Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [text deleted]
AICAC File No.: AC-97-43

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C. Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by** **Ms Joan McKelvey** **the Appellant, [text deleted], appeared in person**
HEARING DATE:	**June 5th and June 6th, 1997**
ISSUE(S):	**1. Termination of payment for chiropractic treatments - whether premature;** **2. When had Appellant reached pre-accident status?** **3. Whether Appellant's professional witness entitled to 'appearance fee'; and** **4. Claim for payment of gymnasium or health club dues.**
RELEVANT SECTIONS:	**Section 136 (1) of the M.P.I.C. Act and Sections 5 and 9 of 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

The present appeal relates to a motor vehicle accident in which the Appellant, [the Appellant], was the passenger in a vehicle that was rear-ended on March 8th, 1996. [The Appellant] was then [text deleted] years of age, employed on a casual or part-time basis as a [text deleted] therapist and also a student at [text deleted].

Following her motor vehicle accident of March 8th, 1996 (which, in the interests of simplicity, we shall refer to hereafter as her MVA), [the Appellant] continued to receive chiropractic treatments consisting almost exclusively of adjustments (i.e. spinal manipulation) from [Appellant's chiropractor], from whom she had been receiving similar adjustments since the age of ten. The frequency of those treatments following March 8th is difficult to determine with total accuracy, since the number of treatments apparently paid for by MPIC does not seem to be identical to the number of visits to [Appellant's chiropractor's] office for which [the Appellant's] transportation costs were paid by MPIC, nor to the number reflected in [Appellant's chiropractor's] own clinical notes. These discrepancies are not major and, in this context, we accept [Appellant's chiropractor's] notes which indicate that, from March 13th to October 31st, both inclusive, of 1996, [the Appellant] received a total of 104 such treatments including two adjustments on each of September 23rd and September 27th, 1996. Thereafter, she received seventeen adjustments in November and another fifteen in December - an aggregate of 136 treatments in forty-two weeks, or an average of 3.2 adjustments per week.

Becoming concerned about the frequency of these treatments, MPIC arranged for [the Appellant] to attend at the office of its own consultant, [text deleted], on August 7th, 1996, for the purpose of an independent chiropractic examination. Based upon [MPIC's chiropractor #1's] report, MPIC's adjuster who had been handling [the Appellant's] claim wrote to her on October 17th, to tell her that MPIC would pay for one more treatment per week in each of the following ten weeks, and no more. Notwithstanding that advice, for reasons that are not apparent from the file MPIC, citing "our previous letters", appears subsequently to have withheld payment for any treatments after October 23rd, although no such "previous letters" seem to exist.

The effect of that notification was referred by [the Appellant] to MPIC's internal review officer, who agreed with the adjuster's position. It is from that decision that [the Appellant] now appeals. She seeks an Order requiring MPIC to pay for all her chiropractic adjustments from October 23rd, 1996 until the end of 1997 when, she believes, she will have reached pre-MVA-status; she asks, as well, for an appearance fee for the time spent by [Appellant's chiropractor] giving evidence. She also seeks payment for a gymnasium membership, but that is not a matter that has been decided by the internal review officer and we are therefore without jurisdiction to deal with it.

The hearing of [the Appellant's] appeal extended, with an occasional hiatus to accommodate professional witnesses, over two days. Oral evidence was adduced from the Appellant herself, from [Appellant's chiropractor], from [MPIC's chiropractor #1] and from a second chiropractic consultant of MPIC, [text deleted]. As well, we have had the benefit of reading the insurer's entire file respecting this claim.

Despite the lengthy correspondence and memoranda thus made available to us and the extensive expert testimony of the three chiropractic practitioners, the actual issue before us may be simply expressed: had [the Appellant] reached pre-March 8th-accident status or, in any event, had she attained maximum therapeutic benefit from the chiropractic treatments related to her motor vehicle accident, by October 23rd, 1996 when MPIC discontinued paying for her treatments, and was that discontinuance therefore justified? By 'maximum therapeutic benefit' is meant 'the return to pre-injury status or the minimum level of symptomatology or disability attainable on a given treatment/care approach'. (See: Clinical Guidelines for Chiropractic

Practice in Canada, being a Supplement to the Journal of Canadian Chiropractic Association, Volume 38, No. 1, March 1994 - hereinafter 'the Guidelines'.)

APPELLANT'S HISTORY:

It should be noted, at the outset, that [the Appellant] had been the unfortunate victim of a series of motor vehicle accidents: in October of 1987, in June of 1988, in February of 1990, in May of 1991 and on July 14th of 1994. She and [Appellant's chiropractor] testified that, by August of 1995, she had reached a plateau equal to about 70% of her pre-1994 accident status. She had been receiving manipulative treatments from [Appellant's chiropractor] with a frequency of three times per week and, despite having reached that plateau, the frequency of those treatments remained, unabated, through until the end of 1995, when the treatments were reduced to twice per week. Then, on January 21st of 1996, she experienced a skiing accident which resulted in the fracture of her twelfth thoracic vertebra. As a result of that fracture she was attended to by [Appellant's neurosurgeon], [text deleted], and wore a body brace from her chest to her pelvis for the next three months, until April 12th of 1996. [Appellant's chiropractor's] records reflect the fact that [the Appellant] continued to receive chiropractic adjustments following her discharge from hospital, even though using the body cast, - three adjustments during the last twelve days of January, twelve adjustments in February and four during the first seven days of March; those treatments continued at the rate of three times a week after the MVA on the 8th of March 1996 - the MVA with which we are now concerned.

[THE APPELLANT'S] EVIDENCE:

[The Appellant] testified that she was suffering from headaches, low back pain and shoulder pain, and had had much the same kinds of pain, with the addition of upper back and temporomandibular pain, as a result of her 1994 accident. She had been receiving manipulative treatments three times a week following her accident of July 1994 through until the end of 1995, when the frequency was reduced to twice each week until her skiing accident in January of 1996, by which time her low back pain and headaches were still with her although decreased in intensity and frequency; by that time, also the pain between her shoulders had become merely periodic.

[The Appellant] further testified that, prior to her MVA, she had constant dull headaches and more intensive ones once or twice a week; after the MVA, those headaches had been reduced (as a result of chiropractic adjustments, she believed) to a frequency of once or twice per week without any marked intensity. Before her MVA, she experienced fairly constant pain in her lower back at or about the top of the pelvic girdle, to a point where she occasionally had to lie down until the pain subsided. After her MVA, she was also in constant pain but, she said, it was more intense.

[The Appellant's] further evidence was that she had experienced some pain in her right leg which started as a result of her skiing accident, had dissipated by about mid-April, reappeared in August and had finally disappeared by the end of 1996. Now, she testified, her discomfort was limited to constant headaches, lower back pain that was more intense than had been the case prior to her skiing accident, and sporadic pain between her shoulder blades.

On cross examination, [the Appellant] acknowledged that she had been involved in yet another automobile accident in May of this year when, slowing down in order to make a turn, her vehicle was rear-ended; she sustained the same basic kinds of injury as had been the case in 1994 and 1996, including a recurrence of the leg pain which had disappeared by December of 1996. She had been attending at [Appellant's chiropractor's] chiropractic clinic five times a week since this most recent accident. From April through December of 1995, [the Appellant] testified, she had been receiving about ten to eleven treatments per month from [Appellant's chiropractor]. She had improved, but had plateaued in August of 1995; she started to improve again in December of 1995. The frequency of those treatments did not change during the 'plateau period'.

Both [the Appellant] and [Appellant's chiropractor] were emphatic in their testimony that her skiing accident of January 21st, 1996, when she fell on her back onto a mogul, did not exacerbate her lower back or upper back problems that had existed prior to the skiing accident. [The Appellant] figured that she was "up to about 60% of normal" in the context of her neck and lower back injury, immediately prior to her 1996 MVA. The car in which she had been a passenger at the time of the MVA had not sustained any damage, to the best of her recollection.

[The Appellant] further testified that she had noted a small improvement in her condition between March and July of 1996. She was able, she said, to do most things in moderation by July, although she found cycling uncomfortable and she described her tennis game as 'non-aggressive'. She was able to work out at the gymnasium three to four times per week but she could not do much running until the fall of 1996. She had, however, returned to work by May

of 1996. The pain that recurred in July of 1996 was very similar to that which followed her skiing accident, except that it now involved the right buttock as well as the upper leg and thigh.

[The Appellant] added that the only week that she had been without chiropractic treatment since her 1994 accident was the week in January of 1996 that she spent in hospital following her T12 fracture. She felt that there would be a serious setback if she missed a couple of weeks; she felt a lot better after receiving chiropractic adjustment. Between July and October of 1996, she said, she had been going three times, and occasionally four times, per week to [Appellant's chiropractor's] clinic. She had reached a plateau in late July or early August of 1996, but had started to improve a little between October and the end of the year.

[APPELLANT'S CHIROPRACTOR'S] EVIDENCE:

[Appellant's chiropractor] confirmed that he had been treating [the Appellant], almost exclusively with spinal manipulations, since she had been ten years of age. It was [Appellant's chiropractor's] opinion that the T12 fracture might have caused some leg pain but would not, normally, have caused the gluteal pain of which [the Appellant] had complained. When he cared for [the Appellant] shortly after her ski accident, one-third of his time was spent working on the fracture site and, as a result, [Appellant's chiropractor] felt that his patient had been able to return to school much sooner than had been predicted by [text deleted], her neurosurgeon. [Appellant's chiropractor] described, in detail, the various stages of recovery from the tearing of tissues surrounding one or more joints that, he said, normally results from a motor vehicle accident. The acute, inflammatory stage, usually accompanied by swelling, lasts for seventy-two

hours; the body lays down new cells containing collagen in the location of the tearing, for about six to eight weeks and, thereafter, there is no further healing of the tissues. The third and final stage is an attempt by the body to convert the collagen into normal tissue, and this stage is motion dependent - that is, the quantum of motion will dictate the speed of full recovery - and this 'remodelling' stage will depend upon many factors such as the patient's age, flexibility, strength and general health prior to the accident, gender, willingness and ability to follow a program of home exercise and, of course, the nature of the impact itself, amongst other things.

[Appellant's chiropractor] was at pains to emphasize that normal exercise will remodel approximately the central one-third of the torn tissues; stretching would remodel up to an additional one-third; chiropractic care and adjustment will cover the rest and, in his view, only chiropractic care is capable of doing so. [Appellant's chiropractor] also emphasized that only the attending chiropractor can tell how a patient responds to an adjustment - something that, indeed, an independent examiner is not ethically allowed to do. [Appellant's chiropractor] testified that [the Appellant's] adjustments have been getting easier, steadily, and that this of itself was a clear indication that the treatments that he had been administering were causing regular improvements. What he referred to as [the Appellant's] "de-enervation super-sensitivity" was diminishing.

It was [Appellant's chiropractor's] further testimony that [the Appellant's] headaches may well have been caused by irritation of the greater occipital nerve which, in turn, was likely caused by a misalignment of the cervical spine. Referring to certain X-rays of portions of [the Appellant's] spine taken by [text deleted], a chiropractic roentgenologist, which appeared to show "early discopathy of L4 and 5", [Appellant's chiropractor] indicated his belief that the

degenerative process could be forestalled by accentuated motion (i.e. chiropractic manipulation) which would force nutrition into the disc. He did not, however, suggest that this early discopathy was a result of [the Appellant's] MVA.

On cross-examination, [Appellant's chiropractor] agreed that he had been treating the neck and lower back areas of [the Appellant] for some [text deleted] years although, he added, "I adjust on a global basis, addressing one part of the spine to treat another. If I found a fixation or subluxation, that is what I would adjust. The adjustment does not always take place at the situs of the dysfunction - for example, I might decide to work on the pelvis in order to straighten, or correct, the spinal column." Describing 'instability' as a segment of the spine where there is aberrant motion or lack of it and 'subluxation' as possibly including neurological deficit or other ramifications, [Appellant's chiropractor] agreed that [the Appellant] still had subluxations just prior to her skiing accident and "certainly had instabilities after her earlier accidents".

In an article by Dr. Arthur C. Croft, published in the July 31st, 1992, issue of 'MPI's Dynamic Chiropractic', and entitled 'MVA and MMI: How much is enough?' (MMI, in this context, meaning maximum medical improvement, and MVA meaning motor vehicle accidents), Dr. Croft posits five grades of severity of cervical acceleration/deceleration trauma, which have become known as whiplash associated disorders, or WAD's. Of those five grades, Nos. II and III seem to be the ones relevant to the present inquiry. Grade II describes the victim's injuries as "slight, limitation of motion, no ligamentous injury, no neurological findings"; Grade III speaks of "moderate, limitation of motion, some ligamentous injury, neurological findings present". (The commas before "limitation of motion" in each grade appear in the text although, in our

respectful view, the descriptions would make better sense without them.) These definitions, which appear to have been generally adopted within the chiropractic profession, are significant, in that [Appellant's chiropractor] categorized [the Appellant's] injuries from the MVA as WAD III. The insurer's consultants placed those same injuries in the category of WAD II. [Appellant's chiropractor] explains his diagnosis by saying "Whenever there is a radiation of pain there is a WAD III. I don't believe there is any such thing as a WAD II. Anyone with a headache must be a WAD III, because every headache has its origin in nerve root irritation, which constitutes a neurological finding".

[Appellant's chiropractor] indicated that he did not know whether the discopathy in [the Appellant's] case was causing her pain since, as he puts it, "one can have disc problems that can cause pain without nerve root irritation; the disc itself has a nerve system". [Appellant's chiropractor] reiterated his opinion that [the Appellant] "had neurological signs because she had headaches, and you can't get these without nerve root irritation". [Appellant's chiropractor] agreed that chiropractic treatment can temporarily relieve pain after the remodelling referred to above has been completed, although such treatment will no longer accomplish any healing purpose.

[Appellant's chiropractor] pointed out that, in his view, [the Appellant] would become a chronic pain patient unless her chiropractic care were continued. Her case was a difficult and complicated one, he said, due to a number of factors: specifically, her unfortunate history of accidents; secondly, the mere fact that she is female predisposes her to long term care; thirdly, her thoracic spine had been immobilized by the body cast at the time of her accident

which, while necessary for the healing of her T12 fracture, would increase the whiplash type of effect in both the cervical and lower lumbar spine; her body was in a weakened state from lack of proper exercise while wearing the body cast; finally, she was described by [Appellant's chiropractor] as a "high stress patient" because she was working and concurrently studying, and also suffering from certain sleep disorders.

[MPIC'S CHIROPRACTOR #1'S] EVIDENCE:

As has been noted, the Appellant had been referred by MPIC for an independent chiropractic examination to [MPIC's chiropractor #1], who acknowledged that he has performed approximately 2,300 such examinations since 1983.

As with [Appellant's chiropractor's] evidence, so also in the case of [MPIC's chiropractor #1] we were given his written reports and, as well, heard his oral testimony. After outlining the subjective history that he had obtained from [the Appellant], [MPIC's chiropractor #1] presented the results of the examination that he had performed of her condition on August 7th of 1996. In essence, he found that, while [the Appellant] had continuing, subjective symptoms of discomfort, her global ranges of motion were not impeded and she had no evidence of any nerve root signs relative to injuries from her MVA. She did have sensory symptoms in the right lateral thigh which, he felt, were most likely to relate to her skiing injury. He disagreed with [Appellant's chiropractor's] view that the discomfort in the right leg stemmed from nerve root injury at L4-5 or S1 and must have been caused by the MVA. He expressed the view that, if nerve root injury at that location existed, then one would expect sensation to have been felt down the

lateral side of the right leg and extending as far as the small toe. The onset of the leg problem right after the skiing accident and its later recurrence indicated, in [MPIC's chiropractor #1's] view, that the ski accident caused the entire leg problem, and that there were no indications of any other cause.

[MPIC's chiropractor #1] added that, from both [Appellant's chiropractor's] own narrative and from what [the Appellant] had told him in the course of his examination, she had reached about 70% improvement prior to her 1996 accident and had once again reached about that same point by the time the insurer had discontinued paying for further chiropractic treatments.

[Appellant's chiropractor] had expressed his opinion that [the Appellant] had suffered some facet joint damage in the 1996 MVA. [MPIC's chiropractor #1] expressed the view that, had such damage existed, it would have produced more restriction of motion than had been apparent upon examination. By the same token, the radiological report referred to above had only reflected a certain asymmetry at L4 and 5 which, by common agreement, was probable congenital and almost certainly not caused by the MVA.

[MPIC's chiropractor #1] also felt that any early discopathy at L4 and L5 could have resulted just as readily from [the Appellant's] ski accident as from the MVA since, he said, the force needed to fracture the T12 must have been strong enough to transmit at least some force to other aspects of her spine.

Of perhaps greater significance, in the view of this Commission, was the fact that,

when examined in August of 1996, [the Appellant] had stated to [MPIC's chiropractor #1] that her main problem was with her leg. This accords with the comments apparently made by [Appellant's chiropractor] to [MPIC's chiropractor #2] when they spoke by telephone on December 3rd, 1996. As [MPIC's chiropractor #2] relates it, "he (i.e. [Appellant's chiropractor]) was happy enough with her neck and upper back, which were practically back to normal, but really worried about the leg pain". In the course of [MPIC's chiropractor #1's] examination, [the Appellant] complained of tenderness with decreased mobility at the level of T5-6 right of the mid-line, which in his testimony before the Commission [MPIC's chiropractor #1] acknowledged was probably caused by the MVA.

In his prognosis and recommendations, [MPIC's chiropractor #1's] view of [the Appellant's] condition might well be summarized by the expression "long on symptoms but short on signs". He felt that [the Appellant] was "very close to maximum therapeutic benefit and maximum medical improvement" and that there was no further need for treatment at two to three times per week.. He felt that her visits should be decreased over the following eight to ten weeks, with the focus of her care being on active exercise.

Not surprisingly, [Appellant's chiropractor] took violent exception to the view expressed by [MPIC's chiropractor #1], since those views clashed at almost every point with the opinions of [Appellant's chiropractor]. There are some ethical questions that have arise as to the manner in which [Appellant's chiropractor] expressed his disagreement with [MPIC's chiropractor #1], but those questions will have to be resolved, if at all, in another forum.

[MPIC'S CHIROPRACTOR #2]'S EVIDENCE:

[MPIC's chiropractor #2] has never examined [the Appellant]. His evidence is based entirely upon the written record contained in MPIC's file related to [the Appellant's] claim. His comments may be summarized this way:

(a) [Appellant's chiropractor] may disagree with the WAD categories, but that entire system has been adopted by both the Canadian and Manitoba Chiropractic Associations;

(b) all headaches are not necessarily neurological; for example, muscle headaches are common place;

(c) some of the modifying factors enumerated by [Appellant's chiropractor] probably would have delayed [the Appellant's] recovery to at least a limited extent;

(d) pain or discomfort at the outer thigh can be stimulated by injury at Tll/12 which, in turn, may trigger L4 and 5;

(e) too much manipulation - that is, too much motion - can cause or hasten the degenerative process rather than retard it;

(f) [Appellant's chiropractor] diagnoses [the Appellant's] post-MVA condition as a WAD IIIA; I would call it a WAD II, since there was no clinical or objective evidence of neurological damage;

(g) if the radicular leg pain had been related to the MVA I would have expected to see it appear quite soon after the MVA;

(h) although [Appellant's chiropractor] diagnoses multiple facet joint damage, I view that as highly unlikely in [the Appellant's] case since such damage would have produced sharply

reduced range of motion, which does not seem to have occurred;

(i) I do not agree with the concept of continuing adjustments when a patient has reached a plateau and stayed there for two or three months. At that point, treatment should be suspended, if only to see whether the natural history of the injury will take over and complete the recovery. In expressing that view, I am relying upon the unanimous views expressed by the Consensus Conference commissioned by the Canadian Chiropractic Association which resulted in the publication of the Clinical Guidelines for Chiropractic Practice in Canada;

(j) the file shows that [the Appellant's] leg problem was not even accident-related. The remainder of her MVA-related problems appeared to have been restored to at least pre-accident status by mid-to-late-October of 1996. [Appellant's chiropractor] seems to agree that the MVA did not aggravate the earlier leg problem, so that subsequent recurrence of the problem must have been caused by the skiing accident. I had actually suggested a solution - that, if we can agree that the MVA aggravated the results of the ski accident, then we could probably justify paying for continuing treatment - but, since [the Appellant] and [Appellant's chiropractor] are unanimous in their view that the MVA did not aggravate the results of the ski accident, it was patently the latter which caused the flare up of the leg problem;

(k) [the Appellant's] headaches are not new - they have been with her for years. She had reached maximum therapeutic benefit since her range of motion was good and there were no neurological deficits apparent.

(As with our summaries of the evidence given by [Appellant's chiropractor] and

[MPIC's chiropractor #1], so with the foregoing summary of [MPIC's chiropractor #2]'s evidence, there is a real risk of oversimplification and, therefore, of some inadvertent distortion of the views expressed by each of these three gentlemen.)

[APPELLANT'S NEUROSURGEON'S] EVIDENCE:

[Appellant's neurosurgeon's] evidence is simple and is contained in his letter of December 27th, 1996 addressed to MPIC's adjuster. It is short enough that it bears repeating here, practically in full:

> "I last saw this young girl in August, 1996 in follow up from her thoracic vertebral fracture sustained in January, 1996. At the initial time she had had significant leg pain appropriate to the level of her fracture and indicative of some nerve root injury. This settled down with time, but had recurred to some extent in August and was really the same pain that she had initially described.
> All x-ray studies, including a recent MRI scan done in November, 1996, have shown that the original fracture is healing and showed no evidence of any surgically treatable problem relative to the injured nerve root. I am unaware of the timing of any accident in the car relative to all of this, but feel that the leg pain that she had had more recently in August, 1996, was compatible with the initial injury in January, 1996 and simply was going to take longer to heal up."

As will be apparent, it was [Appellant's neurosurgeon's] view that the leg pain of which [the Appellant] was complaining was, indeed, a result of the ski related fracture, and not caused by her MVA.

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Were [the Appellant's] continuing symptoms related to the MVA? [the Appellant's] pre-accident history shows five motor vehicle accidents giving rise to neck and

back injuries with accompanying headaches. She had achieved a 70% recovery after 138 chiropractic adjustments from [Appellant's chiropractor] following her 1994 automobile accident. After March of 1996 there was good progress noted until, in July of 1996 and primarily as a result of a recurrence of her leg pain, we find a significant increase in the frequency of her treatments. Although, from [Appellant's chiropractor's] evidence, we understand that [the Appellant] had reached a plateau of sorts in August of 1996, her chiropractic treatments seem to have continued, unchanged in kind and in frequency, right through up to and including December. It is noteworthy, although not conclusive, that the accident in which [the Appellant] is alleged to have sustained the injuries giving rise to the need for this unusual number of chiropractic adjustments produced no damage whatsoever to the vehicle in which she was a passenger. While we do not conclude, from that fact alone, that she sustained no injuries at all, we are persuaded upon viewing all of the evidence that the injuries she sustained in March of 1996 amounted to no more than a mild aggravation of her condition as it existed immediately before the accident.

THE LAW:

Section 136(1) of the Manitoba Public Insurance Corporation Act ('the Act') provides, in part, that:

> Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under The Health Services 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.....
>
> (d) such other expenses as may be prescribed by regulation.″

Sections 5 and 9 of Regulation 40/94, (being the relevant sections referred to in the

Act quoted above), read, in part, as follows:

> "**Medical or paramedical care**
> 5. Subject to Section(s).....9, the corporation shall pay an expense incurred by a victim.....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;.....
> **Dental care, chiropractic treatment and physiotherapy**
> 9. The expenses payable by the corporation for dental care, chiropractic treatment and physiotherapy provided to the victim shall be fixed by the corporation in such amount as the corporation considers reasonable and proper for the service provided."

It is clear, from the foregoing, that what this Commission needs to decide is whether all or any of the chiropractic treatments received by [the Appellant] from [Appellant's chiropractor] after October 23rd, 1996 were medically required and can properly be called 'expenses incurred..... because of the accident'. If so, then she must be reimbursed for them; if not, her appeal must fail.

SOME SALIENT POINTS OF EVIDENCE:

The extracts from the evidence of [Appellant's chiropractor], [MPIC's chiropractor #1] and [MPIC's chiropractor #2] that are noted above by no means represent the entirety of their testimony; they each gave lengthy and carefully considered evidence. [the Appellant], herself, testified at some length, and we have no reason to doubt her sincerity. But, as is apparent from the foregoing, we are faced with quite conflicting opinions as to the nature and extent of, and the appropriate treatment for, the effects upon [the Appellant's] musculoskeletal structure of her 1996 MVA. Assuming, as we do, that those opinions were all advanced in good faith, we must weigh the reasoning and motivations behind each of those opinions and, having

regard also to the professional literature to which we have been referred, must then adopt the view which, to us at least, appears to be the most logical and reasonable.

Several aspects of the evidence presented to us stand out as being persuasive. They are, in no particular order of priority, these:

1. We have already referred to Dr. Croft's article entitled "MVA and MMI: How much is enough? Dr. Croft provides a table, indicating the frequency and duration of care in normal WAD trauma cases, of which the applicable portions are these:

Duration of Treatment	**Total Number**	**Daily**	**3x/wk**	**2x/wk**	**1x/wk**	**1x/mos**
Grade II	1wk	4wks	4wks	4wks	4mos	25wks	29*
Grade III	1-2wks	10wks	10wks	10wks	6mos		
56wks*	76					

(* Dr. Croft's figures seem to be slightly inaccurate since, by our calculation, the total for Grade II should be 33 and the number of weeks for Grade III should be 57-58, but are close enough to be acceptable for present purposes.)

If we accept, as we do, that [the Appellant's] injuries fall within the Grade II category (and this is clearly so), then we might anticipate that absent her personal history, she would have received 33 treatments over a period of some 25 weeks. In fact, she received 104 treatments over 32 weeks between the date of her MVA and the date when the insurer quit financial responsibility for her chiropractic visits. While we accept the proposition advanced by [Appellant's chiropractor] that [the Appellant's] case was, by reason of the several factors noted above, neither normal nor simple, so that some divergence from the norm can be expected, [the

Appellant's] course of treatments at [Appellant's chiropractor's] clinic represents a deviation of three times the norm. The other qualifying comment is that Dr. Croft's figures must all be read with the added words 'more or less'; they are not chiselled in stone tablets.

2. Despite [Appellant's chiropractor's] dismissal of the Guidelines as being something cobbled together too hastily, not accepted by three-quarters of Canadian chiropractors and never even seen by many members of the Manitoba Association, the fact is that the Guidelines were adopted and endorsed by the Manitoba Chiropractor's Association's Board of Directors, to be applicable to the profession at large in this province, in May 31st, 1994. It is our understanding that all members of the M.C.A. were provided with copies. The following excerpts from those guidelines deserve repetition here:

> "The primary goal of chiropractic care is to provide sufficient care to restore health, maintain it, and prevent the recurrence of injury and illness. Used appropriately, chiropractic care is capable of reducing pain, improving function and promoting health. Used inappropriately, it can become a passive treatment approach promoting patient dependency (Chapman-Smith 1992)."

"Alone, the repeated use of acute care measures* generally fosters chronicity, physician dependence, and over-utilization (Riley et al. 1988)."

* This Commission notes, at some risk of over-simplification, that acute care measures are predominantly those of the passive kind, such as manipulation or adjustments and transcutaneous electrical nerve stimulation, at least initially, followed in due course by slow speed and minimal load exercises that can gradually be increased to promote, first, endurance and, thereafter, strength. [the Appellant] appears to have received passive treatments only from [Appellant's chiropractor], supplemented by home exercises and work-outs.

"D. Complicated cases

Subacute and chronic conditions are usually considered to be complicated in that

> they have exhibited regression or delayed recovery in comparison with expectations from the natural history.
>
> 8.7 Symptom response: after a maximum trial therapy session of manual procedure lasting up to two weeks, and consisting of 3 to 5 treatments per week, reassessment is required if no demonstrable improvement has been noted. An alternative approach consisting of a maximum of four weeks may be instituted if warranted. Should not demonstrable improvement be forthcoming following this second trial, the patient should be referred or discharged."

Lest it be thought that we adhere too slavishly to the language of the Guidelines, we would add that we are fully cognizant of, and in agreement with, the disclaimers that appear immediately after the title page of the Guidelines.

3. It is abundantly clear either that [the Appellant's] condition, whatever the cause, was chronic, or alternatively that she had developed an unhealthy degree of dependency, long before her 1996 accident - witness the fact that, in December of 1995 (about 17 months after her 1994 accident) she was still receiving three adjustments per week, and then twice weekly until the MVA in March of 1996.

4. [the Appellant's] condition was not stable prior to the MVA, according to her own evidence and that of [Appellant's chiropractor].

5. Drs. [Appellant's chiropractor], [MPIC's chiropractor #1] and [MPIC's chiropractor #2], as well as the relevant literature, all agree that each practitioner, when confronted with a new patient, or a new injury of an existing patient, must use his/her best efforts to produce an accurate diagnosis, one or more goals, and a plan for achieving those goals. While we do not suggest that [Appellant's chiropractor] did none of those things, we are hampered by the fact that his clinical notes contain no diagnosis, nor any symptoms nor changes in symptoms between the pre-accident and post-accident periods of treatment. Similarly, no

particular plan of treatment is indicated by his notes; while this, of course, does not necessarily mean that he had no such plan, it makes it almost impossible for us to gauge whether, if he had such a plan, it was working. We can only deduce that, since she was still going for treatments 3.3 times per week, on an average, as recently as December of 1996, that the plan/treatment were not working. The treatment seems to have been limited to continuous, passive intervention rather than having been directed towards restoring function.

6. [the Appellant] points out, quite correctly, that [MPIC's chiropractor #1] had only seen her once, in his capacity as an independent medical examiner and at the request (and expense) of the insurer. She submits, therefore, that [MPIC's chiropractor #1's] evidence should be viewed against the backdrop of the facts that he has been conducting examinations of this kind for MPIC since 1983 and, recently, at the rate of about 3 per week, ('he who pays the piper.....etc.'), and that a single examination on a patient's 'good day' can, at best, only produce a snapshot of that patient's condition, without the more comprehensive knowledge of the whole patient that comes with extensive contact and treatment. The latter point is indisputable; the former is a dangerous argument to advance, since it can quickly become a two-edged sword - to the cynic, each chiropractor might be said to have had an ulterior motive underlying his testimony. Since we do not share that cynicism, we elect to pass by that argument on the other side of the road.

7. Drs. [Appellant's chiropractor] and [MPIC's chiropractor #1], as well as the Guidelines, all agree that there are normally three phases to the chiropractic treatment of a person who has suffered injuries of the sort sustained by [the Appellant]: acute, active and rehabilitative. The available literature tells us that the acute phase normally lasts only a

few days or, at most three or four weeks; treatment during this period is directed toward reducing any swelling and inflammation, perhaps bed rest, reduction of activities and some chiropractic adjustments. During the active phase, the thrust of treatment is to improve pain-free motion in the affected area(s) of the body. When the maximum range of motion has been achieved, then the rehabilitation phase begins. Here, the goal is to achieve increased strength and endurance and to increase the patient's physical work activity. These last two phases each take some period between a few weeks and a few months, depending upon the patient and the injuries sustained. In those same later stages, the patient may have to do some exercises or make changes to the way in which they work and conduct their life-style, or both.

8. [the Appellant] complained of pain, discomfort and headaches prior to the MVA, the extent and amount of which we cannot ascertain, but she was seeing [Appellant's chiropractor] for treatments at least twice and, more often, three times per week in early 1996. For example, 12 treatments in February and 4 during the first seven days of March immediately prior to her MVA on March 8th would seem to indicate a need for treatments perceived, at least, either by [Appellant's chiropractor] or his patient, or by both of them, to call for much the same frequency as was in effect at the time MPIC decided to terminate its payments. While the Appellant's condition cannot be gauged with any accuracy by relying solely upon the frequency of chiropractic treatments - particularly when the victim of one or more accidents has had a lengthy history of pre-accident chiropractic adjustments extending over many years - the fact of her ability to return to full working days some time in May of 1996 is at least one other factor to which we may look. So, also, her ability to work out with weights at the gymnasium of her choice, and to play tennis,

throughout most of the summer of 1996, while not of themselves negating the need for continuing chiropractor care, are factors that do tend to indicate a return to pre-accident status.

CONCLUSIONS:

1. While it is clear that the injuries sustained by [the Appellant] in her earlier accidents may well have been exacerbated to a limited extent by the MVA, proper chiropractic treatment should have restored her to pre-MVA status by October 23rd, 1996, if not sooner.
2. We are not persuaded that, once [the Appellant's] condition had failed to show any material signs of improvement during the months of August, September and October of 1996, despite an aggressive course of adjustments, it was appropriate for those treatments to be continued, unabated, without the adoption of some alternative potential remedy. The alternatives would include a different kind of treatment, referring the patient out to another practitioner or, perhaps, even to another discipline, or at least the tapering off and then temporary discontinuance of treatments altogether, in order to give natural history an opportunity to take over and complete the restorative process.
3. We find that it was the complaint of leg pains that was the principal target of [the Appellant's] continuing chiropractic treatments, at least from early August until the end of 1996. This finding is based upon [the Appellant's] own statement to [MPIC's chiropractor #1] in September of 1996 and upon [Appellant's chiropractor's] statement to [MPIC's chiropractor #2] on December 3rd, 1996.
4. We find, further, that on a strong balance of probabilities [the Appellant's] complaint of leg

pains has its origin in her skiing accident and was unrelated to her MVA.

5. We find, therefore, that MPIC's decision to discontinue payments for [the Appellant's] chiropractic treatments in late October of 1996 was justified, since any continuance of those treatments, even if useful rather than potentially harmful, was not medically necessary as a result of her MVA.

6. MPIC, in its letter to [Appellant's chiropractor] of October 21st, 1996, undertook to continue paying for ten more treatments on a once-weekly basis. [Appellant's chiropractor] apparently received that letter on October 24th. We find no justification for MPIC's apparent decision to repudiate that undertaking. The disposition that we make of this appeal is, of course, based upon the assumption that MPIC has not already paid [Appellant's chiropractor] nor reimbursed [the Appellant] for those ten additional chiropractic adjustments - if it has done so, that fact is not apparent from the material furnished to us by MPIC.

7. There is no provision in the Act, nor in the Regulations, that empowers us to award a 'hearing fee' to a professional practitioner who appears as a witness and devotes half a day or more, as did [Appellant's chiropractor], to his testimony (including time spent waiting to be called). It may be thought that this works an inequity upon the practitioner, or upon the Appellant who cannot afford to pay that kind of money, when one of the objectives of the Personal Injury Protection Plan is to provide a more level playing field for insurer and insured. The Corporation's expert witnesses are paid out of gross premium income; the insured is left to fend for herself and, even if successful, will almost certainly not be awarded the costs of her appeal. Unfortunately, this is a problem for which the solution lies in other hands.**(Concluded on page 26.)**

DISPOSITION:

1. The Appellant is entitled to reimbursements from MPIC for ten treatments at $25.66 each, or $256.60, provided that sum has not already been paid;
2. The decision of MPIC's internal review officer of April 3rd, 1997 is varied accordingly.

Dated at Winnipeg this 4th day of July 1997.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED