Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-11

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Dr. Patrick Doyle** **The Honourable Mr. Armand Dureault**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**September 21, 2004 and September 22, 2004**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits beyond 181st day following motor vehicle accident.**
RELEVANT SECTIONS:	**Sections 85(1) and 86(1) of The Manitoba Public Insurance Corporation Act (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], was involved in a motor vehicle accident on May 27, 1997 wherein she sustained injuries to her back, hips and bilateral sacroiliac joints, with pain radiating into her legs. Due to those injuries, the Appellant became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was pregnant with her third child. She was not employed outside of the home and was classified as a non-earner for Income Replacement Indemnity ('IRI') purposes. Section 70(1) of the MPIC Act provides the definition of a non-earner as follows:

> **Definitions**
> **70(1)** In this Part,
> **"non-earner"** means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or student.

After the accident, the Appellant was able to undertake some physiotherapy treatments, but due to her pregnancy, the physiotherapy treatments had to be suspended. She was also referred by [text deleted], her family doctor, to [text deleted], a clinical psychologist, for assistance with Post-Traumatic Stress Disorder. According to [Appellant's psychologist's] report of July 29, 1997, the Appellant's symptoms included:

1. re-experiencing the trauma through flashback episodes, depressive thoughts and anxiety attacks;
2. avoidance of stimuli associated with the trauma; and
3. persistent symptoms of increased arousal, including difficulties concentrating, irritability and sleep disturbance.

In a subsequent report dated October 28, 1997, [Appellant's psychologist] advised that the anxiety that the Appellant had experienced as a result of the accident had resolved with their treatment sessions.

After the motor vehicle accident, the Appellant also complained of an exacerbation of right hand pain. This complaint progressively worsened over the ensuing months. In a report dated

February 9, 1998, [Appellant's doctor #1] indicated as follows with respect to the Appellant's condition:

> [The Appellant] was seen on January 29, 1998 in review of her injuries following her motor vehicle accident. At this time she stated that her hips and lower back are basically back to normal and she is able to carry out full duties with respect to them. The real problem at this time is in her wrists with the right more so than the left. She had a carpal tunnel release done prior to the accident and the symptoms from her carpal tunnel syndrome were approximately 95% resolved. At the time of the accident she braced her right arm with her wrist in a flexed position against the steering wheel and noted the day after the accident that she had increased pain in the right wrist. Since the accident the pain in her right wrist has continued to worsen although she did not complain of numbness. She says the main pain is in the wrist but has a great deal of pain in her hand especially her thumb as well as some pain in her arm including her elbow and up to her shoulder. She has also noticed that she has decreased power in her right hand and has been dropping many things. She does have carpal tunnel syndrome in the left hand which preceded the accident but this has not worsened since the accident.
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> She would not at this point in time be able to carry out full employment as she is not able to hold a phone with her right hand and she has difficulty doing any lifting overhead for fear of dropping things. She has dropped some objects but has adjusted her lifting and carrying posture so this does not happen. She has difficulty writing and is able to write approximately one half of a page of note paper before she has to stop due to the pain. She is unable to type.
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> The treatment at this time would be to restart physiotherapy for her wrist and she has been fitted for bilateral wrist braces by the occupational therapists at the [hospital]. She is being seen by [Appellant's surgeon #1] for release of the left carpal tunnel and it appears that she may have to have a re-release of the right. Her examination shows tenderness in the wrist and hands with a positive Allen sign on the median side. She has negative Phalen's and her elbow examination was normal.

[Appellant's surgeon #2], the surgeon who had performed the carpal tunnel release for the Appellant, provided a report dated June 1, 1998, wherein he indicated as follows:

> [The Appellant] was originally seen by myself at the request of [Appellant's doctor #1] on the 15th of November 1996 for management of bilateral carpal tunnel syndrome. She had a history of progressive carpal tunnel syndrome affecting both hands. She was at the point where the numbness and tingling was quite severe and it was radiating proximal from the hand up into the forearm. She was unable to perform her regular activities secondary to this discomfort.
>
> Clinical examination at that time was consistent with bilateral carpal tunnel syndrome. Nerve conduction studies demonstrated electrophysiological evidence of moderate bilateral carpal tunnel syndrome.

> After a lengthy discussion, [the Appellant] decided to proceed ahead with a right carpal tunnel release. This was performed on the 23rd of January 1997. Her operative procedure was uncomplicated. For some reason [the Appellant] had trouble attending her follow-up visits. She was apparently seen by her family physician in [text deleted]. She eventually returned to be reassessed by myself on the 31st of March 1997. At that time she complained of recurrence of her symptoms in the right hand that had just been recently operated on. She stated that she had intermittent numbness and tingling in the radial 3 digits that was worse at night time and with activity.
>
> Examination revealed that the scar had healed well. There was no swelling at the base of the palm. She had good range of motion in the wrist. The Tinel sign was negative at the level of the carpal tunnel but the Phalen test was positive after 20 seconds and it did produce some pain in the wrist when performing the test.
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> After a lengthy discussion with [the Appellant] it was felt that she should have repeat nerve conduction studies to reassess the status of the nerve. She was return to the Clinic for reassessment following this. Her nerve conduction study tests were scheduled for the 18th of April 1997 with [Appellant's neurologist]. She eventually cancelled this appointment and has not been seen by myself since that time.

The Appellant was also referred to [Appellant's surgeon #1] by [Appellant's doctor #1] with respect to complaints of left carpal tunnel syndrome. In his report dated June 19, 1998, [Appellant's surgeon #1] advised as follows:

> The patient presented to me with complaints of left carpal tunnel syndrome and was referred for her left carpal tunnel syndrome. The patient had complaints of numbness and paresthesiae in a median nerve distribution and some decrease in strength. Examination showed no sensory change from right or left hand, no motor weakness, no wasting, a positive Tinel's on the left and a positive Phalen's on the left. EMG studies from October of 1996 show mild to moderate bilateral carpal tunnel syndrome. Repeat nerve conduction of May 12, 1998 showed mild residual slowing in the right median nerve across the wrist and moderate left CTS. This presumably represents a slight improvement in the right CTS but not in the left inoperative hand although this may need to be corroborated by the neurologist who did the report.
>
> This patient has tentatively been booked for surgery November 12, 1998 with respect to her left carpal tunnel syndrome.
>
> As indicated to you, this patient was not primarily examined with respect to her right carpal tunnel syndrome and she was apparently returning, after her initial visit to see me, to see [Appellant's surgeon #2] with respect to this. If this patient had had complete recovery after her first surgery, then it is possible that direct trauma could have bruised the nerve and caused some perineural fibrosis giving her her symptoms of pain.

> [The Appellant] does require relief of her left carpal tunnel syndrome and arrangements are going to be made to have this done. Her symptoms of left carpal tunnel syndrome, in a preoperative state, usually do not impact on the ability of someone to continue on in their job.

During the summer of 1998, the Appellant began re-experiencing symptoms of Post-Traumatic Stress Disorder and recommenced sessions with [Appellant's psychologist]. In a report dated August 17, 1998, [Appellant's psychologist] noted that:

> [The Appellant] contacted me recently because of reoccurence of symptoms of PTSD, including: panic attacks when in the car; uncontrollable and vivid images and thoughts about the accident that took place on May 27, 1997; cognitions about the accident that result in depressed mood; irritability, persistent crying and depressed mood and affect; and, occasional reexperiencing of components of the original trauma.
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> The symptoms appear to be very similar to the initial symptoms, and will be treated in the same manner (i.e., with cognitive behaviour therapy and systematic desensitization). As per our discussion, I believe that six sessions will suffice to relieve [the Appellant's] current symptoms. I have already had two sessions, for which I have enclosed my statement.

During 1998 and 1999, the Appellant continued to have pains in her arms, neck, back and legs. Due to [Appellant's doctor #1's] retirement, she attended upon [Appellant's doctor #2], a family physician, in April 1999. [Appellant's doctor #2] initially treated the Appellant for gastritis, brought on by the anti-inflammatory medication which the Appellant was taking to treat the leg, arm and back pain.

As [Appellant's doctor #2] continued to see the Appellant throughout 1999 and 2000, she diagnosed the Appellant with various conditions including fibromyalgia, C5-C6 disc degeneration, chronic knee pain and depression. [Appellant's doctor #2], in her testimony at the appeal hearing, stated that the cervical disc degeneration was likely due to the motor vehicle accident, since only two percent of women in the Appellant's age group developed chronic degenerative osteoarthritic cervical disc disease. She was also of the opinion that the Appellant's

fibromyalgia was likely caused by the motor vehicle accident and the depression was related to her chronic pain history.

The Appellant also presented with bilateral knee pain, more left than right. The pain was aggravated by activity, but was also present at rest. [Appellant's doctor #2] referred the Appellant to an orthopedic specialist, [Appellant's orthopedic specialist] due to the Appellant's complaints of knee pain.

The Appellant initially attended upon [Appellant's orthopedic specialist] on January 15, 2001. [Appellant's orthopedic specialist] diagnosed patello-femoral pain, and prescribed braces, ice, physiotherapy, analgesics and rest as required. Based upon the history given by the Appellant, [Appellant's orthopedic specialist] attributed the knee pain to the motor vehicle accident. In his report dated June 11, 2001, he opined that:

> There is a direct link between the victim's present condition and the injury sustained in the motor vehicle accident. She does describe that her foot was locked on the brake and clutch. She does not think that she struck her knee. However, she was knocked out and probably sustained some degree of amnesia from this and may not remember that her kneecap struck the dashboard which would be the most common mechanism for patellofemoral pain post motor vehicle accident.
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> She notes that she has had anterior knee pain in the left knee ever since the motor vehicle accident.

In July 2001, the Appellant returned to [Appellant's psychologist] for further therapy. In a report dated July 31, 2001, [Appellant's psychologist] indicated as follows with regards to the Appellant's continued need for treatment:

> [The Appellant] has asked for me to reinstate our therapy sessions to help her overcome the feelings of depression and anxiety that she has experienced following her Motor Vehicle Accident. I initially began treating [the Appellant] in July of 1997, when she was experiencing the acute symptoms of Post Traumatic Stress Disorder. At the time she was experiencing both anxiety and depression, with disturbance in many areas of her life. I saw

> her for approximately eleven sessions over the course of the next year. Our therapy was prematurely interrupted by various life events (childbirth, move to the city, etc.). I never actually did see [the Appellant] functioning to her reported pre-accident levels of emotional well-being.
>
> [The Appellant] reinitiated therapy several weeks ago because she was experiencing significant symptoms of depression, with frequent episodes of crying and sadness, feelings of guilt, low energy, anhedonia, sleep disturbance, and changes in eating habits. [The Appellant] also reported that she continues to experience anxiety when driving under some conditions.
>
> [The Appellant] is experiencing many symptoms of chronic pain on top of her depression. She is having a very difficult time coping with the physical changes that she has underwent since the accident, and with the pain itself.
>
> I would like to treat [the Appellant] with ongoing bimonthly sessions to help her better cope with the changes that have resulted from the accident. I would also like to help her work through this depression, using a cognitive behavioual approach. [The Appellant] does not overly utilize my services - she is the type of person that does not ask for more than she needs. She generally resists coming for help unless she absolutely needs it. However, I can see that her emotional well being is severely compromised, and I think that she will require regular sessions ongoing for the months to come. I would appreciate your consent to see [the Appellant] as needed; right now we are scheduling appointments every second week.

[Appellant's psychologist] also provided a further report, dated November 21, 2001 commenting on the cause of the Appellant's clinical issues. In that report, [Appellant's psychologist] noted that:

> Originally, the work that I did with [the Appellant] in July of 1997 was to alleviate symptoms of PTSD. At that time, [the Appellant] experienced significant symptoms of PTSD, including: intrusive distressing recollections of the accident; distressing dreams; flashbacks; panic attacks; irritability; difficulty concentrating; hypervigilance; and avoidance of situations that reminded her of the accident (e.g., driving on the highway). For the most part, the symptoms of PTSD had decreased significantly and our therapy had terminated from September 1998 to July 2001. In July of 2001, [the Appellant] approached me for treatment because of a recurrence of symptoms of PTSD and depression. Although the symptoms of depression have lessened, there is still depressed mood daily. [The Appellant] reports crying daily, and she continues to cry in sessions (albeit less so, as objectively measured by a large decrease in facial tissues used). She reports feeling rather helpless and debilitated by her physical limitations and pain. She has low self-esteem in regard to her physical appearances (i.e., weight gain); her loss of independence (e.g., having to rely on others to open jars, carry laundry, etc.) and her sedentary life style (vis-a-vis the independent and very active lifestyle that she lead prior to the accident).

> I have no evidence to suggest that [the Appellant] is in any way malingering, or that she has significant secondary gain for being in pain. [The Appellant] strikes me as having been a very independent woman who was active and showed much self-initiative and motivation for activities which bettered the lives of her family. I assumed this by her reports of past leisure activities with her children (e.g., outings to the beach, zoo, etc.) and by direct evidence (e.g., preserves that she had made from harvests from her garden). I believe that having to rely on others to help her with daily chores (e.g., housework) has been very frustrating for [the Appellant],

Subsequently, the Appellant's file was reviewed by [MPIC's psychologist #1], consulting clinical psychologist to MPIC's Health Care Services Team, to provide an opinion as to whether the psychological symptomatology described by [Appellant's psychologist] in her reports was motor vehicle accident-related. In his Inter-Departmental Memorandum dated February 7, 2002, [MPIC's psychologist #1] indicated that:

> Based on the available information, the symptoms related to post-traumatic stress disorder and possible driving-related phobic anxiety are considered linked to the motor vehicle accident. In this, I agree with [MPIC's doctor's] previous statement of September 17, 2001. Her symptoms of post-traumatic stress disorder do meet clinical criteria for this disorder and given no previous history, are deemed to be motor vehicle accident caused.
>
> The symptoms of depression, at this point, appear to have at least in part, a possible pre-accident basis. Further clarifying information from [Appellant's doctor #2] may be helpful to obtain.
>
> [Appellant's psychologist] has indicated in the past that driving anxiety does not represent a significant driving issue with respect to her psychological functioning and she is able to drive in the city to get to appointments and so on which would not be interfering substantially with activities of daily living.
>
> Post-traumatic stress disorder very commonly occurs with premorbid conditions including depression (50% of some clinical samples) and may represent a risk factor for the development of post-traumatic stress disorder but is not necessarily directly related or causes post-traumatic stress disorder.
>
> You may wish to consider further assessment or consultation with respect to the ongoing treatment plan. Typically, post-traumatic stress disorder is treated significantly more aggressively from a psychological basis than the relatively intermittent meetings that [the Appellant] has been having with [Appellant's psychologist] to this point.

In a follow-up Memorandum to the case manager dated February 18, 2002, [MPIC's psychologist #1] advised that occupational impairment was probable since it was considered part of the diagnostic criteria for Post-Traumatic Stress Disorder. He also indicated that according to [Appellant's psychologist], the Appellant was vocationally impaired at that time due to her Post-Traumatic Stress Disorder symptoms.

In a decision dated March 1, 2002, MPIC's case manager advised the Appellant that she was not entitled to IRI benefits as of the 181st day following the accident, since the current medical information on her file indicated that the conditions arising from the motor vehicle accident would not result in an impairment of function that would prevent the Appellant from holding employment. However, the case manager did advise that MPIC would continue to fund the Appellant's treatment with [Appellant's psychologist] in regards to the Post-Traumatic Stress Disorder, since that was found to be connected to the motor vehicle accident.

The Appellant sought an Internal Review of that decision. Prior to the Internal Review decision, [Appellant's psychologist] provided two subsequent reports to MPIC. In her report dated April 10, 2002, [Appellant's psychologist] stated that:

> I met with [the Appellant] initially in 1997, and her symptoms of Post Traumatic Stress Disorder (PTSD) were quite significant at that time. She experienced significant anxiety and depression, with frequent crying and depressed mood throughout the day. Given the significant amount of crying and difficulty in coping with even the daily activities of life with her children, it does not seem likely that [the Appellant] would have been able to hold down full-time employment. When I saw [the Appellant] in the summer of 1998, she was similarly depressed, and employment would not have been a viable option.
>
> I am currently meeting with [the Appellant] more frequently, and the antidepressant medication that she is taking seems to be having a positive impact. Although the recent sessions are suggesting significant improvement in mood, concentration, and motivation, there have also been sessions in the past months where [the Appellant] has described experiencing oppressive depression which is debilitating - cutting down on motivation to get up and engage in the activities of daily living; causing fatigue and emotional drain; and resulting in crying throughout the day. It does not seem likely that [the Appellant] would be

> able to work during these periods - and they may occur once to several times a month. In trying to determine the cause of these symptoms, it seems that they are related to Depression. In probing, there was no significant environmental stressor that appeared to trigger the symptoms. I do not believe that I can, in good conscience, attribute the symptoms to causes of PTSD related Depression or to secondary Depression. I guess that your determination will relate to whether you have accepted that [the Appellant's] Depression is ultimately caused by her accident.

[Appellant's psychologist] provided further clarification of her opinion in a subsequent letter dated May 27, 2002, where she stated that:

> I met with [the Appellant] today, and I understand that you are reviewing her file. She mentioned to me that my letter of April 10th, 2002 was part of your review. I would like to just clarify the context in which that letter was written. The letter was addressed to [text deleted] In response to two questions that he asked me to respond to. First, he asked me to comment on [the Appellant's] emotional state as it related to determination of employment issues (i.e., if she was employable right after her accident). I responded to that issue on the first page of my response, stating that 'it did not seem likely that [the Appellant] would have been able to hold down full-time employment'.
>
> The second question that [text deleted] asked me to respond to was if [the Appellant's] Depression was related to PTSD or, whether it was a secondary effect of the impact of the accident on her life. Since some of [the Appellant's] Depression is related to her pain and to the debilitation that resulted from the accident, I was not able to ascribe how much of her Depression was related to secondary effects and how much of the Depression reflected the initial PTSD related Depression.
>
> As my letter states, I do not believe that [the Appellant's] Depression is reactive to environmental stressors in her life other than the changes in her life due to the accident. In other words, there seems to be no outside stressors such as family concerns, relationship issues, etc. that are fuelling her Depression. I believe that the Depression is accident related; however, I cannot ascribe it directly to the impact of the accident on her current life or to the initial symptoms of PTSD.

[MPIC's psychologist #2], a consulting clinical psychologist to MPIC's Health Care Services Team, also reviewed the file to determine the relationship between the Appellant's diagnosis of Post-Traumatic Stress Disorder and her capacity to hold employment as of the 181st day after the motor vehicle accident. In an Inter-Departmental Memorandum dated August 14, 2002, [MPIC's psychologist #2] expressed the following opinion:

> Based on the information presented in the medical file, it is this writer's opinion, based on the balance of probabilities, that the claimant would have been employable as of the 181st day after the MVA in question. Despite the somewhat contradictory statements by [Appellant's psychologist] as noted above, she does clearly state as of October 28, 1997 that the claimant's anxiety had resolved which is prior to the 181st day (November 23, 1997). The claimant does return to see [Appellant's psychologist] in the summer of 1998, but only has two sessions with her and then does not return to see her for approximately 3 years. [Appellant's psychologist] states that the PTSD symptoms had "decreased significantly" and that therapy was terminated until July 2001. This limited amount of contact in the summer of 1998 would further support the contention that the claimant's symptoms had resolved or were at such a manageable level that they would not interfere with her ability to hold employment.

The Internal Review Officer, in his decision dated October 28, 2002 upheld the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found that the documentation on the Appellant's file did not establish that she was unable to be employed as a clerk 3 on account of injuries, whether physical or psychological, arising out of the motor vehicle accident, as of November 23, 1997.

The Appellant has appealed the Internal Review decision dated October 28, 2002 to this Commission. The issue which requires determination in this appeal is whether the Appellant was unable of holding employment at any time subsequent to the 181st day following the motor vehicle accident of May 27, 1997.

At the appeal hearing, counsel for the Appellant submitted that the Appellant developed physical and psychological injuries as a result of the motor vehicle accident, which prevented her from working since the accident. He attributes the Appellant's ongoing physical aches and pains including the carpal tunnel syndrome in her wrists, the fibromyalgia, the patello-femoral pain in her knees and the cervical degenerative disc disease to the motor vehicle accident of May 27, 1997. Counsel for the Appellant also maintains that the Appellant's psychological problems,

including the Post-Traumatic Stress Disorder and the depression, were connected to the motor vehicle accident, and were debilitating conditions for the Appellant. Therefore, counsel for the Appellant argues that the Appellant was unable to hold employment at any time after the motor vehicle accident and in accordance with ss. 86(1) of the MPIC Act is entitled to IRI benefits as of the 181st day after the motor vehicle accident.

Counsel for MPIC submits that the Appellant was not disabled from holding employment as a clerk from the 181st day after the motor vehicle accident on account of injuries arising from the accident. He maintains that, even if she was disabled from holding employment, it was not on account of injuries arising from the motor vehicle accident of May 27, 1997. Therefore, the Appellant was not entitled to IRI benefits at any time beyond the 181st day after the accident.

Counsel for MPIC argues that neither the Appellant's physical, nor psychological problems were caused by the motor vehicle accident. He insists that the medical evidence on the Appellant's file does not establish a causal connection between the Appellant's many conditions and the motor vehicle accident. In support of his position, counsel for MPIC notes the following:

- By January 1998, the Appellant's pain in her back, hips and legs was resolved and she was at full function;
- the carpal tunnel syndrome in her wrists was a pre-existing condition, which would not have prevented her from holding employment in any event;
- There was no evidence of a dashboard injury to the Appellant's knees during the accident and no reports of knee problems for one and one-half years post-motor vehicle accident;
- [Appellant's doctor #2]'s diagnosis of fibromyalgia should be given little weight

since she immediately diagnosed the Appellant with fibromyalgia, even though the condition would normally take a significant time to diagnose;

- [Appellant's psychologist] indicated in the fall of 1997 that the Appellant's Post-Traumatic Stress Disorder had resolved. [Appellant's psychologist's] later reports are inconsistent and speculative. Further, the Appellant's Post-Traumatic Stress Disorder symptoms in 2001 were different than in 1997 and therefore not connected and no longer resulting from the motor vehicle accident.

As a result, counsel for MPIC claims that the Appellant was capable of holding employment as a clerk as of November 23, 1997 and any problems which she later developed, which may have prevented her from working, were not caused by the motor vehicle accident. Therefore, counsel for MPIC submits that the Internal Review decision dated October 28, 2002 should be confirmed and the Appellant's appeal dismissed.

The Law

The relevant sections of the MPIC Act and Regulations are as follows:

> **Entitlement to I.R.I. for first 180 days**
> **85(1)** A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:
>
> (a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;
>
> (b) he or she is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.
>
> **Entitlement to I.R.I. after first 180 days**
> **86(1)** For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section

106, and the non-earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident.

Manitoba Regulation 37/04
Meaning of unable to hold employment
8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Discussion

Upon a review of all of the evidence made available to it, both oral and documentary, the Commission finds that as of July 2001, the Appellant was not capable of holding employment as a clerk on account of the psychological problems which she developed as a result of the motor vehicle accident of May 27, 1997.

The Internal Review Officer, in his decision dated October 28, 2002, carefully reviewed the medical evidence on the Appellant's file respecting her physical injuries, and determined that, on a balance of probabilities, her problems related to her wrists, knees, fibromyalgia and ongoing aches and pains were not related to the motor vehicle accident. We find the analysis provided by the Internal Review Officer, and the submissions made by counsel for MPIC, persuasive on this point. In arriving at our conclusion, we have considered that:

- The medical evidence indicates that the Appellant's low back and sacroiliac problems had resolved by the end of January 1998 and that she had returned to full function.
- The medical evidence does not establish, on a balance of probabilities, that the Appellant's wrist problems were related to the motor vehicle accident. Rather, the evidence before the Commission indicates that the Appellant's wrist problems were likely related to pre-existing conditions and her pregnancy. Further, [Appellant's

surgeon #1]'s report of May 15, 1998 expresses his opinion that the wrist problems would not impact upon the Appellant's ability to perform occupational duties, in any event.

- There is no documentation of a traumatic injury to the Appellant's knee in the motor vehicle accident. While we find that it may have been possibly connected, based on the totality of the evidence before us, we cannot, on a balance of probabilities, attribute the Appellant's knee problems to the motor vehicle accident of May 27, 1997.

With regards to the psychological issue, the Internal Review Officer based his decision on [MPIC's psychologist #2's] opinion, expressed in his Inter-Departmental Memorandum of August 14, 2002, that:

> Based on the information presented in the medical file, it is this writer's opinion, based on the balance of probabilities, that the claimant would have been employable as of the 181st day after the MVA in question. Despite the somewhat contradictory statements by [Appellant's psychologist] as noted above, she does clearly state as of October 28, 1997 that the claimant's anxiety had resolved which is prior to the 181st day (November 23, 1997). The claimant does return to see [Appellant's psychologist] in the summer of 1998, but only has two sessions with her and then does not return to see her for approximately 3 years. [Appellant's psychologist] states that the PTSD symptoms had "decreased significantly" and that therapy was terminated until July 2001. This limited amount of contact in the summer of 1998 would further support the contention that the claimant's symptoms had resolved or were at such a manageable level that they would not interfere with her ability to hold employment.

However, it appears that neither [MPIC's psychologist #2], nor the Internal Review Officer, gave sufficient consideration to the Appellant's psychological status as of July 2001 and its impact on her ability to hold employment as of that date. [Appellant's psychologist] is clear in her discussions with [MPIC's psychologist #1], that the Appellant was vocationally impaired at that time due to her Post-Traumatic Stress Disorder symptoms. [MPIC's psychologist #1] also

indicates that with a diagnosis of Post-Traumatic Stress Disorder, occupational impairment is probable as it is part of the diagnostic criteria. Further, in her report dated April 10, 2002, [Appellant's psychologist] provides her opinion that the Appellant likely would not have been able to work during her periods of oppressive depression. [Appellant's psychologist] was unable to ascribe how much of the depression was a secondary affect of the impact of the accident on the Appellant's life, and how much of the depression was related to the symptoms of the Post-Traumatic Stress Disorder. However, she was certain that it was unlikely that the Appellant would have been able to hold full time employment during these periods, when her psychological condition was aggravated.

The Commission accepts [Appellant's psychologist's] opinion with respect to the Appellant's occupational capacity beyond July 2001. We find that [Appellant's psychologist], having observed the Appellant at the relevant time, was in the best position to comment on her functional capabilities. She also had the opportunity to observe her over an extended period of time through her treatment sessions with her. As such, her opinion that the Appellant was not capable of working in any capacity at that time, convinces us, on the balance of probabilities, of that fact. In this situation, we find that the comments and observations made by [Appellant's psychologist], who had the benefit of personally observing the Appellant and treating her throughout the relevant time, must be preferred to those of [MPIC's psychologist #2], who was at a disadvantage of not personally assessing the Appellant. Additionally, we find that the Appellant's depression was in part attributable to her symptoms of Post-Traumatic Stress Disorder, which was causally related to the motor vehicle accident of May 27, 1997, and the effect of these two psychological conditions, rendered the Appellant unemployable.

Based on the limited contact with the Appellant in the summer of 1998 (2 treatment sessions), we are not satisfied, on a balance of probabilities, that the Appellant's psychological condition at that time was of such a severity so as to prevent her from holding employment. Rather, as noted above, we find that the gradual development of the depression, when combined with the symptoms of Post-Traumatic Stress Disorder rendered the Appellant unable to hold employment as of July 2001.

As a result, we find that the Appellant is entitled to IRI benefits as of July 2001, until such time as her entitlement is terminated or suspended in accordance with the MPIC Act. In accordance with Section 163 of the MPIC Act, the Appellant shall be entitled to interest upon the monies due to her by reason of the foregoing decision. The Internal Review decision dated October 28, 2002 is therefore, rescinded, and the foregoing substituted for it.

Dated at Winnipeg this 21st day of February, 2005.

YVONNE TAVARES

DR. PATRICK DOYLE

HONOURABLE ARMAND DUREAULT