Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-18-081, 18-085

PANEL:	**Ms. Jacqueline Freedman, Chair** **Mr. Brian Hunt** **Ms. Pamela Reilly**
APPEARANCES:	**The Appellant, [text deleted], was represented by Rodion Ihnatenko of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Anthony Lafontaine Guerra.**
HEARING DATE(S):	**July 27 and 29, 2020.**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity ("IRI") benefits as a result of the September 2, 2016, MVA.** **Whether the Appellant is entitled to additional chiropractic treatment.**
RELEVANT SECTIONS:	**Subsections 81(1), 136(1) and section 138 of The Manitoba Public Insurance Corporation Act ("MPIC Act"), section 8 of Manitoba Regulation 37/94, and section 5 of Manitoba Regulation 40/94.**

Reasons For Decision

Background:

[Text deleted] (the "Appellant") was driving his car when he was involved in a collision with a third party motorist on September 2, 2016 (the "MVA"). The Appellant suffered various injuries as a result of the MVA and he received certain treatments pursuant to the Personal Injury Protection Plan ("PIPP") provisions of the MPIC Act, including physiotherapy and chiropractic treatment.

The MVA occurred on the Friday of a long weekend; the Appellant returned to work the following Tuesday. He continued to work, although he changed his duties from working as a skilled carpenter to working as a supervisor, for the duration of a project which he had been working on prior to the MVA. When that project was completed, in or around November of 2017, he resumed working as a skilled carpenter.

The Appellant told MPIC that he was having difficulty at work due to the MVA. He inquired about Income Replacement Indemnity ("IRI") benefits. The case manager asked him to provide a list of his time missed from work. MPIC reviewed the Appellant's file, and the case manager issued a decision letter dated March 26, 2018, which provides as follows:

> In order to qualify for IRI benefits, you must be entirely or substantially unable to perform the essential duties of your employment as indicated in Section 8 of the Manitoba Public Insurance Corporation Act, Regulation 37/94 […]
>
> […]
>
> You advised you missed work sporadically due to your motor vehicle accident injuries. You were to provide a list of days missed, nothing has been received to date.
>
> Medical information on your claim was reviewed by our Health Care Services team, based on the medical information on file your motor vehicle injuries are WAD Type II cervical and lumbar spine.
>
> Based on the medical information, there is [sic] no objective findings to preclude you from holding employment in a full time capacity, therefore there is no entitlement to Income Replacement Indemnity (IRI) benefits.

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer considered the decision of the case manager and issued an Internal Review Decision dated July 12, 2018, which provides as follows:

> Having continued to work, we know that your injuries do not <u>entirely</u> prevent you from performing your employment. In my view, the question becomes whether your injuries <u>substantially</u> prevent you from performing your employment?
>
> […]

> Giving consideration to all the information on your file, I agree with the case manager's decision of March 26, 2018 which is supported by MPI's Medical Consultant. As such, you are not entitled to Income Replacement Indemnity ("IRI") benefits as a result of the September 2, 2016 MVA.

The Appellant disagreed with the decision of the Internal Review Officer and filed this appeal with the Commission.

In addition, as noted above, the Appellant received chiropractic treatments following the MVA. MPIC funded treatment pursuant to Track II, Phase 2 chiropractic care under the PIPP provisions of the MPIC Act. The Appellant sought treatment with a new chiropractor, who provided a report requesting that MPIC fund treatment beyond Track II, Phase 2. MPIC reviewed the Appellant's file, and the case manager issued a decision letter dated April 26, 2018, which provides as follows:

> That report, as well as your entire medical file, has been reviewed by our Health Care Services Team. The medical information on file supports that you have reached maximum therapeutic benefit and that additional treatment is not "medically required." Therefore, there is no entitlement to further funding of chiropractic treatment beyond Track II, Phase 2, which is a maximum of 58 treatments including your initial assessment.

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer considered the decision of the case manager and issued another Internal Review Decision, also dated July 12, 2018, which provides as follows:

> Based on the totality of the medical information on file, in my view, there is no objective medical information supporting that additional chiropractic treatment would be deemed "medically required" within the meaning of PIPP legislation and directly related to the accident of September 2, 2016.
>
> There is sufficient evidence to support the decision under review and no basis has been shown for interfering with the decision of April 26, 2018. I am therefore confirming the case manager's decision and dismissing your Application for Review.

The Appellant disagreed with the decision of the Internal Review Officer and filed this appeal with the Commission.

Issues:

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

1. Whether the Appellant is entitled to IRI benefits as a result of the MVA; and
2. Whether the Appellant is entitled to additional chiropractic treatment.

Decision:

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

1. The Appellant has not met the onus to establish, on a balance of probabilities, that he is entitled to IRI benefits as a result of the MVA; and
2. The Appellant has not met the onus to establish, on a balance of probabilities, that he is entitled to additional chiropractic treatment.

Preliminary and Procedural Matters:

Case Conference

Prior to the hearing of this appeal, a Case Conference was held (on January 8, 2020) to discuss preliminary matters. At that Case Conference, counsel for the Appellant noted that the Appellant returned to work following the MVA (as indicated above). Counsel advised that the Appellant was seeking IRI benefits in respect of days that he missed from work from time to time when his injuries were exacerbated, and that the Appellant would testify with respect to the days that he missed from work. At the Case Conference, it was confirmed that neither party would be submitting any further documentary evidence. The hearing dates for this appeal were also set for

April 15 and 16, 2020, at that time. All of this was confirmed in a letter sent from the Commission to the parties on January 8, 2020.

Due to operational considerations in light of COVID-19, and in consultation with the parties, the Commission determined to postpone the April hearing, and the appeal hearing was rescheduled to July 27 and 29, 2020.

Late-filed Documents – Prior to Hearing

On July 15, 2020, counsel for the Appellant submitted additional documentary evidence to the Commission for inclusion to the indexed file, 12 days in advance of the appeal hearing. The Commission's Guidelines for Hearings provide as follows:

> 7.1 All new documentary evidence not already in your indexed file must normally be filed with AICAC at least 30 days prior to the hearing. A copy will be sent to MPIC. MPIC must also file any new evidence with AICAC within the same time frame and a copy will be sent to you. AICAC has the discretion, on proper grounds, to allow for a shorter period of notice to permit the filing of new documentary evidence.
>
> If, for example, MPIC has submitted new evidence later than 30 days prior to the date fixed for the hearing of your appeal, and if you believe that this does not allow you enough time to consider and respond to that new evidence, you may:
>
> a) Ask AICAC to adjourn the hearing in order to give you more time. You will need to provide AICAC with the reasons why you are requesting an adjournment in writing; or
>
> b) You may object to the filing of new evidence. An objection of this kind may be considered by AICAC at, prior to, or during the hearing.
>
> If your own material is late then MPIC has the same right.

The Commission forwarded a copy of the additional documentary evidence to counsel for MPIC, for review and comment. Counsel for MPIC advised the Commission that counsel for the Appellant had previously provided this information to MPIC on March 16, 2020, and therefore

MPIC did not require additional time to review it. The Commission advised the parties that given that the documents had not been submitted to the Commission 30 days prior to the hearing date, as indicated in the Guidelines, they would not be included as documentary evidence in the indexed file prior to the start of the appeal hearing; however, counsel for the Appellant could argue for their admission at the outset of the hearing. Therefore, a supplementary indexed file was prepared, and the documents were marked for discussion as Tabs A, B, C and D, as follows:

A: log sheets prepared by the Appellant, appearing to bear date December 23 through to March 31, years unknown;
B: pay stubs issued by the Appellant's employer from March 19, 2017 to July 8, 2017;
C: Employer's Verification of Earnings dated December 8, 2017; and
D: T4 statements issued by the Appellant's employer for the years 2015 through 2018.

At the outset of the hearing, we noted that Tab C, the Employer's Verification of Earnings, already existed in the indexed file. Counsel for the Appellant argued that the other documents should be admitted to the indexed file as they were relevant to the IRI issue under appeal. (For ease of reference, those documents, found at Tabs A, B and D, may be referred to as the "Supplemental Documents"). He advised that the purpose of submitting the Supplemental Documents was to show the hours that the Appellant missed from work, and the difference in his income from employment from before the MVA and after the MVA.

Counsel for the Appellant explained that the late filing arose due to "major disruptions" in accessing documents remotely caused due to COVID-19. Counsel for MPIC said that he would have no objection to the Supplemental Documents being admitted to the indexed file, as he had prepared for the appeal hearing on the basis that these documents reflected the Appellant's claim for missed time from work.

Late-filed Document – At the Hearing

At that point in the discussion, the Appellant himself advised that he would like to submit an additional document as evidence of his missed time from work between 2016 and 2018. This was a new document, which had not been previously provided to his counsel (the "Appellant's New Document"). When questioned by the panel, he advised that he had asked his employer 3 times to prepare a list of all the days from 2016 to 2018 that he missed work or worked half days. In January or February, 2020, his employer started on the list, and the Appellant received it approximately 2 months prior to the July hearing. He did not provide the Appellant's New Document to his counsel. Although counsel for the Appellant had not seen the Appellant's New Document, and could not confirm its contents, he said that he would anticipate that its contents (the days and half days missed from work) would be the days for which the Appellant is seeking IRI benefits.

Counsel for MPIC objected to the admission of the Appellant's New Document. He said that he had prepared for the appeal hearing on the basis that the Supplemental Documents were previously provided to him by counsel for the Appellant to support the Appellant's claim for IRI. Those documents relate to specific calendar days, and MPIC reasonably considered that those were the days to which the Appellant's claim related. If the Appellant's New Document now reflected different days, this would essentially constitute a trial by ambush. Counsel for MPIC would require an adjournment of the hearing, in order to review the Appellant's New Document, reassess the evidence in light of the new information and revisit previously prepared questions and argument.

Counsel for the Appellant agreed with counsel for MPIC that the Appellant's New Document could be material, although he had not seen it. He noted that he could not comment on whether reviewing the Appellant's New Document and incorporating its contents into an analysis of the other evidence would take a long time, or whether it would require an adjournment. He submitted

that because the Appellant's New Document would appear to be material, it should be admitted into evidence.

The panel adjourned to consider the submissions of the parties regarding the late-filed Supplemental Documents submitted by counsel for the Appellant and the further late-filed Appellant's New Document.

Rulings on Late-Filings

After considering the submissions made by the parties, the hearing resumed and the panel made the following rulings regarding the documents.

The panel noted that the Commission's policy on the submission of documents for use at a hearing is reflected in its Guidelines for Hearings, as set out above, being that documents should be submitted no later than 30 days prior to the hearing date. That deadline was not observed by either the Appellant or his counsel.

As noted above, counsel for MPIC did not object to the admission of the Supplemental Documents, as counsel for the Appellant had forward the Supplemental Documents to MPIC on March 16, 2020. Counsel for the Appellant identified work disruptions as the reason that the Supplemental Documents were submitted to the Commission on July 15, 2020, rather than at the same time that they were sent to MPIC.

Counsel for MPIC did object to the admission of the Appellant's New Document, on the basis that its admission would constitute unfair surprise, as set out above.

The onus in an appeal is on the Appellant to establish his case. Here, the Appellant said that he asked his employer several times to provide him with information regarding his days missed from work. However, when he did finally receive the Appellant's New Document, he did not pass it on to his counsel. He acknowledged that he held on to the document for approximately 2 months. There was no explanation given for his failure to provide this document to his counsel or to submit this document to the Commission on a timely basis.

Counsel for the Appellant was advised by the Commission at the Case Conference held on January 8, 2020, to address the issue of the Appellant's missed time from work. The panel was of the view that there was ample time for this to be done, and for evidence on this point to be submitted on a timely basis, particularly since the originally scheduled hearing date was postponed.

Taking all of the above into consideration, and bearing in mind the rules of procedural fairness that apply, the panel determined that to admit the Appellant's New Document into evidence at this point, would in fact constitute an unfair surprise to MPIC, and would likely result in an undue delay of the proceedings. In contrast, although the Supplemental Documents had not been filed with the Commission on a timely basis, they had been provided to counsel for MPIC several months in advance of the July hearing date, and counsel had adequate time to review them and prepare for the hearing, so their admission would not contravene any fairness principles.

Accordingly, the objection of counsel for MPIC regarding the admission of the Appellant's New Document was sustained, and the Appellant's New Document was not admitted into evidence. The Supplemental Documents, comprised of the log sheets prepared by the Appellant, pay stubs issued by his employer and T4 statements issued by his employer, were admitted into evidence and remained identified as marked in the supplementary indexed file.

Opening Statements:

After concluding discussions of the preliminary matters, the panel briefly discussed with counsel for the parties the issues under appeal, including the applicable legislative provisions. The parties were then invited to give opening statements. Counsel for both parties gave opening statements, which will not be summarized here, as their content was reflected in their submissions, below.

However, there is one matter that bears specific note from the opening statement of counsel for the Appellant. Counsel identified that the Appellant is specifically seeking IRI for the period from November, 2017, to November, 2018. Notwithstanding that the panel had just admitted the Supplemental Documents, counsel for the Appellant acknowledged that this time period is not reflected in Tab B, the pay stubs issued by the Appellant's employer and may or may not be reflected in Tab A, the log sheets prepared by the Appellant. Counsel for MPIC was allowed a brief recess to modify his opening statement to incorporate the new information.

The hearing proceeded on the basis that the Appellant is seeking IRI only for the period from November, 2017, to November, 2018.

Legislation:

The relevant provisions of the MPIC Act are as follows:

> **Entitlement to I.R.I.**
>
> 81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the full-time employment;
> […]

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;
[…]

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

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.

Manitoba Regulation 40/94 provides, in part, as follows:

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, nurse practitioner, clinical assistant, or physician assistant;
[…]

Evidence for the Appellant:

Pre-MVA Condition

The Appellant testified at the appeal hearing, and he described his pre-MVA condition. The Appellant came to [country #1] from [country #2] in 2013 for work. Prior to the MVA, he was quite physically active and was in very good shape. He typically worked 8 to 12 hours per day, working even on the weekends. He did not have experience with medical professionals in [country #1], other than a minor workplace injury in early 2016. He said that working in construction sometimes he was a little bit sore, but that was normal, and being active in sports he was used to it. He had no pre-MVA psychological conditions.

MVA Injuries

The Appellant described the injuries he suffered in the MVA. Immediately after the MVA he was dizzy, his mouth was dry and he needed to lay down due to dizziness. An ambulance attended at the scene and asked him if he wanted to go to the hospital, but he did not. He doesn't like hospitals, and he didn't think he was in very bad shape. Although he had pain in his neck, shoulder and low back, he didn't think anything was broken and he didn't lose consciousness or have any very bad cuts. Later that night, he had a headache and was not able to move his head. Two teeth were cracked. He called MPIC and reported the accident. The next day he went to the hospital, but he was very uncomfortable on the chairs in the waiting room and so he called the chiropractor whom he had seen before and made an appointment. At the time of the MVA he was also concerned because that weekend he was scheduled to move into his new house.

A few months earlier, he and his fiancée had purchased a house, with possession to be that September. Immediately after the MVA, he was not able to do anything when they moved houses; he had to have his friends unpack his clothes. At work, he would take breaks and lay down in his

truck. He was not able to cook or walk the dog. He could not exercise but only stretch, and this was difficult for someone who was used to being active.

The Appellant said that his most severe injury was headaches, which caused him to not be able to sleep and rest. He still has headaches, and requires an orthopedic pillow to sleep. In addition, his shoulder and shoulder blade were injured, and still hurt him to this day. He also injured his neck, and couldn't move it to the left for many months. He was also dizzy, which caused him problems with walking on uneven ground, and also had pain in his low back. All of this pain has persisted since that day, and although he did see some improvement from physiotherapy, acupuncture and chiropractic treatment, nevertheless he still has pain all the time and has lived by taking pain killers and having faith that he would get better.

He also had some mental health issues after the MVA. He was diagnosed with depression in June or July 2017, and it got really bad in 2018. He started having issues financially and even issues in his relationship. He was spending a full day at work and then going for physiotherapy or chiropractic treatment, and he began to feel very alone and unsupported by MPIC. He was exhausted and not able to sleep very well, and he also started to get really bad headaches in 2017.

Actions of MPIC

The Appellant felt that he was not supported by MPIC, and in fact felt that MPIC discriminated against him. While acknowledging that MPIC funded physiotherapy, athletic therapy and chiropractic treatment, he said that MPIC did not advise him regarding seeking out a family doctor. MPIC did not arrange any medical examinations for him and did not provide him with any guidance; they just told him how many treatments he was entitled to. He is a safety rep at his workplace, and he is familiar with [text deleted] legislation, and therefore he knew he should work

light duties after the MVA. However, MPIC did not arrange for a job demands analysis, a percentage of duties assessment or a functional capacity evaluation. He felt that MPIC did not "do their due diligence" for him, and that this impacted his medical care. For example, if he had been advised to get a family doctor right after the MVA, that person could have guided his treatment. He thought the case manager from MPIC was supposed to guide his treatment, but that didn't happen. The case manager asked him in late 2017 to provide documentation regarding the time that he missed from work. He said he did send it to MPIC at the end of 2017, but MPIC said they never received it.

Duties of Employment

The Appellant was brought to [country #1] in 2013 by his employer, [text deleted], through a contract. He is still with that same employer to this day.

The Appellant discussed his job duties. His profession is a skilled carpenter and a supervisor with [employer]. His primary role is as a skilled carpenter, and on a temporary basis, he will get assigned to be a supervisor on projects from time to time. In 2016, he was assigned to be a supervisor on a project for [company], which was a year-long project, the longest project he had worked on as a supervisor. He is also a safety representative with [employer] and a right hand lead. As a skilled carpenter, his duties are heavy demand. They build the beams and walls for multiple story commercial buildings, working with steel forms and concrete, using heavy equipment such as jackhammers. It is physically demanding, involving lifting, carrying, pulling, cutting steel, chipping, and the use of a harness and scaffolding in awkward situations. It takes place at heights and requires focus and training. The Appellant noted that the average weight for lifting, carrying and pulling is not more than 45 pounds according to the legislation, but they always lift more in

typical construction jobs. The position of supervisor involves more mental work, arranging for material, making phone calls, writing emails, and supervising the work of others.

The Appellant tried to estimate the percentage of his daily work duties which required heavy strength demands when working as a skilled carpenter. He found it difficult to estimate this, saying that it depended on the day and the task. After some thought, and first estimating 25% and then 50%, he settled on 40% as the percentage of daily work duties that are heavy strength demand in the skilled carpenter role. The Appellant said there is a 10% heavy strength demand involved in his supervisory role. The Appellant said that as a skilled carpenter, if he needed to perform light duties, he would perform the duties that are usually performed by a labourer, such as cleaning, using a broom, and getting things for other people. The supervisor role is considered to be a light duty role; there is generally no lifting involved in that role.

He said that at [employer], the work schedule is not seasonal, and they generally work 365 days a year. During the summer, they often work 9 to 12 hours daily, and in fact work never stops except during the Christmas holidays, even during COVID-19. As a supervisor, he would even work on Sundays. During the summer, they average 80 hours biweekly. During the winter, their average hours are between 75 to 80 hours biweekly, although they may shut down for a day if it's -35°.

Ability to Perform Duties of Employment

When the Appellant arrived in [country #1] in 2013, he applied to become a permanent resident. He said that after the MVA, because he was employed under contract, until his permanent residency came through he couldn't stop working and couldn't change employers, or he would risk being deported. Luckily, his employer was able to change his duties and he worked as a supervisor immediately following the MVA.

The Appellant said that he worked on the [company] project as a supervisor from immediately after the MVA until the fall of 2017. During that time, he would need to take a half-day off work from time to time due to his MVA injuries, but he did not seek IRI benefits, because he had faith that he would get better. When the [company] project finished, he was required to return to his skilled carpenter role, and after one day working in that role, he would be so sore due to his MVA injuries that he would end up missing a half-day of work here and there.

In November or December, 2017, he shifted from full to light duties in the skilled carpenter role, because he couldn't tolerate full duties. Restrictions in the light duty role included: 5 pounds maximum lifting and 5 minutes maximum for tasks with his hands held in front of him. He also had difficulty putting his gear on, and difficulties walking distances on uneven ground.

From November, 2017, to November 2018, especially during the fall and winter months, rather than averaging 80 hours biweekly, he was only able to average 30 to 40 hours biweekly, because he was not able to move easily. He was no longer receiving any treatment funding from MPIC, and that is why he is seeking IRI benefits for that period of time.

Chiropractic Treatment

With respect to the chiropractic treatments that he is seeking, the Appellant said that the sessions that he receive from his chiropractors helped him, but he didn't have the improvements that he felt he was supposed to have after all of those treatments and they were not enough to enable him to fulfil his full-time duties at work. The positive effects of a chiropractic treatment session would generally last for a few days. When MPIC stopped funding his chiropractic treatment, he did have some other coverage which enabled him to go for five treatments a year, but he couldn't afford more. There was a time gap between the end of the MPIC-funded treatments and when the

Appellant paid for chiropractic treatment on his own, and during that gap in treatment, he started to get worse. In addition, during that time period, as he started to get worse, he suffered from depression, which caused him to be very ashamed. He would like to be able to go back and see a chiropractic specialist.

Evidence for MPIC:

Counsel for MPIC did not call any witnesses, but did question the Appellant on cross-examination.

Pre-MVA Condition

Counsel questioned the Appellant regarding his workplace injury, which occurred in January 2016. The Appellant explained that he fell between the walls at a job site. At first, he didn't think it was serious, but on the way home he was not able to move his neck and he called his workplace to report the injury. He went to see a doctor, who advised him to take a few days off work, which he did. He also went to a chiropractor, [text deleted], whose treatment was funded by [text deleted]. The Appellant said that he was satisfied with the treatment that he received from [chiropractor], and he agreed that after completing treatment with her he was no longer reporting the neck and back pain that had been preventing him from working.

MVA Injuries

The Appellant was questioned regarding the circumstances of the MVA. He confirmed that although an ambulance had attended the scene, he declined to be taken to hospital by the ambulance. He said he didn't think he was injured badly enough to attend at the hospital. The airbag hit his face, and he was dizzy, but he did not lose consciousness. He had a friend who was a co-worker come and pick him up and drive him home. While he was waiting for his friend, he

had to lay down. The accident occurred on the Friday of a long weekend. He went to work on the following Tuesday.

Counsel confirmed with the Appellant that after the MVA, he went to see [chiropractor]. When questioned whether he went to see her because of the positive experience he had previously had, the Appellant responded that this was one reason, but said he also went to her because she was the only medical professional he knew. When questioned, the Appellant confirmed that [chiropractor] had correctly reflected his symptoms on her report dated October 17, 2016.

Counsel questioned the Appellant regarding the report of [chiropractor #2] dated February 26, 2018, in which he noted that the Appellant also suffers with depression. The Appellant confirmed that he told [chiropractor #2] that he was feeling depressed. After all of the treatments he had received from medical professionals, and the treatment he had from MPIC, he was struggling financially and he felt very depressed. It was very hard for him to talk about and he said he was ashamed.

The Appellant was questioned regarding a report from [health care provider] dated May 2, 2018. He indicated that he was referred to [health care provider] by his family doctor, a new doctor whom he had recently started seeing. He confirmed that he did not provide to [health care provider] any reports from his other health care providers, or from Health Care Services. He also confirmed that the symptoms that [health care provider] recorded in his report were those that the Appellant reported to him. [Health care provider] recommended trigger point injections, but the Appellant could not afford them.

Duties of Employment

Counsel questioned the Appellant regarding his training. The Appellant said that he was born in [country #3] and studied in [country #4], [country #5] and [country #3]. He attended three years of law school, and picked up his skills as a carpenter in [country #5] and [country #4]. He was sponsored to come to [country #1] in 2013 by [employer]. He confirmed that he is employed by [employer] as a skilled carpenter, who is able to supervise as well. His work there as a supervisor is dependent on the project and how busy the employer is.

In response to questioning, the Appellant confirmed that he started working on the [company] project as a skilled carpenter at the end of August, 2016, and then after the MVA, his employer put him there full-time as a supervisor because he had already been working there on and off prior to the MVA; he was familiar with the project and he was qualified for the role. The Appellant said that he told the general director of the company that he could not do the physical work of a skilled carpenter as a result of the MVA, and they appointed him to be supervisor on the project. He acknowledged that he did not have a letter from a doctor or other health care professional directing that he perform light duties, although he said that his employer did not require a letter because they trusted him. He worked as a supervisor from September, 2016 to the end of 2017. The Appellant said that after the [company] project finished, his physiotherapist did restrict his duties.

Counsel questioned the Appellant regarding his regular hours of work, pointing to a [text deleted] form completed by his employer on January 20, 2016. The Appellant agreed that, as stated in that form, he would typically work 40 hours a week in January. He stated that working hours were shorter in the winter than in the summer. In the winter they could work from 75 to 100 hours biweekly, in the summer it could be up to 100 or 110 hours biweekly. The Appellant also agreed with the statement from his employer in another [text deleted] form dated January 21, 2016, that

hours of work per week vary depending on the workload. Those two forms indicated his hourly wage as $21 per hour. The Appellant agreed that he advised MPIC's case manager on June 16, 2017, that his hourly wage was $21 per hour, and that his hours were 80 to 100 hours every two weeks, with overtime paid only if he passed 100 hours. He also agreed with the details in the Employer's Verification of Earnings form dated December 8, 2017, completed by his employer, which indicated that he had variable hours, averaging 50 hours per week at a rate of $21 per hour, and that he had received overtime pay of $1,634.50 in that calendar year.

When questioned regarding whether his rate of pay was $21 per hour throughout the time period in question, the Appellant said that he did not recall. He noted that he got a raise every year, and his rate of pay is currently $26 per hour, as of four months ago.

The Appellant's counsel questioned him regarding his hours of work on redirect. The Appellant stated that his average biweekly hours are typically 100 in the summer, and 90 in the winter, and he works a minimum of 8 hours a day. He said that the reason he chooses to work for [employer] is because he has steady work and he wants to be secure financially. There is more daylight in the summertime and so the hours are a bit longer, and they only shut down in the winter if the weather is really bad. The work is generally consistent throughout the year and from year to year.

Ability to Perform Employment Duties

Counsel for MPIC questioned the Appellant regarding a note made by the case manager on February 23, 2017, in respect of a phone call from the Appellant advising that he was having a hard time with work lately. The Appellant said that he did not specifically recall the subject matter of that phone call, although he did recall that he had conversations by phone and email with the case manager. Counsel questioned the Appellant as to whether any of his medical professionals

took him off work in February, 2017. The Appellant responded that he did not have a doctor at that time, and he did not believe that a physiotherapist or chiropractor had the authority to take him off work.

The Appellant was questioned regarding his treatment by physiotherapist [text deleted]. Counsel reviewed [physiotherapist]'s discharge report dated June 27, 2017, with the Appellant, who confirmed he was working on that date. The Appellant agreed with the reporting on the form by [physiotherapist], that he could return to work, subject to some conditions, specifically no lifting greater than 40 pounds, no chipping hammer use and limits on repetitive movements. The Appellant also acknowledged that despite these restrictions, he was continuing to work 80 hours per week, as a supervisor. The restriction on heavy lifting did not impact on his employment as a supervisor.

Counsel reviewed [athletic therapist]'s athletic therapy report with the Appellant, dated March 23, 2018. The Appellant confirmed that he saw [athletic therapist] between treatment with [chiropractor] and [chiropractor #2]. When questioned whether he was at work on March 23, 2018, the Appellant said he was at work on and off at that time. The Appellant stated that [athletic therapist] imposed restrictions on his work, indicating in her report that repetitive tasks and heavy lifting above 25 pounds aggravated and worsened his symptoms.

The Appellant was questioned as to whether [chiropractor #2] took him off work. The Appellant reiterated that the physiotherapists and chiropractors do not have the authority to take him off of work; rather, they can just guide him and issue restrictions. On questioning from his own counsel on redirect, the Appellant clarified that his chiropractor and physiotherapist told him that they are

not able to tell him to stay home from work and ask that his company pay him; the only one who could do that is a family doctor or a [text deleted] doctor like in 2016.

Counsel for MPIC questioned the Appellant regarding the log sheets prepared by him and admitted into evidence as part of the Supplemental Documents. The Appellant explained that the log sheets are prepared by the worker, to chart the hours worked on each day over a two-week pay period. A supervisor from [employer] fills out another log sheet, and an administrative person in the office matches the two forms, in order to generate the worker's paycheque.

The Appellant was asked whether the log sheets would reflect the period from December 23, 2016 through to March 31, 2017. The Appellant, on the first day of his cross-examination, was firm in his view that the log sheets related to the period December 23, 2017, through to March 31, 2018, based on the projects and supervisors referred to in the log sheets. If this were the case, these log sheets would relate to the time period in question. In response to questions, the Appellant reviewed the hours listed on various log sheets, and testified regarding how the log sheets related to his claim for IRI benefits. He said that on days where less than eight hours were recorded, he would have gone home sick that day due to his MVA injuries, such as a headache, being really sore, or being unable to sleep the night before, because otherwise he always worked at least eight hours. He would therefore be claiming IRI benefits for the difference between eight hours and the amount of hours recorded on the log sheet for that day. However, the Appellant also noted that without the aid of a calendar, he couldn't be certain, because if the date recorded was a Saturday, there might not be a claim for IRI, because it was not always common to work eight hours on a Saturday. Similarly, the Appellant said that where there were calendar days missing from a two-week period on the log sheet, his claim for IRI would be for the eight hours not recorded for that calendar day. However, again, he couldn't be certain, because he had not compared the dates on the log sheets

to a calendar, and so it was possible that the missing calendar date might be a weekend day or holiday.

Counsel questioned the Appellant regarding calendar days on which no hours were recorded on the log sheet. He queried whether this could be because the Appellant was simply not scheduled for work, rather than that the Appellant was absent due to MVA injuries. The Appellant responded that he works very hard and doesn't take any holidays, and further that construction projects are never finished and he is never out of work.

On the second day of cross-examination, counsel for MPIC, having reviewed a calendar subsequent to the first day of cross-examination, asked the Appellant again to review the log sheets, in an effort to confirm the dates to which they related. The Appellant said that, as on the prior day, he was 80% certain that the log sheets related to December, 2017, through March, 2018, based on the locations identified in the log sheets, with a 20% chance that they related to December, 2016, through March, 2017. When questioned whether it was common to work on the weekend, the Appellant responded that in order to get a paycheque for 100 hours, he would have to work on Saturday. He said that he often works on Saturdays, in the summer and in the winter.

Counsel asked the Appellant whether in 2016 or 2017 he would have worked every Saturday for 8 hours or more. He responded that at that time, he would not have had the energy or power to work every Saturday. If he would have worked on a Saturday, it would have been only for a three or four hour shift. Counsel pointed out that if the log sheets related to December, 2017, through to March, 2018, they would reflect the Appellant working on every Saturday, for shifts of eight hours or more. For example, if the first log sheet was for December, 2017, then it would contain an entry for December 23, 2017, which was a Saturday, and it would show the Appellant working nine

hours on that day. Counsel pointed out that if the log sheets related instead to December, 2016, through to March, 2017, then the first log sheet would contain an entry for December 23, 2016, which was a Friday. The Appellant said that a nine hour shift on a Friday would make much more sense. The Appellant therefore concluded that the log sheets must in fact relate to December, 2016, through to March, 2017, and they therefore do not relate to the period for which he is seeking IRI.

The Appellant was asked whether the pay stubs provided to him by his employer and admitted into evidence as part of the Supplemental Documents relate to the time period which he is seeking IRI benefits, and if not, why they were submitted as evidence. The Appellant said that the pay stubs do show some missing hours, for example the first pay stub reflecting the pay period from March 19, 2017, to April 4, 2017, indicates that he was paid for 50 hours of work, whereas normally he would expect to work 80 hours biweekly. However, he confirmed that he is not seeking IRI benefits for that period of time, because he was receiving treatment at that time and he believed he would get better.

When asked whether he was documenting his missed time from work separately, by keeping a record at home, the Appellant responded that he never had the intention of asking for IRI, because he thought he would get better. Counsel pointed out to the Appellant that on February 23, 2017, he had called MPIC to inquire about IRI, but the Appellant said that he did not recall this.

Counsel questioned the Appellant regarding a note made by the case manager on June 20, 2017, asking the Appellant to send in a list of all the days he had missed from work. The Appellant said that he did not specifically recall that conversation. However, he did recall conversations in November and December, 2017, with his case manager. He said that in December he sent in all of his pay stubs for his missing days to his case manager, and he received a reply that she was on

holidays. In February, 2018, his case manager sent him a response requesting his claim number and indicating that she did not receive any material from him and then his claim was closed. MPIC told him that they did not receive the information he sent.

Chiropractic Treatment

Counsel reviewed with the Appellant the case manager's decision dated January 10, 2018, approving funding for 16 chiropractic treatments following the 42 he had already received with [chiropractor]. The Appellant confirmed that he had received that letter; however, he noted that there had been a delay in receiving MPIC's approval and he had not been happy with his progress with [chiropractor]. He therefore went for athletic therapy with [athletic therapist]. [Athletic therapist] recommended [chiropractor #2] for further chiropractic treatment.

When questioned regarding the statement in [chiropractor #2]'s report dated February 26, 2018, that the Appellant found "no relief" from prior chiropractic treatment, the Appellant responded that it was not that he did not get better from [chiropractor], but rather that he felt that he should have progressed further. He clarified that he had been going for athletic therapy, and they were a little stuck, and the athletic therapist said that he should see a chiropractor. The athletic therapist referred him to [chiropractor #2]. He said that after the first treatment with [chiropractor #2], he saw the difference between his treatment and that of [chiropractor]. The Appellant said it was also convenient to see [chiropractor #2], because his office was in the same location as the athletic therapist. That had been the case when he had been seen [chiropractor], who was in the same location as his physiotherapist. When questioned whether he agreed with the statement that he got "no relief" from [chiropractor], the Appellant responded that he had been without treatment for a few months, so he had not been in great shape prior to seeing [chiropractor #2].

Submission for the Appellant:

Counsel for the Appellant submitted that there are two issues in this appeal: the entitlement of the Appellant to IRI in respect of hours and days missed due to his MVA injuries, and the entitlement of the Appellant to funding for chiropractic treatment beyond Track II Phase 2. Counsel referred to the relevant legislation, which had been discussed at the outset of the hearing. With respect to chiropractic treatment, he also referred to section 138 of the MPIC Act (quoted above), which had not been discussed earlier, but which he argued could form the basis of an alternate means to support the Appellant's entitlement to chiropractic treatment, based on the testimony at the hearing.

IRI Entitlement

It is the Appellant's position that he sustained significant injuries in the MVA, and that there was a profound shift in his level of function after the MVA that persisted for many years, to the extent that he was substantially unable to perform the duties of his employment subsequent to the MVA.

MVA Injuries

Prior to the MVA, the Appellant was fully independent, able to perform all of his work functions, other than a short period of time off work for a [text deleted] injury. He was fully active, very athletic and performing tasks at home. MPIC does not appear to dispute these facts. However, the Appellant sustained significant injuries in the MVA. It is his testimony that the MVA, which occurred at a speed of 50 km/h, caused a profound shift in his function.

Immediately following the MVA, the Appellant reported pain in the left side of his low back, as noted in the ambulance report. That report also notes that C-spine management was undertaken.

The Appellant saw his chiropractor, [chiropractor], on October 17, 2016, who diagnosed him with cervical, cervicothoracic, thoracic, and lumbar subluxations, as well as right lumbar radiculopathy.

Counsel referred to a discharge report from the Appellant's physiotherapist, [text deleted], dated June 27, 2017, which stated that his status at discharge was "much improved until flare up". Counsel pointed out that the report diagnosed the Appellant's condition as cervical radiculopathy and did not indicate that the condition was resolved.

[Chiropractor] provided a further report dated November 3, 2017. In that report, the diagnosis portion was left blank, which counsel noted was pursuant to the instruction "leave blank if unchanged". [Chiropractor] noted that the Appellant's recovery was delayed during a stoppage in treatment while waiting for MPIC's approval.

Counsel referred to the report from [chiropractor #2] dated February 26, 2018, in which he diagnosed the Appellant with occasional moderate to severe cervicalgia, occasional moderate left shoulder pain, intermittent moderate dorsalgia and occasional moderate lumbalgia.

The Appellant saw [health care provider] on May 2, 2018, who diagnosed him with WAD II with cervicogenic headaches. He recommended trigger point injections for the Appellant.

Counsel submitted that as a result of the injuries suffered by the Appellant in the MVA, the Appellant has been suffering from dizziness, headaches, migraines, pain to the left side of his neck, left trapezius, middle of his back and low back, and resulting cervical and lumbar radiculopathy.

Ability to Perform Duties of Employment

As a result of his MVA injuries, the Appellant's pain and objective impairments impacted his ability to function and they limited his ability to perform many of his work tasks, causing him to miss days and hours of work.

Counsel referred to the testimony of the Appellant, that after the MVA he could no longer do the following: lift objects over 5 pounds, push and pull heavy objects, work with objects directly in front of him, work with objects at heights such as on scaffolding, walk on uneven surfaces such as ice or mud, or easily tolerate other tasks required in the essential duties of his pre-MVA employment of a skilled carpenter.

Counsel noted that the report from the Appellant's physiotherapist, [text deleted], dated June 27, 2017, prescribed limitations on the Appellant's duties: no heavy lifting greater than 40 pounds, no chipping hammer use, limit repetitive movements. At that time, he was still working as a supervisor.

He also referred to the report of the athletic therapist, [text deleted], dated March 23, 2018, and to [health care provider]'s May 2, 2018, report. In both of those reports, the Appellant's health care providers noted that his condition would result in an inability to perform required tasks at work.

Counsel noted that the Appellant is seeking IRI for days and hours of missed work from November, 2017 to November, 2018. Based on the testimony of the Appellant and the documentary evidence, his hourly rate during that time period was, at a minimum, $21 per hour. This was not disputed by MPIC. Counsel also noted that the Appellant's evidence was that the average hours typically worked during the summer season were 100 to 110 hours biweekly, while the average hours

typically worked during the winter were 90 to 100 hours biweekly, which he submitted was not a significant difference.

It is the Appellant's position that he suffered a decrease in his income from [employer] subsequent to the MVA, as can be seen from looking at the T4 statements. Counsel submitted that the Commission should infer that the reduction of income as evidenced on the T4 statement establishes the Appellant's absence from work during the time period in issue. Counsel argued that the specific days and hours of missed work are not at the core of the appeal; the fact that hours and days of worked were missed is confirmed by the T4 statements, and the issue of quantifying the days could be referred back to MPIC, by directing the Appellant to provide relevant information to MPIC in this regard.

Counsel argued further that the only explanation for the reduction in income, as evidenced by the T4 statements, is that the Appellant was substantially unable to perform the work duties that he was able to perform at the time of the MVA. As indicated, there was not a significant seasonal fluctuation of workload, and therefore there is no other reason to account for the Appellant's loss of income during the time period in question.

Actions of MPIC

It is the Appellant's position that the Internal Review Decision relating to IRI was issued based on inadequate information and is therefore incorrect, and should be overturned on that basis.

Counsel pointed out that MPIC did not conduct a review of the Appellant's actual job, skilled carpenter. There is no job demands analysis on the file, or an assessment of the percentage of duties that the Appellant was capable of performing. No functional capacity evaluation was done, and

the Appellant was not sent for an independent medical examination. Counsel argued that it is common practice for MPIC to employ one, or several, of these methods to determine if the claimant is able to perform the essential duties of his employment, but none were undertaken in this case.

This may explain why it was so difficult for the Appellant, in his evidence, to make an assessment of the percentage of his job duties which were heavy duties. This assessment is difficult, given the fluid nature of construction work, the various projects which are undertaken and the seasonal demands of the work. This speaks to the necessity of an assessment by a specialist, like an occupational therapist, to determine the percentage of duties the Appellant would have been capable of performing, based on a job demands analysis. Counsel argued that MPIC's failure to determine if the Appellant was able to perform the essential duties of his employment on a full-time basis proves MPIC's failure to do its due diligence, and this resulted in MPIC's error in deciding to deny IRI to the Appellant.

Counsel also argued that the reports of MPIC's Health Care Services ("HCS") physicians were of insufficient scope and therefore not complete. He referred to the report of [MPIC's Health Care Services consultant] dated September 21, 2017, which found that the Appellant's MVA injuries were "Whiplash Associated Disorder (WAD) Type II, cervical and lumbar spine". Counsel noted that [MPIC's Health Care Services consultant] pointed out the following:

> There is a gap in medical information on file between October 17, 2016 and the Therapy Discharge Report of June 27, 2017, although it appears that [the Appellant] attended for 24 sessions with the physiotherapist in this interval;

Counsel argued that any subsequent opinion by [MPIC's Health Care Services consultant] regarding the Appellant's ability to work would be based on incomplete information, given that the "gap in medical information" continued to exist. He further argued that given that no due

diligence was shown by MPIC to investigate the Appellant's specific job duties, what his hours of work were and how these correlated with the Appellant's post-MVA function, [MPIC's Health Care Services consultant]'s opinion should be approached with caution, particularly since [MPIC's Health Care Services consultant] is a family physician and not a specialist, for example an occupational therapist.

During his reply, counsel for the Appellant was questioned by the panel regarding whether the Appellant sought to fill the "gap in medical information", by seeking out further medical reports. Counsel responded that in his view, it is sufficient for the Appellant to point out the shortcomings in the reports of the HCS consultants. Counsel stated further that this would not shift the onus to MPIC. It is part of the Appellant's case to show how MPIC's decision was wrong, and in doing so, to highlight how MPIC did not do their due diligence, in making their determination that the Appellant's MVA injuries prevented him from working. Counsel said: "we cannot be expected to procure our own evidence to support this notion in the positive", for example by obtaining a report from an occupational therapist for that purpose; the only way to look backward is by using the Appellant's testimony and the documents available from the relevant time.

Chiropractic Treatment

Counsel addressed the Appellant's claim for additional chiropractic treatment. He noted that [chiropractor], in her Track II Report dated November 3, 2017, had identified that the Appellant was "progressing very well" and "continuing to improve". He also submitted that in [chiropractor #2]'s report of February 26, 2018, the measurement of the Appellant's range of motion had improved since the measurements noted by [chiropractor] in her report from November 3, 2017.

Counsel addressed the comments made by [chiropractor #2] in his report, that the Appellant "found "no relief" from previous chiropractor […] Patient also suffers w/ depression". He argued that the Appellant's depression could account for his emotional description of the difference between his two experiences of chiropractic care. He noted further that the only comparison the Appellant had of his treatment with [chiropractor] was to no treatment at all, because he had never received treatment from another provider prior to seeing [chiropractor #2]. Counsel submitted that the Appellant's lack of experience and depression explain his description of finding "no relief" from [chiropractor], when that was not the case.

In his reply, counsel for the Appellant clarified that the Appellant is not seeking Track II, Phase 3 chiropractic treatment. He is simply seeking chiropractic care beyond Track II, Phase 2, which he argued was medically required because the Appellant demonstrated improvement over time in the reports found in the documentary evidence. The only time period during which the Appellant did not demonstrate improvement could be attributed to MPIC's delay in funding treatment.

More specifically, counsel said that the Appellant is only seeking funding for one chiropractic examination to be provided for the Appellant by [chiropractor #2], and the Appellant is hoping that [chiropractor #2] may then suggest a course of treatment. At that point, the Appellant would then approach MPIC for funding for the suggested course of treatment.

When questioned by the panel regarding how the issue facing MPIC at that point would differ from the decision that MPIC has already made and that is in front of the panel in this appeal, being whether the Appellant is entitled to further chiropractic care beyond Track II, Phase 2, counsel for the Appellant said that he recognized that it may not be different. Notwithstanding this, the remedy that the Appellant seeks is funding for one additional chiropractic treatment.

Conclusion

The Appellant sustained significant physical and psychological injuries in the MVA. His physical injuries lead to pain in his trapezius and lower back, dizziness, headaches, and cervical and lumbar radiculopathy. His psychological injury was depression. All of these injuries left him with pain and psychological impairments. Despite extensive treatments, the Appellant had difficulties with the duties of his employment. The symptoms continued for several years, impairing his ability to function at work and at home, and affected many aspects of his life, even his relationship.

MPIC did not conduct examinations into his job duties. MPIC did not pursue a job demands analysis, investigate the percentage of duties the Appellant was able to perform, or conduct a functional capacity evaluation. None of the HCS doctors ever spoke to the Appellant with respect to his injuries or their impact on his function.

Conversely, [chiropractor], [athletic therapist], [physiotherapist], [chiropractor #2] and [health care provider] each met with the Appellant, many of them on several occasions, and therefore their opinions should be given greater evidentiary weight than the opinions of the HCS doctors. They had the opportunity to assess the Appellant on several occasions. The presentation of the Appellant before his health care providers was consistent, and no issues of credibility were ever raised.

Counsel submitted that the Appellant has established, on a balance of probabilities, that his ability to perform the duties of his employment was limited by pain and objective impairments related to the MVA. Although the Appellant provided MPIC with information detailing his time missed from work, MPIC lost that information. The Appellant submits that the Commission should allow the appeal, and refer the matter of quantifying the amount of days and hours missed, as well as

payment for that time, back to MPIC. The Appellant also requests that the Commission extend entitlement to chiropractic treatment for the Appellant beyond Track II, Phase 2.

Submission for MPIC:

Counsel for MPIC submitted that the Appellant must satisfy the Commission, on a balance of probabilities, that he is entitled to benefits.

IRI Entitlement

The Appellant is seeking IRI for the period from November, 2017, to November, 2018, for sporadic days. MPIC submits that the Commission must determine the nature of the Appellant's injuries, and then must determine whether those injuries rendered the Appellant entirely or substantially unable to perform the duties of his pre-MVA employment.

MVA Injuries

Counsel referred to the September 21, 2017, report of MPIC's HCS consultant, [text deleted]. As indicated above, [MPIC's Health Care Services consultant] found that the Appellant's MVA related injuries were "Whiplash Associated Disorder (WAD) Type II, cervical and lumbar spine". Counsel noted that in the report, [MPIC's Health Care Services consultant] found that the Appellant's cervical radiculopathy developed some time subsequent to October 17, 2016, and was not related to the MVA. This finding was based on the fact that in [chiropractor]'s October 17, 2016, Track II Report, she did not diagnose the Appellant as having cervical radiculopathy at that time.

[MPIC's Health Care Services consultant] had occasion to review additional medical documentation in his report dated January 9, 2018. He reviewed the ambulance report dated

September 2, 2016, and noted that although the Appellant reported back pain, neck pain was noted to be absent. [MPIC's Health Care Services consultant] also noted that the Appellant declined transport to hospital. Counsel pointed out that in his testimony, the Appellant said that he did not think that his injuries were severe enough to warrant going to the hospital. The additional documents reviewed did not change [MPIC's Health Care Services consultant]'s opinion from September 21, 2017. He further confirmed his September 21, 2017, opinion in his report dated January 24, 2018.

Counsel noted that the Appellant's physiotherapist, [text deleted], in her discharge report dated June 27, 2017, diagnosed the Appellant with cervical radiculopathy. He submitted that this diagnosis came several months after the MVA, and [physiotherapist] did not have the benefit of seeing the reports from [chiropractor] or the ambulance report.

[MPIC's Health Care Services consultant] provided a final report dated April 30, 2018, in which he reviewed additional medical information, including reports from [chiropractor #2] and [athletic therapist], as well as cervical and lumbar spine x-rays taken shortly after the MVA but not provided to MPIC until March, 2018. [MPIC's Health Care Services consultant]'s report provides that:

> My opinion regarding diagnosis is unchanged from previous. WAD Type II cervical and lumbar spine remain the probable compensable injury diagnoses, in my opinion. […]

Counsel noted that [chiropractor #2]'s report dated February 26, 2018, states that "patient also suffers w/ depression". He submitted that it is not clear whether [chiropractor #2] was diagnosing the depression or recording what the Appellant was telling him. The Appellant's testimony was that he told [chiropractor #2] that he was depressed. In the circumstances, it is MPIC's submission

that the Appellant has not presented sufficient evidence to show that he was diagnosed with depression, or that any such diagnosis was connected to the MVA.

Counsel addressed the report of [health care provider] dated May 2, 2018, in which [health care provider] diagnosed the Appellant with "WAD II with cervicogenic headaches". Counsel noted that [health care provider]'s report was provided one and a half years after the MVA, following MPIC's decision to deny IRI benefits to the Appellant. The report identifies symptoms which had not been previously documented in the reports from [chiropractor] or [athletic therapist], such as blurred vision and headaches. It is unclear whether [health care provider] had access to any of their reports, or to the reports from HCS. Counsel submitted that it is unknown whether [health care provider] would maintain his diagnosis if he had access to these reports, and counsel pointed out that [health care provider] was not called to testify.

Counsel submitted that the best assessment of what the Appellant's MVA-related injuries are is the opinion of [MPIC's Health Care Services consultant] from his report dated September 21, 2017, which found that the injuries were WAD Type II, cervical and lumbar spine. MPIC submits that those were the only injuries that were caused by the MVA.

Ability to Perform Duties of Employment

The next issue is whether those injuries prevented the Appellant from completing the essential duties of his employment. Counsel noted that the Appellant returned to work immediately after the MVA, following the long weekend. His claim for IRI arises 14 months later, for the period from November, 2017 to November, 2018.

Counsel noted that the first documentary medical evidence supporting the Appellant's testimony that he was unable to work was the report of [physiotherapist] dated June 27, 2017, which is 299 days after the MVA. Her finding that he was "flared up" and required limitations at work stemmed from her diagnosis of cervical radiculopathy, which was determined by MPIC to be unrelated to the MVA.

In any event, even though the Appellant was limited in his abilities, this did not mean that he was unable to perform his duties at work. Counsel referred to the pay stubs submitted in evidence by the Appellant. There is one pay stub for the same pay period as the report from [physiotherapist], for the period from June 25, 2017, through to July 8, 2017. In that pay period, the Appellant worked 82.5 hours. He was clearly able to work full time, even if he was limited in the duties that he could perform.

Counsel referred to the January 24, 2018, report of [MPIC's Health Care Services consultant], which, after identifying the MVA related diagnoses as noted above, concluded that there was no evidence of objective impairment or risk to the Appellant, and "In the absence of risk or impairment, [the Appellant] appears medically able to return to work, should he choose to do so".

Counsel reviewed the evidence provided by the Appellant to support his absence from work. He referred to the log sheets prepared by the Appellant, noting that in his testimony, the Appellant originally thought the log sheets related to the time period in question, and that they would reflect time that he missed from work, but then, on further questioning, the Appellant realized that it was more likely that the log sheets related to an earlier time period. Counsel noted that the log sheets themselves are incomplete, in that they don't show the year, and there is only one corresponding pay stub submitted by the Appellant as evidence. Counsel argued that regardless of the year to

which they relate, the log sheets provide only a narrow snapshot of a year in the life of the Appellant as a construction worker, and even then, just the winter months.

He also reviewed the evidence addressing whether there was a difference in the Appellant's hours of work between the winter and the summer months. Counsel referred to the seven pay stubs issued by the Appellant's employer which were submitted by the Appellant into evidence. For the pay periods beginning March 19, 2017, through to May 13, 2017, the Appellant's hours ranged from 39 to 51.5 hours. In contrast, for the pay periods beginning May 14, 2017 through to July 8, 2017, the Appellant's hours ranged from 73 to 96 hours. Counsel argued that this suggests that there was a significant discrepancy between the Appellant's hours in the winter and summer months, and the Appellant had testified that when the winter weather was particularly harsh, operations would shut down.

The Appellant did not keep a journal recording his time missed from work. He said that during the time period in question, November, 2017, to November, 2018, he didn't keep a log because he didn't think it was important to do so. He also testified that he was not looking for IRI prior to November, 2017, when he was still working as a supervisor. However, the case manager's file note dated February 23, 2017, indicates that the Appellant called to inquire about IRI. There is another file note from the case manager dated June 16, 2017, in which the case manager noted that she would have his file reviewed for IRI coverage. On June 20, 2017, the case manager made a further note that she called the Appellant. The note indicates that they discussed chiropractic treatment and physiotherapy, as well as IRI. The case manager noted that she had advised the Appellant to make a list of all the days he had missed due to the MVA, in order that causation could be investigated, to determine his entitlement to IRI. Counsel said that as far as MPIC is concerned, the Appellant has not ever provided MPIC with such a list. Further, he produced no

medical leave notes, such as, for example, a note from a doctor whose office he attended after missing a day of work.

The Appellant testified that after the MVA, he agreed with his employer that he would go to light duties, until approximately December, 2017. He said that upon returning to his role as a skilled carpenter in December 2017, that is when he had problems. Counsel argued that his testimony is not consistent with the documentary evidence. Rather, the documentary evidence shows that he was having problems at work earlier, when he contacted the case manager in February and June, 2017. The Appellant also testified that his income was reduced during the period in question due to missing days, but this is also not consistent with the documentary evidence. The documentary evidence, specifically the pay stubs, shows that in the summer months of 2017, at least beginning around the May long weekend, he was working longer hours than during the late winter to spring earlier that year. Therefore his reduced income in 2017 could be due not to missing days, but due to a reduction in the work schedule that year because of winter weather.

Counsel invited the panel to find that the Appellant has not met the onus of proof to show that he had missed any hours of work due to any MVA injuries, because there are too many unanswered questions. He referred further to the T4 statements issued by the Appellant's employer and submitted by the Appellant in support of his inability to work from November, 2017 to November, 2018. These T4 statements show that in 2016, the Appellant's income from [employer] went up slightly as compared to the prior year, and then dropped in 2017, and again slightly in 2018. Counsel argued that the drop in income alone as reflected on the T4 statements does not prove that the Appellant was unable to work due to MVA injuries. The Appellant has not established any significant period of inability to work. Even if he was unable to work for a day, or a few days at a

time, he has not established the reason. It could have possibly been due to the cervical radiculopathy, which was not caused by the MVA, or it could have been due to the weather.

Actions of MPIC

Counsel addressed the Appellant's argument that MPIC should have done more investigation. He argued that the onus is not on MPIC; rather, the onus is on the Appellant in the appeal. It is irrelevant whether or not MPIC's HCS thought it was important to do further investigations.

When questioned by the panel regarding whether MPIC had an obligation to determine the specific duties of the Appellant's employment, counsel for MPIC stated that it is not necessary for MPIC to inquire as to the specific job duties of the Appellant. He noted that [MPIC's Health Care Services consultant]'s comments in his report dated January 24, 2018, that "in the absence of risk or impairment", the Appellant was medically able to return to work, would apply regardless of what the Appellant's duties were. Counsel stated further that if he were wrong in that regard, and there was a positive obligation on the case manager to inquire as to the Appellant's job duties and that was not done, what the Appellant is asking the Commission to do is overturn the Internal Review Decision on the basis that the Decision was wrong because it was made on a lack of evidence. Counsel urged the panel not to do this, because this would have the effect of shifting the burden from the Appellant to MPIC, and it is not up to MPIC to prove the Appellant's case; rather, the onus is on the Appellant to establish that he was substantially unable to perform the duties of his employment. Counsel submitted that the Appellant has failed to do so, and the Internal Review Decision on this issue should be upheld.

Chiropractic Treatment

Counsel addressed the Appellant's claim for additional chiropractic treatment. He noted that the Appellant started his chiropractic treatment with [chiropractor], who he had previously seen following a [text deleted] injury. In her report dated October 17, 2016, [chiropractor] requested Track II treatment, and MPIC approved this. In her report dated November 3, 2017, she requested Track II, Phase 2 treatment, and by decision dated January 10, 2018, MPIC approved this, up to a total of 58 treatments.

Counsel noted that even though MPIC approved Track II, Phase 2 treatment, the documentary evidence shows that the Appellant was not improving with treatment. His numeric pain scores were unchanged from May 8, 2017, to November 13, 2017, and the HCS chiropractic consultant, [text deleted], noted this in his report dated November 28, 2017.

The Appellant then left [chiropractor]'s treatment and switched to [chiropractor #2]. In [chiropractor #2]'s report of February 26, 2018, he indicated that the Appellant found "no relief" from his previous chiropractor. Counsel submitted that the Appellant was "at best polite" when describing his feelings for [chiropractor]. Counsel argued that if the Appellant had felt that [chiropractor] was providing him with the relief he had expected, he would not have changed providers. Counsel also noted that the Appellant's numeric pain scores as indicated on [chiropractor #2]'s February 26, 2018, report were significantly higher than previously reported.

[MPIC's Health Care Services chiropractic consultant], in his report dated April 24, 2018, noted that the Appellant's condition, as reported by [chiropractor #2], had not improved despite a significant number of treatments with [chiropractor]. [MPIC's Health Care Services chiropractic

consultant] stated that: “Additional chiropractic treatment would not be considered medically required”.

Counsel submitted that the Appellant had received coverage from MPIC for 58 chiropractic treatments. His condition did not materially improve. Further treatment would not be medically required and would therefore not be permitted under the PIPP provisions of the MPIC Act. Therefore, the Internal Review Decision on this issue should be upheld.

Conclusion

Counsel therefore submitted that the Appellant’s appeal should be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to:

1. IRI benefits for the period in question, being from November, 2017, to November, 2018; and
2. Additional chiropractic treatment.

Based on the legislation noted above, in order to establish that he is entitled to the above benefits, the onus is on the Appellant to establish, on a balance of probabilities, that:

1. He suffered an injury that was caused by the MVA, which rendered him entirely or substantially unable to perform the essential duties of his pre-MVA employment during the period in question; and
2. Additional chiropractic treatment is medically required.

IRI Entitlement

As noted above, in order to be entitled to IRI benefits, the Appellant must establish that he was substantially unable to perform the duties of his pre-MVA employment due to his MVA injuries. Accordingly, he must establish, on a balance of probabilities:

i) The nature of his MVA injuries;

ii) The duties of his pre-MVA employment; and

iii) That he was substantially unable to perform those duties during the period in question due to his MVA injuries.

MVA Injuries

The parties did not agree as to the nature of the injuries suffered by the Appellant in the MVA. Counsel for MPIC relied upon the report of MPIC's HCS consultant, [text deleted], dated September 21, 2017, which concluded that the Appellant's compensable MVA injuries "would be Whiplash Associated Disorder (WAD) Type II, cervical and lumbar spine". Counsel for the Appellant argued that in addition, the Appellant's MVA injuries included cervical and lumbar radiculopathy, dizziness, headaches and depression.

The Appellant testified regarding his MVA injuries. He said that he had neck, shoulder and back pain, but that his "most severe injury" was headaches. He testified that it was the headaches which caused him not be able to sleep and rest, and also that his dizziness caused him problems with walking on uneven ground. The Appellant also testified regarding his depression. His headaches, dizziness and depression will be discussed below.

The Appellant saw numerous health care providers for treatment, including [chiropractor], [physiotherapist], [chiropractor #2], [athletic therapist], and [health care provider]. There are

reports from each of those providers in the documentary evidence (although none is in narrative form). In their reports, the Appellant's health care providers documented symptoms of neck, shoulder and back pain, and provided related diagnoses.

The first medical report on file following the MVA is [chiropractor]'s Chiropractic Track II Report dated October 17, 2016. She noted that the Appellant's neurologic examination was normal, and provided a diagnosis of cervical, cervicothoracic, thoracic and lumbar subluxations as well as lumbar radiculopathy on the right side. [Chiropractor] provided a further Chiropractic Track II Report dated May 8, 2017, in which she again noted a normal neurologic examination, and in which she did not note a change in diagnosis.

The next medical report from the Appellant's health care providers is a Therapy Discharge Report from [physiotherapist] dated June 27, 2017. Although the Appellant had attended 24 sessions with [physiotherapist], there are no other reports from her in the file. [Physiotherapist] noted neurologic symptoms in the Appellant's left hand and provided a diagnoses of cervical radiculopathy. She also noted work limitations for the Appellant.

[MPIC's Health Care Services consultant], in his September 21, 2017, HCS report, stated as follows:

> Based upon the Track II Report of October 17, 2016, the file reflects that [the Appellant] developed neck pain with radiation into the left trapezius and back pain with radiation into the right lower extremity, with **normal accompanying neurologic examination;** [emphasis in original]
>
> […]
>
> Based upon neck and back symptoms, with limitation in motion but without neurologic impairment, probable compensable diagnoses (despite limitations described above) would be Whiplash Associated Disorder (WAD) Type II, cervical and lumbar spine, in my opinion;

> […]
>
> The June 27, 2016 [2017] Therapy Discharge Report noted **neurologic findings in the left upper extremity leading to a diagnosis of cervical radiculopathy,** which were not present at the time of the chiropractor's Track II Report on October 17, 2016, suggesting that these findings developed sometime after October 17, 2016 (and therefore not in temporal association with the collision). [emphasis in original]
>
> […]
>
> The medical file reflects that findings to support cervical radiculopathy developed sometime following October 17, 2016, refuting the collision as the probable medical cause for the development of cervical radiculopathy. The October 17, 2016 Track II Report reflects absence of focal neurologic findings or impairments which would support cervical radiculopathy as of that time.
>
> Logically, it follows that the current presentation is distinct from the post-collision presentation, and therefore not medically related to the collision.

Subsequent to the September 21, 2017, report of [MPIC's Health Care Services consultant], the Appellant saw [chiropractor] again, and she provided a further Chiropractic Track II Report dated November 3, 2017, in which she again noted a normal neurologic examination, and in which she did not note a change in diagnosis.

In a report dated January 9, 2018, [MPIC's Health Care Services consultant] had occasion to review the medical documentation on the Appellant's file once again, including additional clinical notes from [chiropractor]. He stated that "my opinion and rationale noted in the September 21, 2017 review is unchanged by the new medical information". He further stated, in a report dated January 24, 2018:

> Opinion regarding compensable diagnoses of WAD Type II cervical and lumbar spine, respectively, is unchanged. There is insufficient evidence to relate cervical radiculopathy to the collision; please see September 21, 2017 review.

Subsequent to these reports from [MPIC's Health Care Services consultant], the Appellant was seen by [chiropractor #2], who provided a Chiropractic Track II Report dated February 26, 2018.

He noted that the Appellant's neurologic examination was normal, and provided a diagnosis of left shoulder pain, cervicalgia, dorsalgia and lumbalgia. The Appellant was also seen by [athletic therapist], who provided a Subsequent Therapy Report dated March 23, 2018. In the report, she noted that the Appellant's neurologic examination was normal, and provided a diagnosis of "whiplash aggravating degenerative changes within the cervical spine and hip – accelerating the arthritic changes noted in the radiology report".

[MPIC's Health Care Services consultant] had occasion to review the additional medical reports, including cervical and lumbar spine x-rays taken shortly after the MVA but not provided to MPIC until March 23, 2018, and he provided a report dated April 30, 2018. In that report, he stated as follows:

> My opinion regarding diagnosis is unchanged from previous. WAD Type II cervical and lumbar spine remain the probable compensable injury diagnoses, in my opinion. The new information does not characterize additional current diagnoses. There is insufficient medical evidence to indicate the September 2, 2016 collision caused or altered the natural history of degenerative change of [the Appellant's] cervical spine as noted in the chiropractic x-rays above. The lumbar spine x-rays did not comment upon degenerative hip changes.

The panel finds that [MPIC's Health Care Services consultant], in the preparation of his reports dated September 21, 2017, January 9, 2018, January 24, 2018 and April 30, 2018, had the opportunity to review all of the medical reports, assessments and reports of interventions on the Appellant's file (other than the report of [health care provider], which is discussed below), and was thorough and comprehensive in his analysis. The panel preferred the evidence provided by [MPIC's Health Care Services consultant] to that of [chiropractor], [physiotherapist], [athletic therapist] and [chiropractor #2], none of whom had an opportunity to conduct a review of all of the file material.

The panel accepts evidence of [MPIC's Health Care Services consultant] regarding the MVA-related diagnosis of the Appellant of Whiplash Associated Disorder (WAD) Type II, cervical and lumbar spine, subject to the additional diagnosis of [health care provider] which follows below.

Subsequent to [MPIC's Health Care Services consultant]'s April 30, 2018, report, the Appellant was seen by [health care provider], a Winnipeg anesthesiologist, on May 2, 2018, who provided a Primary Health Care Report dated the same date. In the report, [health care provider] noted that the Appellant's neurologic examination was normal, and he provided a diagnosis of WAD II with cervicogenic headaches. The report documented symptoms of headaches and sleep disturbance (among other symptoms).

The Appellant testified that his most severe injury was headaches. The panel reviewed the documentary evidence and determined that there is additional documentation of the Appellant's headaches contained in Neck Disability Index Questionnaires completed by the Appellant from time to time during the course of his treatment by his health care providers, as follows:

1. A Neck Disability Index Questionnaire signed by the Appellant, which, although undated, bears an MPIC scan date of October 19, 2016. At the appeal hearing, the parties agreed that the MPIC scan date would be the date the document was received by MPIC, so such a document could not have been prepared later than the scan date. In this document, the Appellant indicated: "I have severe headaches which come frequently".
2. A Neck Disability Index Questionnaire signed by the Appellant, dated December 13, 2017. In this document, the Appellant indicated: "I have moderate headaches which come in-frequently".
3. A Neck Disability Index Questionnaire which is not signed by the Appellant, but which bears a scan date of May 2, 2018. It is indicated on [health care provider]'s report of the

> same date that the Neck Disability Index Questionnaire is an enclosure. In this document, the Appellant indicated: “I have severe headaches which come frequently”.

Based on a review of the documentation, it appears that the Appellant was consistently reporting headaches, from shortly after the MVA. The panel accepts the evidence of [health care provider] regarding the MVA-related diagnosis of the Appellant of WAD II with cervicogenic headaches. While we acknowledge that counsel for MPIC disputed this diagnoses, there is no medical evidence to support that challenge, and we are satisfied to accept [health care provider]’s diagnosis.

The Appellant testified that he suffered from dizziness subsequent to the MVA. The panel reviewed the documentary evidence and determined that there is no documentation of dizziness in any of the reports from the Appellant’s health care providers. The panel has considered the lack of documentation of the Appellant’s dizziness, including the fact that the Appellant saw several health care professionals on numerous occasions from September 2, 2016, the date of the MVA, to May 2, 2018, the date of the report from [health care provider], which is the last medical report on file. There are at least seven medical reports from health care providers whom the Appellant visited during that time period. In reviewing those records, it is evident that the Appellant reported his neck, back and shoulder pain, as well as headaches, on several occasions, and these complaints were recorded in the medical documentation, but, as noted, there is no record of dizziness. The panel finds that the Appellant has not established, on a balance of probabilities, that he was diagnosed with dizziness as a consequence of the MVA.

The Appellant testified that he was diagnosed with depression in 2017. He did not submit a report from either a psychologist or a psychiatrist, or any other licenced medical doctor, confirming this diagnosis. The only comment by his health care providers in the documentary evidence which

references the Appellant's depression is a notation in the Chiropractic Track II Report from his chiropractor, [text deleted], dated February 26, 2018, which states "patient also suffers w/ depression". In his testimony, the Appellant said that this is something which he told to [chiropractor #2]. It is not known whether [chiropractor #2] made this observation independently. We find that the Appellant has not established, on a balance of probabilities, that he was diagnosed with depression as a consequence of the MVA.

In summary, based on the evidence of [MPIC's Health Care Services consultant] and [health care provider], the panel finds that the Appellant's MVA injuries were Whiplash Associated Disorder (WAD) Type II, cervical and lumbar spine, and cervicogenic headaches.

Duties of Employment

Having determined the Appellant's MVA injuries, the next step is to determine the essential duties of the Appellant's employment.

(We note that Counsel for the Appellant argued that MPIC had a duty to inquire as to the Appellant's specific employment duties, but did not do so. He submitted that the failure to do so rendered the Internal Review Decision regarding IRI invalid. We will address this argument below.)

The Appellant testified regarding the duties of his employment with [employer], and this testimony was not disputed by MPIC. He testified that his primary role was as a skilled carpenter, and on a temporary basis, he was assigned to be a supervisor on projects from time to time. In 2016, he was assigned to be a supervisor on a project for [company], which he worked on from immediately after the MVA until the fall of 2017. When the [company] project finished, he was required to

return to his skilled carpenter role. In November or December, 2017, he shifted from full duties to light duties in the skilled carpenter role.

As a skilled carpenter, his duties are physically demanding, involving lifting, carrying, pulling, cutting steel, chipping, and the use of a harness and scaffolding in awkward situations. The Appellant noted that the average weight for lifting, carrying and pulling is not more than 45 pounds according to the legislation, but they always lift more in typical construction jobs. The position of supervisor involves more mental work, arranging for material, making phone calls, writing emails, and supervising the work of others.

The Appellant estimated the percentage of his daily work duties which required heavy strength demands when working as a skilled carpenter to be 40%. The Appellant said there is a 10% heavy strength demand involved in his supervisory role.

The panel accepts the Appellant's evidence regarding the essential duties of his employment.

Actions of MPIC

Counsel for the Appellant spent a fair bit of time at the hearing, both in direct examination of the Appellant, and in argument, addressing the question of whether the actions of MPIC impacted the Appellant's entitlement to IRI benefits. It was counsel's argument that MPIC's failure to conduct various investigations resulted in the decision to deny IRI benefits having been made without full information, and therefore that it should be overturned on that basis. In particular, as noted, counsel emphasized that MPIC did not inquire as to the particular duties of the Appellant's employment, nor did MPIC seek out certain medical information.

MPIC does have certain duties and obligations under the MPIC Act. The main provision which deals directly with an Appellant's entitlement to benefits is section 150 of the MPIC Act, which provides as follows:

> **Corporation to advise and assist claimants**
>
> 150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

Here, MPIC did advise and assist the Appellant with respect to his entitlement to benefits, in that subsequent to his MVA, the Appellant received chiropractic treatments, physiotherapy treatments, and athletic therapy treatments funded by MPIC. As we know, at some point MPIC terminated those benefits, and in addition the Appellant sought other benefits, specifically IRI, and that is the reason for this appeal.

When pursuing an appeal at the Commission, the onus is on the Appellant to establish his entitlement to benefits under the MPIC Act, and the burden of proof is a balance of probabilities. Therefore, regardless of whatever actions were or were not taken during the case management phase by MPIC, prior to the termination of benefits, the Appellant is not only free but is encouraged to take further actions to gather and submit additional evidence to the Commission, in order to establish his entitlement to whatever further benefits he is seeking under the MPIC Act.

The issue of the ability of the parties on this appeal to submit additional evidence was raised with the parties at the Case Conference held on January 8, 2020. Although, at that time, the parties indicated that they did not intend to submit further evidence, the panel is of the view that the Appellant had ample time to do so, had he been of the view that there was missing evidence which he felt should be in front of the Commission in his appeal. Again, the onus is on the Appellant to

establish his case. It is not the responsibility of MPIC to produce evidence at the case management stage of the file, with a view to ensuring that certain evidence will be before the Commission on appeal. (We note that MPIC does have an obligation, under section 151 of the MPIC Act, to provide one copy of an Appellant's claim file to the Appellant upon request. The Commission does request that MPIC provide a copy of the claim file, and periodic updates, to the Commission, for the purpose of allowing the Commission to prepare the indexed file, which forms the basis of the documentary evidence in all appeals.)

The question of whether MPIC is required to conduct various investigations is not an issue in this appeal. Even if there were a deficiency in the information gathered by MPIC, and thus considered by the Internal Review Officer, it would not be significant because the Commission, on an appeal, is tasked with making a fresh decision, and is not simply reviewing the prior decision made by the Internal Review Officer. The Commission has the following powers on appeal under the MPIC Act:

> **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.

The Appellant cannot meet the onus upon him, to show that he is entitled to certain benefits, merely by arguing that the Internal Review Decision was not validly or correctly made; rather, there is a positive onus on the Appellant to establish, on a balance of probabilities, that he is entitled to the benefits that he seeks under the MPIC Act, regardless of the earlier decisions made by MPIC. This positive onus can be met through oral testimony and/or documentary evidence. The Commission is empowered to make any decision granting benefits to the Appellant that MPIC could have made.

Ability to Perform Duties of Employment

Having made a determination of the Appellant's MVA injuries, as well as the essential duties of his pre-MVA employment, the next step is to determine whether the Appellant was, as a result of his MVA injuries, substantially unable to perform the duties of his pre-MVA employment.

The Appellant argued that his MVA injuries caused him to be substantially unable to perform his duties at work. Due to this inability to perform his duties, he was forced to miss days and hours of work from time to time. The Appellant seeks IRI benefits for hours and days missed from work during the period from November, 2017, to November, 2018, when he was working as a skilled carpenter. He submitted that his testimony regarding the fact that he missed time from work should be sufficient, and the particulars of which hours and days were missed can be provided to MPIC at a later date. The Appellant argued further that his testimony regarding his inability to perform his employment duties during the period in question is supported by the T4 statements provided by his employer, which show a reduction of income from employment, and by reports from his health care providers, who imposed restrictions on his duties.

MPIC argued that there is no documentary evidence to show that the Appellant missed any hours or days from work during the period in question, and that the Appellant's testimony on this point was unreliable. MPIC further submitted that the T4 statements and medical evidence do not support the Appellant's position.

The panel notes that although the Appellant did testify that he missed hours and days from work during the period in question, there is no documentary evidence in front of the panel to support which hours and days during the period in question the Appellant may have missed. As indicated above, the Appellant had ample time and opportunity to submit evidence to the Commission to

establish the particulars of his missed time from work. The panel has reviewed the Appellant's testimony regarding his missed time from work, as well as the documentary evidence. We find that the Appellant's testimony was inconsistent with the documentary evidence in several respects, as follows:

1. The log sheets: In cross-examination, on an initial review of the log sheets prepared by him, the Appellant was of the firm view that they related to the time period in question and that they therefore reflected days and hours missed from work. In fact, he said that he was 80% certain that they related to the relevant time period, based on the projects and supervisors referred to in the log sheets. However, when his memory was jogged by counsel for MPIC, after reference to a calendar, the Appellant concluded that the log sheets must relate to the prior year, and not to the period for which he is seeking IRI.
2. Seasonal fluctuations in hours of work: The Appellant testified that the reason that he worked for [employer] was that the work was steady, He said that there was no significant seasonal fluctuation in the typical working hours. The Appellant testified that the average hours typically worked during the summer season were 100 to 110 hours biweekly, while the average hours typically worked during the winter were 90 to 100 hours biweekly. However, this is not consistent with the documentary evidence. A review of the pay stubs issued by the Appellant's employer shows that, at least in 2017, from mid-March to mid-May, the Appellant's working hours ranged from 39 to 51.5 hours biweekly, while from mid-May to mid-July, the Appellant's working hours ranged from 73 to 96 hours biweekly. This shows that there could be a significant variation in working hours, and that the Appellant was working longer hours in 2017 during the summer months then he had been during the late winter and spring earlier that year.
3. When he first asked MPIC for IRI: The Appellant testified that although he missed some days and hours from work prior to November, 2017, he was not concerned about that

missed time, because he felt that he was going to get better. He said that it was only when he returned to his role as a skilled carpenter, in November, 2017, that he really began to have difficulty at work, and he felt abandoned by MPIC, that he determined to seek IRI benefits. However, this is not consistent with the documentary evidence. There is a file note from February 23, 2017, in which MPIC's case manager documented: "[claimant] called to inquire about IRI. [Claimant] works in construction and said that he has been having a hard time with work lately." In a subsequent file note, from June 16, 2017, the case manager noted: "[claimant] called to advise that he is in pain and has been unable to work on and off for the last while. […] Advised [claimant] that his file would be transferred to a CM to review for IRI coverage". There is a further file note from June 20, 2017, in which MPIC's case manager advised the Appellant to make a list of all the days he had missed, in order that causation could be investigated to determine his entitlement to IRI:

> […] advised [claimant] to make a list of all the days he has missed, and there will be a causation investigation to see if there is objective medical evidence to preclude [claimant] from working his construction job on days he has advised MVA has affected him.

The Appellant testified that he sent a list of dates to MPIC, but as noted in the case manager's decision dated March 26, 2018: "you were to provide a list of days missed, nothing has been received to date".

Based on the above inconsistencies, the panel finds that the Appellant's evidence with respect to the days and hours that he may have missed from work was unreliable.

The Appellant submitted that the T4 statements provided by his employer show that he missed days and hours from work during the period from November, 2017, to November, 2018. Counsel for the Appellant argued that since the Appellant's rate of pay stayed the same, and since the T4

statements show a reduction in income from employment, therefore that must mean that he was working less. Counsel argued further that if the Appellant was working less, then it must have been due to his MVA injuries. The T4 statements show that the Appellant's income from [employer] was as follows:

- In 2015, $53,400.29;
- In 2016, $56,110.48;
- In 2017, $47,272.08; and
- In 2018, $44,213.57.

It is clear that the Appellant received less employment income from [employer] in 2017 than in 2016, and slightly less again in 2018. The Appellant has asked the Commission to make an inference regarding the reason for the reduction in employment income, specifically that he worked less due to missing days and hours as a result of his MVA injuries. However, that is exactly the matter which the Appellant has the onus to prove in this appeal. The T4 statements, while reflecting a reduction of employment income, on their own, do not establish, the reason for the reduction. While it is possible that the Appellant earned less employment income as a result of an absence due to MVA injuries, it is also possible, as noted above, that the Appellant's income was reduced due to a reduction in scheduled work in 2017 as a result of a particularly harsh winter early in the year, or due to the Appellant taking additional vacation, or due to other, unknown reasons.

The Appellant argued that the reports from his health care providers support his position that he was not able to perform the duties of his employment during the time period in question. There are three medical reports in which the Appellant's health care providers made some remarks in relation to his duties of employment. The first such report is from the Appellant's physiotherapist, [text deleted], who provided a Therapy Discharge Report dated June 27, 2017. In this report, [physiotherapist] noted that the Appellant was currently at work, and that a return to the workplace

would not adversely affect the natural history of his clinical condition. [Physiotherapist] prescribed limitations on the Appellant's duties: no heavy lifting greater than 40 pounds, no chipping hammer use, limit repetitive movements. At that time, the Appellant was still working as a supervisor.

The second report is from the Appellant's athletic therapist, [text deleted], who provided a Subsequent Therapy Report dated March 23, 2018, in which she stated that "repetitive tasks and heavy lifting above 25 lbs aggravates and worsens [the Appellant's] symptoms".

Finally, in [health care provider]'s May 2, 2018, report, he noted that the Appellant was currently at work full time, "but struggling to do regular duties".

[MPIC's Health Care Services consultant] had an opportunity to consider the impact of the Appellant's MVA injuries on his ability to perform the duties of his employment, in his report dated January 24, 2018. After identifying the MVA related diagnoses (as noted above), [MPIC's Health Care Services consultant] stated as follows:

> Objective impairment arising out of these diagnoses is not supported by the information on file. Physical activity would not confer risk to an individual with these diagnoses. In the absence of risk or impairment, [the Appellant] appears medically able to return to work, should he choose to do so.

[MPIC's Health Care Services consultant] stated further in his report dated April 30, 2018, as follows:

> My medical opinion regarding ability to work is unchanged. The file does not indicate that work as a Carpenter would cause medical risk. The file does not indicate that there is objective physical impairment that would limit [the Appellant] from work. Rather, the file reflects that work has been reported to increase [the Appellant's] symptoms; this is an issue of tolerance, which cannot be determined medically.

The panel finds that [MPIC's Health Care Services consultant], in the preparation of his reports dated January 24, 2018 and April 30, 2018, had the opportunity to review all of the medical reports, assessments and reports of interventions on the Appellant's file and was thorough and comprehensive in his analysis. The panel preferred the evidence provided by [MPIC's Health Care Services consultant] to that of the Appellant, whose evidence was inconsistent and unreliable. The panel also preferred the evidence of [MPIC's Health Care Services consultant] to the evidence of [physiotherapist], [athletic therapist], and [health care provider], none of whom had an opportunity to conduct a review of all of the file material.

Further, we note that even if the Appellant was limited in his abilities, this did not mean that he was unable to perform his duties at work. There is one pay stub for the same pay period as the report from [physiotherapist], for the period from June 25, 2017, through to July 8, 2017, when the Appellant was working as a supervisor. In that pay period, the Appellant worked 82.5 hours. He was clearly able to work full time, even if he was limited in the duties that he could perform.

Based on the above, we find that the Appellant has not established, on a balance of probabilities, that he was absent from work during the time period in question; nor has he established, on a balance of probabilities, that even if he were absent, that the reason for any absence was his MVA injuries. We find that the Appellant has not established, on a balance of probabilities, that he was substantially unable to perform the essential duties of his employment during the time period in question. We therefore find that the Appellant is not entitled to IRI benefits for the period from November, 2017, to November, 2018.

Chiropractic Treatment

Based on the legislation noted above, in order to establish that he is entitled to additional chiropractic treatment, the onus is on the Appellant to establish, on a balance of probabilities, that such treatment is medically required. In order to do so, the Appellant must establish that additional chiropractic treatment would advance him towards recovery. This necessarily involves an assessment of whether the treatment received by the Appellant up to the time of the request assisted in that goal. Here, the treatment to be reviewed is the treatment provided to the Appellant by [chiropractor] subsequent to the MVA, up to the request for further treatment by [chiropractor #2] in his report of February 26, 2018.

Counsel for the Appellant argued that the Appellant demonstrated improvement over time with chiropractic treatment from [chiropractor]. Although [chiropractor #2], in his report dated February 26, 2018, stated that the Appellant found "no relief" from his previous chiropractor, it was the Appellant's lack of experience and depression which could explain this description of finding "no relief" from [chiropractor], when that was not the case. MPIC argued that the Appellant's condition did not improve with chiropractic treatment.

The Appellant testified regarding his views of [chiropractor]'s treatment. He said that although he had made some progress with [chiropractor], he was not happy and he did not believe that he had progressed as far as he should have. It was for that reason that he started with athletic therapy, and then went to [chiropractor #2]. He said that after the first treatment, he saw the difference between [chiropractor #2]'s treatment and the treatment that he had received from [chiropractor]. When questioned directly on cross-examination as to whether he found "no relief" from [chiropractor], the Appellant responded only that he had been without treatment for a few months, and so he had not been in great shape prior to seeing [chiropractor #2]. The panel finds that the Appellant's

evidence with regard to the benefit that he received from [chiropractor]'s treatment was, at best, equivocal.

[Chiropractor], in the narrative comments on her reports, made some remarks regarding the Appellant's progress. In her report dated May 8, 2017, she stated:

> […] progress has been steady and improving but due to the physicality of the patient's work duties and prior recent WCB injury in 2016 progress has been delayed. […]

In her report dated November 13, 2017, [chiropractor] stated:

> […] patient was progressing very well. Treatment was stopped while we were waiting for a response by MPI. Continued improvement was halted and therefore has delayed recovery. […] [The Appellant] is continuing to improve.

These remarks could suggest that the Appellant was receiving a benefit from his treatment with [chiropractor]. However, a review of the numeric pain scale ratings and range of motion reporting in those two reports indicates that, in contrast to the narrative comments, the Appellant's neck pain and trapezius pain had not changed at all, and the range of motion of his cervical spine and lumbar spine had changed only marginally.

This lack of improvement was noted by MPIC's HCS chiropractic consultant, [MPIC's Health Care Services chiropractic consultant], in his report dated November 28, 2017:

> It appears that the numeric pain rating scores provided in the May 8, 2017 Chiropractic Track II Report and the November 13, 2017 Chiropractic Track II Report are unchanged for neck pain and trap pain (5/10) […]

We find that [chiropractor]'s reports are not entirely internally consistent, and we would therefore give the narrative comments in them less weight.

As noted above, the Appellant subsequently went to see [chiropractor #2], who provided a report dated February 26, 2018. At the time of the Appellant's assessment by [chiropractor #2], it would appear that he was reporting the same, or even greater, symptoms and pain as when he was assessed by [chiropractor] on November 13, 2017, and as reflected in her report of the same date. A comparison of the symptoms and numeric pain rating scores from those two reports is as follows:

Symptom	[chiropractor] Nov. 13/17	[chiropractor #2] Feb. 26/18
Neck pain	5/10	10/10
Trap pain	5/10	8/10 (left shoulder pain)
Mid back pain	Resolved	7/10
Low back pain	2/10	6/10

A comparison of the reporting of the six measurement of the range of motion of the Appellant's cervical spine between the two reports further shows that although two of the measurements had improved slightly, there was overall no improvement in his range of motion, as one of the measurements had stayed the same, and three had declined. As indicated, in his report [chiropractor #2] stated that the Appellant: "Found "no relief" from previous chiropractor w/ ≈ 32 visits".

[MPIC's Health Care Services chiropractic consultant] had occasion to review [chiropractor #2]'s February 26, 2018, report, and stated as follows in his report of April 24, 2018:

> The claimant's current subjective and objective findings provided by [chiropractor #2] in the most recent Chiropractic Track II Initial Report suggests that the claimant despite a therapeutic number of chiropractic treatments over a therapeutically relevant treatment interval with [chiropractor], has not demonstrated improvement with chiropractic treatment.
>
> Additional chiropractic treatment would not be considered medically required. Track II, Phase 3 chiropractic treatment would not be considered medically required.

The panel finds that [MPIC's Health Care Services chiropractic consultant], in the preparation of his reports dated November 28, 2017, and April 24, 2018, had the opportunity to review all of the chiropractic reports, assessments and reports of interventions on the Appellant's file and was thorough and comprehensive in his analysis. The panel preferred the evidence provided by [MPIC's Health Care Services chiropractic consultant] to that of the Appellant, whose evidence was equivocal. The panel also preferred the evidence of [MPIC's Health Care Services chiropractic consultant] to that of [chiropractor], whose evidence was not consistent and to which we therefore assign less weight. The panel notes that the Appellant's own treating chiropractor, [text deleted], stated that the Appellant found "no relief" from the treatment he received from [chiropractor].

We find that the Appellant has not established that additional chiropractic treatment would advance him towards recovery, and we therefore find that the Appellant has not established, on a balance of probabilities, that additional chiropractic treatment would be medically required. We therefore find that the Appellant has not established, on a balance of probabilities, that he is entitled to additional chiropractic treatment.

We note that counsel for the Appellant advised, during argument, that the Appellant was seeking funding for only one chiropractic examination, and that he intended subsequently to approach MPIC for funding for the suggested course of chiropractic treatment thereafter. While we have found, as indicated above, that the Appellant is not entitled to funding for any further chiropractic treatment, it should be noted that proceeding in this fashion should be discouraged, as it would result in a duplication of proceedings. The question in this appeal is whether the Appellant is entitled to additional chiropractic treatment; that question should not be brought before MPIC again as a result of this appeal.

Conclusion

In summary, after a careful review of all the reports and documentary evidence filed in connection with this appeal and after careful consideration of the testimony of the Appellant and of the submissions of counsel for the Appellant and counsel for MPIC and taking into account the provisions of the relevant legislation, the panel finds as follows:

1. That the Appellant has not met the onus of establishing, on a balance of probabilities, that he was entirely or substantially unable to perform the essential duties of his employment during the relevant period as a result of the MVA. Therefore, he is not entitled to IRI benefits for the period from November, 2017, to November, 2018; and
2. That the Appellant has not met the onus of establishing, on a balance of probabilities, that additional chiropractic treatment would be medically required. Therefore, he is not entitled to additional chiropractic treatment.

Disposition:

Therefore, the Appellant's appeal is dismissed and the two Decisions of the Internal Review Officer, both dated July 12, 2018, are upheld.

Dated at Winnipeg this 24th day of September, 2020.

JACQUELINE FREEDMAN

BRIAN HUNT

PAMELA REILLY