AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-167

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Mr. Charles T. Birt, Q.C.** **Mr. Colon Settle, Q.C.**
APPEARANCES:	**The Appellant, [text deleted], represented by [Apellant's representative]** **Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Tom Strutt;**
HEARING DATE:	**June 10th, 1999**
ISSUE(S):	**Termination of income replacement indemnity ('IRI') – whether appellant able to fulfill essential duties of employment when IRI terminated**
RELEVANT SECTIONS:	**Sections 110 (1)(a) and 160 of the MPIC Act, and Section 8 of Manitoba Regulation 37/94.**

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

REASONS FOR DECISION

[The Appellant], [text deleted] years of age at the time, was driving his employer's vehicle in [Alberta] on September 13, 1996 when he was involved in a motor vehicle accident. The appellant's vehicle was travelling east on a green light through an intersection when another vehicle, travelling west, made a left-hand turn, right into the appellant's path. [The Appellant's] vehicle was travelling at about 50 km per hour: the front of his car hit the right front wheelwell

of the other vehicle. [The Appellant's] vehicle became undriveable and was towed to an auto repair shop: it sustained about three thousand dollars worth of damage.

Immediately following the accident, [the Appellant] rented another car and drove to [text deleted], Saskatchewan. He testified that he developed a severe headache on the way to [Saskatchewan] but, since this was not an unusual occurrence, he could not say if that had been due to end-of-the-week stress or to the accident itself. By the time he had reached [Saskatchewan], having stopped en route for lunch, for coffee, etc., he had "really started to stiffen up". He reached [Manitoba] on the following day, a Saturday. On the Sunday he went to [hospital] where he was given Tylenol 3 and advised to keep his neck moving. He first saw his family physician, [text deleted], on the following Tuesday or Wednesday; he had consulted her from time to time in the past for headaches.

At the time of his accident, [the Appellant] was employed by [text deleted]., a [text deleted] corporation owned by his family and having its head office in [text deleted], British Columbia. [the Appellant] had been that corporation's sales representative for the territory of Manitoba, Saskatchewan and Northern Ontario since May of 1991. [The Appellant] And [Appellant's wife] each testified that, when first [the Appellant] had been posted to [Manitoba], it was the declared intent of both [text deleted] and [the Appellant] and [Appellant's wife] that this would be a temporary posting, for only a couple of years; the two years stretched to six, against the strongly held and voiced objections of [Appellant's wife], and this of itself seems to have created major emotional stress for all concerned. As [Appellant's wife] (who describes herself as "a very, very pronounced person in every way") puts it: "We were only committed for two years, but his

parents kept us here for six years. Then I put my foot down and insisted we go back to [British Columbia]. I'd done so even a couple of years before; it became a major marital issue and also a major emotional issue – even a spiteful issue – within the family." In the event, the evidence seems to indicate that a return to [British Columbia] had already been planned a few months before [the Appellant's] accident. [The Appellant] was at pains to assure the Commission that, although he had told his adjuster that he was being 'transferred' to [British Columbia], his clear plan was that he would continue to act as the Corporation's sales representative in the same territory. He expected to be covering that territory, working out of [British Columbia] rather than out of [Manitoba], despite the substantial, additional expense to the Corporation and the longer periods away from the appellant's home that would have resulted. He does not seem to have made that plan known to MPIC's personnel whose understanding, not unnaturally, was that he had been transferred to British Columbia to perform the same or similar duties in that province.

While working in [Manitoba], [the Appellant] and [Appellant's wife] both testified, [the Appellant] was travelling away from home from seven to ten days out of every five or six weeks; while in [Manitoba], he was able to work out of his house for the rest of the time, making sales calls upon [text deleted] both in the city and in the rural communities within half a day's driving distance. The appellant testified that it was never the corporation's intent that he would act as a sales representative in [British Columbia] or any other new territory; his sales territory was to remain unchanged. [The Appellant], in the course of his employment, was selling [text deleted] which he described as, for the most part, fairly small items, with even the only couple of other, larger items being "pretty light weight". His evidence was that, since he also had some supervisory duties for the family corporation in [Alberta], the plan was that, when the time came for him to cover his territory after the move to B.C., he would fly to [Alberta], rent a car and

cover Saskatchewan, Manitoba and Northern Ontario by road, staying in hotels or motels throughout the course of each trip. The resultant, increased cost to the corporation, and the added wear and tear upon the physical and emotional systems of [the Appellant] seem to us to be quite startling, but [the Appellant] assured us that these factors presented no problems for him nor for his family nor for his employer.

MPIC paid income replacement indemnity to [the Appellant] for the period from September 21st, 1996 up to and including March 22nd, 1997 when, in the view of [the Appellant's] adjuster at MPIC, he had regained his ability to fulfill the essential duties of his employment. That decision to terminate his benefits as of March 22nd was not communicated to [the Appellant] until he received a letter from his adjuster dated May 2nd, 1997. That decision was confirmed by MPIC's internal review officer on November 19th, 1998. It is from this latter decision that [the Appellant] now appeals.

The essence of [the Appellant's] case may be simply paraphrased this way: "I was injured in my motor vehicle accident to such an extent that the resultant pain, coupled with an emotional breakdown that was also brought about by the accident, precluded my returning to my former employment or, indeed, to any employment at all, but especially one requiring extended periods of driving. That situation prevailed until May 10th, 1999 when I recommenced working for the family corporation on a part-time basis, three afternoons a week. I was certainly not fit for work on March 22nd, 1997 when my IRI benefits were terminated. I think I am entitled to have my income replacement indemnity continued in full until May 10th, 1999 and, thereafter, to have my income at least supplemented until I am fully restored".

The pith of MPIC's position is that [the Appellant] has a continuing obligation to establish his entitlement to income replacement, that the medical evidence (although voluminous) does not support any physiological disability – none , at least, that could not have been overcome by a more flexible approach to the fulfillment of [the Appellant's] work – and that, if he is disabled, the disability is purely psychological. This Commission, says counsel for MPIC, must either dismiss the claim or order a psychiatric or psychological assessment. Further, it is submitted for MPIC, [the Appellant's] move to British Columbia precluded any possibility of rehabilitation on a gradual return to work basis. His job was here in Manitoba, spending roughly one week to ten days on the road and five to six weeks at home. If he says that he could not do his job because he could not drive without pain, then he puts himself in a difficult position if he moves a few thousand miles away, both from the center of his operations and from the carefully monitored therapy that could have been available to him.

A number of factors make this unusual case difficult to decide. The first of those factors is the degree of exaggeration which, in our respectful view, is found both in the investigation reports upon which, for the most part, the insurer based its decision to terminate [the Appellant's] benefits, and in the evidence (both written and oral) of the appellant himself.

MPIC retained the services of private investigators, both in [Manitoba] and in [British Columbia], to carry out surveillance of [the Appellant]. Between them, those investigators recorded some eight hours of video tape and provided written descriptions of what the tapes ostensibly disclosed. We find that in a number of instances, the written reports tend to

exaggerate the functional abilities of [the Appellant] that the video tapes are said to reflect. As well, there are several instances in which the typewritten commentary contains suppositions rather than observed fact. Yet, it is in large measure upon the basis of the typewritten material that MPIC's medical consultant, [text deleted], based his opinion that [the Appellant's] functional capacity would have enabled him to return to work as of March 22nd, 1997. [MPIC's doctor] was not given the opportunity to view the videotaped evidence, nor does he seem to have been provided with any details of the requirements of [the Appellant's] employment. More specifically, [MPIC's doctor] was not made aware of the fact, heavily stressed by [the Appellant] in his oral testimony, that the appellant's job entailed a great deal of driving – long-distance driving about one week out of each five or six weeks. None of the investigative material seems to have touched upon that aspect of [the Appellant's] work, either.

On the other hand, after the members of this commission's panel who heard [the Appellant's] appeal had viewed all of the video tapes in question, we were of the unanimous and firm view that [the Appellant] was certainly capable of doing a great deal more than he would have us believe - perhaps more than he had persuaded himself to believe. By way of examples only:

(i) In his application for compensation, dated September 24th, 1996, [the Appellant] says that he was unable to do any cleaning, cooking, child care (particularly lifting his [text deleted] children), gardening, home maintenance, grocery and other shopping, and unable to perform any aspects of his position as sales representative. His testimony was that between September 24th and December 31st, 1996, the extent of his injuries and the pain that he was suffering from those injuries became worse rather than better, to a point at which "the pain was at all parts of my body". He

further testified that, when he underwent a functional assessment by [vocational rehab consulting company] on February 13th, 1997, and, again, when he was re-assessed by his new caregivers in [British Columbia] in March, he was still suffering from those same disabilities that he had described in his application for compensation. Yet, the video tapes clearly show him carrying one end of a heavy sofa out of his house and helping to load it into a van; similarly, he is seen emerging from his home carrying one end of what appears to be a loveseat, for the same purpose. He carried many other items solo, including what appears to be a solid, wooden table as well as both large and small boxes, from his home into the van, although he testified that the boxes only contained lightweight materials such as teddy bears and pillows. He also agreed that he had helped to pack many of the boxes that had to be transported to [British Columbia].

(ii) [The Appellant] testified, and had told all of his caregivers, that the lateral movement of his neck gave him great pain and that he was unable effectively to shoulder-check when driving since he could barely move his neck. He appears in the video tapes to be capable of moving his neck quite freely in all directions, without apparent discomfort. When confronted with that fact upon cross-examination, [the Appellant] responded, firstly, by saying that he had never claimed to be unable to move his neck and that it was his lower back that was causing his difficulty; secondly, he asked rhetorically whether it was wrong for him to have moved his neck when he had been told to exercise it as much as possible.

(iii) [The Appellant] says that, within a few days following his motor vehicle accident, he became unable to drive or, indeed, to sit anywhere in one place for longer than about fifteen minutes. At his hearing, he also testified that, even now, 2.75 years post-mva, thirty minutes was about the extent of his sitting tolerance. While the condition described by [the Appellant] may not be impossible, we do note that:

(a) A few weeks before leaving for [British Columbia] permanently, [the Appellant] did accompany his wife and children on a vacation to Florida; he did not know how long the flight took but sat during the flight without discomfort after waiting for a couple of hours prior to flight time; they attended Disney World with the children, where he experienced "a lot of waiting around, lots of walking….." but, "I paced myself".

(b) After visiting [British Columbia] between the date of his accident and the date of his final departure, [the Appellant] says he had about four hours flying time each way plus waiting time at each airport, without marked difficulty;

(c) His evidence was that, during the drive to [British Columbia] with their household belongings, he personally had only driven for some ten to fifteen minutes through an awkward passage in the Rockies but, in light of the excellent time made by the three-vehicle caravan between [Manitoba] and [British Columbia], we have some difficulty in accepting that [the Appellant's] discomfort forced him to stop and take fifteen- to twenty-minute breaks for as often and as long as his evidence might indicate;

(d) [The Appellant] agrees that he has driven on the highway frequently since sometime in early 1997, although he says that these trips were, for the most

part, of short duration, such as a fifty-six kilometer round trip between his own home and that of his parents. He has also driven on vacation to [text deleted], approximately one hundred kilometers out of [British Columbia], on which occasion he drove both ways.

(e) While it may be fair to say that none of these trips by road or by air necessarily indicate an ability on the part of [the Appellant] to drive himself for long distances in furtherance of his occupation, they nonetheless indicate an ability to sit, drive, walk and otherwise use his body to a much greater extent than was reflected by his evidence.

The medical and paramedical reports made available to us are many and varied, from sources both in Manitoba and in British Columbia. We do not believe that a useful purpose would be served by analyzing each of those reports in detail, but we think it important to summarize certain aspects of [the Appellant's] medical history since the time of his accident, in the following chronological order:

September 20th, 1996: [Text deleted], [the Appellant's] family doctor, diagnoses "neck and back muscle pain; anterior chest wall contusion" (*this bruise, it appears, was from his seat-belt*) and indicates a grade two whiplash associated disorder (WAD II). She recommends working modified duties, with a management plan that contemplates maintenance of usual activities, the use of Tylenol, ice and physiotherapy. She makes no mention of complaints of leg pain.

September 20th, 1996: [Text deleted], a physiotherapist with the [text deleted] Physiotherapy Clinic, finds cervical/lumbar spine joint dysfunction, muscular strain injury to lumbar and

cervical areas, a WAD II and an anticipated length of treatment of from six to eight weeks. He says the patient is "unable to sit/stand/walk a lot, limited with lifting". His report mentions leg pain/spasm, but later reports make it clear that he was referring to the thigh.

November 29th, 1996: [Appellant's physiotherapist #1] reports steady but slow improvement, the patient being pain focused and ultra-protective**.** [the Appellant's] adjuster at MPIC starts to express concern about possible chronicity.

December 2nd, '96: [The Appellant] is referred for a physical assessment to [Appellant's physiotherapist #2] at the [text deleted].

January 15th, 1997: [Appellant's physiotherapist #1] notes slow progress; patient needs another six to eight weeks of implementing [Appellant's physiotherapist #2**'**s] recommendations (at that point only received by telephone). [The Appellant's] neck and shoulder are reported to be progressing but his back is still very slow in recovery. [Appellant's physiotherapist #1] felt that there was work that [the Appellant] could do from his home, using his laptop computer, his telephone and correspondence, but was unsure of [the Appellant's] sitting tolerances.

January 17, 1997: [The Appellant] agreed that he could certainly try the foregoing, but could only make a few customer calls per day. (In fact, he never did.)

January 22nd, 1997: The written report from [Appellant's physiotherapist #2], prepared at the [text deleted], becomes available. Among her ten specific recommendations are the use of

certain devices such as an Obus back support for use in home and car, an elastic back support for walking, sitting, standing and exercising (to be progressively decreased over time), the use of a so called "AbMaster" device and of "an appropriate sized lumbar roll" for use in certain exercises, a specific form of insert for [the Appellant's] right shoe ([the Appellant's] right leg is one centimeter shorter than the left, for reasons unrelated to his accident) and a number of specific forms of physiotherapy, plus an assessment by an occupational therapist to be performed over an approximately three-week period.

February 6th, 1997: [Vocational rehab consulting company] are retained to perform the assessments recommended by [Appellant's physiotherapist #2].

February 19th, 1997: Occupational therapy report from [vocational rehab consulting company], while mirroring all of the pain complaints voiced by [the Appellant] – low back pain, upper back pain and shoulders, neck pain, headaches, sitting tolerance limited to fifteen minutes, standing tolerance limited to four minutes, walking tolerance limited to ten to twenty minutes, neck and trunk range of motion for shoulder checking extremely limited – also indicates excessive pain behavior and obvious psychological problems on the part of [the Appellant]. This report gives no indication of what tests, if any, were applied, nor anything to tell us whether the limitations described by the therapist were, as the report appears to reflect, purely subjective on the part of the appellant.

February 24th, 1997: A lengthy and detailed report is prepared by [Appellant's physiotherapist #1], intended for [the Appellant] to give to whomever he might consult in [British Columbia],

since [the Appellant] and his family had now sold their [Manitoba] home and were headed for [British Columbia] on or about March 19th. At the risk of oversimplification on our part, [Appellant's physiotherapist #1] may be described as expressing disappointment and puzzlement at the slowness of the progress displayed by [the Appellant's] condition over the course of the roughly six months [Appellant's physiotherapist #1] had been treating him. In sum, [the Appellant] had been noting a decreased thoracic discomfort "to the point where the patient essentially has no thoracic discomfort", his cervical discomfort had continued to improve and was actually giving him much less trouble on a daily basis, but his lumbar discomfort persisted. In addition, by some time in or about early December, 1996, [the Appellant] was commencing to report frequent occurrences of bilateral leg numbness and tingling to just below the level of the knees, posteriorly. [Appellant's physiotherapist #1] noted that, in a discussion he had had with [Appellant's physiotherapist #2], she had recommended a series of pool exercises on alternate days between days when physiotherapy was scheduled. ([Appellant's physiotherapist #2] had confirmed that recommendation in her assessment letter.)

March 3rd, 1997: Before any further steps can be taken to give effect to [Appellant's physiotherapist #2's] recommendations, [the Appellant] reports that his house sale has been confirmed and that he will be leaving the city on or before March 19th. He leaves on his Florida vacation on March 8th , is away about one week and, on

March 19th, 1997: He meets with his adjuster just prior to his departure for B.C. He reports that his neck is very much better but that his low back is his primary concern..

April 2nd, 1997: X-ray reports show no significant, degenerative changes nor any bony injury; lordotic curve is reversed, indicating the possibility of muscle spasm. There is a slight narrowing at the L5 – S1 disc space, otherwise normal; no signs of compression fracture nor bony trauma.

April 25th, 1997: [the Appellant] is seen by [text deleted], a physiatrist, on referral from his B.C. family physician, [Vocational rehab consulting company]. From this examination and from the results of subsequent x-rays, nuclear medicine bone scan and CT scan, [Appellant's physiatrist] reports that no abnormalities were detected other than a slight bulging of the annulus at L4-5 (with no focal herniation) and a small central disc bulge at L5-S1 which was of doubtful significance. The CT scan was of the lumbar spine between L3 and the sacrum.

May 2nd, 1997: MPIC, in reliance almost exclusively on reports from its special investigations unit, concludes that [the Appellant] has reached a level of function that would allow him to resume his former occupation and terminates his income replacement indemnity benefits, retroactively to March 22nd.

May 7th, 1997: [Appellant's doctor #3], whose letterhead proclaims "Mind/Body Medicine & Psychotherapy" reports that [the Appellant] is "recovering from a physical and psychological trauma of a serious motor vehicle accident and is not at this time capable of returning to work. It would be inappropriate and unhealthy for him to resume employment before completing treatment aimed at restoring his health and well-being." No objective signs nor any reasons are given for [Appellant's doctor #3's] opinion. [Appellant's doctor #3] is connected with the [rehab

clinic #1] referred to below.

May 12, 1997: [Appellant's doctor #4] of the [rehab clinic #1] in [British Columbia], reports briefly that [the Appellant] has been suffering, since his accident of September 13, 1996, from severe pain in his lower back and "a disabling degree of stiffness of his neck", along with severe frontal and occipital headaches. [Appellant's doctor #4] adds that it is very painful for [the Appellant] to sit and he can only get relief by getting up and walking and changing position every few minutes. He is unable to sit in a car for any length of time for this reason. (*This is markedly at odds wth the Appellant's own testimony that, for example, even before the date when he left for [British Columbia], he could tolerate lengthy flights, could drive himself for at least one half-hour and could sit as a passenger in a vehicle for substantially longer than that*.) [the Appellant] is, therefore, disabled from doing any work and [Appellant's doctor #4] is unable to say when he will be fit to work, although prognosis for recovery is good. No objective signs are described nor are any reasons given for [Appellant's doctor #4]'s conclusions.

July 14th, 1997: A letter from [Appellant's doctor #5] of the [rehab clinic #1] addressed to [Appellant's doctor #2] reports that, on examination of [the Appellant], "straight leg raising was to **40 degrees on the right and to 60 degrees on the left**. Neurological examination of the legs was normal. Passive and resisted movements of the hip joints appeared to be normal and pain free." This report is in sharp contrast to that of [Appellant's doctor #4], who, from the same clinic, issued his report on July 28th, summarized below. [Appellant's doctor #5] said that there did not appear to be any evidence of a radiculopathy. Her examination of the lumbar region of [the Appellant's] back showed some tenderness and spasm in the left quadratus lumborum

muscle, but the right seemed normal. She noted marked tenderness in the paravertebral muscles on both sides extending from L3 to S1. She felt that [the Appellant's] low back pain was mechanical in origin and that it might be "primarily muscular in origin and be part of the generalized fibromyalgia picture related to his accident and to his emotional state." [Appellant's doctor #5] felt that it was time to become a little more aggressive in [the Appellant's] treatment by the use of epidural steroids.

July 25th, 1997: [Text deleted], a specialist in physical medicine and rehabilitation, having seen [the Appellant] that day, reports to [Appellant's doctor #2] that the appellant's exercises were then consisting of using the Ab-Roller at home, five minutes a day, doing ten to twenty sit-ups, some pelvic tilts, stretching exercises for his neck and thirty minutes in the pool three or four times a week. [Appellant's physiatrist] had suggested to the appellant that he needed to "push himself somewhat more in regard to his exercises". He had recommended some upper body exercises using eight to ten pounds of weight in each hand and spending twenty to thirty minutes a day at this. [Appellant's physiatrist] also felt that some stationary bicycling would be appropriate.

July 28th, 1997: A more detailed letter from [Appellant's doctor #4] to MPIC lists twenty-seven attendances by [the Appellant] at the [rehab clinic #1] from April 23rd to July 26th, including examinations and, where apparently deemed necessary, treatment by an intake nurse, internist, orthopaedic surgeon, family practitioner, acupuncturist, anaesthetist, and bio-feedback therapist. In addition, [the Appellant] was receiving weekly and, sometimes, twice-weekly appointments for physiotherapy and massage, along with at least four hours of pain education therapy from

[Appellant's doctor #3]. [Appellant's doctor #4] reports that, as at July 22nd, 1997, [the Appellant] "still needed to stand as he could not sit for more than a few minutes". Active **straight leg raising on the right side was reported to be 0 degrees, and only 10 degrees on the left. Passive straight leg raising could be achieved only to 20 degrees on the left and to 10 degrees on the right.** The patient walked and moved cautiously and with difficulty. There was considerable grunting, flushing and straining during the examinations but, nonetheless, considerable improvement in neck movements, less spasm in the neck and shoulder muscles and a great improvement in the appellant's mood since his original admission to the clinic. [Appellant's doctor #4] observed that [the Appellant] had been regular, cooperative and apparently keen to return to work. He had shown "marked recovery from his post-traumatic stress syndrome, a marked improvement in his head and neck movements "as manifested by his easier demeanour as he moves about" and his positive response to counseling and to the pain education group sessions he had attended. Hence, [Appellant's doctor #4] felt that [the Appellant's] prognosis was good. His present program at the clinic consisted of physiotherapy, massage, epidural steroid injections, counseling and supervision both by family practice and internal medicine practitioners. [Appellant's doctor #4] felt that [the Appellant] would require six months of further treatment to achieve the goal of restoring him to the point at which he would be able to work again.

Some aspects of [Appellant's doctor #4]'s report of this date are puzzling. [Appellant's doctor #4] reports that, when first examined on April 28th, [the Appellant] held his head stiffly and tilted toward the right, wincing with pain when passive flexion and extension of the neck and lateral movements of the head were attempted, whereas the video tapes made a few weeks earlier,

following [the Appellant's] arrival in [British Columbia], seem to indicate a fairly free and easy movement of the head and neck. On April 28th and, again, on July 14th, straight leg raising was limited to 40 degrees on the right and 60 degrees on the left, whereas by July 22nd, straight leg raising on the right was 0 degrees and 10 degrees on the left; even passive straight raising could only be achieved to 20 degrees on the left and 10 degrees on the right by July 22nd , which seemed to indicate a serious regression starting some seven or eight months after [the Appellant's] accident. [Appellant's doctor #4] reports normal neurological examination of the upper and lower limbs – no motor nor sensory disturbances of the nervous system, although marked tenderness in the paravertebral muscles on both sides extending from L3 to S1. Heart, lung and blood-pressure examinations proved normal; no masses nor any tenderness could be detected abdominally, and no peripheral edema nor any distension of the neck veins were noted.

September 2nd, 1997: [MPIC's doctor's] analysis of the situation on this date indicates that he had not seen [Appellant's doctor #4]'s letter of July 28th nor [Appellant's physiatrist]'s report of July 25th; [MPIC's doctor] appears to have based his opinion that no further IRI benefits were payable upon two factors:

(a) the narrative reports from the special investigations personnel which, as we have noted earlier, contain some significant inaccuracies and conclusions based on suppositions; and

(b) the mechanics of the accident.

[MPIC's doctor] says that, if [the Appellant] had been wearing his seatbelt with the shoulder restraint, there would have been very little movement of the trunk within the vehicle. Conversely, says [MPIC's doctor], the head would be quite free to move and would likely

sustain the greatest amount of injury. He goes on to say:

> Given that it is noted on the file that the claimant's neck is markedly improved, it is difficult to reconcile how the region of the spine, to which most of the force of the impact was imparted, has recovered, while the low back has not. This suggests either a pre-existing condition or other extrinsic forces outside of the motor vehicle accident which have led to an increased low back complaint.

[MPIC's doctor] concludes, therefore, that on the balance of probabilities there did not appear to be a cause and effect relationship between [the Appellant's] ongoing low back pain and disability and the motor vehicle accident of September 13th, 1996.

November/December: At some point during this time frame, [the Appellant] and [Appellant's wife] prepared a lengthy and detailed analysis of the video tapes and of the accompanying narrative prepared by MPIC's external and in-house investigators. That analysis, while containing a number of perfectly valid criticisms of the investigative reports, is marred, as MPIC's internal review officer commented, by much of the same hyperbole and 'nit-picking' as [the Appellant] and [Appellant's wife] allege are present in the very reports that they are analyzing. However, when the dust has settled upon these charges and counter charges, [the Appellant] did agree, on cross-examination, that he was "able to do the things that the surveillance reports say I was doing", although he felt some of his apparent movements had been misinterpreted.

November 17th, 1997: [Appellant's doctor #4] gives a handwritten memorandum (no addressee) to the affect that [the Appellant] was still disabled by low back pain and limitation of head and neck movements due to pain. The appellant had "marked limitation of head turning to the left and of lateral flexion of the neck to the left. Head and neck movement to the right are much

better." This memorandum also reflects severe low back pain – worse when sitting, improved when lying …. unable to straighten his legs when lying on couch: had to remain with knees flexed because of pain." [Appellant's doctor #4's] memorandum concludes that [the Appellant] was:

> …….disabled due to intractable low back pain. He has limitation of neck movement to the left due to pain. His back pain limits the distance that he can walk to one and a half kilometers when he is at his best, sometimes he had difficulty walking at all. He needs to continue to combine walking with physiotherapy, counseling, chiropractic, acupuncture and pain and anti-inflammatory medications.

December 15th, 1997: [Appellant's doctor #4] writes a brief note, 'to whom it may concern' to the effect that he also has viewed all eight of the investigators' video tapes, and does not feel that they indicate [the Appellant] had worsened his condition by the activities involved in moving from [Manitoba] to [British Columbia]. We note, in parenthesis, that it does not seem to have been suggested by anyone that those activities worsened [the Appellant's] condition. Rather, the submission of MPIC is that the video tapes show [the Appellant] to have a much greater functional capacity than he was prepared to admit.

April 14th, 1998: [The Appellant's] counsel advised MPIC that his client would be officially discharged from the [rehab clinic #1] on March 20th, 1998, since they felt there was nothing further they could do for him. [the Appellant], said his counsel, was now attending the [rehab clinic #2], where he was undergoing a form of treatment known as VAX – D at a cost of $1,684.00 for twenty treatments. The literature provided to us on behalf of [the Appellant], describing VAX - D therapy, seems to indicate that it is directed primarily towards patients whose low back pain and sciatica have their origin in herniated or degenerated discs, or posterior facet syndromes. At the heart of this form of treatment is the VAX – D Therapeutic Table

which, says the literature, is "the only therapeutic device to achieve non-surgical decompression of the lumbar spine." However, none of the medical evidence presented to us discloses any herniated or degenerated disc, nor any posterior facet syndrome, nor any compression of the lumbar spine. True, the CT scan performed on June 23rd, 1997 does show a small central disc bulge at L5 – S1, described as "of doubtful significance" since it did not impinge upon the thecal sac or exiting nerve roots. There was a slight bulging of the annulus at L4 – 5, but with no focal herniation.

[Text deleted], [the Appellant's] counsel, also noted that his client had started a gradual return to work on February 2nd, 1998 but had quit that course of action on March 11th, when he went for an assessment and, thereafter, for the twenty consecutive working days of the VAX- D therapy referred to above.

May 1st, 1998: In a letter to [Appellant's representative], [Appellant's doctor #4] reiterates his view that [the Appellant] had not made his condition worse by the activity involved in the move of himself, his family and household contents to [British Columbia]. [Appellant's doctor #4] also confirmed that [the Appellant] had been discharged from the [rehab clinic #1] on March 29th, 1998, "not because he was well but because he has had the full course of our treatment and advice over a period of one year" and had been referred back to his family doctor, [text deleted]. [Appellant's doctor #4] had been told by [the Appellant] that he was having continued counseling and was going for physiotherapy plus a course of VAX- D therapy "which I understand is a back-stretching procedure … on a daily basis." [The Appellant] was not going to his employer's office at all as he had been advised to rest each day after receiving VAX – D

treatment. [Appellant's doctor #4] felt that [the Appellant] would be able to resume full activity but "it may take as long as one year for him to work up to this".

June 20th, 1998: In a further, lengthy letter bearing this date, addressed to [Appellant's representative] (*which, [Appellant's representative] advised us, he had only received on or about November 12th*), [Appellant's doctor #4] makes the point that, as he puts it,

> The key to the whole situation is, therefore his ability to drive long distances. There was no job with his company which he could take that would avoid the necessity for all of his driving and carrying.

[Appellant's doctor #4] also makes the point that, despite the opinion of [MPIC's doctor] who questioned the relationship of [the Appellant's] low back pain to the motor vehicle accident,

> As his complaint of low back pain dated from the time of the accident and as he had been driving long distances without discomfort until the time of the accident, it seemed certain to me that the back pain was indeed due to the accident. As our clinical reports show, [the Appellant] had both subjective and objective evidence of injury from the time we first saw him. Such evidence also correlates with the reports from those who treated him in [Manitoba] after the accident.
> I cannot believe that the symptoms were not caused by the motor vehicle accident for all the reasons mentioned above.

DISCUSSION:

A significant facet of the evidence presented to us has been that which relates to [the Appellant's] emotional and psychological state. We have [Appellant's doctor #3's] report, referred to above, but it is of little, if any, assistance in the context of either diagnosis or causation. Several of [the Appellant's] caregivers have noted that, in the course of discussion, he appeared distraught and teary-eyed. [The Appellant's] own testimony, in this context, was that his inability to resume his full-time position with [text deleted] caused him to become very emotional. At one point, he told us that he did not know why he had not tried a graduated

return to work but, later, he said that he had tried to return to work in or about February of 1998 "but was prevented by my emotional state, which wouldn't permit it." While acknowledging that a lot of customer contact could be achieved by telephone, fax or e-mail, [the Appellant] said that his memory had been poor – "there's a lot to remember and I would look pretty stupid if I am asked a question and cannot answer it". Interestingly enough, [the Appellant] also testified that his father had been keeping in touch with the company's customers in the appellant's territory during the appellant's indisposition, and that he did not think that the corporation had lost much, if any, business. As he puts it:

> The products that we carry are mainly for [text deleted]. Some of our customers are changing over to [text deleted]. If we lost any business since my motor vehicle accident, I think that would be the main reason. In fact, I don't think we have lost much business at all that I am aware of.

We find the history of [the Appellant's] many attendances at the [rehab clinic #1] perplexing in that, despite the remarkable number of assessments and treatments on multi-disciplinary levels, the only complaint with which he had first presented to that Clinic and which seems to have shown any major improvement was the pain and stiffness in his neck. [Appellant's doctor #4], in his letter of May 1st, 1998 addressed to [the Appellant's] counsel says:

> I last saw [the Appellant] at the Clinic on March 29th, 1998. At that time he was continuing to have low back pain and pain down the calves of both legs. In addition, he complained of numbness in his legs after driving for several kilometers and this was a matter of concern to him as it made him feel insecure in the use of the pedals. He was still suffering from depression and frustration about his continuing disability. However, the pain and stiffness in his neck which was present when we first treated him had almost entirely resolved.

The neck and shoulder pain, along with thoracic discomfort, had apparently re-appeared after [the Appellant's] arrival in [British Columbia], since [Appellant's physiotherapist #1] had reported that they had been brought well under control by the time of his last attendance upon

> the Appellant. It seems only to have been since [the Appellant] started to receive standard physiotherapy at [rehab clinic #2] that he has shown significant gains in postural correction, flexibility and strength. By May 24th of this year he had apparently attended for eighteen physiotherapy sessions there, between March 29th and May 24th. His treatments included active physiotherapy focusing on symptom control through postural education, stretching, strengthening and cardiovascular conditioning, using gymnasium facilities on [rehab clinic #2's] premises. By May 24th [the Appellant] had apparently reported significant improvement with his low back pain and mobility of the low back, with improved strength. His sitting tolerance was apparently still limited due to complaints of right leg pain but he had returned to work on a part-time basis.
>
> [The Appellant's] own comment about his return to work is enlightening. He said "I sort of woke up one morning and decided 'enough of this; I'm going back to work', and I did. I just put on my suit and tie, drove to work and said 'Here I am'. I am limiting my work to three hours a day on the advice of my physiotherapist. This was as a result of his comment that I couldn't do any more damage to my back than I had already done."

We have carefully considered the suggestion of counsel for MPIC that this commission should, perhaps, order a psychiatric assessment of [the Appellant]. We are of the view that the only purpose of such an assessment would be to seek an opinion whether [the Appellant's] current emotional or psychological condition was caused by his motor vehicle accident. We do not believe that a psychiatric assessment can satisfactorily answer that question now, close to three years post- accident.

After very careful consideration and after revisiting all of the evidence made available to us, we have unanimously reached the following conclusions, each of which is, necessarily, based on a balance of probability rather than any unassailable certainty:

(a) in his motor vehicle of September 13th, 1996, [the Appellant] sustained a Grade II Whiplash Associated Disorder, with no neurological deficits, no skeletal damage, no concussion and no apparent post-traumatic stress disorder. He had suffered from severe headaches before his accident; these continued and, for some months following his accident, were accentuated. The accident does appear to have brought about severe pain in [the Appellant's] lumbar region – an unusual result, in light of the mechanics of his accident, but not impossible, particularly in view of the temporal relationship and the absence of any other logical explanation;

(b) [The Appellant] also sustained soft tissue injuries to his cervical and thoracic regions in that accident, but the thoracic area had been restored to pre-accident condition, or very close to it, by February 24th, 1997; his cervical discomfort, while it may have been the subject of occasional flare-ups over the ensuing months, had also been brought under control by November, 1997, at least to the point that would have allowed a return to work;

(c) [The Appellant] was not, as at March 22nd, 1997 capable of performing the essential duties of his employment, since one of the primary factors constituting those duties was the ability to drive fairly long distances, often for several consecutive days, and it seems clear that he was not able to do so;

(d) the recommendations contained in the letter addressed by [Appellant's

physiotherapist #2] to MPIC on January 22, 1997, had they been given effect, would have restored him, if not full pre-accident status, at least to reasonably full working capacity by the first anniversary of his accident.

(e) the move [the Appellant] and his immediate family from [Manitoba] to [British Columbia] in March of 1997 effectively frustrated the rehabilitation plan proposed by [Appellant's physiotherapist #2]; that plan only took shape again in the form of physiotherapy treatments given to [the Appellant] at [rehab clinic #2], commencing March 29th, 1999;

(f) the twelve months of his treatments at the [rehab clinic #1] in [British Columbia] appear only to have brought him back to much the same condition as was reflected in the last report of his [Manitoba] physiotherapist, [text deleted], of February 24th, 1997 except that, between the date of that report and the commencement of his treatments at [rehab clinic #1], [the Appellant's] leg pain seems to have become more pronounced and chronic. We are unable to ascribe any cause to that leg pain and the attendant numbness of which [the Appellant] complains - we do not doubt their presence, but have insufficient evidence upon which to base a causal relationship between them and the motor vehicle accident;

(g) despite the finding reflected in subparagraph (d) above, we are prepared to extend [the Appellant's] Income Benefits by approximately 31/2 months beyond the date by which, had he remained in [Manitoba] and followed that program, his Income Replacement otherwise have ended;

(h) his Income Replacement Indemnity will be reinstated from March 23rd, 1997, to December 31st, 1997, both inclusive, with interest thereon calculated at the statutory

rate to the date of actual payment.

The question of [the Appellant's] entitlement to further physiotherapy or other treatment at the expense of the insurer was not before us, not apparently having been the subject of a decision by MPIC's internal review officer; we are therefore without jurisdiction to deal with it.

Dated at [Manitoba] this 16th day of July, 1999.

J. F. REEH TAYLOR, Q.C. **CHARLES T.BIRT, Q.C.** **COLON SETTLE, Q.C.**

(*Alternative conclusion re physio.)*

It is clear that [the Appellant] did need additional physiotherapy following his departure from [Manitoba]. As we have indicated above, his condition at the termination of his treatments at the [rehab clinic #1] showed, at best, only a marginal improvement over his condition at the beginning of those treatments and the decompression therapy does not seem to have been directed toward any injury created by [the Appellant's] motor vehicle accident. However, his subsequent physiotherapy at the [rehab clinic #2] does seem to have had beneficial results and the treatments there from March 29th, 1999 to date should be paid for by MPIC. This aspect of [the Appellant's] claim is referred to back to his adjusting team at MPIC, in order that they may obtain from [rehab clinic #2] a time-limited treatment plan for their approval. [The Appellant] has already commenced a graduated return to work and, with monitoring from his current physiotherapist, will presumably be able to increase the frequency and duration of his work days. While we do not attempt to make any decision on this point, it does appear to us as if he may need a further four to six months of physiotherapy, although on a planned, decreasing basis. That, however, is a decision which, at least for the time being, we prefer to leave for the insurer to work out in direct conjunction with [the Appellant's] physiotherapist, [text deleted] at the [rehab clinic #2], whose address is at [text deleted] [British Columbia],. His telephone number is [text deleted] and his fax number is [text deleted].