Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the APPELLANT]
AICAC File No.: AC-16-063

PANEL:	**Ms. Jacqueline Freedman, Chair** **Ms. Nikki Kagan** **Ms. Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Anthony Lafontaine Guerra.**
HEARING DATE(S):	**August 20, 2020.**
ISSUE(S):	**Whether the Appellant had a reasonable excuse for the late-filing of her Application for Review.** **If so, whether the Appellant is entitled to Income Replacement Indemnity benefits as a result of the September 2, 2011, MVA.**
RELEVANT SECTIONS:	**Sections 70, 85, 86, 87, 91, 172 and 184 of The Manitoba Public Insurance Corporation Act ("MPIC Act") and section 8 of Manitoba Regulation 37/94.**

Reasons For Decision

Background:

[Text deleted] (the "Appellant") was driving her car when she was involved in a collision with another vehicle on September 2, 2011 (the "MVA"). The Appellant suffered various injuries as a result of the MVA and she received certain treatments pursuant to the Personal Injury Protection Plan ("PIPP") provisions of the MPIC Act, including chiropractic treatment.

Subsequent to the MVA, the Appellant contacted the case manager to discuss her claim and she advised that she had difficulty finding work. There were then further developments on the Appellant's file. The case manager subsequently obtained medical reports in order to consider the Appellant's request for Income Replacement Indemnity ("IRI") benefits. MPIC reviewed the Appellant's file, and the case manager issued a decision letter dated April 29, 2014, which provided as follows:

> During our meeting of October 15, 2013, you informed me that at the time of the motor vehicle accident (MVA) you were a full time student at [school], and you graduated from the course in November 2011. You advised me that since you graduated, you have not been able to work because of your MVA related injuries.
>
> The medical information on file was reviewed by our Health Care Services Team. The medical information indicates that you sustained a neck and back sprain because of the MVA and that this would not have prevented you from doing a reasonable range of employment. Therefore you are not entitled to any IRI benefits provided by PIPP.

The Appellant disagreed with the decision of the case manager and filed an Application for Review. That Application was dated February 23, 2016, which was beyond the 60-day deadline set for filing an Application for Review in the MPIC Act. In her Application for Review, the Appellant stated that: "I was not informed of the decision properly […]".

The Internal Review Officer considered the decision of the case manager and the Appellant's Application for Review, and issued an Internal Review Decision dated March 18, 2016, which provided as follows:

> On the Application for Review, you did not provide a reasonable excuse for the late filing other than you did not receive the decision until over a month after it was supposedly sent.
>
> The late Application for Review is rejected.
>
> The issue regarding the entitlement to Income Replacement Indemnity benefits will be completed on the merits.
>
> […]

> As indicated by the medical information reviewed by Health Care Services, the diagnosis of your accident injuries (neck and back strain) would not have prevented you from doing a reasonable range of employment.
>
> Currently, there is no medical evidence to support an entitlement to Income Replacement Indemnity benefits as a result of the accident.
>
> The Injury Claim Decision of April 29, 2014 is upheld.

Issues:

The issues which requires determination on this appeal are as follows:

1. Whether the Appellant had a reasonable excuse for the late-filing of her Application for Review; and
2. If so, whether the Appellant is entitled to Income Replacement Indemnity benefits as a result of the September 2, 2011, MVA.

Decision:

For the reasons set out below, the panel finds as follows:

1. The Appellant has met the onus to establish, on a balance of probabilities, that she had a reasonable excuse for the late-filing of her Application for Review; and
2. The Appellant has not met the onus to establish, on a balance of probabilities, that she is entitled to IRI benefits as a result of the MVA.

Legislation:

The relevant provisions of the MPIC Act are as follows:

> **Definitions**
>
> 70(1) In this Part,
>
> **"non-earner"** means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or student; (« non-soutien de famille »)

"student" means a victim who, at the time of the accident, is

(a) 18 years of age or older and attending a secondary or post-secondary educational institution on a full-time basis, […]

Entitlement to I.R.I. for first 180 days

85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

(a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;

(b) he or she is deprived of a benefit under the Employment Insurance Act (Canada) to which he or she was entitled at the time of the accident.

Entitlement to I.R.I. after first 180 days

86(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section 106, and the non-earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident.

Student at secondary, post-secondary institution

87(2) For the purpose of sections 87 to 92 (students), a student is considered to be attending a secondary or post-secondary educational institution on a full-time basis from the day the student is admitted by the educational institution as a full-time student in a program of that level until the day the student completes, abandons or is expelled from his or her current studies, or no longer meets the requirements of the educational institution.

Indemnity for student able to begin or resume studies

91(1) A student who resumes his or her current studies but who is unable because of the accident to hold employment after completing or ending the current studies is entitled to an indemnity from the day of the end of his or her studies and for such time as the student is unable to hold employment because of the accident.

Application for review of claim by corporation

172(1) Except as provided in subsection (1.1), a claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

[…]

Corporation may extend time

172(2) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.

Powers of commission on appeal

184(1) After conducting a hearing, the commission may

(a) confirm, vary or rescind the review decision of the corporation; or
(b) make any decision that the corporation could have made.

Manitoba Regulation 37/94 provides, in part, as follows:

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.

Evidence for the Appellant:

The Appellant testified at the appeal hearing and she described the MVA. She said she was travelling slowly, approximately 25 km/h, and the other vehicle crashed into her. Her airbags went off and smashed into her face. In response to questions from the panel, the Appellant described her injuries. She said she had pain in both her knees and hips, as well as pain in her neck and back, and she broke her pinky finger. She has developed osteoarthritis, and now she can't walk very far and gets tired. She also has developed vision problems which she attributes to the MVA. The Appellant also spoke about feeling that she had "some kind of brain damage" from the MVA. She said that she is suffering from chronic pain, but she does not like to use pain killers.

The Appellant said she initially went to seek help from her physician, [Appellant's physician], but he was not helpful. She described a theory that he is corrupt. Similarly, when she went to see another doctor, that doctor tricked her and she ended up being treated against her will.

MPIC was also not helpful to her, and the Appellant described a theory that MPIC is conducting surveillance on her, perhaps in coordination with the police, who have also been conducting surveillance on her.

The Appellant said that at the time of the MVA, she was finishing school, taking a course in bookkeeping and accounting. Prior to the MVA, she had many skills and had worked at many different jobs. She said that after the MVA, she was thwarted pursuing a career. She no longer has the strength and vision required to work with computers, and has limited ability to sit, which is required for programming. She did work as a respite worker for a period of time after the MVA, but that was not paid work. She is not presently working.

She described moving residences numerous times subsequent to the MVA, possibly a total of eight times. The dates of the moves, and the reasons for the moves, were not entirely clear. The Appellant said that in 2016, there was a fire in the apartment she was living in at that time, which caused her to have to move. She said that one of the reasons she was late filing her Application for Review was that she had "a lot going on". This included the various theories already described, the moving, as well as the fact that she was being sought by the [text deleted] to be a witness in a criminal case.

Evidence for MPIC:

Counsel for MPIC did not call any witnesses, but did question the Appellant on cross-examination. The Appellant confirmed that at the time of the MVA, she was married, and her last name was [married name]. She got divorced in 2012, and reverted to her maiden name, [text deleted], in the summer of 2012. The Appellant said that she notified MPIC right away of her name change, but they didn't immediately process it, and she had to remind them more than once. Counsel noted that the Appellant had indicated in her Application for Review dated February 23, 2016, that she did not keep documents separate that were addressed to her using the two different last names, and the Appellant confirmed this. The Appellant said that she did not personally complete the Application for Review; a woman in her building assisted her with it. However, she did sign it, and she agreed with its contents.

The Appellant was questioned regarding her address at the time of the MVA, which she confirmed was [text deleted]. Counsel noted that the same address is listed on the Appellant's Application for Review. The Appellant said that that was not where she was living on the date that she signed the Application for Review. Counsel pointed out to the Appellant that her Notice of Appeal, signed on May 16, 2016, also has the same address. The Appellant responded that that was also wrong. She said she believed that on the date of her Application for Review, she was living at [text deleted], and that she moved out of the [address] apartment at the end of 2014, possibly in October. She said that she probably put the [text deleted] address on the Application for Review because it was the address that was listed on the case manager's decision. Counsel pointed out that in her Application for Review, she said that she did not receive the case manager's decision until over a month after it was supposedly sent. The Appellant responded by saying that she would not have received the case manager's decision at the [text deleted] address.

Counsel questioned the Appellant regarding the courses she was enrolled in at the time of the MVA. She said that she was studying two courses at the [school], [course#1 and course#2]. The Appellant initially said she started her courses in August or September, 2011, but then on further questioning said that she started her courses a year earlier, and wrote her certification just before the MVA. Counsel pointed out that according to a file note made by the case manager on October 15, 2013, the Appellant said she graduated from the course in November, 2011. The Appellant said that was wrong, she was certified in September, 2011. She finished her courses just before the MVA; at the time of the MVA she was not a student, she was ready to go into the job market and the school was going to line that up. Counsel noted that in her chiropractor's report dated November 1, 2011, it is indicated that her occupation is a student. The Appellant said that was not correct; perhaps the chiropractor wrote that because she told him she had just finished school.

The Appellant was questioned regarding whether she worked subsequent to the MVA. She said she went a year after graduation without working. She said she was on social assistance at the time of the MVA. She did work for 10 weeks, from mid-January to mid-March, 2013, doing accounting work for [employer], during the tax season. After that, she went back on social assistance, which she had previously been on due to non-MVA related disabilities (rheumatoid arthritis, psoriatic arthritis, and a neurological condition). She also did unpaid respite work, caring for children during the day from June, 2013, through October, 2014, and caring for an elderly woman who lived with her for a period of time.

Counsel questioned the Appellant regarding her MVA injuries. She confirmed that she did not lose consciousness in the MVA, although she said she was stunned after the airbags hit her face. Counsel reviewed the ambulance report with the Appellant. He pointed out that it stated that the Appellant was anxious but had no visual disturbances or dizziness. The Appellant said that she did

not agree with this, because she did not remember the ambulance attendants asking her about that. Counsel confirmed the Appellant's prior medical history of rheumatoid arthritis, inflammatory bowel syndrome, migraines and psoriatic arthritis. The Appellant said that although the triage report noted a past medical history of seizure, she had never had one.

Counsel noted that the [hospital] Emergency Record indicated a diagnosis of neck and back strain. The Appellant agreed that she must have suffered from neck and back strain, but said she felt that her injuries were worse, because her car was completely wrecked. Counsel questioned the Appellant regarding her broken pinky finger. She said that she did not mention it at the hospital, but she mentioned it later, to [Appellant's physician #2]. She confirmed that she had no cuts or scars.

The Appellant was referred to a file note made by the case manager on October 5, 2011, in which it was noted that she was "taking [a] course right now". Counsel noted that in her direct examination, the Appellant said she had finished her course just prior to the MVA. The Appellant confirmed her direct testimony, and said that part of the case manager's note did not make sense to her. They did discuss treatment, and the Appellant confirmed that she went for chiropractic treatment. The Appellant also confirmed that the case manager told her she could get her glasses repaired, because they were damaged in the MVA, and she had that done.

Counsel questioned the Appellant regarding her vision issues. The Appellant acknowledged that she needed glasses prior to the MVA, but said they were not for general use. She said that her vision loss happened within three weeks to a month after the MVA. She requires good vision in order to work, because she can't work on computer parts without good eyesight. Counsel pointed out that there is no mention of vision difficulties in the case manager's note of October 5, 2011.

The Appellant responded that she was sure she mentioned it to the case manager, but the case manager didn't care. Counsel noted that the Appellant had seen an optometrist, [text deleted], after the MVA. The Appellant confirmed that she did not provide any documentary evidence from [optometrist] for her appeal. Counsel also noted that in [Appellant's physician #2]'s report dated October 2, 2018, there is reference to the Appellant having seen an ophthalmologist in 2018, but she did not recall who that was.

The Appellant was questioned regarding her chiropractic treatment, which took place between November, 2011 and January, 2012. Counsel asked the Appellant if she stopped going to treatment because she was feeling better, and pointed to a file note dated November 23, 2011, in which the case manager noted that the Appellant "advised she is feeling better". The Appellant said she stopped going to chiropractic treatment because it was causing her more pain, and it was not the right treatment for her. She acknowledged she was probably feeling better in general, because time had passed since the MVA, and she had been quite shaken up by the MVA.

Counsel questioned the Appellant regarding her mention of suffering brain damage. The Appellant said that she was struck in the head, pretty hard, twice, and she was shocked and distressed. Even the simplest tasks were a struggle for her after the MVA. She said that this lasted for about a year, but she is stronger now. Counsel pointed out that although she reported this in 2014, she was not treated for it. The Appellant responded that nobody even tried to figure it out. Counsel noted that the Appellant was sent for a brain MRI in 2016, which was normal. The Appellant said that the reason for the MRI was to investigate the severe migraines she had been having. She thought that the MRI may have been requested by a neurologist.

The Appellant was questioned regarding the medical specialists she had seen, and whether she had submitted any documentary evidence from them. She confirmed that she went to see a rheumatologist, and she also saw [text deleted], a specialist in electrodiagnostic and neuromuscular medicine, but did not produce a report from either specialist. Counsel pointed out that [Appellant's physician #2] stated, in the report dated October 2, 2018, that the Appellant felt she had PTSD, and asked the Appellant whether she had been formally diagnosed with PTSD. The Appellant responded that she had been formally diagnosed by a psychologist, who said she has both ADHD and PTSD, but she did not produce a report from that doctor. Counsel asked the Appellant whether she sought any other treatment. She responded that she wanted to get physiotherapy, but the case manager told her that she couldn't.

Counsel questioned the Appellant regarding her communication with MPIC. He asked the Appellant whether she recalled that the case manager was trying to reach her in the summer of 2012, but the Appellant said she did not recall. Counsel suggested that the Appellant did not communicate with MPIC until September, 2013; the Appellant disagreed with this, and said she communicated with a case manager named [text deleted or text deleted]. Counsel noted that the Appellant met with the case manager on October 15, 2013, although the Appellant did not recall the meeting. He asked the Appellant whether she would have reviewed the case manager's decision letter regarding her entitlement to chiropractic treatment dated November 10, 2011. The Appellant said normally she would review letters like that, but at the time she was "dealing with a lot", and she may have just put it in a pile. Counsel questioned the Appellant regarding the case manager's decision letter on IRI, dated April 29, 2014, which she said she didn't receive until January, 2016. She said she thought it was sent to her at [address #2], after she moved out of the [address] apartment. Counsel asked her if she had a copy of the decision with the [address #2] address. The Appellant responded that she lost a lot of documents in the fire. She acknowledged that she filed

the Application for Review after the fire. Counsel noted that it is MPIC's position that the case manager's decision was sent to her at the [address] address. The Appellant responded that she just did not remember.

Counsel referred to a file note dated December 8, 2015, in which it is recorded that the Appellant contacted MPIC to discuss her entitlement to IRI. He questioned the Appellant as to whether she had communicated with MPIC between the date of the meeting with the case manager, October 15, 2013, and December 8, 2015. The Appellant said that she had not contacted MPIC, because she had "given up". Counsel confirmed with the Appellant that it is her position that the Application for Review was not filed late, because she did not receive the decision until January, 2016. He questioned her as to whether it was possible that she received the decision in April, 2014, and simply didn't look at it. She said that it was possible, because MPIC made a lot of mistakes with her name.

Submission for the Appellant:

The Appellant addressed the two issues under appeal. With regard to whether she had a reasonable excuse for the late-filing of her Application for Review, she submitted that she filed her Application for Review on time, because she received the April 29, 2014, case manager's decision late. As well, she pointed out that there was "a lot going on" in her life at that time, because she perceived her life to be in danger and she couldn't function properly. The case manager wasn't following up enough with her, was misspelling her name and also using her old name, and did not handle her claim professionally.

Regarding her entitlement to IRI, the Appellant submitted that she has always been a hard worker, functioning well, and she did well in her courses and passed her certification. Her plan was to be

a computer technician; however, after the MVA it all disappeared. She lost her vision, and her body is in so much pain that it is now chronic. The MVA made her arthritis flare up, to the point where she now has osteoarthritis. She also now has nightmares, from incidents that occurred while she was dealing with MPIC, even if they were not directly caused by MPIC. She does not have the strength to deal with the computer equipment that she was trained to work on, and she would never last in a full-time job anymore. She didn't feel that the chiropractic treatment was helping her, and it was hard to find a doctor. She argued that she deserves IRI benefits. Her life was going well before the MVA, and now she is in pain and can barely move. The MVA affected her whole life, and if she could, she would happily go back to work.

Submission for MPIC:

Counsel for MPIC noted that there are two issues to be addressed in this appeal: whether the Internal Review office correctly rejected the Appellant's appeal for lateness, and whether the Appellant is entitled to IRI benefits. He first addressed the issue of the Appellant's late-filing of her Application for Review.

Counsel referred to section 172 of the MPIC Act, which provides that an Application for Review must be filed within 60 days after receiving a decision. MPIC may extend that deadline where it is satisfied that and Appellant has a reasonable excuse for failing to file the Application within that time. He noted that the case manager's decision is dated April 29, 2014, and the Appellant's Application for Review was filed on February 23, 2016, making it one year, seven months and 20 days past the 60-day deadline date. Counsel noted that the Appellant denies being late, saying she received the case manager's decision in January, 2016, and filed it on time. The question is therefore whether the Appellant actually did file her Application for Review on time or not.

Counsel acknowledged that MPIC does not have confirmation that the Appellant received the decision when it was originally sent to her in April, 2014. This is because there is no provision in the MPIC Act requiring MPIC to obtain confirmation of receipt for case manager's decisions (in contrast to Internal Review decisions). However, it is MPIC's position that the Appellant probably received the case manager's decision shortly after it was sent, on April 29, 2014, but that she did not review it or did not respond to it, for whatever reason, perhaps because she misfiled it, or mixed it up with other papers.

Counsel submitted that it is reasonable to find that the Appellant did receive the decision in April, 2014, for several reasons. First, the address on the case manager's decision was correct. The Appellant's testimony was that she did not move out of the [address] apartment until the end of 2014, and therefore she was still residing at the [address] apartment in April of 2014. Second, the case manager's decision is addressed to [name] [married name], and the Appellant acknowledged that she often mixed up letters that were addressed to [name] [married name] as opposed to [the Appellant]. As well, there is evidence that the Appellant's record-keeping was less than optimal; in a file note dated November 23, 2011, the case manager recorded that the Appellant "advised she had lost her initial package". These might be reasons why the Appellant doesn't think that she received the case manager's decision earlier than January, 2016.

In addition, counsel argued that the Appellant had a habit of not being in contact with MPIC. He noted that on July 24, 2012, the case manager recorded that the Appellant said she was having trouble finding work and asked if MPIC would retrain her. However, the Appellant made no further contact with MPIC until a year later, as noted in the case manager's file note of September 3, 2013. Similarly, after meeting with the case manager on October 15, 2013, there is no evidence that the Appellant contacted MPIC until December 8, 2015. Counsel submitted that it is likely that the

Appellant received the case manager's decision in 2014, and simply did not respond, perhaps because she was not interested in pursuing her claim, or perhaps because she didn't read it, or perhaps because she misfiled it, as this was her pattern of behavior.

If the Commission finds that the Appellant filed her Application for Review beyond the 60-day deadline, counsel noted that there are several factors to review when considering whether her excuse for the late-filing was reasonable. When considering the Appellant's reasons for the delay, he noted that the Appellant said her life was very hectic at this time, but there is no documentary evidence to support her testimony, and so this is not credible. The length of the delay is significant, 600 days, and coupled with the Appellant's disinterest in pursuing her claim, this weighs against granting her an extension of time to file her Application for Review. There has been no waiver by MPIC of the 60-day deadline. There is no evidence of specific prejudice due to the delay, but inherent prejudice results from the passage of time. Counsel submitted that weighing all factors, the balance weighs against the granting of an extension, and the Commission should dismiss the Appellant's appeal, based on the Appellant not filing her Application for Review within the 60-day deadline.

In the event that the Commission considers that the Appellant had a reasonable excuse for her late-filing, counsel addressed her entitlement to IRI benefits. He noted that the Appellant must establish, on a balance of probabilities, that she is entitled to IRI. In determining eligibility for IRI, a starting point is determining the category of earner that the Appellant would be. Counsel pointed out that differences between the documentary evidence and the Appellant's testimony made it difficult to determine which category applied to her. The documentary evidence gave the impression that the Appellant was a student at the time of the MVA. However, the Appellant's testimony, both in direct and cross-examination, was that she had completed her studies, and was

on social assistance at the time of the MVA. Different provisions of the MVA would apply depending on which circumstance is correct, and counsel reviewed those provisions (quoted above).

There are two periods of time during which the Appellant wasn't working, from either September or November, 2011 to January, 2013, and then from April, 2013 to the present. Whichever category of earner the Appellant falls into, she has to establish that due to her MVA injuries, she either was unable to hold employment or was deprived of an employment insurance benefit during either of these periods. Counsel submitted that there is no evidence based on which the Commission could make such a finding.

Counsel reviewed the medical reports found in the documentary evidence. He pointed out that the Appellant's physician, [Appellant's physician #2], in her report dated October 2, 2018, stated that she did not know the extent of the Appellant's injuries attributable to the MVA; her comments were based on the Appellant's reporting to her. [Appellant's physician], in his report dated December 23, 2013, noted that the Appellant suffered no fractures or "obvious injuries" when seen at [hospital] after the MVA. The Emergency Record from that hospital noted that the Appellant's diagnosis was back and neck strain.

The Appellant went for chiropractic treatment. In his report dated November 1, 2011, her chiropractor diagnosed spinal strains and subluxations. Subsequently, the case manager noted on November 23, 2011, that the Appellant advised that she was feeling better and she ceased attending for chiropractic treatment. Counsel noted that the Appellant testified that she did not like the treatment, and that she wanted to get physiotherapy but that the case manager wouldn't let her.

However, this is not consistent with the case manager's file note dated July 24, 2012, in which the case manager recorded that the Appellant "can attend to either physio or athletic therapy".

Regarding the Appellant's claim that she had vision problems arising from the MVA, the Appellant did wear glasses prior to the MVA, and [Appellant's physician #2]'s report noted that she required glasses for near vision, and had amblyopia (lazy eye). However, the Appellant did not produce any reports supporting her claim that the MVA affected her vision. Similarly, counsel submitted that the Appellant did not produce any medical reports supporting her claim that she suffered brain damage due to the MVA. As noted in the medical reports of the paramedics and the [hospital], the Appellant denied any dizziness, headache and loss of consciousness immediately following the MVA. [Appellant's physician #2] noted that an MRI of the Appellant's brain was normal in 2016. Although the Appellant argued that she suffers from chronic pain, she also acknowledged that she suffers from pre-existing rheumatoid arthritis, psoriatic arthritis and fibromyalgia. She did not provide reports from any of her physicians to say that the MVA exacerbated any of those conditions. The Appellant also said she was diagnosed with ADHD and PTSD, but there was no documentary evidence from a medical professional to indicate that these conditions were caused or exacerbated by the MVA.

Counsel reviewed the medical reports provided by MPIC's Health Care Services ("HCS") consultants. [MPIC's HCS' consultant] provided a report dated January 20, 2014, in which she stated that the Appellant's injuries would not have prevented her from doing "a reasonable range of employment". [MPIC's HCS' consultant#2] provided a report dated July 16, 2019, and concurred in that opinion. Counsel therefore submitted that even if the Appellant could establish that there was a period of time in which she was unable to work, or was deprived of a benefit under

the Employment Insurance Act, she has not established that this was a result of the MVA. Therefore, the Appellant's appeal should be dismissed.

Discussion:

The onus is on the Appellant to show that she is entitled to the benefits that she seeks. Specifically, the onus is on the Appellant to show, on a balance of probabilities, that:

1. She had a reasonable excuse for the late-filing of her Application for Review; and
2. She is entitled to IRI benefits as a result of the September 2, 2011, MVA.

In making our decision, as set out below, the panel has carefully reviewed all of the reports and documentary evidence filed in connection with this appeal. We have given careful consideration to the testimony of the Appellant and to the submissions of the Appellant and counsel for MPIC. We have also taken into account the provisions of the relevant legislation and applicable case law.

Testimony of the Appellant

In considering the oral testimony of the Appellant, the panel notes that while testifying, the Appellant was, at times, scattered and unfocussed in her thought process. She described, often at length, numerous theories related to her doctors being "corrupt" and involving surveillance allegedly conducted on her by MPIC and by the [city] police. It was not clear whether all of this testimony had an acceptable factual foundation. This caused the panel some concern in connection with the reliability, as a whole, of the Appellant's testimony. As such, to the extent that the Appellant's testimony conflicted with the documentary evidence before us, the panel preferred to rely on the documentary evidence, rather than on the testimony of the Appellant, which we found to be unreliable.

Late-Filing

The case manager's decision regarding the Appellant's entitlement to IRI is dated April 29, 2014. As indicated above, under subsection 172(1) of the MPIC Act, the Appellant had 60 days after she received that decision within which to file an Application for Review with MPIC. Under subsection 172(2) of the MPIC Act, MPIC can extend the 60-day time limit if it is satisfied that the Appellant had a reasonable excuse for the late-filing. Under paragraph 184(1)(b) of the MPIC Act, the Commission can make any decision that MPIC could have made, and thus can also extend the 60-day time limit.

Counsel for MPIC argued that the Appellant must have received the case manager's decision shortly after the date that it was issued, and therefore the 60-day deadline would have expired by approximately the end of June, 2014. Since her Application for Review was not filed until February 23, 2016, it was filed almost 20 months late. It is MPIC's position that the Appellant did not have a reasonable excuse for the late-filing and that the Commission should not extend the 60-day time limit.

It is the Appellant's position that she did not receive the case manager's decision when it was originally sent to her, but rather that she only received it in January, 2016, after she contacted MPIC late in 2015 to inquire about IRI. The Appellant argued that there was no delay in filing, since she filed her Application for Review in February, 2016, shortly after receiving it.

The panel reviewed the documentary evidence on file. MPIC does not have confirmation that the Appellant received the case manager's decision when it was originally sent to her in April, 2014. MPIC argued, however, that it is reasonable to infer that the Appellant must have received the decision at that time, based on her pattern of behaviour, and as well based on her testimony that

she had not yet moved from the [address] apartment in April, 2014. But MPIC also argued that the Commission ought not to accept the Appellant's testimony as to when she received the decision, because her testimony was not credible. In our view, it is slightly inconsistent to argue that the Commission should, on the one hand, accept the Appellant's testimony regarding the dates of her move, while on the other hand, reject the Appellant's testimony regarding when she received the decision.

As noted above, the panel prefers to rely on the documentary evidence, rather than the Appellant's testimony, to the extent possible, particularly where the documentary evidence was made contemporaneously. The documentary evidence contains an MPIC file note dated December 8, 2015, recording notes of a call with the Appellant, which provides, in part, as follows:

> Claimant was very scattered in her thought process. I attempted several times to re-direct the conversation to claim issues. We were able to briefly discuss her BI claim as she mentioned several times that she "wanted to get paid". I explained to her that DL – no entitlement to IRI was sent April 29, 2014. She claims that she never did receive this letter and asked for it to be re-sent along with the IRO appeal package. I re-sent both.

There is a further file note, dated February 8, 2016, which provides, in part, as follows:

> [Claimant] called inquiring how to submit her IRO package; [claimant] advised that she thought there was a deadline on the form, but she only just received it and it is dated as being sent on December 8, 2015.
>
> Advised that a quick review of the file indicates that the decision that she is seeking to review (the IRI entitlement issued in 2014) has far exceeded the traditional 60 day deadline for a decision to be reviewed. Advised that she could submit the IRI package at her discretion and it would be up to the IRO to consider the application for review, in spite of the time lapse.

As noted above, the Appellant filed her Application for Review on February 23, 2016. She stated on her Application, in part, as follows:

> I was not informed of the decision properly. The letter was not received by me until over a month after supposedly sent. […]

The panel considers that MPIC's own file notes, made contemporaneously, constitute the best evidence here, and we prefer them to the Appellant's oral testimony, which, as indicated above, we found to be unreliable. Based on the documentary evidence, we find that the Appellant did not receive the case manager's decision dated April 29, 2014, at the time that it was originally sent.

The next step is to try to determine when the Appellant *did* receive the case manager's decision. As noted above, in the file note dated February 8, 2016, it is recorded that the Appellant stated that "she only just received it and it is dated as being sent on December 8, 2015". In her Application for Review, the Appellant stated that "The letter was not received by me until over a month after supposedly sent". While we are not able to fix an exact date, we find that the earliest that the Appellant would have received the case manager's April 29, 2014, decision would have been shortly after it was re-sent to her on December 8, 2015.

The Appellant filed her Application for Review on February 23, 2016, which is 77 days after December 8, 2015. That would mean that if the Appellant had received the case manager's decision on December 8, 2015, she filed her Application for Review 17 days beyond the 60-day deadline for filing, which is a short delay. Counsel for MPIC acknowledged that there was no specific prejudice caused to MPIC by a late-filed Application for Review in this case. In the circumstances, the panel finds that the Appellant has met meet the onus upon her of establishing, on a balance of probabilities, that she had a reasonable excuse for her failure to file her Application for Review relating to the case manager's decision of April 29, 2014, regarding IRI benefits, within the 60-day time limit set out in section 172 of the MPIC Act.

Accordingly, the Commission will extend the time limit within which the Appellant may file the Application for Review dated February 23, 2016, with MPIC.

Entitlement to IRI

Given that the Commission has extended the time limit within which the Appellant may file her Application for Review of the case manager's decision dated April 29, 2014, the Appellant is able to appeal her entitlement to IRI benefits as a result of the MVA.

a) Category of Earner

The first step in determining an entitlement to IRI is typically determining the category of earner into which an appellant falls. Unfortunately, that determination is somewhat difficult in this case, due to the differences between the documentary evidence and the Appellant's testimony. Based on the documentary evidence, it is possible that the Appellant may have been a student at the time of the MVA. For example, there is a file note dated October 5, 2011, in which the case manager recorded that the Appellant stated that she is "taking [a] course right now". A further file note, dated October 15, 2013, states that: "[…] she graduated from the course in Nov 2011". If the Appellant was a student at the time of the MVA, then her entitlement to IRI benefits would arise under subsection 91(1) of the MPIC Act, quoted above. That provision provides an indemnity where a student "is unable to hold employment because of the accident" after completing their studies.

The Appellant testified, however, that she had completed her studies prior to the MVA and that she was on social assistance at the time of the MVA. If that was, in fact, the case, then her entitlement to IRI benefits would arise under sections 85 and 86 of the MPIC Act, quoted above, which are the provisions applicable to non-earners. Under those provisions, IRI is provided for the

first 180 days after the MVA where, “as a result of the accident”, the non-earner is unable to hold a promised employment or is deprived of an Employment Insurance benefit. IRI is provided after the first 180 days based on a determined employment, where the non-earner “is not able because of the accident to hold the employment”.

Although it is not entirely clear into which category of earner the Appellant falls, it is not necessary to make a determination on this issue, because the provisions referred to above all have similar wording. Therefore, whether the Appellant was a student or a non-earner at the time of the MVA, in order to be entitled to IRI benefits, she must establish, on a balance of probabilities, that:

1. She was unable to hold employment because of the MVA; or
2. She was deprived of an Employment Insurance benefit because of the MVA.

b) Unable to Hold Employment

Based on the legislation set out above, in order to show that she was unable to hold employment because of the MVA, the onus is on the Appellant to establish, on a balance of probabilities, that she suffered an injury that was caused by the MVA, which rendered her entirely or substantially unable to perform the essential duties of that employment.

As noted above, the Appellant was not employed at the time of the MVA. The Appellant did work for 10 weeks subsequent to the MVA, from mid-January to mid-March, 2013, doing accounting work for [employer]. The courses that the Appellant had completed (or was completing) at the time of the MVA were [course#1 and course#2]. In her submission, the Appellant said that her plan was to be a computer technician, but she was unable to work in that job after the MVA. Whether her potential post-MVA employment might have been as a computer technician or in accounting, there is no documentary evidence before the panel with respect to the essential duties

of either occupation. We are therefore left to rely on the Appellant's testimony and the documentary evidence regarding the Appellant's injuries and her ability to work generally.

The Appellant testified regarding the injuries that she attributes to the MVA. She said she had pain in both her knees and hips, as well as pain in her neck and back. She has developed vision problems which she attributes to the MVA. The Appellant also spoke about feeling that she had "some kind of brain damage" from the MVA, although she said this has improved. She said that the MVA made her arthritis flare up, to the point where she now has osteoarthritis. She can't walk very far and gets tired, and her body is in so much pain that it is now chronic. She also now has nightmares, and PTSD. With respect to her ability to work, the Appellant said that she does not have the strength to deal with the computer equipment that she was trained to work on, and she would never last in a full-time job anymore.

As noted above, the panel found the testimony of the Appellant to be, at times, scattered and unfocussed, and as a result we would prefer to rely on the documentary evidence, rather than the Appellant's testimony, to the extent possible. We therefore carefully reviewed the documentary medical evidence.

The Emergency Record from the [hospital], dated September 2, 2011, provided a diagnosis of back and neck strain. At the hospital, x-rays were taken of the Appellant's spine. The x-ray report of her cervical spine dated September 2, 2011, stated that: "[…] no fracture is identified. The prevertebral soft tissues appear normal." The x-ray report of her thoracolumbar spine dated September 2, 2011, stated: "No bone or disc space abnormality is identified".

The Appellant's chiropractor, [text deleted], provided an Initial Chiropractic Report dated November 1, 2011, in which he diagnosed spinal sprains/strains and multiple subluxations. He provided a further report dated May 15, 2012, in which he indicated that the Appellant had not returned to the clinic since January 9, 2012. In that report, he noted that the Appellant had "improved posture, ROM, strength & muscle tone, decreased subluxations".

MPIC wrote to the Appellant's physician, [Appellant's physician], on October 15, 2013, to ask for his comments regarding the Appellant's injuries sustained in the MVA. [Appellant's physician] responded by letter dated December 23, 2013, as follows:

> [The Appellant] was seen at [hospital] by [doctor].
> There were no fractures or obvious injuries noted.

[Appellant's physician] followed up with a further letter dated January 13, 2014, as follows: "Please contact [doctor] at [hospital] Emergency for reports". There are no reports from [doctor] in the documentary evidence.

The Commission wrote to the Appellant's physician, [Appellant's physician #2], on August 1, 2018, to ask for her comments regarding the Appellant's injuries sustained in the MVA. [Appellant's physician #2] responded by providing a report dated October 2, 2018, which states, in part, as follows:

> As I did not know [the Appellant] prior to the accident and only met her years after the accident, I am unable to determine how much of her symptoms were pre-existing and/or caused by the accident. I have sent her to multiple specialists to determine how to help her with the symptoms that she is feeling and [she] has been seen by pain clinic, rheumatology and ophthalmology in the past. The ophthalmologist she saw in 2018 indicated that she has an amblyopia in her Right eye and that she needs glasses for near vision, which is the same recommendation as a previous MD a few years prior. Again, I am unsure what her vision was like prior to the accident.

> She has also had MRIs in the past. MRI brain was normal in 2016. MRI of her cervical spine showed some disc bulging at C5-C6, which could be causing some of upper back and neck pain. However, I am not sure if this was caused from the accident.
>
> She was also sent to [text deleted], a specialist in electrodiagnostic and neuromuscular medicine, who didn't see any clear evidence of pathology in the peripheral nervous system.
>
> […]
>
> There is a possibility that this accident could have cause[d] an increase in her pre-existing fibromyalgia, however, I can not confirm this because I can not compare what her pain was like prior to the accident.

MPIC's HCS consultants reviewed the file and provided reports commenting on the Appellant's MVA injuries and her ability to work. [MPIC's HCS' consultant] provided a report dated January 20, 2014, which states as follows:

> The available documentation (Paramedic and Emergency record) notes diagnosis as neck and back strain. This would not have prevented the claimant from doing a reasonable range of employment.

After receipt and review of the report from [Appellant's physician #2], [MPIC's HCS' consultant#2] provided a report dated July 16, 2019, which states, in part, as follows:

> […] there is no change to the prior opinion that the claimant's accident related diagnoses were neck and back strains. This new information provided has no temporal relationship to the accident in question.

[MPIC's HCS' consultant#2] was asked to advise: "Whether your opinion remains that the injuries sustained by the claimant in the September 2, 2011 MVA would not have prevented her from doing a reasonable range of employment". The response provided in the report was: "No new information has been provided on file which would alter this opinion".

We find that [MPIC's HCS' consultant] and [MPIC's HCS' consultant#2], in the preparation of their reports, had the opportunity to review all of the medical reports, assessments and reports of interventions on the Appellant's file and were thorough in their analyses. The panel preferred the

evidence provided by [MPIC's HCS' consultant] and [MPIC's HCS' consultant#2] to that of the Appellant, whose evidence was unreliable. The panel notes that the evidence of the Appellant's chiropractor, [text deleted], was consistent with the evidence of the HCS consultants regarding the Appellant's MVA injuries. The panel notes further that the Appellant's physicians, [Appellant's physician] and [Appellant's physician #2], did not provide any diagnoses of the Appellant's MVA injuries.

Based on the evidence of [MPIC's HCS' consultant] and [MPIC's HCS' consultant#2], the panel finds that the Appellant's MVA injuries were neck and back strain. The panel acknowledges the testimony of the Appellant that she is suffering from other symptoms as she described. However, there is no evidence from a medical practitioner indicating that these other symptoms are connected to or caused by the MVA. We do understand the Appellant's conviction that this is the case; however, there is no medical evidence supporting her position.

Furthermore, none of the Appellant's health care providers has provided an evaluation or opinion that any of the Appellant's symptoms, including her neck and back strain, has resulted in an inability to work. However, [MPIC's HCS' consultant] and [MPIC's HCS' consultant#2] have both opined that the Appellant's MVA injuries would not have prevented her from doing a reasonable range of employment, and the panel accepts that evidence.

Based on all of the above, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that she suffered an MVA injury which has rendered her entirely or substantially unable to hold employment.

c) Deprived of Employment Insurance Benefit

The Appellant did not address the issue of whether or not she had been deprived of Employment Insurance benefits in her testimony or in her submission, nor is there any documentary evidence which addresses this point.

The only evidence in front of the panel regarding social assistance or Employment Insurance benefits is the following: In the documentary evidence, there is a file note dated October 15, 2013, in which the case manager recorded that the Appellant stated: "She is currently on social assistance (for disability)". In her testimony, the Appellant said that she was on social assistance due to non-MVA related disabilities. She said she was in receipt of those benefits at the time of the MVA, and also prior to and subsequent to her work for [employer].

There was no evidence that the Appellant was deprived of an Employment Insurance benefit because of the MVA. Therefore, we find that the Appellant has not met the onus to establish, on a balance of probabilities, that she was deprived of such a benefit.

d) Conclusion

Based on the above, we find that the Appellant has not established, on a balance of probabilities, that she was unable to hold employment because of the MVA; nor has she established, on a balance of probabilities, that she was deprived of an Employment Insurance benefit because of the MVA. We therefore find that the Appellant has not established, on a balance of probabilities, that she is entitled to IRI as a result of the September 2, 2011, MVA.

Disposition:

Accordingly, the Appellant's appeal is dismissed. The decision of the Internal Review Officer dated March 18, 2016, is:

1. Varied, with respect to the late-filing issue, as follows: the Appellant did have a reasonable excuse for the late-filing of her Application for Review; and

2. Upheld, with respect to the IRI issue, as follows: the Appellant is not entitled to IRI benefits as a result of the September 2, 2011, MVA.

Dated at Winnipeg this 26th day of October, 2020.

JACQUELINE FREEDMAN

NIKKI KAGAN

LINDA NEWTON