Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-70

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Ms. Yvonne Tavares** **Mr. Colon C. Settle, Q.C.**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Keith Addison;** **the Appellant, [text deleted], was represented by [Appellant's representative]**
HEARING DATE:	**May 2, 2000**
ISSUE(S):	**(i) Whether Appellant entitled to home care assistance;** **(ii) Whether alleged income reduction attributable to motor vehicle accident and, therefore, compensable.**
RELEVANT SECTIONS:	**Sections 81(1)(a), 110(1)(a), 131 and 136 of the MPIC Act, and Sections 2 and 8 of Manitoba Regulation 40/94**

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

Reasons For Decision

The Appellant, [text deleted], was riding as a passenger, unbelted, on the rear deck of her family's [text deleted] station wagon at about 9:30 a.m. on January 14th, 1995. One of her daughters, [text deleted], was driving the vehicle, and the Appellant's husband, [text deleted], was riding as a passenger in the front seat; there were either three or four other young people in the vehicle. [Appellant's daughter], who had been driving south on [text deleted], made a left turn across the path of oncoming traffic; the [text deleted] was hit by a [text deleted] vehicle, just

forward of the front wheel, and the Appellant sustained a Grade 2 whiplash associated disorder, together with what appears to have been musculoligamentus strain or pain in the interscapular area. (We are obliged to say "appears to have been" because none of the early medical reports really contains a diagnosis. Rather, they simply indicate that the Appellant was complaining of pain in mid-back, upper back and neck.) [The Appellant] did not sustain any skeletal damage.

On April 4th, 1995, [the Appellant] completed an Application for Compensation, in which she described her injuries as "very soar [sic] right mid back. Possible broken lower ribs. Very soar [sic] neck and spine, bad headaches and pain shooting down legs and shoulder." Her application noted that she was unable to do housework, unable to perform her occupational duties (specifically, driving), and unable to do her normal family activities. [The Appellant] claimed Income Replacement Indemnity, home assistance, reimbursement for the cost of certain medication, and payment for continuing physiotherapy and massage treatments.

[The Appellant's] adjuster at Manitoba Public Insurance Corporation ('MPIC'), [text deleted], refused income replacement because the information on MPIC's file did not support objective physical findings indicating a level of functional impairment to a degree that would have prevented the Appellant from carrying on her duties as a real estate agent and/or property manager. Further, despite numerous requests on the part of MPIC, [the Appellant] had refused or neglected to provide the insurer with the relevant information upon which any rational calculation of income replacement could have been made. She had promised, on at least a couple of occasions, to have her accountant furnish the required information to MPIC, but that was never done.

[Appellant's MPIC adjuster] also refused payment for any housekeeping assistance, for reasons that we shall touch upon later. The pharmaceutical expenses are no longer an issue, and by the time of [Appellant's MPIC adjuster's] decision, in November of 1997, the insurer refused payment for further physiotherapy upon the grounds that maximum therapeutic benefit from that modality had already been achieved.

On January 30th, 1998, counsel for [the Appellant] filed an application for an internal review of [Appellant's MPIC adjuster's] decision. It was not until April 8th, 1999, that MPIC's Acting Internal Review Officer, [text deleted], was finally able to hold a hearing. We note, in passing, that we can find little, if any, fault on the part of the insurer to account for the extraordinary hiatus between the filing of the review application and the conduct of that review. [MPIC's Internal Review Officer] found that [the Appellant] had been disabled between the date of her accident on January 14th, 1995, until and including February 16th, 1995, and he awarded her income replacement for that period, less the statutory seven-day waiting period. [MPIC's Internal Review Officer] also allowed [the Appellant] the cost of certain medications that she had been denied, and also ordered that she be reimbursed $185, being the cost of physiotherapy treatments she had received in 1997. He denied a claim for massage therapy, referring to Section 8 of Manitoba Regulation 40/94 which is dealt with in greater detail below. He also denied [the Appellant] any personal assistance benefits. [MPIC's Internal Review Officer's] decisions were contained in a letter of April 30th, 1999, and, by a notice bearing date June 23rd but not received by this Commission until July 6th, 1999, counsel for [the Appellant] appealed to this Commission from [MPIC's Internal Review Officer's] decisions respecting Income Replacement Indemnity, housekeeping assistance and massage therapy.

There are several factors that add difficulty to the adjudication of [the Appellant's] appeal. Firstly, as will appear, there are major discrepancies between the evidence presented to us by [the Appellant] at the hearing of her appeal and the information apparently given by her to her medical and paramedical care-givers. Secondly, the inexplicable delays, not only between the date of her accident and the date of the Internal Review Officer's decision but, as well, between the date of that decision (April 30th, 1999) and the readiness of the Appellant's counsel to have her appeal heard by this Commission, tend to becloud the evidence—in particular, the oral testimony—given the frailties of the human memory. Thirdly, at the time of her accident [the Appellant] was apparently engaged in two separate but related occupations: a property manager and a real estate agent or broker. She testified that she was not able to return to the field of real estate sales until January 1st, 1997, but that, for at least part of the time between her accident and her return to full employment, she was able to conduct some, although not all, of her property management duties. The data presented to us make it extremely difficult to determine what loss of income can properly be attributed to her motor vehicle accident.

There are two facets of [the Appellant's] appeal that can be dealt with quite simply, since it is clear that neither of them can succeed:

Personal Home Assistance

Section 131 of the MPIC Act provides that, subject to the regulations, the Corporation may (this word was amended on June 29th, 1998, to read "shall") reimburse a victim for expenses relating to personal home assistance where the victim is unable, because of the motor vehicle accident, to care for herself or to perform the essential activities of everyday life without assistance. The applicable Manitoba regulation is 40/94. That regulation contains two evaluation grids: the one grid lists certain personal care activities such as getting up, getting dressed, washing and other

bathroom activities, eating and the like; the other grid details certain home assistance requirements, such as the preparation of meals, light housekeeping, house cleaning, laundry, and the purchase of supplies. Each activity has a particular 'score' assigned to it, dependent upon whether the claimant is completely dependent on the assistance of others, only partially in need of assistance, or in no need of assistance. The points obtained on both of those grids are added together and the resultant total is applied to a chart which calculates the benefit as a percentage of the indexed maximum ($3,000 per month). In order to be entitled to any financial assistance for home care, a claimant must be able to score a minimum of five points. There is some evidence that the [Appellant's] family retained the services of a pair of cleaning ladies, whose names [the Appellant] did not remember, who came in every two weeks from March 2nd, 1995, to August 21st, 1997. The cleaning ladies spent approximately four hours on each occasion and apparently vacuumed, cleaned the bathrooms, and cleaned the kitchen. As [the Appellant] testified, "specifically what they did during the time they were there I don't know—they came, they worked for four hours and then they left; there was money left in the drawer for them and they were supposed to sign for it before leaving."

If we correctly take it, from [the Appellant's] evidence, that she was partially in need of assistance for light housekeeping and completely on assistance for housecleaning, that would give her 1.5 points—not enough to qualify her for any financial assistance under the MPIC Act. It follows, then, that this portion of [the Appellant's] appeal must be dismissed.

Massage Therapy

As we noted earlier in these Reasons respecting the massage therapy for which [the Appellant] claims reimbursement, MPIC's Internal Review Officer pointed out that, under Section 8 of Manitoba Regulation 40/94, the Corporation is precluded from paying any expense incurred by a

victim for massage therapy unless that therapy is dispensed by a physician, chiropractor, physiotherapist or athletic therapist. Since [the Appellant's] masseur held none of those qualifications, [MPIC's Internal Review Officer's] decision in that regard was correct and the claim for reimbursement must be dismissed.

Income Replacement Indemnity

This facet of [the Appellant's] claim requires a more detailed analysis of the evidence made available to this Commission. The following summaries will cover at least the salient portions of that evidence.

Report of [Appellant's doctor #1]

[Appellant's doctor #1] examined [the Appellant] on February 20th, 1995 (about five weeks post-accident). [The Appellant] had been examined by [text deleted], a chiropractor, shortly after her accident, but we have not been provided with any report from [Appellant's chiropractor]. [Appellant's doctor #1] noted "muscular neck sprain improving, sleep improving, neck range of motion most limited in 50% lateral bending, bilaterally, other ranges of motion almost full. Mid-back discomfort right sub-scapular." [Appellant's doctor #1] added the following comments:

> Discontinued Mobiflex February 17th because feeling groggy—improving, self heat and stretch/just Tylenol now. Chiropractor too aggressive at first, reduced to three times per week. Massage therapist $40 not covered by MPIC? So not done.

Noting that [the Appellant] felt incapacitated by neck pain, [Appellant's doctor #1] concluded her report by saying "Fully disabled until February 17th. Feeling well enough to resume part-time work."

Evidence of [Appellant's doctor #2]

[Appellant's doctor #2] first examined [the Appellant] post-accident in late February 1995, when [the Appellant] was complaining of pain in the right ribs posteriorly. [Appellant's doctor #2] noticed a tenderness in the right paraspinal region and the upper lumbar muscles of [the Appellant]. [The Appellant] had appeared tremulous all the time and said she had lost 10 pounds in weight during recent weeks. [Appellant's doctor #2] had diagnosed musculotendinous pain and had prescribed physiotherapy together with anti-inflammatory and muscle-relaxant drugs.

As a result of a laboratory test that she had ordered, [Appellant's doctor #2] had tried to reach [the Appellant] on three occasions on February 23rd and had left messages for her but without response. She saw [the Appellant] again on February 27th, primarily with respect to an apparent, fine tremor of both hands.

[Appellant's doctor #2's] notes, made at the time of her examination of [the Appellant] on March 20th, 1995, show a medical history of [the Appellant] involving suspected multiple sclerosis (fortunately, discounted) in 1991, suspected migraine headaches in 1993, and "neck problems since MVA getting better."

[Appellant's doctor #2's] next meeting with [the Appellant] occurred on April 11th, 1995, when her clinical notes reflect, *inter alia*:

> Put on pantyhose yesterday and re-aggravated neck pain. Increased pain left hip and right lower ribs (apparently resulting from a specific physiotherapy). Very tight superior trapezius bilaterally; pain posterior left iliac crest, discomfort lower right ribs posteriorly.

[Appellant's doctor #2] noted that [the Appellant] might have re-injured her neck muscles and wondered whether [the Appellant] was developing chronic pain of a musculotendinous type.

She prescribed a short course of non-steroid anti-inflammatories and a muscle relaxant, noting that "may need phys-med rehab." Her report to MPIC of that date (her first such report) reflects most of the foregoing but makes no mention of the possibility of Chronic Pain Syndrome, nor of the possible need for rehabilitation program. She recommended the continuance of physiotherapy.

On April 28th, 1995, [Appellant's doctor #2] again saw [the Appellant], who reported that her medication helped a lot with her pain, although it made her sleepy. She still ached on the left side of her neck, but her headaches were less painful and she was reportedly sleeping well. Objectively, [Appellant's doctor #2] noted that the Appellant's range of motion in flexion, extension and lateral bending, while still reduced, were much improved and there was now minimal tenderness in the upper left trapezius.

The Appellant's next appointment with [Appellant's doctor #2] was on June 1st, 1995. [The Appellant] was now complaining of major headaches and pain in the trapezius muscles. She had, for some reason, stopped taking her anti-inflammatory medication and her Tylenol. She was again not sleeping well. [Appellant's doctor #2] diagnosed myofascial pain which, she felt, was contributing to [the Appellant's] headaches. She felt that more aggressive physiotherapy was called for but that, if [the Appellant] did not improve soon, a reference to physical medicine rehabilitation would be required. [Appellant's doctor #2] reported to MPIC, on June 1st, 1995, as she had in her earlier report of April 11th, that [the Appellant] was capable of partial resumption of her main occupation, "limited only by headache and neck and shoulder pain."

On June 29th, 1995, following a further examination of [the Appellant], [Appellant's doctor #2] referred her to [text deleted], a specialist in rehabilitation medicine at [text deleted]. [Appellant's doctor #2], in a narrative report to MPIC on July 4th, 1995, says, in part:

> With regards to [the Appellant's] disability periods you may know that [the Appellant] has not completely stopped to work, however, she has had to modify her work significantly to account for her ongoing pain. As you know, she is employed in both property management and real estate. She has had to stop the real estate activities as she is indeed unable to drive for prolonged periods. She finds shoulder-checking with her sore neck is almost intolerable. Also she endures almost persistent headaches and finds that the contact with the community, i.e., customers, is too draining and that interaction with her clients are [sic] somewhat stressed due to her irritability.

During two visits to [Appellant's doctor #2] in August 1995, [the Appellant] continued to complain of headaches, concentrated mainly at the back of her head and her neck. [Appellant's doctor #2] prescribed Amitriptyline to help with the Appellant's sleep disorder and, by August 18th, [the Appellant] was reporting an improvement, her headaches were now dull rather than sharp, she was able to function in spite of the headaches and was back to work on a limited basis. By January 9th, 1996, [the Appellant] was reporting an almost total absence of headaches, an improvement in her weight but a reduced memory since starting the Amitriptyline. [The Appellant] was still complaining of bilateral tenderness over the trapezius muscles and interscapular pain.

[Appellant's doctor #2], during her oral testimony to this Commission, confirmed the several reports she had rendered to MPIC and explained some of her clinical notes. Those notes, to the extent that they bear dates after the referral of [the Appellant] to [Appellant's rehab specialist], reflect primarily the continuance of myofascial pain, the several medications prescribed for [the Appellant], and the possible need for counselling respecting chronic pain. [Appellant's doctor #2] had made a note for herself on August 25th, 1996, to "consider selective serotonin reactive

inhibitor at some point" and did, in fact, prescribe Serzone (Nefazodone), an antidepressant drug, in dosages which appear to have increased from November 1996, when they were first prescribed, until about April of 1997, by which point [the Appellant] had reported that the Serzone was not working.

[Appellant's doctor #2] testified that "my notes are silent as to [the Appellant's] work abilities. She did tell me she was having difficulties but it was my understanding that she never quit work. My only note, quite early on, is that she was back at work on a limited basis, and that was on August 18th, 1995." [Appellant's doctor #2] felt that the distribution of [the Appellant's] headaches was more indicative of muscular strain, originating in the neck, than of migraine.

[Appellant's doctor #2] offered her impression with respect to the 53 physiotherapy treatments received by [the Appellant] from March 1st to September 20th, 1995, both inclusive, that "this was a lot of physiotherapy."

Reports of [Appellant's rehab specialist]

[Appellant's rehab specialist] first saw [the Appellant] on February 28th, 1996, about 13 months after her motor vehicle accident. The Appellant had reported that she had noticed neck and back pain over the course of the few days immediately following her accident. X-rays had revealed no evidence of fractures, and [the Appellant] had attended for eight months at [text deleted] physiotherapy clinic where, she reported, she had done some stretching exercises which brought some relief of pain but she had continued to have problems with neck pain and headaches. [Appellant's rehab specialist's] initial report to [Appellant's doctor #2] of March 5th, 1996, says, in part:

> …you started her on Amitriptyline in September 1995 and she finds this of the most benefit. It has helped her headaches as well as the sleep disorder but she still has some pain. She finds that the pain is really limiting her work as a realtor. Apparently her income has dropped because of the pain interfering with her function.
>
> The only thing she complains of is that whenever she is on the Elavil *(i.e., Amitriptyline)* she feels that her memory is not that great and she feels that this also is interfering with her job.
>
> At home she manages most of the light household duties. She finds that vacuuming is a problem. Painting the walls of her home is a problem. Any kind of repetitive activity increases discomfort. *(Emphasis added.)*

[Appellant's rehab specialist] reported tenderness over the Appellant's trapezius muscles bilaterally, as well as the sternomastoid and the scalene. She found that the Appellant had restricted movement of her neck in rotation, extension, flexion and lateral flexion. The Appellant had full mobility of her shoulders and, although she did not complain of any tenderness in her back, she did have asymmetry of the pelvis. She had full movement of her back. [Appellant's rehab specialist] found no neurological deficit, good strength, normal reflexes and no sensory deficit. [The Appellant's] left leg was measured to be one-half centimetre shorter than her right one.

[Appellant's rehab specialist] agreed with [Appellant's doctor #2] that [the Appellant] had myofascial pain of numerous muscles of her neck and shoulders. She felt it wise to wean the Appellant off the Elavil and try a different medication for the sleep disorder. She referred [the Appellant] to [rehab clinic] for more stretching exercises and planned to bring the Appellant back to see her in four to six weeks' time for trigger point needling if need be.

On April 23rd, 1996, [Appellant's rehab specialist] reported to [Appellant's doctor #2] that [the Appellant] was attending [rehab clinic] for stretching, spray-and-stretch treatments together with

some heat. Her mobility had improved; she was still getting headaches with the spray-and-stretch treatments; [Appellant's rehab specialist] found a taut band in the left trapezius which she wanted to needle but [the Appellant] said it was her [text deleted] birthday and she did not want any needling done that day.

On May 7th, 1996, [Appellant's rehab specialist] reported to MPIC's adjuster, summarizing the foregoing reports to [Appellant's doctor #2], and adding that she had seen [the Appellant] on April 30th when she had needled the trapezius taut band, had sprayed and stretched the Appellant and planned to see her two weeks thereafter. [Appellant's rehab specialist] did not know, at that point, how long it would take for [the Appellant] to improve the mobility of her neck and decrease her symptoms so that she could go back to working full-time as a realtor. (We note, in passing, that [the Appellant] never seems to have worked as a realtor on a full-time basis, since a good part of her time was obviously taken up with her property management functions.)

On May 15th, 1996, [Appellant's rehab specialist] reported again to [Appellant's doctor #2], adding that she had also seen [the Appellant] on May 14th. [The Appellant] had reported that she had done well after the needling of her left trapezius on April 30th, but now had a taut band on the right side in the levator scapula area, which [Appellant's rehab specialist] had needled, sprayed and stretched.

On June 6th, [Appellant's rehab specialist] reported to [Appellant's doctor #2] that [the Appellant] had made an urgent appointment to see her because, apparently, she had been ironing about 60 shirts and noticed pain in her trapezius area. She had tried stretching it out without resolution, so [Appellant's rehab specialist] saw her on June 4th when a taut band in the right trapezius muscle was needled, sprayed and stretched.

[The Appellant] next saw [Appellant's rehab specialist] on June 18th and reported that she was doing fairly well after the last needling.

In a report to MPIC, which is undated but appears to have been rendered some time in July 1996, [Appellant's rehab specialist] describes [the Appellant's] clinical status as "improving. Still some tightness of trapezius." She diagnosed a Grade 2 whiplash associated disorder, described the Appellant's then current function as "full function with symptoms" and expressed the view that [the Appellant] could work modified duties. Her management plan for [the Appellant] included stretching, physiotherapy and Xanax, a drug for the management of anxiety disorders.

On July 30th, 1996, [Appellant's rehab specialist] reported to [Appellant's doctor #2] that, when seen that day, [the Appellant] had said she was "not doing too badly," except for the preceding three days when she had been having tightness of her shoulder muscles. [Appellant's rehab specialist] had needled, sprayed and stretched a taut band in the Appellant's left trapezius.

On September 17th, 1996, [Appellant's rehab specialist] again reported to [Appellant's doctor #2] that [the Appellant] had been seen on September 16th. She had said she was not doing too badly, though she still noticed some headaches and discomfort. The Appellant's left trapezius was still tight with slightly decreased rotation of her neck and lateral flexion. [Appellant's rehab specialist] said "Since this has been going on for such a long time I asked her if physio had done a functional restoration program. She says she has not been attending physio from July." As a result, [Appellant's rehab specialist] again referred [the Appellant] to [rehab clinic], for both physiotherapy and occupational therapy.

On December 11th, 1996, the last occasion on which [Appellant's rehab specialist] examined [the Appellant], the Appellant had reported that she was attending [rehab clinic] for a functional restoration program but was "not too happy with the treatment she is getting." [The Appellant] felt that the massage therapy she was receiving from a private source was actually giving her more benefit. Objectively, most of [the Appellant's] muscles were fairly good, except for the scalene which was tight. She had good mobility of her neck, except for lateral flexion. She still had pelvic asymmetry and the leg length discrepancy, so [Appellant's rehab specialist] advised her to get a heel insert to see if that would help her myofascial pain.

[Appellant's rehab specialist] provided a brief report under date April 7th, 1999, in which, after briefly summarizing the reports noted above, she concluded that [the Appellant] should continue with her functional restoration program but that, because of a number of missed appointments due to apparent illnesses in her family, the physiotherapy department at [rehab clinic] had discontinued her treatments; she never did get to see the occupational therapy department for a functional restoration program.

Reports of Physiotherapists

[The Appellant] received three different series of physiotherapy treatments, the first being from [Appellant's physiotherapist #1] of [text deleted] Physiotherapy Services on referral from [Appellant's doctor #2], and the other two by [Appellant's physiotherapist #2] at [rehab clinic], on referral from [Appellant's rehab specialist]. [Appellant's physiotherapist #1's] memoranda to [Appellant's doctor #2] cover a period from March 8th to July 19th, 1995, and are, for the most part, unremarkable. They speak of [the Appellant's] continuing complaints of dull ache to her mid-back, as well as occasional sharp pain on the right side of her neck and shoulder, occasional

bilateral headaches, arm stiffness, and difficulty staying asleep at nights. Her treatments consisted of thermotherapy, manual traction of the cervical and lumbar spinal regions, stretching exercises, TENS (transcutaneous electrical nerve stimulation), and the provision of a series of home exercises to improve the Appellant's ranges of motion by exercising and stretching. By April 5th, 1995, the Appellant's symptoms, which had appeared to be alleviating, apparently took a downturn, evidenced by renewed complaints of daily headaches and low back pain. [Appellant's physiotherapist #1] asked [Appellant's doctor #2] whether [the Appellant] should be taking anything for pain. By mid-June, [Appellant's physiotherapist #1] notes that [the Appellant] "continued to present with occasional headaches, suboccipital muscle tenderness, neck stiffness/tightness," although overall her strength and endurance had improved, along with her mobility. By July 19th, 1995, [Appellant's physiotherapist #1] reported that [the Appellant's] range of motion was now full, although, apparently, with pain on the right side of her neck accompanying rotation to that side.

There is only one report from [Appellant's physiotherapist #2]; it covers both periods of physiotherapy for [the Appellant] following referral by [Appellant's rehab specialist]. Since the Appellant's claim for IRI is for the period ending December 31st, 1996, we need not concern ourselves with the 1997 physiotherapy treatments. [Appellant's physiotherapist #2] reports that [the Appellant] attended at [rehab clinic] for treatment from March 14th to June 6th, 1996. On March 14th, the Appellant was assessed as having presented with decreased cervical range of motion to approximately three-quarters of her natural range, both actively and passively, diffuse muscular tightness of the sternocleidomastoid, suboccipital, upper trapezius, cervical thoracic paraspinals, scalenes and pectoralis major bilaterally. Trigger points were noted in both upper trapezii muscles, there was facet tenderness on the right side at C3-4, diffuse bilateral upper extremity weakness (Grade 4+ out of a possible 5) and decreased endurance. Treatment given to

[the Appellant] included a stretching program, posture and a general neck care education, local pain relief and thermal modalities, spray and stretch as necessary, progressive scapular stabilization strengthening exercises, and a home exercise program. During the course of this physiotherapy, [the Appellant] was seen on several occasions by [Appellant's rehab specialist] for trigger point injections, as noted earlier in these Reasons. No formal discharge assessment was done after that course of therapy, since [the Appellant] did not book any further appointments. Objective physical findings on the last visit of June 6th, 1996, included:

- [The Appellant's] cervical range of motion was limited to approximately one-half of the norm for left side flexion and right rotation, although that range of motion was registered shortly after [the Appellant] had received a trigger point injection to the right upper trapezius muscle, and [Appellant's physiotherapist #2] felt that this might have limited her range of motion at the time. *(We note that, rather than an improvement, this measurement seems to indicate a decreased range of motion when compared to the initial assessment of March 14th, 1996.)*
- Decreased tightness was noted in the right upper trapezius, but tenderness persisted in the right sub-occipital region and in the right levator scapulae muscle. Mild tenderness and tightness were also noted in the left upper trapezius muscle.

Evidence of [Appellant's husband]

[Text deleted], the Appellant's husband, testified that his wife's life had deteriorated over the two years immediately following her motor vehicle accident. Her normal optimism had changed to depression and mood swings. "We couldn't figure out what was wrong. There was definitely pain; it even woke her up at night."

[Appellant's husband] testified that he and his wife owned five or six rental units which the Appellant managed for them. Her brother, [text deleted], also arranged for her to manage several properties [text deleted]. "We wanted the flexibility that allowed her to work evenings and weekends, when I would try to be available."

[Appellant's husband] said that his wife had seemed to become disoriented, not really in control of her life. She would find herself somewhere without knowing why or how she got there. After her accident, she was not as 'engaged' as she had been in the domestic scene. She was not as active nor as organized in running the home. Their marriage had deteriorated over a period of two or three years. It was not that there was increased domestic discord; rather, [Appellant's husband] said he had had to adjust to a new person—[the Appellant] had become introspective, less communicative, less enthusiastic. When he came home at night, his house would often be dark, the children would be doing homework, and [the Appellant] would be in bed, or using TENS equipment or doing exercises pursuant to directions from her doctor or physiotherapist. She had recommenced full engagement in realty sales in early 1997. "The lasting stress for me was the emotional impact her motor vehicle accident had on our marriage."

[Appellant's husband] agreed that, in addition to managing their own rental properties and those owned by her brother's [text deleted], [the Appellant] managed several rental properties for her parents, particularly during the winter months when they were away. She was paid for all of her property management work, save only for the rental properties owned by [Appellant's husband] and [the Appellant] themselves.

Evidence of [the Appellant]

[The Appellant], at the time of her accident, was working part-time as a real estate broker with the firm [text deleted], which is owned by her mother, [text deleted]. She testified that her parents own a 14-suite apartment block and a fourplex in [text deleted] which she managed for them during the winter months, helping occasionally when needed during the rest of the year. She looks after the office at [text deleted] which firm, in turn, manages a number of other properties in [text deleted] for which she assumed responsibility during her parents' winter absences. She also manages a house owned by her brother on [text deleted]. As well, she also managed 17 rental units owned by [text deleted]; they were, for the most part, individual houses or, in a few cases, duplexes.

[The Appellant's] evidence was that, prior to her motor vehicle accident, she had done all of the work related to the management of those properties, but after the accident "my parents helped, my daughter helped, I took help wherever I could get it."

[The Appellant] testified that despite [Appellant's doctor #1's] report, she did not go back to work on February 17th, 1995, because she could not; she was in too much pain and could not move her neck without extreme pain. She handled as much property management as she could while lying on a couch at home, using a cordless telephone. On one occasion, she decided that, perhaps, if she went out for a while, "I could get kick-started." So, she drove downtown. She found herself in a shopping mall but did not know why she was there nor how she got there; she telephoned her husband to come and get her.

The Appellant's evidence was that she spent a great deal of time lying on her couch. The children would make their own breakfasts and luncheons; she made no beds, did no cleaning

and, for a large part of the day and evening, was close to a vegetative state. In August of 1995, she was doing nothing in the field of real estate sales and all of her property management work had been farmed out to her mother. She was taking antidepression medication and muscle relaxants, although she did not believe she was depressed and thought that she would be back in business any day; that, unfortunately, did not happen. [The Appellant] further testified that she was unable to stay asleep. She added "I could not have coped but, so far as I can recall, there was not much to cope with—my work was all being done by others."

She had refused to let MPIC's adjuster into her home because, she said, she was too proud to let anyone into her home when it was just such a mess.

[The Appellant] testified that she had recommenced working in March of 1996 although she had no sales income that she earned in 1995, nor in 1996; she had continued to receive payments for all her property management work.

[The Appellant] testified that, during all of 1995 after her accident and almost all of 1996, she simply stayed home, except when going to physiotherapy or to visit her doctors. She did not go anywhere elsewhere, she said. On the occasion referred to by [Appellant's rehab specialist], [the Appellant] testified that she had forced herself to get up off her couch to iron about 60 shirts, because her children were all at private schools and the clean, ironed shirts were a necessity. She said "I don't know how I coped with the children's vacations, birthdays, Christmas, special events and returns to school. My extended family must have rallied around, but I did not know what was happening. In essence, I lay on my couch for two years. I would often have people drive me to the doctors or to physiotherapy, although [text deleted] Clinic is close to my home. I was physically capable, but the will was gone; the system shut down."

[The Appellant] was not able to explain why a major part of the testimony that she gave at the hearing of her appeal was not reflected in any of the medical reports. For example, to have found herself in a shopping mall without knowing how or why she got there, might have been found worthy of mention to her family physician, yet neither [Appellant's doctor #2] nor [Appellant's rehab specialist] was made aware of it. Similarly, all of her medical and paramedical care-givers expressed the clear belief that she was working, at least on a part-time basis, throughout the entire period. None of those care-givers indicates the remotest belief that [the Appellant] was as disconnected from the world around her as her testimony to this Commission indicates.

[Appellant's doctor #1] records, on February 20th, 1995, her clear impression that [the Appellant] had, in fact, returned to work on February 17th. [The Appellant's] parents were out of the country during the winter months of 1995/96 and 1996/97; her children were at school and her husband was fully employed as [text deleted], whose work took him out of town a great deal. We have difficulty in accepting the evidence that [the Appellant] was able to manage all of the properties entrusted to her, merely by using a cordless telephone while lying on a couch. In that context, it is also noteworthy that MPIC's file is replete with notations of the many times when the insurer's personnel, and others, attempted unsuccessfully to reach her by telephone. She explains this by saying that, having Call Display on her telephone, she elected not to respond.

Discussion

As we noted earlier in these Reasons, there are major gaps in the information given by [the Appellant] to her care-givers and her adjuster, when that information is contrasted with her testimony before this Commission. [Appellant's doctor #1's] report of February 22nd, 1995,

describes [the Appellant] as being fully disabled until February 17th when she was well enough to resume part-time work; the adjuster's notes of April 4th, 1995, made immediately following a meeting with the Appellant indicates that she had returned to work on February 17th; [Appellant's doctor #2's] several reports in April, June, July and August of 1995 all indicate that the Appellant was working part-time, had not completely stopped work, and similar comments; [Appellant's rehab specialist], either specifically or by necessary implication, in her reports of March, May and July of 1996 tells us that [the Appellant] was at least working on a part-time basis—"The pain is really limiting her work as a realtor…Her memory is not that great and she feels that this also is interfering with her job…decrease her symptoms so that she can go back to working full-time as a realtor…able to work modified duties." Again, [Appellant's physiotherapist #2] reports that "To my knowledge, [the Appellant] was working part-time when I saw her in October of 1996. However, she did report having to have someone to assist her with work on contracts, and that her hours were variable depending upon how she was feeling."

Again, [Appellant's doctor #2], in her summary of November 13th, 1999, says "To my knowledge, she did not quit working altogether but she had to cut back on the amount of work she was doing. In particular, her work involved a lot of driving, which aggravated her neck pain and headaches." We infer from this, and similar statements, that [the Appellant] did drive throughout 1995/96, but that the discomfort of her neck symptoms caused her to limit her driving as much as she could.

All of those comments are clearly at odds with [the Appellant's] testimony from which, if we were to accept it totally, we would have to conclude that she was barely able to move for close to two years, save only to force herself with difficulty to visit her doctor and her physiotherapist.

That said, we are not prepared to discount completely the evidence of [the Appellant]. It is clear that, from shortly after her accident in January 1995 and throughout most much of 1996, she was functionally impaired to some degree, having developed myofascial pain syndrome. That condition made driving more difficult, since shoulder-checking was painful. It also seems clear that this condition was a direct result of her motor vehicle accident. The fact that her condition persisted well beyond the natural history of a WAD-II type of injury is, in our view, attributable to two primary factors:

- Since neither the mechanics of her accident nor the objective findings reflected in [the Appellant's] medical records support the existence of physical injuries of the severity and duration described by [the Appellant], we have to conclude that what her counsel referred to in his submission as the 'psychological overlay to her condition' was an outcropping of a fragile psyche pre-dating her accident;
- Her condition—myofascial pain in the neck and upper back areas with an occasional taut band in one or the other trapezius area and overtones of depression—was not fully recognized until about January of 1996, when her family practitioner, [text deleted], referred her to a specialist in physical medicine and rehabilitation, [text deleted]. Even then, about another 10 months elapsed before the combined treatments from [Appellant's rehab specialist] and [Appellant's physiotherapist #2] and medication prescribed by [Appellant's doctor #2] restored [the Appellant] to the point at which she, herself, was willing to acknowledge her readiness to devote the same amount of time to her twin careers as she had done prior to her accident.

We therefore accept the submission of [the Appellant] and her counsel that her motor vehicle accident did result in a diminution of her earning capacity. Accepting, therefore, that the

Appellant was partially disabled and that her disability persisted beyond February 17th, 1995, the primary questions that confront us are the extent and duration of that disability and, in particular, for how long was [the Appellant] unable to return, totally or partially, to her occupation as a real estate agent or broker—her property management duties were not, in our considered view, materially affected.

We are unable to find, upon a reasonable preponderance of evidence, that [the Appellant's] condition prevented her return to the real estate sales/brokerage facet of her careers until January 1st, 1997, as her counsel submits. Undoubtedly, the decision to return to her full, former duties required an effort of will on her part, but we find on the evidence that this was a decision that could have been made sooner. The salient facts upon which we based that finding are:

- As early as August 1995, the Appellant's headaches have become modified from sharp pains to a dull ache; despite that discomfort, she reported to [Appellant's doctor #2] that she had been able to return to work, albeit on a limited basis. [The Appellant] never did tell [Appellant's doctor #2] that she could not leave her home, being confined for the most part to her couch. It is, therefore, reasonable to infer that, when [the Appellant] reports a 'return to work,' she means a return to her office where, after all, all of her files, records, computer and other equipment were situated;
- By January 9th, 1996, the headaches have nearly disappeared, she is regaining weight, and the symptoms of which she complains are now limited to the muscles at the top of each shoulder and the area between the shoulder blades;
- In July 1996, apart from a taut band in her left trapezius, the Appellant reported that she was "not doing too badly"; [Appellant's rehab specialist] had opined that she was capable of "full function with symptoms"; the left upper shoulder would not, in our view, have presented

enough of a problem to prevent shoulder-checking or any other aspects of automotive driving;

- [The Appellant] was, by her own admission, capable of driving during most, if not all, of the time following her accident. She testified that she had *sometimes* arranged for someone else to drive her, although we accept that, at least for most of 1995, she tried to keep that activity to a minimum;
- The memorandum prepared by MPIC's adjuster, [text deleted], on June 21st, 1995, reflects a conversation he had had with [the Appellant] on that date. He notes, *inter alia*, that "she advises that since the date of the accident she's not been able to sell any homes except till June 15/95 as that is when she started to solicit for listings." That same memorandum does, however, go on to say that [the Appellant] was still complaining of a restricted range of motion of her neck and therefore did not wish to drive clients around. As well, she had said, the pain in her neck was hard to deal with and she did not want to jeopardize her career by being unpleasant to her clients.

By August 18th, 1995, [the Appellant] had been out of the real estate industry for seven months, had no 'live' listings and would have had to start from scratch when re-entering the field. That fact, combined with continuing discomfort that undoubtedly would have caused her to approach the resumption of her real estate work in a more deliberate, gradual fashion, would have resulted in a dead period during which little, if any, income could have been generated from real estate sales. We are therefore prepared to extend that period of inability to earn until the end of 1995.

We are also prepared to accept the proposition that the Appellant was, on January 14th, 1995, a "full-time earner" within the meaning of Section 70(1) of the MPIC Act when we combine both

of her occupations, although we concur in the comment of the Internal Review Officer that "the evidence is far from convincing."

The decision of MPIC's Internal Review Officer does call for one, further comment; we refer to [MPIC's Internal Review Officer's] decision not to allow interest to be paid on the Income Replacement Indemnity that he did award to [the Appellant]. [MPIC's Internal Review Officer] based that decision upon the undisputed fact that [the Appellant] had been totally uncooperative in furnishing MPIC with the requisite, or any, financial information upon which a calculation of IRI could reasonably have been made. When her adjuster did obtain some of the necessary data, he had to do so by requesting it from what was then called Revenue Canada. Even to this date, the available information is not as complete as it should be, although it seems to have enabled MPIC to make a calculation acceptable to [the Appellant], since she has not appealed against the quantum of IRI.

Much as we may agree with the sentiment expressed by [MPIC's Internal Review Officer], the language of Section of 163 of the statute is clear and unequivocal. It provides that, where a person's application for a review or appeal is successful,

> the Corporation shall pay interest to the person on any indemnity or expense to which the person is found to have been entitled before the review or appeal, at the prejudgment rate of interest determined under Section 79 of the Court of Queen's Bench Act, computed from the day on which the person was entitled to the indemnity or expense.

That language does not allow an Internal Review Officer, nor this Commission, any discretion in the matter.

Disposition

For the foregoing reasons, [the Appellant's] Income Replacement Indemnity will be reinstated from February 17th to December 31st, 1995, both inclusive, with interest from the dates when each installment respectively fell due until the date of actual payment. She is also entitled to interest on the sum of $620.36 (being the IRI awarded to her by [MPIC's Internal Review Officer]) for the period from February 17th, 1995, to November 24th, 1997, both inclusive, this being the interest denied her by the Internal Review Officer.

Dated at Winnipeg this 7th day of June, 2000.

J. F. REEH TAYLOR, Q.C.

YVONNE TAVARES

COLON C. SETTLE, Q.C.