

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF Appeals by [the Appellant]**

**AICAC File Nos.: AC-11-150, AC-12-183, AC-12-192, AC-13-037, AC-13-101**

**PANEL:** Laura Diamond, Chairperson  
Pamela Reilly  
Leona Barrett

**APPEARANCES:** The Appellant, [text deleted], appeared on his behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Andrew Robertson.

**HEARING DATE:** December 16, 2021; December 17, 2021

**ISSUE(S):** AC-11-150:  
Whether the Appellant is entitled to be reimbursed for the following expenses:

- Olopatadine (eye drops) purchase of March 17, 2011
- Knee and elbow brace purchase of April 26, 2011
- Custom foot orthotics purchase of February 15, 2011
- Physician's fee of February 18, 2011 for a letter to your school

\*Note: Initial Chiropractic examination invoice of February 3, 2011 is not an issue before the Commission per CAO representative Nicole Napoleone, February 24, 2012

**AC-12-183:**  
Whether the Appellant is entitled to be reimbursed for the following expenses which were submitted on a Medical and Personal Expenses form dated August 14, 2012:

- Neck support (memory foam pillow) purchased August 13, 2012
- Car rental while in (City) from August 8-13, 2012
- Magic bag purchased June 30, 2012

**AC-12-192:**  
Does the file information support the decision that the

**Appellant is capable of holding the determined employment of a General Office Clerk, pursuant to the Act and Regulations?**

**AC-13-037:**

**Whether the Appellant is entitled to be reimbursed for the following expenses:**

- Sports Tape
- Liver Oil
- Sleep-Eze
- Wake-Up
- Vick's Rub
- Epsom Salts

**AC-13-101:**

**Whether the Appellant's Personal Injury Protection Plan (PIPP) benefits were properly terminated pursuant to Section 160(a) of the Act, and;**

**Whether the Appellant is responsible to reimburse Manitoba Public Insurance (MPI) \$19,502.10 for Income Replacement Indemnity (IRI) benefits as a result of the termination.**

**RELEVANT SECTIONS:** Sections 107, 109, 110(1)(d), 136(1), 160(a) and 189(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 5(a) and 20 of Manitoba Regulation 40/94

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

## **Reasons For Decision**

### Background

The Appellant was injured in a motor vehicle accident (MVA) on April 20, 2005 when the vehicle that he was driving rolled over at highway speed, while travelling on a gravel road. He

suffered multiple injuries, and was hospitalized for approximately 18 days. At the time of the MVA, the Appellant was a high school student, with part-time work.

The Appellant's MVA injuries included: a left posterior cruciate ligament (PCL) tear; cervical fractures at C3/C4; tear of the small and large bowel requiring a temporary colostomy, and blunt trauma to his right eye.

Following his discharge from hospital, the Appellant attended a number of follow-up appointments with various specialists to monitor and treat his numerous injuries. The Appellant's need for a colostomy bag led to psychological difficulties. He also developed abdominal hernias, which caused a noticeable stomach bulge requiring subsequent surgeries.

In November 2005 the colostomy was surgically reversed and the bag removed. In 2006, the Appellant developed a bowel obstruction that required surgical intervention and removal of adhesions. A subsequent hernia repair and abdominal wall reconstruction was performed in February 2008. In June 2009, the Appellant underwent surgery to repair his left knee posterior cruciate ligament. The Appellant underwent a second hernia surgery in August 2012.

MPIC established a multi-disciplinary team of professionals to work with the Appellant to not only manage and treat his injuries, but also assist with career counselling. In December 2005, the Appellant underwent a neuro-psychological assessment, which included ongoing counselling. He also attended rehabilitative physiotherapy and vocational rehabilitation assessments that commenced in early 2006 and continued into 2007.

The Appellant received PIPP medical benefits to support his medical treatment and rehabilitation. After his high school graduation, while he was still working on his physical and psychological recovery, he worked with a vocational counsellor funded by MPIC, to identify occupations which he could undertake, given the significant restrictions he was experiencing as a result of his MVA-related injuries.

In September 2005 MPIC determined that, at the time of the MVA, the Appellant was a student working part-time. MPIC calculated and paid IRI benefits to the Appellant based upon the Industrial Average Wage. However, in July 2010, this decision was overturned by MPIC upon internal review, when it was found that the Appellant should be determined under s. 108 of the MPIC Act, which applied to students.

In October 2012, MPIC assessed the Appellant's residual earning capabilities for employment. Based upon an independent Functional Capacity Evaluation (FCE), MPIC determined the employment category that best reflected the Appellant's post-accident physical and intellectual abilities, was that of General Office Clerk. MPIC subsequently paid IRI benefits based upon this category.

The physiotherapy and vocational rehabilitation professionals noted inconsistent and inexplicable presentation of the Appellant's physical activity as between his physiotherapy and vocational rehabilitation sessions. MPIC referred the Appellant for a multi-disciplinary assessment, which was completed in August 2007. The various professionals continued to note the Appellant's inconsistent observed levels of function, and his inconsistent attendance for treatment.

MPIC placed the Appellant under varying intervals of surveillance commencing in October 2007 and continuing until October 2012. This resulted in 15 separate surveillance reports and numerous videos of the Appellant performing various public activities of daily living.

In 2008, the Appellant commenced study at [university] with an initial goal of entering [text deleted]. However, in 2011, the [university] admitted the Appellant into [text deleted]. In or about the spring of 2012, the Appellant transferred to [university]. The Appellant later moved his studies to [university].

MPIC ultimately discontinued all PIPP benefits based upon surveillance video that MPIC relied upon to find that the Appellant had knowingly provided false or inaccurate information to MPIC. MPIC also determined that PIPP benefits paid to the Appellant in the amount of \$19,502.10 must be reimbursed.

The Appellant subsequently sought reimbursement for numerous medications, which MPIC denied. The Appellant appealed all of these matters to the Commission.

### Issues

Whether the Appellant is entitled to be reimbursed for his medical expenses for Olopatadine (eye drops); knee and elbow brace; custom foot orthotics; and a Physician's fee for a letter.

Whether the Appellant is entitled to be reimbursed his expenses for a memory foam pillow, a car rental, and magic bag.

Whether the file information supports the decision that the Appellant is capable of holding the determined employment of a General Office Clerk, pursuant to the Act and Regulations.

Whether the Appellant is entitled to be reimbursed his expenses for Sports Tape, Liver Oil, Sleep-Eze, Wake-Up, Vick's Rub, and Epsom Salts.

Whether the Appellant's Personal Injury Protection Plan (PIPP) benefits were properly terminated pursuant to s. 160(a) of the Act.

Whether the Appellant is responsible to reimburse Manitoba Public Insurance (MPI) \$19,502.10 for Income Replacement Indemnity (IRI) benefits as a result of the termination.

### Disposition

The Commission finds that MPIC properly applied the Act to deny funding for all of the Appellant's expenses listed above in AC-11-150, AC-12-183, and AC-13-037. These IRDs are upheld and the Appellant's appeals are dismissed.

The Commission finds that the evidence supports MPIC's determination that the Appellant was capable of holding employment as a General Office Clerk. This IRD is upheld and the Appellant's appeal is dismissed.

The Commission finds that the evidence supports termination of the Appellant's PIPP benefits on the basis that he knowingly provided false and misleading information to MPIC contrary to s. 160(a) of the Act. The Commission also finds that the Appellant is therefore required to reimburse MPIC \$19,502.10, pursuant to s. 189(1). The IRD is upheld and the Appellant's appeal is dismissed.

### The Hearing

As a result of the pandemic and safety considerations, the hearing of the appeal was conducted remotely, through video-conference technology.

### Documentary Evidence

The Appellant's testimony and submissions referred extensively to the documentary evidence contained in his Indexed file (the Index). The Index is prepared by the Commission to include relevant documentary evidence on file and is provided to the parties and the panel for reference at the appeal hearing.

The panel has reviewed the Index of documents, which includes numerous MPIC case management and internal review decisions.

The Index also includes:

#### Post-Accident

- Ambulance patient care notes and emergency room hospital notes from the date of the MVA, April 20, 2005.
- Surgical, x-ray, CT scan, MRI and ultra sound reports from the day following the MVA, while the Appellant was being treated in hospital for his injuries.
- Hospital (HSC) records and Discharge reports noting odontoid and cervical fractures, small bowel injury, cervical thoracic orthosis for neck immobilization and right intraocular sub-hyaloid hemorrhage.

#### Orthopaedic

- Orthopaedic reports and letters from [orthopaedic surgeon] diagnosing an MVA-related fracture of the odontoid, C3 facet and C4 endplate compression fracture with good alignment. He recommended treatment for 6 months with physiotherapy when C-spine treatment was completed.
- MRI report of the Appellant's knee showing a complete tear of the posterior cruciate ligament.
- Reports from Orthopaedic surgeon, [text deleted] , regarding surgical treatment and follow up assessments for the Appellant's MVA-related knee injury
- Numerous physiotherapy reports.
- Prescription from [text deleted] to Surgical Elastic Co. for surgical supports and compression stockings and request for authorization and invoices from Surgical Elastic Co.
- MPIC's HCS physiotherapy report from [text deleted] opining that the Appellant did not require further physiotherapy treatment.

#### Ophthalmology

- Ophthalmologist report from [ophthalmologist], diagnosing a small sub-hyaloid hemorrhage along the right supertemporal vascular arcade of the retina, likely related to the MVA, with 20/20 vision and a good prognosis for normal visual acuity.
- Ophthalmology report from [ophthalmologist #2] dated July 18, 2012 noting 20/25+ vision with evidence of a very mild and early macular disturbance that was not a permanent impairment, but which may predispose him to earlier age-related macular degeneration and a more pronounced scotoma as he ages.
- Ophthalmology report from [ophthalmologist #3], noting 20/20 vision but issues with intraocular pressure, which should be monitored.

### Dental

- Dental treatment reports regarding dental injuries, including fractures, sustained in the MVA.

### Psychological

- Psychological reports from [psychologist] addressing the Appellant's difficulty dealing with the sequelae of his injuries. [Psychologist] diagnosed an adjustment disorder with mixed anxiety and depressed mood.
- Neuro-psychological assessment reports from [neuropsychologist]. He reviewed the Appellant's cognitive abilities and issues, as well as physical injuries and diagnosed a post concussion syndrome with symptoms and intermittent depressive ideation. Treatment with behavioral suggestions was recommended and follow up assessments provided.
- Psychological assessment report from [psychologist #2] and [psychologist #3] diagnosing depression and anxiety (with DSM diagnoses) and recommending that his rehabilitation include updated neuropsychological assessment regarding problems of forgetting, finding words and irritability. Cognitive Behaviour Therapy for panic attacks, investigation of sleep patterns and problem solving with supportive therapy regarding educational and vocational pursuits were also recommended.
- MPIC's Health Care Services (HCS) psychological reports from [text deleted]. [MPIC's HCS psychologist] agreed that scarring from the MVA could lead to the Appellant's psychological and intimacy issues and approved psychotherapy treatment for chronic MVA-related psychological issues. He also recommended sending the Appellant for an Independent Psychological Evaluation (IPE).
- Counselling reports from [text deleted], Registered Clinical Counsellor. After reviewing the Appellant's MVA-related complaints of chronic pain, medical issues, anxiety, fatigue, body issues and depression, she assessed the Appellant as struggling with cumulative trauma and recommended Cognitive Behavioural Treatment (CBT) and mindfulness – based stress reduction techniques.  
Blocks of sessions were approved by MPIC and [clinical counsellor] provided progress reports, detailing his struggles with chronic pain and sleep issues. While he was managing his abdominal, back, neck and knee pain, he continued to be anxious about social situations and protective of his abdomen. She noted his hopes of pursuing meaningful work in his chosen field of [text deleted] and opined that it would be psychologically devastating (further major depressions and anxiety) for him to interrupt his hard-won career trajectory to undertake employment as a General Office Clerk.



- Following a review of more recent medical reports from [clinical counsellor] and [university health centre] pain specialist, [text deleted], [MPIC's HCS psychologist] reported again, concluding that the updated medical reports did not change his opinion that the Appellant was not precluded from holding determined employment as a General Office Clerk and that he had provided false or misleading statements to MPIC.

### Medical and Surgical

- Colonoscopy and operative reports from [hospital] regarding the Appellant's MVA-related colostomy treatment.
- Operative report from [surgeon] regarding the Appellant's treatment for bowel obstruction secondary to adhesions, arising out of the MVA.
- Operative and follow-up reports from surgeon [text deleted] regarding the Appellant's MVA-related hernia repair and abdominal wall reconstruction. He advised that the Appellant was doing well following the surgery but that he expected the Appellant to have a permanent weakness of his abdominal wall and be limited in his lifting ability. He reported regarding subsequent surgeries for scar revision.

### Permanent Impairment

- MPIC's HCS medical consultant, [text deleted] provided a review of a number of Permanent Impairment (PI) benefits to which the Appellant was entitled for various injuries, outside of his dental and psychological injuries.
- PI assessments and reports from PT [text deleted] assessing PI entitlements for multiple injuries including fractures, odontoid fractures, reduced ROM, bowel dysfunction, laparotomy, muscle atrophy, eye impairment, abdominal hernia, scarring deformities, muscle wasting and sensory impairments.

### Family Medicine

- Reports from [text deleted], family doctor with the [medical group], questioning the value of continued physiotherapy, recommending education for the Appellant to get his life on track and noting that the psychological aspects of his problems were now worse than the physical. He reported to recommend further physiotherapy following the Appellant's knee surgery, and to note the Appellant's excessive levels of fatigue, loss of concentration and insomnia, recommending accommodations at school to assist with his studies.  
In a report dated September 19, 2007, [family doctor] agreed with the individual written rehabilitation plan (IWRP) proposed for the Appellant.
- Report from [text deleted], family doctor with the [medical group], supporting the Appellant's need for foot orthotics in 2010 to support his feet and reduce pain and swelling after the MVA. He also reported regarding his complaints of knee pain and surgery, noting that constant pain with work, especially neck and back pain, headaches and nausea prevented him from working currently.
- Clinical notes from [medical group] for the period from March 19, 2009 through May 11, 2012.

### Neurology

- Neurology and nerve conduction study reports from [neurologist] finding no abnormalities in the Appellant's fundi, visual fields, cranial nerves or ocular movement. Nerve conduction studies were also normal and the neurologist concluded that most of his symptoms were musculoskeletal in origin.

### Chiropractic

- Chiropractic chart notes from [chiropractor] detailing examinations and treatment between February 3, 2011 and July 12, 2011.
- MPIC's HCS chiropractic reports from [text deleted] questioning the need for further chiropractic care (given the date of the MVA and significant exposure to physical treatments to date).
- Third party chiropractic report from [chiropractor #2] dated January 29, 2012 noting back complaints and conditions caused by the MVA. Pain reports were reliable with some pain focus out of proportion and short lived benefit from chiropractic treatment. A trial of manual manipulation with rehabilitative active care methods was recommended but prognosis was guarded with potential future additional MVA-related impairment.
- MPIC's HCS chiropractic report from [text deleted] dated March 1, 2012, approving a further trial of 12 weeks of chiropractic care.

### Rehabilitation/Vocational

- Multi-disciplinary assessment report from [rehabilitation consultants].
- Reports from [rehabilitation consultants] and [rehabilitation specialist] in April 2011 advising that the Appellant was able to work at a level of light physical ability, but that repeated work at a medium level was not advisable due to abdominal wall concerns.
- Vocational evaluation, progress and team meeting reports from [text deleted], vocational rehabilitation consultant. These reports reviewed programs designed to address the Appellant's issues with stamina and fatigue and attempts to build his confidence.
- Communications and rehab progress reports from [text deleted], vocational rehabilitation nurse, documenting attempts to prepare the Appellant for employment through a program at the [disability centre]. The reports noted the effects on the Appellant of fatigue and his inconsistent presentation of physical activity. Sleep issues were also addressed. In 2007, [vocational rehabilitation nurse] also participated, along with the Appellant and his case manager, in planning an individualized written rehabilitation plan which set out schedules for education courses, exercise routine, improved sleep goals, with a goal of assessing the feasibility of enrolling in further courses and discuss further vocational training.
- [University] admission of the Appellant to [faculty], dated June 20, 2011.
- Transferable Skills Analysis from [text deleted] vocational rehabilitation consultant, dated September 2, 2011 concluding that the Appellant was capable of sustaining a light physical ability level through a usual work day.
- Labour Market Reports from [vocational rehabilitation consultant] identifying potential occupations and positions for the Appellant as a weight loss consultant and medical/dental receptionist.

- Rehabilitation Plan dated May 28, 2012 indicating that the Appellant would not assist in identifying alternate employment as he intended to continue school and wished MPIC to continue paying IRI during his schooling.
- HCS medical consultant reports from [MPIC's HCS medical consultant] noting that the Appellant was recovered from his surgeries to the point where he should be in a position to pursue conditioning programs and make education and employment a priority, as his perceived pain surpassed his actual functional deficits.

#### MPIC Surveillance and Level of Function Forms

- Surveillance reports dated October 15, 2007, November 19, 2007, November 23, 2007, January 30, 2008, May 5, 2008, August 28, 2008, December 31, 2009, July 5, 2010, August 6, 2010, August 23, 2010, September 7, 2010, March 28, 2011, July 6, 2012, and October 7, 2012.
- Video taped surveillance was also provided (reviewed below).
- Photographs and social media screenshots depicting the Appellant engaged in various recreational and sports activities (see below for more detail).
- Numerous Claimant's Level of Function Reports completed by the Appellant outlining his symptoms and limitations.
- MPIC's HCS reports from [text deleted]. Following a review of video surveillance and Facebook photos in comparison with the Appellant's self-reported level of function, she concluded that his demonstrated ability was inconsistent with his reports and that he was physically capable of employment at a light to medium demand level as of June 2011.
- Further MPIC's HCS psychological reports from [MPIC's HCS psychologist]. After reviewing surveillance reports and videos of the Appellant's activities, [MPIC's HCS psychologist] concluded that these were not consistent with the Appellant's reported symptoms, dysfunction and presentation. He opined that the Appellant had provided false and misleading information to MPIC regarding his reported symptoms and that he was capable of a reasonable range of employment in the fall of 2008, including employment as a General Office Clerk.

#### University Health

- Reports from [text deleted], pain specialist, of the [university health centre] diagnosing the Appellant as suffering from chronic pain, traumatic brain injury (TBI) and major depressive disorder. He reported on his regular follow-up sessions at the pain clinic every 2 months, recommending a therapeutic animal to help with physical and mental symptoms regarding his chronic illness and suggesting that tinted glasses might help with his migraines.
- Letter from Student Aid [university] approving the Appellant's permanent disability status.
- Letter from [university] regarding accommodations provided for the Appellant in writing of his examinations.
- Report from [text deleted], [university health centre], dated November 13, 2014 finding that the Appellant suffered from chronic pain post-MVA and referring him to the pain clinic.
- Discharge prescription from [text deleted], [hospital], with recommended work and study accommodations of frequent small meals and a modified dental chair.

- Letters from [text deleted], [rehabilitation centre], recommending adaptations to the Appellant's dental chair following a work evaluation.
- [Hospital] documentation regarding treatment for abdominal pain and gallstones, dated January, 25, 2021.

### Surveillance Videos and Social Media

MPIC Counsel shared on screen, and questioned the Appellant, about select portions of video surveillance, as follows:

- Video dated June 24, 2012 from 7:07 p.m. until 7:16 p.m. showing the Appellant playing center position in an adult male hockey league. Appellant is skating, bending, twisting, accelerating, stick handling, turning his head, and climbing over the boards all without apparent pain behaviours;
- Video dated July 3, 2012 at 8:15 p.m. showing the Appellant walking at a steady and normal gait, carrying his hockey stick and his hockey equipment bag containing all of the Appellant's hockey equipment including hockey pads, helmet, hockey pants and gloves;
- Video dated October 2, 2012 from 11:03 p.m. to 11:44 p.m. showing the Appellant playing left wing position in an adult male hockey league, which shows the Appellant skating, accelerating, falling and immediately rising, spinning, and physically shoulder checking and pushing an opposing player;
- Video dated June 30, 2010 showing the Appellant walking with a knee brace, walking with crutches, then walking without crutches and later bending/crouching down in position to lay on the ground, and work under his car, then rising without apparent pain behaviour;

- Video dated July 30, 2010 showing the Appellant at a Blood Donor drive, walking and standing without a knee brace, stepping, reaching, catching, throwing and bending while playing Frisbee;
- Video dated August 21, 2010 showing the Appellant operating a motorcycle, seated in a bent forward position, turning his head to check for traffic.

MPIC Counsel shared on screen, and questioned the Appellant, about photos that the Appellant had posted on his Facebook page in 2011 and 2012. The specific photos were as follows:

- Four photos showing the Appellant in a zip line harness, in a sitting, as well as a face down position, at various stages along a zip line in [text deleted], in June 2011;
- Two photos showing the Appellant as a passenger on what appears to be a sail boat holding the rigging with his right hand, straddling the side and leaning into the water, with his left leg and left hand held in the water creating a wake, in [text deleted], in June 2011;
- One photo of the Appellant, positioned face down on a surfboard, supported upward on both arms, surfing a wave in [text deleted], in June 2011; One photo of the Appellant with a two-handed overhead handhold of a surf board balanced on his head;
- Two photos of the Appellant: 1) holding a ‘mud-board’ (with foot straps) in his right hand with left hand placed on the leg of an adult female sitting on his shoulders; and 2) holding a ‘mud-board’ (with foot straps) in two hands while balancing an adult female on his shoulders;
- Photo of the Appellant at the top of a hill in [text deleted], sitting on the ground, with his knees bent, his right foot attached to the front strap and his left foot attached to the back strap of the board, prior to ‘mud boarding’ downhill in June 2011;

- Poster photo of the Appellant wearing a matching jersey with other young adults entitled [text deleted];
- Photos of Appellant at various stages of a hike up [mountain] circa 2012(?);
- Slide show of Appellant on a dock holding a fishing net and trap, twisting and hurling the net and trap into the ocean, “crab fishing”, September 2012.

## **Testimony**

### **Direct Evidence of the Appellant**

The Appellant referred to the indexed documentation throughout his testimony. He noted that these documents showed that he was being proactive in training and that his symptoms and injuries are quite severe.

He referred to his stomach, knee, left flank and side injuries, his neck injury and fractures, cognitive difficulties, and his psychological injuries, including sleep and fatigue problems, and chronic headaches. He also addressed his need for a colostomy, with stomach issues and difficulty eating.

The Appellant explained that some of his problems were psycho-social and that, as an aboriginal person, he tries to have a holistic view of health, which includes daily activities and exercise such as hockey. He couldn't even skate until after his surgery in December 2012. His surgeon, [text deleted] was very impressed with his efforts to keep skating. The Appellant described it as part of his mind over matter cognitive therapy. He agreed with his counsellor, [text deleted], that he was determined and compliant. By skating, he was trying to move on with his life and get beyond the depression, in spite of his pain.

The Appellant explained that prior to the MVA it had been his dream to attend school for [text deleted] training. As a result of his MVA injuries, he could not do so and this caused him a great deal of pain and disappointment. This is why the job determination process by MPIC was so important to him.

He explained that his long list of injuries led to the later identification of his chronic pain condition. He had many surgeries and hospitalizations. He was depressed, with suicidal ideation and tired all the time. He had difficulty coping with the effects of his head injury and sexual dysfunction related to the embarrassment of his scars as well as with having a colostomy bag. These injuries, along with the diagnosed adjustment disorder and depressed mood have had a permanent lifelong effect on him. His symptoms are serious and consistently reported and he has not misrepresented his injuries for financial gain.

The Appellant described his abdominal surgery and the “unimaginable” price of living with his injuries and their sporadic symptoms. He described it as a lifetime painful condition.

He explained that his recovery had been set back many times while surgery interrupted and postponed his schooling.

In spite of his constant pain and difficulties, he attended university. Some accommodations for his injuries and condition were necessary. He described his vocational plans as crucial to his well-being but ignored by MPIC. The vocational consultants even ignored his doctor’s recommendations. But to him, having a clear goal of studying [text deleted] was good for his recovery. He disagreed with MPIC trying to determine him as a General Office Clerk or bus driver, as he felt it was very important for him to have a career. He is a very highly motivated

intelligent individual for which a job is going to be important for minimizing symptoms. A suggested dispatcher job would also have been inappropriate. It would have been devastating to him to work in these jobs.

The Appellant described his stomach symptoms and gallbladder problems as gruelling and significant. He tried to push through the pain in his rehabilitation program. He needed heat to help with the abdominal pain which led to his request for a magic bag, but this request was denied.

The Appellant noted that he had several different case managers with MPIC, which showed a lack of continuity of care. He had many different case managers who took a while to get up to speed. They never became aware or made themselves familiar with his file. Mistakes were made in his complex case. These problems led to “not a good relationship” with his case managers.

The Appellant described his poor sleep and how important sleep was to managing his pain symptoms. He was denied further physiotherapy which had been recommended by [family doctor #2], which shows that MPIC did not want to help him as a claimant.

The Appellant also expressed concern about his experience during the PI assessment, which was conducted by [text deleted] in a washroom at MPIC’s [text deleted] offices. He was asked to strip down to his underwear, photos were taken and he found it to be very embarrassing and horrifying, describing it as a very unpleasant, traumatic experience.



The Appellant described the many accommodations he was provided during his university schooling, such as parking and help with examinations, as a result of his permanent disability. He also required adaptations to his [text deleted]'s chair.

During his time at university, he attended a prestigious pain clinic at [university] to help with his pain and permanent disability. He described his ongoing issues with chronic pain, pain levels and depression at that time.

The Appellant explained that he is working as a [text deleted]. He had previously worked in [text deleted] in this capacity, but was reluctant to give information about where he is working now, as he was concerned that he might be targeted by MPIC's investigators once again. He did not indicate whether he was working full time.

The Appellant also described his recent experience with severe pain from a gallstone attack in November of 2021, resulting in emergency surgery, and the medication he takes for that.

#### Cross-Examination of the Appellant

The cross-examination of the Appellant encompassed both a review of the documents in the Index and a review of photographs and videotaped surveillance depicting his activities.

The Appellant was asked a number of questions about his participation in hockey games. Although he was not sure of specific dates or where he played, he did agree that the surveillance videos show him playing hockey in [text deleted]. He did not know or remember whether he had ever played pickup games outside of that league, how long a typical game lasted, how long his

shift was, or what position he played. He did recall that this was a no contact league for adults and that he did not advise MPIC that he was playing in a hockey league.

The Appellant did not recall whether he advised his counsellor, [text deleted], that he was playing hockey. He was asked about his comment, as reported by her, that each day was a constant search for relief from pain and that he wanted to participate in dance but was very protective of and anxious about his abdomen. He recalled telling her that his life was very sad and that he could not do much besides school, spending most of his time in bed reading, while occasionally walking around and doing neck stretches.

He said that he did not mention his participation in hockey games to his case manager because it never came up. This had been the case manager who was very rude, aggressive and abrupt to him and he had a lot of negative memories about the washroom incident when he was assessed for his PI. She never apologized for this so he did not mention to her that during his “downtime” he played hockey. He said that during his downtime he rested and hockey was not something he did in downtime.

He did not know if he told any of his other healthcare providers that he was playing hockey, although he noted that he told this to [chiropractor #2], before he moved to [text deleted]. He said that he did not know whether he had ever asked [surgeon #2] or any other health care provider if he could play hockey.

When viewing the video of him skating in hockey games, the Appellant did not agree that he didn't have any difficulty skating. He explained that but for the MVA, he would have been a much better hockey player and he knows that he played while in quite a bit of pain.

When asked about his indication on his level of function reports that he was limited to 30 to 60 minutes of walking and standing and how he could then play hockey, he explained that the limitation was pain after 30 to 60 minutes. He explained that he was still suffering from ankle weakness and instability when skating and but for the MVA and his muscle wasting, he would be a much better hockey player. The twisting movements while making sharp turns on the ice caused him pain. He had trouble spinning around, as shown in the videos, because of his balance problems.

When asked about video showing him in front of the net, elbowing and physically engaged with another player, the Appellant indicated that he couldn't recall whether this was unusual, but that such physical back and forth was not typical for him. Although he is seen in the video pushing and pulling, he indicated that he was allowed to push around 7-10 pounds, within his restrictions.

When asked how he was able to play hockey, the Appellant indicated that hockey has been a part of his life for the whole period of time. It was part of his rehabilitation plan to return to his activities as best as he could, when told to work through the pain. Due to his social isolation, he chose to return to hockey to do the best he could in hopes that it would get him out of the house. How he was able to lace up his skates and get out on the ice probably speaks to the exceptionalism that his doctors have mentioned about him.

The Appellant was also asked why his level of function forms reported that he was unable to run. The Appellant indicated that he can't run without pain and his hernia bulging out. He also explained that the level of function forms were filled out on bad days and that he has good days and bad days.

The Appellant was asked about photos from his Facebook account showing him in [text deleted] zip lining, and of him sailing and hanging off the side of a boat, surfing, posing with a woman sitting on his shoulders, and mud boarding down a hill. He could not recall if he had signed liability waivers to participate in these activities. When asked how he could surf and mud-board with the limited ability to bend and tight stomach muscles he had reported in his level of function forms, he said that he did so with an incredible amount of pain. He was asked how he could bend low to mud-board when his forms had indicated he could not squat, and how he was able to lift a woman on his shoulders and over his head when he said he was limited to lifting 5-10 pounds. He said that with an incredible amount of pain he was able to do so.

The Appellant was asked about participating in a 2012 [charity run] in [text deleted] and agreed that the certificate of completion showed that he had completed the 10K run in 53 minutes, but did not agree that this was an impressive time. He said that he trained for the run by taking part in a progressive walking program with “aboriginal leaders” in the community and decided that running would be the best way to treat his anxiety and depression. He found it liberating but paid the price the next day “beyond imagination”, as he was crippled for the next week and could barely walk up stairs. He did not know if he told MPIC that he was running, as he did not know if it came up, but that if he had been asked he would have been forthcoming. Nor did he recall if he had told [clinical counsellor] or any other doctors.

The Appellant also agreed that he had participated in the basketball leagues shown in team photos, but said that he could not play and just sat on the sidelines and worked the scoreboard.

He recognized himself in several photos of him hiking the [text deleted] trail, agreeing that this trail was 2.9 Km, with a 2800 feet gain up the mountain and 238 stairs. He said that he was able

to do this in spite of the reported limitations on his forms, with a significant amount of effort and with pain.

The Appellant also acknowledged pictures of him throwing a crab fishing trap. When asked if he posted the slide show to his Facebook page, the Appellant said, "I don't recall."

He confirmed that he had taken a full course load at [university], with exam accommodations. He did not agree that if he could handle a complete course load that he could perform the duties of a General Office Clerk. When asked about [family doctor #2]'s report that he could not work, he said she must have been referring to the occupational definition of work and not to school. His understanding was that his employment would have to be one that would not cause further symptoms. Due to the huge amount of meaning that one derives from their employment, being an office clerk would really exacerbate his pain and cause him harm.

The Appellant was asked why some videos showed him using crutches while in others he did not use them, and how he appeared to be working under a car when his forms said he could not bend, or get low and that he had to wear knee and abdominal braces. He said that he was wearing the braces and that in times of crisis, like automotive troubles, one must do something, with a certain amount of pain. But in video of him playing Frisbee he was not wearing a brace because he feared it emphasized his handicap and made him anxious, particularly around young females. And it didn't mean that he could go home and come back and do such things the next day; he paid a great price of pain for doing them.

The Appellant confirmed that he did go water skiing with a friend even though he needed crutches, because he is still breathing and not in the grave yet. Although he had anxiety he

decided to try to do activities. He also confirmed that he had owned a motorcycle and rode it, although not as often as he would have but for the MVA. Although his forms indicated that he could only sit for 15-30 minutes and needed back support, he wore his abdominal binder when riding the motorcycle and felt pain.

## **Submissions**

### **Submission for the Appellant**

In his submission, the Appellant addressed the issues of whether or not an employment determination of General Office Clerk was appropriate and whether misleading information had been provided to MPIC.

He submitted that work as a General Office Clerk should not have even been an issue. After he was steered away from his original goal in [text deleted], MPIC made clear to him that his future occupational trajectory would include attending university, with accommodations. He submitted that the onus should be on them to show why they changed from the university track to General Office Clerk.

The Appellant submitted that not pursuing his university goals would have huge effect on him and cause damage. His psychologist indicated that this would be devastating to his health, by causing a deterioration of his mental health. It would have also led to a deterioration of his pain perception.

The Appellant also addressed the allegations that he had provided misleading information on his level of function reporting forms. His testimony had laid out all of the injuries sustained to each body part and objectively validated any reported symptoms which were listed on these level of

function forms. His doctors' reports indicated that there would be exacerbations of his chronic pain at times and that this was also connected to his mental status. [Pain specialist] noted that the two play off one another and that the amount of physical pain affects the mental state.

The Appellant submitted that there were objective diagnoses of his function and that when he filled out the level of function forms they were as accurate as he could be, even though it was difficult to express his pain since he has it all the time. He was treated for severe pain with medication such as opioids, which also caused dizziness. A diagnosis of traumatic brain injury also contributed to his dizziness. In addition, he suffered from pain in his eye related to scarring of the retina.

The Appellant also noted that he had been diagnosed with gallstones which caused severe pain. Taking food into his body would cause mild to moderate pain and he reported this on his level of function forms as well. He also reported sleep problems which exacerbated the perception of pain.

The Appellant submitted that the rapid succession of case managers led to many misunderstandings regarding his medications and his recovery from surgeries. They were not thorough with his case and it affected how he was treated. He described his relationship with some case managers as being in a very hostile environment.

He submitted that the PI assessment at [text deleted] was a very damaging event. His case managers should have known about his body issues because [psychologist] had reported about that. He was very uncomfortable and found the incident dehumanizing.

The Appellant submitted that the video surveillance consisted only of snippets of his life taken in a way predisposed to invalidate his reported symptoms. The reported symptoms had been validated by many doctors. The snippets of his life did not show the hard times and had been cherry picked to make an argument that he provided misleading information. They did not show the times when he was laying in bed or laying over a yoga ball with ice packs, medication, breathing exercises, elbow braces, abdominal binders and crutches.

The Appellant submitted that as an aboriginal person he viewed health in different ways than the way a non aboriginal person can view it. This helps to explain MPIC's interpretation and limited view of his forms. Pain is a limitation and he was viewing his life through that lens when filling out the forms.

He emphasized that his symptoms of pain with movement all the time had been referred for proper investigation at the pain clinic, resulting in a proper diagnosis of chronic pain. Therefore, he doesn't know any other way he could have filled out the level of function forms. His injuries continued to give him symptoms and that has not changed.

The Appellant submitted that he would have gone into [text deleted] school much earlier had his symptoms and surgical treatments not interrupted this. He would now be in less debt because he would have been able to work. This speaks to the seriousness of his symptoms, which delayed his education.

He submitted that his body issues have not gone away and he is still very anxious, but with cognitive behavioural techniques and a therapy dog he is able to get on with his life by employing coping mechanisms every day.



The Appellant submitted that the MVA ended his hockey career. The videos showed him hunched over and he knows that he had pain, along with stiffness during those games. But for his injuries, he submitted, he would be a much better player. But he plays to maximum effort in order to minimize his pain and his social isolation.

The Appellant submitted that on a balance of probabilities, the appeals should be upheld. He submitted that there was no financial gain to him to obtain benefits. As a [text deleted], it makes no sense for him to seek IRI at average industrial wage levels. His doctors had recognized and reported that he is resilient and exceptional but that his case was hugely complex. An aboriginal person with disabilities and chronic pain who has obtained 3 degrees is a unique individual and that uniqueness must be taken into account in the Commission's decision.

#### Submission for MPIC

MPIC Counsel began by acknowledging that the Appellant suffered serious injuries in the MVA. Nonetheless, the Appellant's testimony and the documentary evidence established that the Appellant provided false or inaccurate information about the nature of his injuries such that MPIC was correct in terminating PIPP benefits.

MPIC counsel grouped and presented his submission in three categories: termination of PIPP benefits pursuant to s.160 (a) of the Act, MPIC's determination of the Appellant's residual capacity as a General Office Clerk, and, the Appellant's claim for expenses.

#### MPIC Act Section 160 (a)

Counsel submitted that the issue is not whether any of the activities in which the Appellant participated were beneficial to him. The issue is whether the information that the Appellant

provided to MPIC was true when compared with the video surveillance and the Appellant's social media photos.

Starting with the earliest video surveillance (2010), Counsel reviewed the corresponding Level of Function (LOF) forms completed by the Appellant and noted the Appellant's stated limitations concerning his right knee (which allegedly required a brace), his inability to turn without pain, his inability to bend without holding something for support, and his inability to twist either left or right.

The June and July 2010 videos depicted the Appellant initially using crutches, but then discarding them after travelling out of the city. The video next showed the Appellant bending and rising from under his vehicle seemingly without support. The Appellant was viewed at the blood drive over the course of 4 ½ hours without crutches or a knee brace and without apparent difficulty walking or playing Frisbee. The Appellant admitted that he went water skiing that weekend, and surveillance video also showed him bent forward and operating a motorcycle.

Counsel conceded that the 2010 videos on their own are not sufficient to establish that the Appellant provided false or inaccurate information to MPIC. Nonetheless, they should be considered in the totality of the evidence and the penalty to be imposed. These are the first examples of the Appellant's observed capabilities in excess of what he reported, and therefore should be considered when determining his overall credibility, and whether or not he provided false information, thereby resulting in the termination of his benefits.

Counsel addressed the Appellant's evidence in which he questioned, 'how was he supposed to complete the LOF forms when he had pain all of the time?' Counsel submitted that the LOF

forms do not ask how long one can perform an activity without pain, they simply ask how long one is able to perform a particular activity. He submitted that the Appellant's written comments on his LOF forms, about which activities hurt when performed, are evidence that the Appellant understood how the LOF forms are intended to be used. They tell MPI what a claimant can and cannot do.

Counsel next commented on scenes from the videos of the three hockey games in which the Appellant participated (June, July and October, 2012) while living in [text deleted]. Counsel submitted that the hockey videos showed the Appellant skating for extended periods of time without apparent difficulty or weakness, twisting his body and turning his neck, and showed the Appellant physically contacting opposing hockey players during play.

This activity must be contrasted with the LOF forms in which the Appellant recorded limitations for walking, standing, bending, twisting, pushing, pulling and dizziness. In particular, the LOF form dated September 21, 2012 stated that he is unable to overhead lift more than 5 lbs. and unable to push, due to his recent hernia surgery. Counsel submitted that the Appellant's testimony (i.e., that his surgeon did not tell him not to perform these activities) does not reasonably explain the discrepancy. Counsel further submitted that the videos of the Appellant playing league hockey are not simply showing "a few good days" but rather, showing a pattern of behaviour.

MPIC Counsel next reviewed the social media photos of the Appellant taken in [text deleted] and [text deleted] in 2011. On the one hand, the Appellant's LOF forms state that he is limited to 15-30 minutes of standing, that his left knee aches all the time, he has limited bending, his tight stomach muscles do not allow him to bend forwards or backwards, he has knee pain that

prevents him from squatting, he has problems with turning his neck, as well as problems twisting, lifting and pushing. However, the photos depict the Appellant harnessed and using a zip line, surfing, mud boarding, and holding a woman on his shoulders. Counsel submitted that these activities are inconsistent with the LOF forms.

Counsel submitted that the Appellant's physical activities in 2012, which included the [charity run] (completed by the Appellant in 53 minutes and which the Appellant admitted took significant physical exertion), and the [mountain] hike, are significant levels of function that are inconsistent with his LOF form dated September 21, 2012.

Similarly, and with reference to the photos of the Appellant crabbing, Counsel submitted that it would take a strong throw by the Appellant to launch the net and trap into the water. The inference being that this effort was inconsistent with the LOF forms.

Counsel submitted that there is a continuity to the information in the LOF forms except when the Appellant was recovering from a surgery. The continuity related to the limited bending, walking, twisting and lifting. However, the various videos show that the Appellant did not in fact experience these difficulties while skating, pushing other players, making quick turns and participating in other physical activities such as mud boarding.

Further, Counsel implied that these activities were inconsistent with the Appellant's evidence as to his limited social life in 2012. Particular examples include the Appellant's advice to his case manager that he was not participating in sporting activities; his counsellor, [text deleted]'s report noting the Appellant's "constant search for relief from pain"; the Appellant's comment to his case manager that "his life is really very sad because he is not able to do much... spends most of

his time in bed... occasionally walks around the block..."; and the third party chiropractic report that records, "He does not participate in sports or jog as he once did."

Finally, on the s. 160(a) issue, Counsel referred to the Health Care Services opinions of Medical Consultant [text deleted]. In both reports, [MPIC's HCS medical consultant] opined that the Appellant's behaviour was not consistent with, and contradicts, the pain concerns set out in [clinical counsellor]'s counselling report. Counsel emphasized that the HCS opinions do not say the Appellant does not have physical or psychological injuries or limitations. The opinions say that those limitations are not what was observed when compared with what was reported to the Appellant's care givers. There is no reasonable explanation other than that the Appellant provided false or misleading information. The Appellant has therefore not discharged his burden, on a balance of probabilities, of showing that the IRD was incorrect in terminating his PIPP benefits.

Counsel noted that s. 160(a) provides for either a suspension or a termination of benefits and submitted that, in this case, termination is the appropriate remedy. He cited two factors in support of this. Firstly, Counsel submitted that it was not simply a 'one time event' in which the Appellant provided false or inaccurate information, but rather a pattern of acts that started in 2010 and continued to the termination letter in April 2013. Secondly, Counsel said that the extent of the discrepancies was relevant. That is, the activities shown in the [text deleted] and [text deleted] photos were so contrary to the LOF forms that termination of benefits was the only reasonable remedy; suspension was not sufficient.

MPIC Counsel next referred to s. 189(1), which states that Appellants who receive indemnity payments from MPIC to which they are not entitled, shall reimburse those amounts. Counsel

submitted that MPIC is seeking reimbursement of benefits paid since July 8, 2012 to the April 24, 2013 termination. He submitted that the July 2012 hockey videos appropriately triggered the reimbursement calculation in the amount of \$19,502.10.

Determined employment as a General Office Clerk

MPIC Counsel noted that a prior decision about the Appellant's Income Replacement Indemnity (IRI) was overturned by the Internal Review Office that directed case management to determine the Appellant's employment pursuant to s. 108. This was done.

In terms of process, MPIC has the power to determine a person into a job that fits their capability. Once the employment is determined, the IRI is then determined accordingly. With specific reference to the Appellant's determined employment of General Office Clerk, Counsel explained that MPIC is not saying that this is the job the Appellant will, or must do forever. It is a determination of what he was capable of doing at the time of the determination. It is within the discretion of the case manager to choose the occupation that appears to be the best fit for the Appellant based upon the information available at the time.

Counsel referred to the FCE which found the Appellant, at the time, was capable of light work, and the Transferable Skills Analysis that documented the Appellant's skills at the time. Five different job options were suggested including the job of General Office Clerk. This was chosen in consideration of the sedentary duties which were appropriate to his then level of function. Numerous labour market studies were completed which led to the conclusion that a determined employment of General Office Clerk best fit the Appellant's apparent physical limitations and educational level. In accordance with the Act s. 109, these are the factors MPIC is required to consider.

Counsel noted that the Appellant has never shown that he was unable to do the job of General Office Clerk. The Appellant's capacity to work was supported by the various medical reports and opinions on file from both the Appellant's care providers and MPIC's Health Care Services. Further, the accommodations about which the Appellant testified would not preclude him from performing the duties of this job.

Finally, Counsel submitted that there appears to be a misunderstanding on the part of the Appellant and on the part of his counsellor, [text deleted], about MPIC's legislative determination process. The Appellant's case manager explained the process to the Appellant during email exchanges in July 2012. The process was further outlined in the HCS report of [MPIC's HCS psychologist] who confirmed the General Office Clerk determination as appropriate. Despite the opinion of the Appellant's counsellor, [text deleted], that the Appellant would be psychologically damaged by this determination, this too seems based upon a misunderstanding of the process.

Counsel submitted that the Appellant had not discharged his burden of showing, on a balance of probabilities, that MPICs determined employment of General Office Clerk for IRI purposes, was incorrect. This appeal should therefore be dismissed.

#### Reimbursement of various medical expenses

MPIC Counsel pointed to the various IRDs which concluded that the Appellant's various expenses were denied on the basis that they were not "medically required." No evidence was submitted to contradict the decisions. Therefore, the Appellant had not discharged his burden of

showing, on a balance of probabilities that the decisions were incorrect. These appeals should therefore be dismissed.

### **Appellant's Reply**

In reply, the Appellant pointed out that the boxes to check on the level of function forms were very limiting. But doctors had confirmed his objective symptoms, which included inflammation signs such as redness, swelling, pain and loss of function.

The surveillance videos showed only MPIC's own subjective interpretation on his forms, he had reported only what he knew and the symptoms which he experienced. He described his hockey league as a regular part of his life, since [chiropractor #2]'s report confirmed that he could not participate in sports and jogging as he once did.

The Appellant reiterated that there was no financial motivation for him to appeal but rather he was here to show his consistent reporting of symptoms and limitations, which continued even after his benefits ceased.

In addition, he noted that science should have been used to find jobs for him which were suited to his intellectual and physical abilities. He was able to study dentistry only through the exam accommodations provided to him by the University, since he couldn't sit for long or stand to take breaks.

The Appellant submitted that he had paid the price for the misunderstanding of his case managers.



## **Discussion**

In arriving at their decisions, the Appellant's case managers and MPIC's IRO relied upon the following provisions of the MPIC Act and Regulations:

### **New determination after second anniversary of accident**

**107** From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

### **Considerations under section 107 or 108**

**109(1)** In determining an employment under section 107 or 108, the corporation shall consider the following: (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination; (b) any knowledge or skill acquired by the victim in a rehabilitation program approved under this Part; (c) the regulations.

### **Type of employment**

**109(2)** An employment determined by the corporation must be

- (a) normally available in the region in which the victim resides; and
- (b) employment that the victim is able to hold on a regular and full-time basis or, where that is not possible, on a part-time basis.

### **Events that end entitlement to I.R.I.**

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

- (d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;

### **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;
- (b) the purchase of prostheses or orthopedic devices;
- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) such other expenses as may be prescribed by regulation.

### **Corporation may refuse or terminate compensation**

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

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

**Corporation to be reimbursed for excess payment**

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

**Regulation 40/94 Reimbursement of Expenses (Universal Bodily Injury Compensation) Regulation**

**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, nurse practitioner, clinical assistant, physician assistant, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician, nurse practitioner, clinical assistant, or physician assistant;

**Expenses beyond 100 km from victim's residence**

**20(1)** Where a victim incurs an expense for travel or accommodation for the purpose of receiving care at a distance of more than 100 km from the victim's residence when the care is available within 100 km of the victim's residence, the corporation shall pay only the expenses for travel or accommodation that would have been incurred by the victim if the care had been received within the 100 km.

The onus is on the Appellant to show, on a balance of probabilities that the IRDs from which he has appealed were in error. The panel has considered the documentary, video and photographic evidence before us, along with the testimony of the Appellant and the submissions of the parties.

Reliability and credibility

In reviewing the Appellant's testimony, the panel considered several factors in making our assessment about credibility and reliability.

These factors involved the Appellant's demeanor, the Appellant's recollection of events, the consistency with which the Appellant recounted events over time, and any corroborating documentary evidence.

The Appellant elected to present his case by essentially reading the numerous documents in the Indexed File. His responses to panel questions were sometimes guarded, which he explained was because of prior surveillance. Nonetheless, the Appellant's responses in cross-examination raised questions about his credibility and reliability.

When questioned in cross-examination about the photo that depicted the Appellant sitting on the ground at the top of a hill, with his feet apparently secured to the board, the Appellant refused to name the activity, stating that it was "an activity where you sit on a board and go down a hill." The Appellant said that he did not know whether a person generally sat or stood, and did not recall if he stood. When the Chair then asked the Appellant what this activity was called, the Appellant responded, "I would call it 'sitting on a board going down a hill'". When the Chair asked him to confirm if that's what he called the activity, the Appellant responded "I don't know". He said that he could not recall the relationship of his feet to the board, while at the same time saying "I went down the hill sitting on my bottom." MPIC Counsel then suggested, for ease of reference, referring to the activity as 'mud boarding', to which the Appellant replied, "I would agree, that's what the company called it as well."

This exchange led the panel to conclude that the Appellant did, in fact, know the name of the activity and how the activity was intended to be performed. The panel also noted that one photo of the Appellant shows him sitting at the top of the hill with the board in a vertical position, attached to his feet. The female in the same photo is beside him but seated on a board. There are also pictures of the Appellant at the bottom of the hill holding a board with obvious foot straps.

The Appellant admitted that he went down the hill, but it is difficult to understand how he sat on the board when, at the top of the hill, his feet were strapped to the board in a front to back orientation.

In response to questions about both the videos and the social media photos, the Appellant responded that he could not recall many events which would typically seem memorable for the average person. For example, when asked what position he played in the men's hockey league, he said he could not recall. When asked if he played weekly or monthly, he said he could not recall. When asked if he played pick up games outside of the league, the Appellant said he did not know. The responses are questionable in light of the Appellant's testimony describing his love of hockey playing and how vital and important it had always been to his emotional well being.

The Appellant became somewhat argumentative when asked what he carried in his hockey equipment bag. The panel found it noteworthy that, given his love and experience with hockey, he did not know or estimate how much his hockey equipment bag would weigh.

The Panel also found it odd that the Appellant could not recall if he posted the slide show of him 'crabbing' to his Facebook page. Considering the Appellant's testimony that he had no friends, it is difficult to imagine who else would have posted the slide show.

Also, while the Appellant explained that he played hockey as a form of rehabilitation, he could not explain why he did not tell his case manager or his various medical care givers that he was playing hockey.

The Appellant could not explain why he told his caregivers that his life was “sad” caused by the fact that he had little social life, despite participating in a number of team and outside physical activities. The Appellant refused to refer to any of his teammates or the individuals in the photos as “friends”.

The above examples represent inconsistent testimony by the Appellant. The panel did not find the inconsistencies to be adequately explained. The Appellant’s testimony appeared at times, evasive, argumentative and at worst, nonsensical. This called into question the Appellant’s willingness to speak the truth (i.e., his credibility) and his ability to observe, recall and recount events (i.e., his reliability). The core issue is whether the Appellant provided false or inaccurate information to MPIC. The panel did not find the Appellant’s testimony to be clear, convincing and cogent on that issue.

### **Termination of IRI pursuant to s 160 of the Act**

In weighing the evidence of the Appellant and our concerns regarding the reliability of that evidence, the panel acknowledges the Appellant’s accomplishments, notably his pursuit of higher level education and qualification as a professional over the course of several years, in the face of severe MVA-related injuries and significant health challenges. These accomplishments speak for themselves and should not be diminished.

Along with the care he received from his doctors, he was provided with support from MPIC in the form of treatment, counselling and IRI benefits and the panel notes that he proceeded with determination, in the face of the initial pain and functional limitations from those early injuries and subsequent surgeries.

But the medical evidence and the surveillance evidence found in the videos and photos does not support his contention that his pain and injuries continued to prevent him from working and functioning on a daily basis. Although he submitted that he has good days and bad days and that the photographic and video evidence may not disclose the pain he experienced, this testimony was compromised by the other evidence before the panel and concerns regarding credibility and reliability. This was not sufficient to meet the onus upon him to show that he did not provide MPIC with false or misleading evidence.

When taken together, the evidence we reviewed and the Appellant's inability to satisfactorily explain the apparent contrast with the information he was providing to MPIC verbally, through his caregivers and in writing (for example in the Level Of Function forms he filled out) the panel finds that, through these communications, the Appellant has violated s. 160 of the MPIC Act.

Accordingly, upon a review of the Appellant's testimony, documentary and visual evidence, and the submissions of the parties, the panel finds that, on a balance of probabilities, the evidence supports MPIC's position that the Appellant knowingly provided false, inaccurate and misleading information to MPIC.

The panel finds the decision of the IRO to uphold the Appellant's termination of benefits, as a result of his fraudulent actions, to be reasonable under the provisions of s. 160 of the Act. The Appellant has not provided sufficient reliable or cogent evidence to meet the onus upon him of showing that this decision was made in error.

The panel has also considered whether a termination of benefits is the appropriate result in the circumstances. The evidence established that, contrary to his assertions and representations, by

June 8, 2012 the Appellant was not disabled by his MVA-related injuries from working on a full time basis, and was capable of holding employment.

Counsel for MPIC submitted that since s. 160 provides for suspension or termination, it can be a question as to whether suspension is an appropriate alternative. However, he submitted that given the duration of the false information (stretching as far back as 2010) and the level of discrepancy between the videos and photographs and the information provided by the Appellant, termination was the only reasonable response.

The panel agrees with this approach, and finds that termination was indeed a reasonable response to the Appellant providing false information in this case. We have concluded that the termination of benefits, including IRI benefits, properly flowed from the Appellant knowingly providing false and inaccurate or misleading information.

Accordingly, the Commission also finds that, pursuant to s. 189(1) of the Act, the Appellant shall reimburse MPIC for the IRI benefits he received after June 8, 2012, to which he was not entitled. This amount has been calculated by MPIC to amount to \$19,502.10.

The IRD which upheld this decision is upheld by the Commission and the Appellant's appeal in this regard is dismissed.

#### **Employment as a General Office Clerk**

The panel agrees with the submissions of counsel for MPIC and the opinions of the various HCS consultants that the Appellant is not prevented, by reason of injuries sustained in the MVA, from performing the duties of a General Office Clerk.

The Appellant did not provide reliable evidence through his own testimony, to establish that he was not able to perform sedentary work. The analysis of the job duties and the Appellant's abilities which were provided by the OTs and experts upon which MPIC relied, established that he had the skills and abilities to perform such employment. Many of the experts who reported opined that he was physically able to perform sedentary employment, and that his MVA-related injuries no longer prevented him from working at a sedentary level.

The video and photographic evidence reviewed by the panel established that the Appellant was able to perform far more challenging physical activities than would be demanded of him as a clerk. Overall, when viewed together, the evidence supported MPIC's position that the Appellant had the residual capacity to perform such employment and the Appellant has not met the onus upon him to establish that MPIC erred in its determination.

The IRD which upheld this determination is upheld by the Commission and the Appellant's appeal in this regard is dismissed.

### **Reimbursement of Expenses**

As a result of dismissing the Appellant's appeal and upholding the termination of his benefits pursuant to s. 160 of the Act, the panel also finds that the Appellant is not entitled to receive the further benefit entitlements and reimbursement he seeks from MPIC in his Notices of Appeal.

The panel did not find it necessary to make separate determinations on each of these issues of compensation and reimbursement. S. 160 provides that MPIC may refuse to pay compensation where a claimant knowingly provides false or inaccurate information.



In addition, and in the alternative, the panel notes that the Appellant did not provide sufficient oral testimony or documentary evidence and medical reports to meet the onus upon him to support his claims that such medical interventions or treatments were necessary as a result of injuries arising out of the MVA or that they were medically required as a result of the MVA.

As a result we also find, in the alternative, that the Appellant has failed to meet the onus upon him, on a balance of probabilities, to establish that the decisions of the IROs erred in upholding the denial of his claims for compensation or reimbursement for:

- Olopatadine (eye drops)
- Knee and elbow brace
- Custom foot orthotics
- Physician's fee of February 18, 2011 for a letter to the Appellant's school
- Neck support (memory foam pillow)
- Car rental
- Magic bag
- Sports Tape
- Liver Oil
- Sleep-Eze
- Wake-Up
- Vick's Rub
- Epsom Salts

The IRDs upholding the denial of reimbursement for these expenses are upheld by the Commission and the Appellant's appeals in this regard are dismissed.

Accordingly, the Commission finds that the Internal Review Decisions from which the Appellant has appealed should be upheld. The Appellant's appeals are hereby dismissed.

Dated at Winnipeg this 10<sup>th</sup> day of May, 2022.

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**LAURA DIAMOND**

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**PAMELA REILLY**

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**LEONA BARRETT**