Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-99

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Dr. Robert Chernomas** **Mr. Neil Cohen**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Stacey Belding;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**January 24, 2006**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits beyond May 23, 2003**
RELEVANT SECTIONS:	**Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

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) was involved in a motor vehicle accident on March 8, 2002 and, as a result, suffered a whiplash injury to her neck and pain to her back, as well as headaches and vertigo. The Appellant was unable to return to work after the motor vehicle accident and was in receipt of Income Replacement Indemnity ('IRI') benefits thereafter.

At the time of the motor vehicle accident the Appellant was employed as a cleaning person at [text deleted] which tasks included vacuuming with a commercial vacuum cleaner, mopping, sweeping, dusting, cleaning the kitchen and washrooms, removing garbage, and lifting and carrying a heavy water pail and a vacuum cleaner. These tasks required movements of walking up and down several flights of stairs, pushing and pulling, squatting and kneeling, neck extension/overhead reaching, strong/heavy dominant hand grasping, and dominant arm movements.

The Appellant was referred by MPIC for an independent examination with [independent doctor] who saw the Appellant on August 19, 2002 and provided a report to MPIC dated August 21, 2002. [Independent doctor], in his report, stated:

> The inconsistencies on examination suggest partial malingering, though they are not diagnostic of this. As well, the findings on examination were all subjective, with the attendant difficulties of interpreting subjective findings. Assuming that malingering is not significant, and the sensitivity to pressure of the soft tissues is accurate the tender points present are suggestive of the presence of a Fibromyalgia Syndrome.

[Independent doctor] further stated that, based upon the available information and to a reasonable degree of medical certainty, there does appear to be a causal relationship between at most a small component of the Appellant's current complaints and the reported injury. [Independent doctor] further stated that he was of the opinion that in her present condition the Appellant did not appear capable of resuming her pre-accident occupation. In respect of her work capacity [independent doctor] expected that the Appellant could return to work in a light level work capacity and that the Appellant would be able to progress to a return to work through a graduated return to work process, if possible.

The Appellant had been receiving physiotherapy treatments in respect of her motor vehicle accident injuries since April 2002. The Appellant's personal physician, [text deleted], referred her to [Appellant's doctor #2] for his assessment and treatment of the Appellant's medical condition. [Appellant's doctor #2] saw the Appellant on September 9, 2002 and provided a report to [Appellant's doctor #1] on October 21, 2002. In his report [Appellant's doctor #2] noted that the Appellant is unable to sleep properly, is suffering from a good deal of stress with complaints about persistent pain. The Appellant reported to [Appellant's doctor #2] that her headaches started in the neck and spread up to her head to headache sites more pronounced on the right. [Appellant's doctor #2] concluded that the Appellant's symptoms and signs were characteristics of multiple muscle myofascial pain syndrome and, as a result, [Appellant's doctor #2] commenced trigger point treatments to deal with myofascial pain syndrome.

[Appellant's doctor #2] provided a further report to MPIC dated January 27, 2003 wherein he reported an improvement relating to the restoration of the Appellant's range of motion to the cervical spine and shoulder. [Appellant's doctor #2's] report was forwarded to [text deleted], MPIC's Medical Consultant, for her review. [MPIC's doctor], in an Inter-Departmental Memorandum to MPIC's case manager dated February 17, 2003 stated that the Appellant would be capable of re-entry at this time, that a graduated re-entry would be reasonable beginning with four (4) hour shifts and graduating up to regular hours after a several week period.

[Appellant's doctor #2] provided another report to MPIC's case manager dated April 23, 2003 which indicated the Appellant was no longer suffering from headaches, but continued to suffer pain to her neck in the mid-line and along the right and left upper trapezius as well as mid-thoracic pain and pain in the right scapula region, as well as pain along the right arm and forearm, low back, left buttock and thigh.

On April 28, 2003 [independent doctor] provided a further report to MPIC in respect of his examination of the Appellant on April 21, 2003 wherein he stated:

> **Specific Activities**
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> On the current review, she reported that she was able to tolerate sitting for approximately 1 hour. She notes neck and top of the shoulder symptoms beyond this. She notes that she is least symptomatic walking rather than standing. She is able to walk for approximately ½ hour but develops increasing back and left leg symptoms as the distance increases.
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> With respect to standing tolerance, she notes she is able to stand for approximately ½ hour, but develops back and left leg symptoms. She notes that bending movements, forwards, backwards and lifting produces discomfort in the low back. In order to control her symptomatology she utilizes cold, heat, and stretching exercises that she was instructed in. She does the stretching exercises 6 times per day.
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> **Progression of Pain**
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> She feels that there has been a greater than 50% improvement in the symptoms, with the needling treatments that she has received primarily more recently. She has noted improvements in the headaches, right arm pain, and right neck pain. She notes that her back and legs on the left are not improved. She reports she has received no directed treatments to these areas to date.
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> **Current Function**
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> She reported she was able to do her activities of daily living. She reported that she continues to do only light house activities. She makes sandwiches and tea. Her mother does her gardening and her husband does the heavier activities such as vacuuming.
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> She stated that her general activity level is down, and that she has attempted to increase her activity level to avoid sleeping in the daytime. She does some walking and sitting and at times lies does (sic). She said she tries to do activities such as reading. She attempts to move around as much as she can. In warmer weather she had been out on intermittent walks. . . .
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> **Prognosis**
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> I would expect that her prognosis would be for functional recovery, to the point pre-existing the motor vehicle accident. I would expect that she should be able to progress to a return to work, her regular work duties. (underlining added)
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> . . . . .

Work Capacity

I would expect that the examinee should be able to progress on a graduated basis to her prior work duties.

[Independent doctor], in this report states that he was informed by the Appellant that her employer advised her that she was not able to return to her job until she recovered one hundred (100%) percent. She further informed [independent doctor] about her ". . .concerns that the job duties ie housekeeping were heavy, especially the large amount of vacuuming [text deleted], using a heavy commercial vacuum and hose." (underlining added)

On May 13, 2003 [independent doctor] provided a further report to the case manager wherein he indicated that surveillance videos were provided to him by MPIC dated November 21 and 22, December 20 and 21 of 2002, January 16 and 17, January 17 and 18 of 2003. [Independent doctor] further stated in this report:

> In summary of the evaluation of the videotapes, a lengthy amount of general light activities was observed, this including walking, driving, opening and closing doors of a vehicle, lifting light items with both upper extremities, and shopping activities. A somewhat heavier force was noted to be exerted when closing a sliding side van door that didn't want to close properly, and lifting heavier bags of groceries. More vigorous physical activities were observed as well, including a short-distance run and a brisk walk that appeared to be for exercise. As well she was observed to perform some high level activity, in terms of energy expenditure metabolically, specifically she was observed to shovel snow with what appeared to be a homemade shovel made of a piece of plywood. She was able to perform this activity at a brisk pace with repetitive lifting and throwing motion for approximately a 1-hour duration. The force exacted in these activities would be through the upper extremities, scapula and lower extremities. Muscular stabilization required of the upper extremities, scapula, trunk and lower extremities. (underlining added)

[Independent doctor] also stated, after examining and viewing the videotapes, that:

1. the Appellant would be capable to function and return to her employment as a cleaning person at [text deleted] and that he expected that the Appellant would be

able to perform the duties of her occupation as outlined in the Physical Demands Analysis as reported by the Occupational Therapist.

2. there did not appear to be any physical contradiction present to prevent the Appellant's return to regular work duties without the necessity of a return to work program.

Case Manager's Decision

On May 23, 2003 the case manager wrote to the Appellant that based on the medical report of [independent doctor] dated May 13, 2003 that there was an absence of any current medical substantiation of an objective functional impairment which would preclude the Appellant from returning to work on May 26, 2003. As a result, the case manager informed the Appellant that no further entitlement to IRI exists beyond this date.

On July 2, 2003 the Appellant made an Application for Review of the case manager's decision terminating IRI benefits as of May 23, 2003.

On July 14, 2003 [Appellant's doctor #2] provided a report to MPIC's case manager and indicates that:

1. he examined the Appellant on April 30, 2003, May 21, 2003, June 4, 2003, June 18, 2003, July 2, 2003 and on July 9, 2003.
2. on July 9, 2003 the Appellant had not reached maximum medical improvement and was now capable of increasing her level of physical and functional activities.
3. he advised the Appellant that she was now capable of a gradual return to work program commencing on July 14, 2003.

4. the initial plan was to return the Appellant to work for two (2) hours Monday, Wednesday and Friday during week one (1), and the same hours during week (2).
5. as the Appellant gradually increased strength and endurance the hours of work will be increased and that this will be assessed after the initial two weeks.

[Appellant's doctor #2] further stated:

> It is my opinion that she was not capable of returning to work prior to mid July 2003 since the heavy and repetitive nature of her work carried out at regular duties and full hours rendered her unsafe as well as interfered with treatment aimed at eradicating her pain symptoms and dysfunction and allowing for a return to work acceptable to both herself and her employer as well as her treating physicians.
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> . . .
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> I note from [independent doctor's]report that he initially recommended a graduated return to work program but changed his mind on viewing a surveillance video tape. Anything seen on the video tape does not change my own observations, history and physical examinations as well as findings during treatment and after treatment. I would emphasize that many people with ligamentous and myofascial trigger points can carry out physical activity that is not repetitive or strenuous over many hours of occurrence. They often suffer with increased pain hours later or the next day rather than immediately. Since [the Appellant] has to return to a very strenuous job carried out repetitively over a full day every day, five days per week, it is my opinion that she was not capable of returning to that type of regular duties with no restrictions until she had adequate treatment of the type and outcome documented in the text of this report.

On January 19, 2004 the case manager wrote to [independent doctor] asking him to clarify certain comments that he had made relating to the Appellant's shoveling of snow on December 20, 2002 and the manner in which she was proceeding on May 13, 2003.

[Independent doctor], in his May 13, 2003 report to MPIC stated that the Appellant shoveled snow "at a brisk pace for approximately one hour duration" in the December 20, 2002 videotape. However, an examination of the videotape clearly indicated that the Appellant was shoveling snow for a total of fourteen (14) minutes, not for one (1) hour. Initially, the Appellant shoveled

snow for a period of four (4) minutes, took a break of thirty-seven (37) minutes, and then returned and continued to shovel snow for an additional ten (10) minutes. [Independent doctor] acknowledged his error in his February 3, 2004 report by assuming the Appellant was shoveling during the thirty-seven (37) minute period on the videotape when the video camera had been shut off.

[Independent doctor] further stated in his May 13, 2003 report that he observed the Appellant engaged in a short distance run and a brisk walk, as well as driving around for various errands, entering and leaving her motor vehicle, walking around in a shopping mall and unloading groceries into the vehicle and carrying a garbage bag.

In his report to MPIC dated February 20, 2004, [independent doctor] stated:

1. having regard to the observation of the Appellant's documented activities, his independent examinations on August 19, 2002 and April 21, 2003, and the available medical information, he was of the opinion that the Appellant was functionally able to return to her employment as a cleaning person at [text deleted] and that she was able to perform the duties of her occupation as outlined in the Physical Demands Analysis report by the occupational therapist.
2. the video surveillance confirms what the medical information, observations, and IMEs suggested regarding her abilities to perform her full-time regular duties.

Internal Review Officer's Decision

The Internal Review Officer issued a decision on March 26, 2004 confirming the case manager's decision of May 23, 2003 terminating the Appellant's IRI. In his decision the Internal Review Officer stated:

Discussion

The issue has to do with whether [the Appellant] was ready to return to her previous job as of the May 23, 2003 decision, or whether there was a medical requirement for her to complete a suitable graduated return to work program before going back to her job.

There is a difference in medical opinion. [Appellant's doctor #2] appears to be of the view that a graduated return to work program was required. [independent doctor] seems also to have been initially of that view, but changed his mind after watching some surveillance tapes depicting the claimant's activities. [Independent doctor's] May 13, 2003 report indicates that the claimant was capable of an immediate return to her regular pre-accident work. The decision under Review is directly based on that report.

At the hearing, you attacked [independent doctor's] opinion on two bases: First, you believed that he had mistaken the claimant's mother, shown on the December 21, 2002 tape, for the claimant. Secondly, you said that [independent doctor] had evidently overestimated the amount of time that the claimant had spent shoveling snow on the December 20, 2002 tape. (This may be an appropriate place to observe that, according to the case manager's brief summary dated October 10, 2003, the December 20th tape shows the claimant doing a number of other things in addition to shoveling snow.)

[Independent doctor]'s February 3, 2004 report makes it clear that he had not made a mistake concerning the identities of the people shown on the tapes. It also makes clear that he is well aware of the timings involved. His February 20, 2004 report clears up any residual uncertainty about his position by declaring that on the basis of all of "the available medical information, I am of the opinion that [the Appellant] was functionally able to return to her employment as a cleaning person at [text deleted], and that she was able to perform the duties of her occupation as outlined in the Physical Demands Analysis reported by the occupational therapist."

It should be noted that our consultant, [MPIC's doctor], prefers [independent doctor's] assessment to that of [Appellant's doctor #2].

As already indicated, there is a difference of medical opinion concerning this claim. That is not, however, by any means necessarily a basis for interfering with a decision under Review.

Accordingly, this Review will confirm the decision of May 23, 2003.

Notice of Appeal

The Appellant filed a Notice of Appeal on May 6, 2004. The Appellant attached an Appendix marked Schedule A to the Notice of Appeal wherein she stated:

SUMMARY OF THE APPELLANT'S POSITION

The Appellant's job requires fairly strenuous activities on a full-time basis. MPIC was

> advocating a gradual return to work program, which was supported by the various medical professionals involved with the Appellant, until a report was prepared by [independent doctor] following a review of the videotape surveillance. The Appellant's primary physician [Appellant's doctor #1] and specialist [Appellant's doctor #2] have consistently opined that she required a gradual return to work.
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> As outlined above, [independent doctor] appeared to overstate the activity level of the Appellant on the tapes. The day prior to the Appellant shoveling snow for 14 minutes she had received treatments from [Appellant's doctor #2] and, consistent with the usual effects of same, was feeling better the following day. The snow was very light and the Appellant was still unable to shovel vigorously and can be observed barely lifting the shovel. After briefly shoveling snow the Appellant felt very stiff and sore, and the next day she stayed home and rested, however same is not an option when working full-time. The Appellant had been advised to increase the intensity of her daily activities and to exercise (which presumably could include activities such as those observed in the videotapes) by both [Appellant's doctor #2] and [independent doctor] to assist with her recovery. The Appellant's work duties are much more vigorous and involve a greater level of physical exertion than the activities observed on the videotapes. The Appellant is also of the view than [independent doctor] may have mistaken her mother for her, as her mother and husband were videotaped shoveling snow for an extended period of time.
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> Based on the foregoing, it is the Appellant's position that she was not able to return to full-time work on May 23, 2003 and accordingly her benefits should be reinstated retroactive to that date and continuing to a date as may be determined by the Automobile Injury Compensation Appeal Commission.

On September 28, 2004 [Appellant's doctor #2] provided a narrative report to the Appellant's legal counsel. In preparation for this report [Appellant's doctor #2] indicates that he reviewed all of the relevant medical reports from both himself and [independent doctor] and, as well, the MPIC surveillance videotapes dated November 21, 2002, December 20, 2002, December 21, 2002, January 16, 2003 and January 17, 2003.

> In regard to the questions posed in your May 18, 2004 letter, I have the following comments.
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> 1. After reviewing my own reports of October 21, 2002, January 27, 2003, April 23, 2003, July 24, 2003, July 28, 2003 and September 16, 2003 as well as [independent doctor']s IME reports dated April 28, 2003, May 13, 2003, February 3 and February 20, 2004 any my own review of the submitted surveillance video tapes, it is my opinion on the balance of probabilities that [the Appellant] was unable to effectively and safely perform her required employment tasks on a full-time or part-time basis as of May 23, 2003. She required further treatment during April, May and June 2003 prior to my initiation of a graduated return to work

> program. This was arranged in conjunction with her employer since MPI would not support a graduated return to work plan. She continued in the graduated return to work program increasing hours every few weeks in conjunction with further treatment carried out by myself between July 2003 and February 2004. She progressively improved with decrease in overall pain symptoms, objective evidence of decreased physical impairment as well as improved function allowing her to resume full time regular duties as of early February 2004.

[Appellant's doctor #2] further states in his report:

> At the time of [independent doctor's] April 21, 2003 exam and his IME report dated April 28, 2003, I had only carried out treatment on four clinic visits i.e. November 27, 2002, December 4, December 11 and December 18, 2002. These dates are important since they precede the video tape surveillance of December 20 and 21, 2002. I noted major improvement following my injection procedures at the cervical level i.e. paraspinous blocks C3 and C5 as well as needling and 1% Xylocaine infiltration of C2-3 and C4-5 supraspinous ligaments and needling with infiltration of myofascial trigger points in cervical and right shoulder girdle region. The degree of improvement as documented by myself as well as [independent doctor] was sufficient in order to allow her to carry out the type of activities shown in the video tape surveillance.
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> . . . . .
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> 2. After viewing the video tapes submitted and especially the December 20 and 21, 2002 video tapes, I would expect her to be able to carry out the activities observed in the video tapes. These activities were carried out over short periods of time i.e. shoveling for four minutes followed by a rest of 37 minutes and resumed shoveling for a further 10 minutes. This activity is neither sustained or heavy enough to prevent her from carrying out the task. Likewise, all the other activities observed on the video tapes do not demonstrate sustained or prolonged postural strain or any type of repetitive use of the limbs or trunk for more than a few seconds or minutes at a time. It required sustained postural or repetitive activities to precipitate and aggravate pain and dysfunction related to myofascial and ligamentous trigger points and sensitized spinal segments. Often, tasks can be carried out without distress only to be followed by pain, fatigue and dysfunction hours or days after the period of physical exertion. I will comment further on the activities observed on the video tapes when I review [independent doctor's] February 3, 2004 addendum to his April 28 and May 13 IME's. I would also emphasize the fact that [the Appellant] had major improvement in regards to head, neck and right upper limb and shoulder girdle symptoms following my treatments of November 27, December 4, 11 and 18, 2002. There was objective evidence of improvement on physical examination and in view of this degree of improvement, she was capable of increasing the level of her physical exertion in relationship to the activities she carried out in the video tapes of December 20, 2002 as well as video tapes before and after that date which I reviewed.
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> . . . . .

> 4. The activities I observed [the Appellant] carrying out on the video tapes were not contraindicated. They were activities I would expect her to be able to carry out in relationship to her diagnoses, symptoms of pain and objective physical findings present as of the dates of the surveillance tapes, I would expect her to carry out the tasks visualized on an intermittent basis but not on a regular basis. It is the sustained heavy physical activity on a regular basis over an 8 hour period that would lead to exacerbation of pain symptoms, further muscle shortening and physical impairment as well as disability.

The case manager, on September 24, 2004, wrote to [Appellant's doctor #3] who had seen the Appellant in respect of her motor vehicle accident injuries and requested a medical report.

On October 17, 2004 [Appellant's doctor #3] forwarded a report to the case manager and stated:

> 4) At the present time I plan no further therapeutic interventions after her motor vehicle-related accident. The patient was able to return to work and it appears that she has great difficulties coping with her duties as a cleaning lady. The patient requires frequent breaks throughout the day and depends on medication to carry out the work day. Activities like vacuuming are too strenuous for the patient.
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> . . .
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> 6) Based on [the Appellant's] signs and symptoms, it would appear that she has not fully recovered from the effects of the motor vehicle accident injuries. After reviewing the extensive reports from [Appellant's doctor #2], [Appellant's doctor #4], and [independent doctor] and comparing them to the patient's current status, it seems to me that her recovery has reached a plateau.
> Her prognosis for future recovery is guarded.

On December 17, 2005 [independent doctor] provided a report to MPIC's solicitor in which he stated, having regard to all of medical reports including that of [Appellant's doctor #2] dated September 28, 2004 and [Appellant's doctor #3] of October 17, 2004, that the Appellant was capable of returning to full-time work duties as of May 23, 2003 on a physical basis.

Appeal

At the commencement of the appeal hearing both parties agreed that the Commission panel was properly constituted and had jurisdiction to hear and determine this appeal.

The relevant provision with respect to this appeal is Section 110(1)(a) of the MPIC Act, which states:

> **Events that end entitlement to I.R.I.**
> **110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
> (a) the victim is able to hold the employment that he or she held at the time of the accident;

The Internal Review Officer correctly defined the issue in this appeal as follows:

> The issue has to do with whether [the Appellant] was ready to return to her previous job as of the May 23, 2003 decision, or whether there was a medical requirement for her to complete a suitable graduated return to work program before going back to her job.

At the appeal hearing the Appellant testified and was cross examined by MPIC's legal counsel. In her testimony the Appellant stated:

1. at length as to the injuries she sustained in the motor vehicle accident, the inability to return to work as a result of the motor vehicle accident injuries and the medical treatments she received from [Appellant's doctor #2].
2. she disagreed with MPIC's decision to terminate her IRI after May 23, 2003 because she was unable at that time to return to work on a full time basis.
3. her employer would not return her to work unless she had recovered one hundred (100%) percent and carried out all her duties.
4. initially she was unable to return to work on a graduated basis but under [Appellant's doctor #2's] direction she did commence return to work in the month of July, without pay, and continued this program on a graduated basis until she was able to return to work full time in the month of February 2004.
5. she was anxious to return to her job and was prepared, without pay, in order to have a job available for her when she was capable of returning to work full time.

MPIC's legal counsel in cross-examination challenged the Appellant's credibility. MPIC's legal counsel referred the Appellant to a discussion the Appellant had with the case manager wherein the Appellant denied to be involved in shoveling snow at a residence on December 20, 2002. The Appellant acknowledged in her testimony that she had denied shoveling snow in her discussion with the case manager.

Submissions

The Appellant's legal counsel referred to the nature of the Appellant's employment at [text deleted] and stated:

1. the Appellant's work activities included walking, lifting, squating during her course of daily activities of cleaning [text deleted];
2. the Appellant's activities of cleaning [text deleted] were beyond light duty activities, particularly having regard to the vacuuming and lifting of heavy pails of water;
3. MPIC was relying on the medical opinions of [independent doctor], who initially provided a medical opinion to MPIC which recommended the Appellant return to work on a graduated work basis, but after viewing the videotapes he changed his opinion and indicated the Appellant could return to work forthwith.

The Appellant's legal counsel, in her submission:

1. was critical of [independent doctor's] medical opinion in respect to the Appellant's ability to return to her work full time on May 23, 2003. She referred to the error [independent doctor] made in respect of his observation relating to the amount of time the Appellant spent shoveling snow and that the doctor had inaccurately reported as to the manner in which the Appellant had walked during the course of shopping;

2. noted that [Appellant's doctor #2] had examined and treated the Appellant on numerous occasions and his medical reports corroborated the Appellant's testimony in respect of her incapacity to return to work on May 23, 2003.
3. having regard to the consistent medical reports of [Appellant's doctor #2], the testimony of the Appellant, the significant error made by [independent doctor] in respect of the amount of time the Appellant shoveled snow, the Commission should reject [independent doctor's] medical opinion that the Appellant was capable of returning to work on May 23, 2003.

The Appellant's legal counsel therefore submitted that the Internal Review Officer erred in terminating the Appellant's IRI effective May 23, 2003 and that the appeal should be allowed and the IRI reinstated.

MPIC's legal counsel, in his submission:

1. attacked the credibility of the Appellant by pointing out that [independent doctor] had initially determined that the Appellant was possibly partially malingering but nevertheless recognized a causal connection between the motor vehicle accident and the Appellant's injuries and recommended the Appellant return to work on a graduated basis.
2. stated that after [independent doctor] had reviewed the video surveillance tapes he changed his mind and concluded the Appellant was capable of returning to work at that time.
3. stated that although [independent doctor] had erred in determining that the Appellant's shoveling of snow was one (1) hour rather than fourteen (14) minutes, [independent doctor] concluded that having regard to his own examinations, the

> medical reports of [Appellant's doctor #2] and his observations of the video surveillance tapes, the Appellant had been capable of returning to work at the end of May 2003.

MPIC's legal counsel therefore submitted the Appellant's testimony was not credible in respect of her incapacity to return to work as of May 23, 2003. As a result, MPIC's legal counsel submitted the Commission should reject the medical reports of [Appellant's doctor #2], accept the medical opinions of [independent doctor] and [MPIC's doctor] and dismiss the Appellant's appeal.

Discussion

The Commission notes that the initial assessment by [independent doctor] was not inconsistent with the initial assessment of [Appellant's doctor #2] that the Appellant was unable to return to work in the month of May 2003. While [independent doctor] was of the view that the Appellant was capable of returning to work on a graduated basis in May, [Appellant's doctor #2] was of the opinion that the Appellant could return to work on a part-time basis in July 2003.

Both doctors had viewed the videotapes but came to different conclusions in respect of the Appellant's ability to return to work full time. It should be noted that both [independent doctor] and [Appellant's doctor #2] were provided with four (4) video surveillance tapes for November 21 and 22, 2002, December 20 and 21, 2002, January 16 and 17, 2003 and January 17 and 18, 2003. As a result both doctors were given an opportunity of observing the activities of the Appellant over a period of eight (8) days.

[Independent doctor's] comments referred to the Appellant's activities on two (2) days, December 20 and 21, 2002 and made no critical comments in respect of the Appellant activities which had been video taped on the other six (6) days. It should further be noted that there are thirty (30) days in November and thirty-one (31) days in December and January, for a total of ninety-two (92) days. Excluding the eight (8) days, which are recorded on these video surveillance tapes, there was no evidence provided by MPIC in respect of the Appellant's activities for which there are no video surveillance tapes in these eighty-four (84) days during the three (3) month period.

The Commission notes that [independent doctor] modified his opinion as to the capacity of the Appellant to work based on his observations of the Appellant's activities on two (2) days in the months of December (December 20 and December 21) but he is unable to comment on the capacity of the Appellant's work based on the Appellant's activities in respect of the eighty-four (84) days in the months of November and December 2002, and January 2003, with respect to which there are no videotapes surveillance tapes. The Commission finds [independent doctor's] observations of the Appellant's activities on December 20 and December 21, 2002 constituted an extremely limited and narrow time frame in order for [independent doctor] to reasonably determine that the Appellant was capable of returning to work full-time five (5) months later on May 23, 2003.

In respect of December 21, 2002 [independent doctor's] observations relate to the Appellant walking and driving while carrying out shopping activities. [Independent doctor] noticed that in respect of these activities the Appellant included a short distance run and a brisk walk that appeared to be exercise. The Commission agrees with [Appellant's doctor #2] that these activities do not correlate with the physical demands of the Appellant's job duties and do not

establish that the Appellant was capable of returning to work full time on May 23, 2003.

In respect of December 20, 2002 [independent doctor] acknowledged that he erred in determining the amount of time the Appellant had spent shoveling snow on December 20, 2002. An examination of the videotapes indicates the Appellant shoveled snow for approximately four (4) minutes, then took a break for thirty-seven (37) minutes, then proceeded to shovel snow again for ten (10) minutes. Although [independent doctor] acknowledged his error, he nevertheless maintained his position that the Appellant was capable of returning to her employment as a cleaning person at [text deleted].

It should be noted that the employment of the Appellant involved working regular hours each day, five (5) days a week, which included walking, climbing, bending, squatting and lifting of heavy objects such as a pail of water and a vacuum cleaner during the course of a regular day's work. The Commission agrees with [Appellant's doctor #2] that the Appellant's work was of a physically demanding nature. As a result, the Commission does not find that shoveling snow for a period of fourteen (14) minutes rather than one (1) hour correlates with the Appellant being required to carry out a physically demanding job for a regular day of employment. As a result, the Commission rejects [independent doctor's] opinion that on December 20, 2002 when the Appellant shoveled for four (4) minutes, took a break for thirty-seven (37) minutes and then shoveled again for ten (10) minutes, demonstrates that the Appellant was capable of returning to work five (5) months later on May 23, 2003.

[Appellant's doctor #2], in his report dated September 28, 2004, notes that he treated the Appellant on November 27, 2002 and December 4, 11 and 18, 2002 with injection treatments. [Appellant's doctor #2] stated in this report that the Appellant demonstrated significant

improvement as a result of these injection treatments and, as a result, this improvement was sufficient to permit the Appellant to carry out her activities on December 20 and 21, 2002. [independent doctor] does not rebut [Appellant's doctor #2's] opinion in respect of this issue.

[Appellant's doctor #2], who treated the Appellant on numerous occasions, was therefore in a much better position to assess the Appellant's credibility than [independent doctor]. In his report dated July 14, 2003 [Appellant's doctor #2] states:

> It is my opinion that she was not capable of returning to work prior to mid July 2003 since the heavy and repetitive nature of her work carried out at regular duties and full hours rendered her unsafe as well as interfered with treatment aimed at eradicating her pain symptoms and dysfunction and allowing for a return to work acceptable to both herself and her employer as well as her treating physicians.

Subsequent to the Internal Review decision, and prior to the appeal hearing, [Appellant's doctor #2] provided a further medical report to the Appellant's legal counsel dated September 28, 2004. In this report [Appellant's doctor #2] reviews all of the relevant medical reports from [independent doctor], [Appellant's doctor #5], [Appellant's doctor #1], [Appellant's doctor #6], the Physical Demands Analysis and the Internal Review Officer's decision. [Appellant's doctor #2] also reviewed his own reports of October 21, 2002, January 27, 2003, April 23, 2003, July 24, 2003, July 28, 2003 and September 16, 2003 and [independent doctor's] IME reports dated April 28, 2003, May 13, 2003, February 3 and February 20, 2004. [Appellant's doctor #2] concluded, after reviewing all of these reports and the surveillance videotapes, that it was his opinion, on the balance of probabilities, that the Appellant was unable to effectively and safely perform her required employment tasks on a full-time or part-time basis as of May 23, 2003.

[Appellant's doctor #2] further reports that the Appellant required further treatment during April, May and June 2003 prior to the initiation of a graduated return to work program and further

stated:

> After viewing the video tapes submitted and especially the December 20 and 21, 2002 video tapes, I would expect her to be able to carry out the activities observed in the video tapes. These activities were carried out over short periods of time i.e. shoveling for four minutes followed by a rest of 37 minutes and resumed shoveling for a further 10 minutes. This activity is neither sustained or heavy enough to prevent her from carrying out the task. Likewise, all the other activities observed on the video tapes do not demonstrate sustained or prolonged postural strain or any type of repetitive use of the limbs or trunk for more than a few seconds or minutes at a time. It requires sustained postural or repetitive activities to precipitate and aggravate pain and dysfunction related to myofascial and ligamentous trigger points and sensitized spinal segments. Often, tasks can be carried out without distress only to be followed by pain, fatigue and dysfunction hours or days after the period of physical exertion.

[Appellant's doctor #2] further stated:

> 3. My opinion regarding [the Appellant's] ability to return to work as of May 23, 2003 was not affected or changed by viewing her activities in the video tapes. The problem remained that her job as documented in the July 19, 2002 Physical Demands Analysis is a very physically demanding job. The type of physical activities required are well documented in the July 19, 2002 report. Her duties required the use of a large commercial vacuum and hose up to four hours continuously when vacuuming the large [text deleted] flooring with [text deleted] seats. In addition, she is constantly on the move carrying out other physically demanding duties fully documented in the Physical Demands Analysis. It is my opinion that she was incapable of returning to work either full-time or part-time duties as of May 23, 2003 or earlier. The type of heavy physical exertion and sustained activities documented in the Physical Demands Analysis would be expected to irritate, activate and further sensitize myofascial and ligamentous trigger points still not eradicated, especially when sensitized spinal segments due to central nervous system sensitization were still evident on physical examination, especially in the lumbar, left buttock and left lower limb muscles as well as ligaments in the lumbosacral region. She required further treatment in those regions which I only initiated in April 2003. She progressively improved with treatment and by early July 2003, it was my opinion that she was capable of a graduated return to work program which I initiated. (underlining added)

In respect of [independent doctor's] reports that the Appellant was observed carrying out a lengthy amount of generalized activities in respect of shopping, [Appellant's doctor #2] states:

> As stated above, all of these activities were carried out over short periods of time and well within her physical capabilities, based on the initial improvement following my treatments prior to December 20, 2002. These activities do not correlate with the heavy physical exertion required in her job as documented in the Physical Demands Analysis. Not only are the activities of her job much heavier and repetitive but also had to be carried out for 8 hours per day, five days per week. It is my opinion that her job activities

> were clearly contraindicated during the time I was treating her up to early July 2003 at which time I initiated a graduated return to work plan.

The Appellant testified and described the nature of her employment at [text deleted]. These duties were totally consistent with [Appellant's doctor #2's] opinion that the work activities were physically demanding and were not of a light nature. The Appellant testified that there were seven (7) bathrooms at [text deleted] and she was required to clean the toilets in these bathrooms, which required her to carry pails of water to each bathroom, which were quite heavy. A Physical Demands Analysis of the Appellant's employment was conducted by an Occupational Therapist, [Appellant's occupational therapist], and she provided a report to MPIC dated July 19, 2002. In this report [Appellant's occupational therapist] states that in respect of mopping/bathroom cleaning that the half filled water pail weighs thirty-nine (39 lbs) pounds. The Commission finds that the Physical Demands Analysis prepared by [Appellant's occupational therapist], dated July 19, 2002, corroborates both the Appellant and [Appellant's doctor #2's] opinion that the Appellant's work activities are not of a light duty nature.

The Commission finds that the Appellant was on the whole a credible witness who attempted to recall as best she could the events in question. MPIC's counsel referred to a memorandum from the case manager in respect of a telephone discussion between the Appellant and the case manager on May 27, 2003. In this telephone discussion the case manager reported:

> I advised that is not what is showing on the video tapes I have of her, she was very capable of shoveling, picking up, and throwing snow in her driveway for an hour, and then proceeded to go out shopping for 5 hours. This was on December 20, 2003- 2 days after [Appellant's doctor #2]'s treatment. I told her I agree that [Appellant's doctor #2]'s treatment must have been very effective.
>
> She replied that it was not her in the video.
>
> I assured her that it was definitely her, along with her mother.
>
> She said again it was not her.

It should be noted that the Appellant was requested by the case manager, on May 27, 2003, to recall events which occurred approximately five (5) months earlier in time and it is not surprising that the Appellant may have had some difficulty in accurately recollecting the events of December 20, 2003.

The Appellant's difficulty in recalling the events of December 20, 2003 may also have been adversely affected by the case manager unintentionally informing the Appellant that the Appellant was observed on the video surveillance tapes of shoveling snow for a period of one (1) hour. It appears the case manager made the same mistake that [independent doctor] did in computing the amount of time the Appellant was shoveling snow on December 20, 2002.

The Commission finds there is a significant difference between the time period of shoveling snow for fourteen (14) minutes and for one (1) hour and that this misinformation may have confused the Appellant's ability to recall accurately the events in question. The Commission finds that because the Appellant was required to recall a single event five (5) months after it occurred, and because the Appellant was misinformed as to the amount of time the Appellant spent in carrying out the activity, the Appellant probably quite innocently failed to recall accurately her activities on December 20, 2002.

The Commission notes that at the appeal hearing the Commission panel asked the Appellant why she had denied shoveling snow on December 20, 2002. The Appellant initially stated to the Commission panel that she could not explain why she had made this denial but after a few seconds of silence she stated that she had not been able to recall the event. As a result, the Commission accepts the Appellant's explanation as to why she denied shoveling the snow on December 20, 2002 as truthful.

The issue of the Appellant's credibility is central in determination of this appeal. In **Faryna v. Chorny** [1952] 2 D.L.R. 354, the British Columbia Court of Appeal addressed the issue of the credibility of witnesses in civil proceedings. Mr. Justice O'Halloran, on behalf of the British Columbia Court of Appeal, stated:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The Commission has rejected [independent doctor's] medical opinion as to the Appellant's capacity to return to work full-time on May 23, 2003 for the following reasons:

1. [Independent doctor] originally opined that the Appellant could commence a return to work program full-time on May 23, 2003.
2. Based on his observations of the Appellant's activities on December 20 and 21 in shoveling snow and going shopping, [independent doctor] changed his opinion and concluded that the Appellant was capable of returning to work full-time on May 23, 2003.
3. [Independent doctor], had a very narrow and limited factual basis after reviewing the Appellant's activities on December 20 and 21 to determine that the Appellant was capable of working full-time five (5) months later.
4. In arriving at his opinion [independent doctor] made a significant error in determining the amount of time the Appellant shoveled snow.
5. That shoveling snow for a period of fourteen (14) minutes one day and going shopping and driving a car another day for several hours does not establish the

Appellant was capable of working full time for her regular working hours five (5) days a week in a physically demanding job.

6. [Independent doctor] erred in initially in concluding the Appellant was partially malingering. The Commission notes that the Appellant, on the advice of [Appellant's doctor #2], commenced a graduated return to work program in the month of July 2003 at [text deleted], without pay, and continued to work on this graduated program, until she was capable of returning to work full time in the month of February 2004. The Commission finds that the Appellant wanted to work and did so for many months without receiving pay in order to convince her employer that she was capable of returning to her full time employment. The Commission determines that the Appellant's conduct in this respect is inconsistent with [independent doctor's] opinion that the Appellant was possibly malingering when he initially assessed her.

The Commission finds an examination of the documentary evidence on file and the Appellant's testimony establishes that the Appellant consistently testified that as a result of the motor vehicle accident she was not capable of returning to work full-time on May 23, 2003. The Appellant's position in respect of her incapacity to return to work is corroborated by [Appellant's doctor #2] and by the Appellant's physician, [Appellant's doctor #1].

The Commission therefore concludes, for these reasons, the Appellant has established, on the balance of probabilities, that she was incapable of returning to work full-time May 23, 2003. The Commission therefore concludes that the Internal Review Officer erred in his decision dated March 26, 2004 when he confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Commission therefore allows the appeal and rescinds the Internal Review Officer's decision dated March 26, 2004.

Dated at Winnipeg this 9th day of February, 2006.

MEL MYERS, Q.C.

DR. ROBERT CHERNOMAS

NEIL COHEN