any stress to the muscle can cause flare-up and anything she does can cause pain and stress on her body.

The Appellant reiterated that there is no evidence to say that her pain is not related to the 2003 MVA and the 2009/10 MVAs.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that she is entitled to receive further IRI benefits, PCA benefits and physiotherapy treatment, and funding for a gym membership. For the reasons that follow, the panel concludes that the Appellant is not entitled to

any further IRI benefits, PCA benefits and physiotherapy treatment, and funding for a gym membership.

The relevant provisions of the MPIC Act are as follows:

> **Definitions**
> 70(1) In this Part,
> **"accident"** means any event in which bodily injury is caused by an automobile;
>
> **"bodily injury"** means any physical or mental injury, including permanent physical or mental impairment and death;
>
> **"bodily injury caused by an automobile"** means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile...
>
> **Application of Part 2**
> 71(1) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

The Appellant was injured in a 2003 MVA and appeared before the Commission in 2007 regarding chiropractic care. The Commission's decision (AC-05-09) shows that the Appellant suffered a soft tissue injury to her neck in the 2003 MVA and was diagnosed by a physiotherapist with having a WAD II injury. At the hearing of her appeal, the Appellant testified that she had made an eighty-five percent (85%) recovery approximately one year after receiving chiropractic treatment for her injury and that after "some period of time" had "essentially recovered" from the 2003 MVA. The Appellant was successful on her appeal and MPIC was ordered to reimburse the Appellant for the cost of chiropractic treatments for the period of time it took until the chiropractic treatments were no longer medically necessary. The Commission referred the matter back to MPIC's case manager in order to conduct the appropriate investigation to determine the amount owing for the chiropractic treatments. Should the parties have been unable to agree on the amount of

compensation owing to the Appellant, the Commission ordered it would reconvene and conduct a hearing as to the amount of compensation owing to the Appellant.

The hearing did not reconvene and no dispute remained as to the compensation of medically required chiropractic treatments. MPIC indicated that it paid for chiropractic treatments pursuant to the Commission's decision until November 23, 2005. The Appellant confirmed that she paid for her own chiropractic treatment after that date, that her chiropractor indicated "MPIC discharge" at November 23, 2005 in his chart notes and that neither she nor her chiropractor contacted MPIC regarding MPIC covering chiropractic care after November 23, 2005. There is no evidence to suggest that the Appellant sought any benefits from MPIC regarding her 2003 MVA after November 23, 2005, the date of her last MPIC covered chiropractic treatment.

The Commission was provided with chart notes from the family medicine walk-in clinic she attended between November 20, 2007 and March 29, 2012. The chart notes show that in early 2009 the Appellant attended to the clinic reporting continuing pain in her neck and shoulders secondary to the 2003 MVA. At the time of her visit to the clinic on January 27, 2009, she was taking opioids and other painkillers. As indicated above, the Appellant had not contacted MPIC at that time requesting any benefits for injuries due to the 2003 MVAs even though she reported to the clinic that her pain was secondary to the 2003 MVA.

The January 27, 2009 and February 1, 2009 chart notes indicate a diagnosis of chronic pain. The February 15, 2009 chart note indicates that the Appellant reported neck, back and shoulder pain over the region of the trapezius muscle and appears to have attributed this pain to the 2003 MVA. The chart notes documents that the Appellant had been attending a chiropractor for neck manipulations but "generally has not had any improvement". The Appellant was diagnosed with

myofascial pain syndrome. By the time of the May 25, 2009 clinic visit, the chart notes show the Appellant reported that she was “still in pain 24 hours a day”.

Despite the Appellant’s assertions that her myofascial pain syndrome diagnosed in May 2009 was caused by the 2003 MVA, the Commission finds, on a balance of probabilities, that this condition was not causally related to the 2003 MVA. The Appellant testified in 2007 that she had essentially recovered from the 2003 MVA. Her chiropractor indicated November 23, 2005 as the last date which MPIC would cover chiropractic treatments and neither the Appellant nor her chiropractic disputed this. Commission decision AC-05-09 in the third paragraph on page 13 notes that the Appellant’s recovery from her 2003 MVA injuries was confirmed by her chiropractor in his report of July 6, 2006. There is no evidence that the Appellant made any attempt to contact MPIC for PIPP benefits, including coverage for the opioids and other painkillers that she was taking for pain in 2009. Having successfully appealed to the Commission in 2007, the Appellant was aware of her rights to benefits for MVA related injuries and the process to ensure she received those benefits. The Commission notes that the reporting to the family physician in February 2009 that she generally had not had any improvement from her chiropractic treatment is in contrast to the testimony she provided to the Commission at the 2007 hearing. The Commission finds that the Appellant had recovered from the 2003 MVA at the time she was reporting pain in early 2009. As such, the Commission accepts the conclusion of MPIC’s HCS medical consultant that, on a balance of probabilities, the Appellant had pre-existing non-MVA related chronic pain affecting the neck, back and shoulder that was diagnosed as myofascial pain syndrome at the time of the 2009/10 MVAs.

The Appellant suffered injuries in the 2009/10 MVAs and PIPP benefits were provided. While a review of the medical documents by MPIC’s physiotherapy consultant shows numerous clinical

diagnoses from the Appellant's various care providers, the injuries have been generally described as soft tissue/sprain injuries. Both the medical consultant and physiotherapy consultant were of the view that the natural history of the Appellant's condition due to the 2009/10 MVAs is one of improvement with time in the absence of therapeutic intervention.

The Appellant was provided physiotherapy, athletic therapy and chiropractic treatments and participated in a reconditioning program of three times per week for six weeks with her physiotherapist. At the end of the reconditioning program, the Appellant's physiotherapist noted significant objective improvements over the course of the program.

An FCE was conducted on November 23, 2010. The FCE report documents that the Appellant was referred with a diagnosis of chronic neck and shoulder pain and was reported taking painkillers two days per week. After testing in which the Appellant's effort was described as acceptable, the FCE physician concluded that the Appellant's physical abilities matched the requirements of her determined employment. In a therapy discharge report dated December 28, 2010, the Appellant's athletic therapist checked off "no" in response to the question whether the Appellant's clinical condition resulted in an inability to perform the required tasks.

In February 2011, the Appellant reported an event in January 2011 that required her to attend to hospital. This was diagnosed as neuralgic amyotrophy, which the neurologist indicated is usually due to a virus. In response to questions posed by MPIC, the Appellant's family physician in October 12, 2012 also provided a diagnosis of neuralgic amyotrophy.

The Appellant did not dispute that the diagnosis of neuralgic amyotrophy was unrelated to the 2009/10 MVAs. However, she relied on the neurologist's report of her visit with him on April 27,

2011 which states that she had recovered from the neuralgic amyotrophy and continued to experience left shoulder pain, for which she was referred to an orthopedic surgeon. However, by the time of the visit with the orthopedic surgeon, the Appellant complained of pain to both shoulders. In his report of March 27, 2013, the surgeon stated that there did not appear to be a specific structural or anatomic cause or source for the shoulder pain and indicated that there was no surgical intervention that he could offer to ameliorate her symptoms.

The Appellant ultimately attended to the pain clinic for neck and shoulder pain and a report dated September 2, 2015 was provided. At the time of this visit, the Appellant reported taking 8 to 10 Percocets per day for pain described as shooting, burning and numbness in her neck and shoulder area. She also reported experiencing weakness and numbness as well as fevers, chills and night sweats. She reported that she had been experiencing the pain and other symptoms since the 2009/10 MVAs. The physician noted that prior MRI and nerve conduction studies did not reveal a neurologic cause of her symptoms. The physician concluded that the Appellant had signs of myofascial pain syndrome and could not rule out there isn't also a component of cervical facet osteoarthritis.

The Appellant then attended another neurologist for which a report was provided dated September 28, 2015. The neurologist noted that the Appellant had had MVAs in 2003, 2009 and 2010 and that the Appellant complained of ongoing discomfort involving her neck, shoulder, and proximal upper limbs. The physician noted that the Appellant has been taking 6-10 Percocet tablets per day for several years. The neurologist concluded that the Appellant had a normal neurological exam and opined that the Appellant has regional myofascial pain syndrome.

An MPIC medical consultant review dated January 27, 2016 notes that neither the pain clinic physician nor the neurologist were aware of the Appellant's pre-existing chronic spinal pain and that neither report indicates a structural abnormality in the Appellant's cervical spine or shoulder that might account for her symptoms or contribute to a physical impairment that might adversely affect her day-to-day activities or ability to perform gainful employment. The medical consultant notes that both physicians saw the Appellant close to six years after the 2009/10 MVAs. The medical consultant concludes that the Appellant developed minor symptoms involving the cervical spine in the 2009/10 MVAs which are in keeping with an exacerbation of her pre-existing condition and that no medical evidence has been identified, indicating that the Appellant's pre-existing condition was enhanced by the 2009/10 MVAs.

The Commission agrees with counsel for MPIC that overall reliance must be placed on MPIC's HCS consultant reports as the consultants reviewed the medical information and were able to cross reference and synthesize all the information on the file. There is no evidence that any of the Appellant's care providers had full access to the many reports on file and chart notes that were provided. Further, the Commission finds that the Appellant is not a reliable historian. For example, the Appellant had no recollection of the January 2011 event which resulted in a visit to the hospital and a diagnosis of neuralgic amyotrophy. The Appellant was unable to identify an approximate time of when she started to take opioids and other painkillers and her reports of how much she was taking varied depending on the caregiver she saw. She testified she had essentially recovered from the 2003 MVA yet attended to a physician in early 2009 complaining of chronic pain due to the 2003 MVA. In AC-05-09, the Commission found that the Appellant's recovery from her 2003 MVA injuries was confirmed by her chiropractor in a July 6, 2006 report, yet the clinic physician's February 15, 2009 chart note documents that the Appellant reported that she generally has not had any improvement from the chiropractic treatment she received. For these reasons, the Commission

accepts the conclusion of MPIC's medical consultant that the Appellant developed minor symptoms following the 2009/10 MVAs that exacerbated but did not enhance her pre-existing condition. As such, the Appellant's ongoing symptoms, on a balance of probabilities, are not causally related to the 2009/10 MVAs.

It is necessary to consider the specific benefits being claimed and whether the Appellant had an entitlement to these benefits at the time they were terminated or denied.

Entitlement to Physiotherapy and a Gym Membership

The Section 136(1) of the MPIC Act provides for reimbursement of medical care expenses incurred because of the accident. Pursuant to the regulations, such treatment must be medically required.

> **Reimbursement of victim for various expenses**
> **136(1)** Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:
> (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
>
> **Manitoba Regulation 40/94**
> **Reimbursement of victim for various expenses**
> **Medical or paramedical care**
> **5** Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:
> (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

The Appellant had requested further physiotherapy treatments and funding for a gym membership in the fall of 2010 and on November 12, 2010, her case manager advised her that ongoing physiotherapy treatment and a gym membership were not medically required. In determining

whether treatment is medically required, one of the key considerations is whether there is any real likelihood that it will lead to a demonstrable improvement in the condition of the patient.

The MPIC physiotherapy consultant that reviewed the Appellant's file was of the opinion that there was no medical documentation that the Appellant's injuries and diagnoses qualified her for more than category 1 physiotherapy treatment. It was noted that the Appellant had completed a six week reconditioning program of three days per week with the physiotherapist. Rather than having the Appellant attend further in-clinic physiotherapy and obtain a gym membership, MPIC's physiotherapy consultant was of the view that the Appellant should continue with a home exercise program. As such, the physiotherapist recommended that the Appellant receive another six physiotherapy sessions for the review and monitoring of a home based program. The consultant also opined that the purchase of some small exercise equipment for the home would facilitate the home program and would therefore be reasonable.

The Appellant's testimony was that she required ongoing in-clinic physiotherapy because of the manual manipulations that are provided as part of the in-clinic physiotherapy treatments. However, the Commission agrees with counsel for MPIC that the record of physiotherapy treatments demonstrates that physiotherapy only provides temporary transient relief of symptoms for the Appellant. As such, the Commission finds that the evidence has not established that ongoing in-clinic physiotherapy treatment would provide further sustainable improvement with respect to the Appellant's injuries due to the 2009/10 MVAs. As a result, the Commission is unable to conclude that ongoing physiotherapy treatments were medically required in this case.

With respect to the gym membership, the Commission accepts the conclusion of MPIC's physiotherapy consultant that a formal gym membership was not medically required. The Appellant was provided

with six additional physiotherapy sessions to be able to maintain an appropriate exercise program at home. The Appellant provided no evidence other than her subjective belief that she requires a gym membership to be able to work on the different machines at the gym rather than simply continuing with her home-based program. Accordingly, the Appellant has not met her onus to establish, on a balance of probabilities, that a gym membership was medically required.

The Appellant testified that her case manager refused to reimburse her for the small equipment that she purchased for her home exercise program. There is no record in the Appellant's file that her case manager refused to reimburse her for this equipment and there is no decision letter in that regard. Although this issue is currently not before the Commission on appeal, it is the Commission's view that it would be reasonable for MPIC to reimburse the Appellant for the purchase of small exercise equipment as suggested by MPIC's physiotherapy consultant should she produce receipts.

Calculation of PCA Benefits

The Appellant, in her closing submission, raised the issue of improper scoring or calculation of the PCA benefits. The Appellant had never raised this issue with the Commission or MPIC at any point before closing submissions. The Commission agrees with counsel for MPIC that it does not have jurisdiction on this appeal to consider whether her PCA was correctly paid before termination of PCA benefits as the issue before the Commission is simply the termination of benefits and not the calculation of benefits while they were being paid. Had the Appellant disagreed with the amount of PCA benefits being paid, she should have followed the appeal process under the Act.

Termination of PCA and IRI Benefits

With respect to PCA benefits, the MPIC Act provides:

Reimbursement of personal assistance expenses

131(1) Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than $3,000. per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

Under reimbursement for personal home assistance expenses, Manitoba Regulation 40/94 states:

Reimbursement for personal care assistance under Schedules C and D

2(3) Subject to the maximum amount set under section 131 of the Act, the corporation shall reimburse a victim for the actual and proven expenses of personal care assistance in accordance with Schedules C and D if

(a) the personal care assistance meets the minimum score prescribed in Schedule D;
(b) the personal care assistance expenses are the direct result of the victim's bodily injury caused by an automobile for which compensation is provided under Part 2 of the Act; and
(c) the personal care assistance expenses are not covered under *The Health Services Insurance Act* or any other Act.

With respect to entitlement to ongoing IRI, the MPIC Act provides:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

(b) the victim is able to hold the employment referred to in subsection 82(1) (more remunerative employment);

(c) the victim is able to hold an employment determined for the victim under section 106;

Section 8 of Manitoba Regulation 37/94 addresses the meaning of unable to hold employment and states:

> 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 Appellant was in receipt of PCA benefits following the 2009/10 MVAs. The PCA assessments showed an improvement of the Appellant's condition after the 2009/10 MVAs such that she was no longer eligible for PCA benefits a few months after the 2009/10 MVAs. The Appellant was advised in a decision letter dated April 20, 2010 that she no longer qualified for PCA benefits. The decision was not appealed. However, the Appellant continued to assert she required assistance. As such, PCA was reassessed and another decision letter was issued May 19, 2011 indicating the Appellant's score was not high enough; the Appellant did not demonstrate sufficient functional limitation to entitle her to PCA benefits. By June 21, 2012, the Appellant's condition appears to have worsened. Another PCA re-assessment was conducted and indicates that the Appellant reported that her left arm had been bothering her more over the previous months, she had constant pain in the top of her left shoulder and increased pain in the entire left arm. The Appellant scored enough to entitle her to $695.00 of PCA benefits. However, after the medical consultant provided his review of the Appellant's medical information on file in September 2012, the PCA benefits were reassessed. The occupational therapist documented that the Appellant reported there had been no change in her left arm since the June 2012 assessment. While the Appellant scored the same as the June 2012 assessment, the score was reduced to 0 because it was determined that the Appellant's functional limitations were a by-product of her pre-existing condition rather than her injuries from the 2009/10 MVAs.

No explanation has been provided by the Appellant or any of her care providers how the Appellant's worsening of her condition 2 ½ years after the 2009/10 MVAs could be related to the 2009/10 MVAs. The 2010 and 2011 PCA assessments were conducted by an occupational therapist and did not show enough functional limitations to entitle the Appellant to PCA benefits. She was cleared to return to work in her determined employment through the FCE process in November of 2010 and, by the end of 2010, her athletic therapist indicates her condition does not

result in an inability to work. The January 2011 event, unrelated to the 2009/10 MVAs, occurred and then the Appellant's symptoms began to significantly increase over time. The Commission agrees with counsel for MPIC that the Appellant's file contents show a change in the Appellant's condition and symptom reporting after the diagnosis of neuralgic amyotrophy.

Given the improvement in the Appellant's condition by the end of 2010, the natural medical history of the Appellant's 2009/10 MVA injuries as documented by the medical and physiotherapy consultants, the change in the Appellant's condition and symptom reports after January 2011, and the increase in symptoms over two years after the 2009/10 MVAs, the Commission finds that the Appellant's functional limitations were not caused by the Appellant's injuries in the 2009/10 MVAs. The Commission notes that the Appellant continued to work close to full-time after the termination of her benefits in 2012 and continued to do so until the end of 2015. The Commission finds that the Appellant has not met her onus to prove, on a balance of probabilities, that she was entitled to further PCA benefits after October 2012 and IRI benefits after December 13, 2012.

Summary:

In summary, the Commission finds:

1. That the Appellant had a non-MVA related condition at the time of the 2009/10 MVAs.
2. That this pre-existing condition was exacerbated but not enhanced by the 2009/10 MVAs.
3. That the Appellant's ongoing symptomology is not causally related to the 2009/10 MVAs.
4. That the Commission does not have jurisdiction on this appeal to consider whether PCA benefits were properly calculated prior to the termination of these benefits.
5. That the Appellant's request for further physiotherapy treatment and funding for a gym membership is not medically required.

6. That the Appellant's functional limitations at the time of termination of PCA benefits and IRI benefits were not causally related to the 2009/10 MVAs.

Disposition:

For the reasons outlined herein, the Commission finds that the Internal Review Officer's decisions of February 15, 2011 and February 26, 2013 should be upheld and the Appellant's appeals are dismissed.

Dated at Winnipeg this 5th day of February, 2018.

KARIN LINNEBACH

DR. SHARON MACDONALD

BRIAN HUNT