

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-96**

PANEL: Ms. Laura Diamond, Chairperson
Ms. Diane Beresford
Ms. Sandra Oakley

APPEARANCES: The Appellant, [text deleted], was represented by Ms. Virginia Hnytka of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: September 11, 2006 and December 9, 2008

ISSUE(S): Were the Appellant's IRI benefits properly terminated under section 160(a) 160(b) of the Act

RELEVANT SECTIONS: Section 160 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 injured in a motor vehicle accident, which killed his common-law wife, on November 17, 2001. At the time of the accident he was employed as a fire alarm technician. He sustained significant bodily injuries including fractures of his C3 and L3 vertebrae, fractures of two of the bones in his left arm with some nerve damage, an undisplaced fracture of the right knee with associated ligamentous tearing, Post-Traumatic Stress Disorder and depression.

The Appellant was in receipt of Personal Injury Protection Plan (PIPP) benefits, including Income Replacement Indemnity (IRI) benefits from MPIC. He participated in a rehabilitation program at [rehab clinic]. A discharge report from [rehab clinic] dated June 24, 2004 concluded that the Appellant was capable of occasional sedentary to light level work and frequent medium level work.

The Appellant also attended counseling appointments at [text deleted] Rehabilitation Consulting Services through the fall of 2004.

On November 3, 2004, the Appellant's case manager wrote to him advising of the termination of his entitlement to PIPP benefits, for knowingly providing MPIC with false information and for failing to advise MPIC of changes in his functional status. The case manager, in a lengthy decision letter, indicated that MPI's investigation of the Appellant's activities demonstrated that his observed functional ability contradicted what he had consistently reported to MPI and his care providers. MPIC disputed the Appellant's claims that his left hand was not functional, that he was not able to perform any activities with it, and that he required a cane for support. According to the case manager, MPIC's investigation, including videotape surveillance, indicated that this information was not correct. The case manager stated that by failing to notify or provide accurate information to MPI concerning his injuries and employability, the Appellant was in contravention of Section 160(a) and Section 149 of the MPIC Act and that his entitlement to all benefits ended as of March 4, 2004.

The case manager also noted the Appellant's uncooperative behaviour regarding rehabilitation attempts and participation in his rehabilitation process. He cited missed and cancelled appointments as well as uncooperative and verbally abusive behaviour to therapists.

Accordingly, the Appellant's benefits were also terminated under Section 160(f) and (g) for without valid reason, preventing or delaying recovery by his or her activities and without valid reason not following or participating in a rehabilitation program made available by the corporation.

In addition, the case manager noted that the Appellant had been asked in writing for his income tax information for the years 2001, 2002 and 2003.

He had been asked to submit these returns by September 30, 2004 and advised that failure to provide the requested information would result in suspension of his benefits. The requested tax returns had not been provided. Accordingly, the Appellant's benefits were also being terminated pursuant to Section 160(b) of the MPIC Act which provides that the corporation may refuse to pay compensation or may reduce the amount of an indemnity, or suspend, or terminate it where the person refuses or neglects to produce information when requested by the corporation in writing.

Further, the Appellant's case manager noted that the investigative material and a file review by the MPIC's Health Care Services Department indicated that the Appellant had the ability to maintain employment. Accordingly, as there was no impairment of function preventing him from returning to work, had his benefits not been terminated under Section 160, they would have been terminated in accordance with Section 110(1)(a), since the Appellant was able to hold the employment that he held at the time of the accident.

The case manager indicated that MPIC was seeking reimbursement from the Appellant in the amount of \$12,571.92, which was the amount of monies paid to him in IRI benefits subsequent to March 4, 2004.

The Appellant sought an internal review of this decision. On March 31, 2005, an Internal Review Officer for MPIC upheld the case manager's decision. He stated:

In other words, a termination of benefits may be warranted where the claimant knowingly provides false or misleading information to MPI relevant to their claim, or neglects or refuses to produce information which has been requested in writing by MPI. This is so whether or not there is an explanation for the behaviour.

With respect to Section 160(a), it is clear that a good deal of inaccurate information was provided by you to MPI in the months leading up to the termination.

With respect to Section 160(b), several written requests for copies of income tax returns were sent to you. They were never provided.

Your non-compliance with Sections 160(f) and 160(g) – relating primarily to your rehabilitation programs – is set out in detail in the decision letter under review. A number of written warnings were provided over the years since the accident.

An explanation has been offered with respect to that non-compliance, but there is frankly not much support for the explanation in the material. The only reports which actually mention your alcohol consumption indicate that it was not problematic at the relevant times.

In short, I am satisfied from the material that the criteria set out in Sections 160(a), 160(b), 160(f) and 160(g) have all been met.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

A hearing into the Appellant's appeal was convened on September 11, 2006. The panel heard evidence from the Appellant, as well as from his brother, [text deleted], and friend and niece, [text deleted] and [text deleted].

At the conclusion of this evidence, the panel expressed some concerns. The Appellant's counsel had raised questions regarding the Appellant's mental state at the time, and the evidence heard seemed to suggest that the Appellant's possible non-compliant behaviour might have had some connection to mental illnesses which he described during his testimony. These included depression, post-traumatic anxiety, panic attacks, agoraphobia and suicidal ideation. Although the Appellant had testified and counsel for the Appellant had called lay people to give their non-professional evidence in support of this suggestion, the panel had not heard or seen any medical evidence or medical reports by a medical professional to address any connection between these issues and the behaviour of the Appellant that MPIC was taking exception to.

Accordingly, the hearing was adjourned to obtain further medical evidence. A medical report from the Appellant's general practitioner and one from an independent psychiatric assessment were obtained.

These reports, dated January 24, 2007 and April 4, 2008, indicated that, on a balance of probabilities, the Appellant suffered from a psychological condition, which was caused by the accident. This psychological condition, which included depression, anxiety disorder and Post-Traumatic Stress Syndrome, had, on a balance of probabilities, according to the psychiatrist, affected the Appellant's ability to comply with the rehabilitation program.

For example, the psychiatrist noted that the Appellant's tendency to miss appointments was partly psychological and partly physical, as a result of fear of going out of his apartment, as he did not trust people, and had a lot of pain and swelling in his right knee. The psychiatrist

believed that the Appellant's psychological condition, combined with his physical disability interfered with his ability to participate in therapy.

After reviewing these medical reports, counsel for MPIC indicated that MPIC was no longer relying on the Appellant's lack of cooperation under Section 160(f) and (g) as a basis for terminating the Appellant's benefits. In addition, MPIC was not relying on Section 110(1)(a) of the Act as noted by the case manager (but not dealt with by the Internal Review Officer).

Rather, counsel for MPIC took the position that although the Appellant had a valid reason for failing to cooperate under Section 160(f) and Section 160(g), no such consideration of a "valid reason" was relevant under Section (a) and (b) of the Act, as these sections did not contain the phrase "without valid reason".

A second hearing date was convened on December 9, 2008. The panel heard evidence from [MPIC's doctor], a medical consultant with MPIC's Health Care Services team and submissions from the parties regarding the termination of the Appellant's benefits for providing false information under Section 160(a) of the MPIC Act and suspension for failing to provide his tax returns until August 2008, under Section 160(b) of the Act.

Evidence and Submission for the Appellant

The oral testimony heard at the appeal hearing on September 11, 2006 from the Appellant and from witnesses who testified on his behalf, described both the motor vehicle accident which injured the Appellant and killed his common-law wife, as well as its effect upon him. Both the Appellant and the other witnesses described the changes in the Appellant, both physically and

emotionally. The evidence was quite clear, and was verified by the Appellant's general practitioner, [text deleted], and the psychiatrist, [text deleted], that the Appellant suffered from a psychological condition of generalized anxiety mixed with grief and depression, following the motor vehicle accident. He developed a Post-Traumatic Stress Syndrome and required medication to treat his anxiety disorder, depression, post-traumatic stress and panic attacks, all exacerbated or caused by the motor vehicle accident.

Both doctors were clearly of the view that, based on the balance of probabilities, the psychological condition was the reason the Appellant had missed appointments and not complied with his vocational rehabilitation program. According to [Appellant's psychiatrist], his psychological condition, combined with this physical disability, combined to interfere with his ability to participate in therapy.

The Appellant's testimony also addressed the video tape surveillance and the allegation by MPIC that he was exaggerating his symptoms. The Appellant explained that he tried to reduce his walking, and that he used a knee brace and a cane. He noted that he could walk distances of five (5) to ten (10) feet without the use of a cane.

He described the difficulties he had with his hand, although he indicated that he could carry light amounts (perhaps up to five (5) pounds) and that he could carry light grocery bags at times, by hooking them on his fingers. He had difficulties with grasping things with his hands and with opening and flexing them, but sometimes by hooking things which did not weigh much on his fingers, he could carry them for short distances.

He also testified that when MPIC asked him to provide his tax returns, he was not really capable of dealing with such issues at the time. In fact, he asked his friend [text deleted] to complete the forms but could not recall if it had ever been done.

The Appellant's brother testified as to the pain and spasms which the Appellant suffered and the short periods of time when he could be up before he would have to go and lie down. His niece, [text deleted], who had lived with him, testified that he had difficulty tying his shoes or holding dishes to wash them and that he suffered from painful spasms and cramping when he tried to do certain tasks. She also described how long it would take for him to prepare himself and get himself together before leaving the house. His friend, [text deleted], also testified regarding the painful spasms which the Appellant appeared to suffer and the depression he appeared to be suffering following the motor vehicle accident, with it sometimes taking two (2) days for him to get up the courage to leave the house.

They all testified that the Appellant had good days and bad days and that some days he did not even leave the house.

Counsel for the Appellant reviewed this testimony, along with the objective medical evidence on the file. She reviewed a report from [Appellant's doctor #2] that described the Appellant's knee injury as well as difficulty with his left upper extremity.

Reports from [Appellant's doctor #3] were also reviewed. These described significant denervation and a focal left radial nerve injury in the upper left arm. In his report of October 3, 2003, he stated:

His wrist extensor power was grade 2/5 in April, it is now grade 4/5 as he can pull the wrist up against gravity through the full range and apply pressure against a mild amount of resistance. Unfortunately finger and thumb extension still ranges between grade 1 to 2 power. Although the amount of improvement is small the important thing is he can now extend his wrist so when he is reaching for things he doesn't hit them with the back of his hand and can approach them with the open hand and from that point of view function has clearly improved, although he feels that it hasn't improved to the degree that he can return to his prior work force. Given that it is almost now two years since the original injury I am rather pessimistic about much further improvement but clearly, ongoing therapy including stretching therapy to try to improve range of motion of his wrist and maintain the function he does have, remains extremely important.

A functional capacity evaluation was completed on December 5, 2003 and amended on January 19, 2004. That evaluation noted the limitation of the Appellant's abilities due to cardiovascular deconditioning and pain in the right knee and left upper extremity. It concluded that the Appellant demonstrated a work capacity consistent with a sedentary level of work.

A report from [Appellant's doctor #4] of [text deleted] dated March 14, 2003 opined that the Appellant suffered from permanent posterior cruciate ligament insufficiency. He indicated that it was probable that the Appellant had permanent patellofemoral symptoms and recommended a brace.

[Appellant's doctor #5] reported, in June 2003, that, in the long term, the Appellant should avoid squatting, crouching, stair or ladder climbing and carrying heavy loads. Counsel for the Appellant noted that these were tasks identified as part of the Appellant's job, as a fire inspector, in a physical demands analysis dated July 23, 2002.

Counsel also reviewed a Multi-Disciplinary Assessment Report provided by [rehab clinic] and dated March 22, 2004. That report noted that the Claimant was cooperative with the

examination process and was a good historian providing information consistent with the medical records provided. The conclusion was set out in the report:

Prognosis

The claimant's prognosis for further resolution of pain complaints is poor due to longevity of symptoms and complexity of injuries. The painful condition has now been present more than 2 years and multiple health professionals have tried to help. The claimant has not reached his Maximal Medical Improvement (MMI) and it is expected that further specific medical treatments may provide additional benefit. Specific such treatments will be listed under a subsequent heading called Treatment Recommendations. The claimant's prognosis for further restoration of function is poor due to the nature, complexity and number of injuries. The Overall prognosis is fair due to the above factors.

Work Capacity

The claimant is not presently capable of even sedentary work. With suitable rehabilitation he may become employable at a sedentary level on a part-time or full-time basis. The work capabilities are impacted upon by physical and behavioural factors.

Counsel for the Appellant noted that the time frame for this assessment (March 4 and 11, 2004) was the same time frame as highlighted in video surveillance evidence provided by MPIC, some of which occurred around March 5, 2004.

These conclusions were followed by ten therapeutic recommendations which included continued use of a wrist/hand brace, medication and treatment for pain relief, and psychiatric consultation for opinion and treatment recommendations.

Counsel contrasted the validity findings in the [rehab clinic] Report with a case manager's note created on February 25, 2004 resulting from a telephone conversation with [text deleted] from [text deleted] Rehabilitation.

... [Text deleted] was of the opinion that [the Appellant] was exaggerating his symptoms and not putting his maximum effort into his rehabilitation and vocational program

This was the only reference to the Appellant's exaggeration of his symptoms, and contrasted with the [rehab clinic] Report completed in March which showed high scores of depression, pain and disability.

The Appellant's case manager, on June 9, 2004, concluded that the Appellant was not providing his maximum effort in rehabilitation and did not see treatment providing any further benefit. He suggested treatment be stopped until the file was reviewed by the medical services department. This was followed by a review by [MPIC's doctor], medical consultant with MPIC's Medical Health Care Services, on June 18, 2004. After reviewing the surveillance tapes, [MPIC's doctor] concluded that the Appellant was demonstrating less than full effort and he could, with regard to his upper limb movement, perform activities involving light resistance. She also reviewed the tapes of him walking and concluded that he demonstrated functional capabilities that would allow him to perform physical duties of a light intensity.

Based upon this report, and a few minutes of video surveillance, counsel submitted, MPIC terminated benefits. His termination under Section 160, she submitted, was based upon a very narrow interpretation of that section and what amounted to a few minutes of video surveillance. She submitted that the weight of medical evidence, as well as the testimony at the hearing supported the Appellant's position that he was not able to work due to his disabilities, and that he had not provided false information to MPIC regarding his symptoms.

Counsel also submitted that the Appellant had provided his income tax returns to MPIC, although with some delay. Therefore, the termination could no longer be upheld and at the most, only a suspension would be appropriate. However, she reminded the panel that due to the Appellant's suspension and termination of benefits, a variety of benefits had not been pursued or

investigated by MPIC including an assessment for permanent impairment benefits or a determination for new employment. Accordingly, any remedy allowed by the Commission should include a referral back to the Appellant's case manager for a determination of further benefits.

Evidence and Submission for MPIC

[MPIC's doctor], medical consultant with MPIC's Health Care Services team testified at the hearing. She testified that she had reviewed the Appellant's medical file and provided a report in that regard. She described the injuries suffered by the Appellant in the motor vehicle accident, including the injuries to the radial nerve of his hand, to his back, and to his legs and knee. She described the Appellant's injuries as very serious.

[MPIC's doctor] also reviewed the reports from [rehab clinic], and excerpts from the videotape surveillance collected during the same time frame, from approximately March through June 2004. In her view, the Appellant's ability to walk (as shown on the videotapes) without his cane as well as to carry beer, grocery baskets and bags and open car doors, contrasted with the Appellant's reports to his caregivers. In the doctor's opinion, it was inconsistent for someone who did not have the use of his left hand, as described, to be able to grasp grocery bags and open doors, which showed more function. As well, in her view, the gait depicted in the videotapes, sometimes with a cane and sometimes without, was inconsistent with the Appellant's reports to his case manager that he could barely walk.

Counsel for MPIC submitted that these videotapes showed that the Appellant had provided inaccurate information regarding his limitations. He pointed to the comments from [text deleted], of [text deleted] Rehabilitation, where, although the Appellant told [text deleted] that he always used his cane, on more than one occasion, and that he could not use his arm, [text deleted] concluded that he was exaggerating his symptoms. [MPIC's doctor], following her review of the tapes and the file, as well as the [rehab clinic] reports, testified that, in her view, there were inconsistencies and inaccurate information provided by the Appellant.

Although counsel acknowledged the evidence regarding the Appellant's psychological condition, he submitted that his psychological condition or perceived disability was not an excuse for his failure to be honest and up front about what he could do with his hand and his leg. Section 160(a) applied if the Appellant knowingly provided false information. Counsel submitted that the Appellant was aware of what he was telling people and what he was saying. Accordingly, as Section 160(a) does not allow for a "valid excuse" to be put forward by an Appellant, the Commission should find that the termination of the Appellant's benefits pursuant to Section 160(a) of the Act was justified as the Appellant had knowingly provided false and misleading information to MPIC.

In the alternative, counsel submitted that the failure of the Appellant to provide copies of his tax returns to MPIC in a timely manner after the corporation requested them, justified a suspension of the Appellant's Income Replacement Indemnity benefits until that information was supplied.

Counsel for MPIC emphasized the corporation's position that Section 160(b) of the Act did not contain the phrase "without valid reason" and so, no valid reason could be advanced by the Appellant under the legislation for his failure to provide this information.

On the evidence, the tax information was not provided until August 2008. Therefore, although MPIC took the position that under Section 160(b) a termination was not justified after August 2008, MPIC was justified in imposing a suspension of the Appellant's benefits, and in a letter to the Commission he reviewed various different dates which would be appropriate for the length of such suspension.

Counsel for the Appellant, in a letter written in reply, addressed the dates suggested, but the panel did not find these comments to be of assistance.

MPIC took the position that no consideration of a valid reason was relevant under Section (a) or (b) of the Act, as these sections did not contain the phrase "without valid reasons," in contrast to the provisions of Section 160(c), (d), (f), (g) and (h) of the Act which do contain the phrase "without valid reason." Accordingly, the Internal Review decision should be upheld.

Discussion

Section 160 of the MPIC Act states:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

- (a) knowingly provides false or inaccurate information to the corporation;
- (b) refuses or neglects to produce information, or to provide authorization to obtain the information, when requested by the corporation in writing;
- (c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;
- (d) without valid reason, neglects or refuses to undergo a medical examination, or interferes with a medical examination, requested by the corporation;

(e) without valid reason, refuses, does not follow, or is not available for, medical treatment recommended by a medical practitioner and the corporation;

(f) without valid reason, prevents or delays recovery by his or her activities;

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation; or

(h) prevents or obstructs the corporation from exercising its right of subrogation under this Act.

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in upholding the suspension and/or termination of his PIPP benefits for knowingly providing false or inaccurate information to the corporation and/or refusing or neglecting to provide information when requested by the corporation in writing.

Counsel for MPIC has taken the position that the absence of the phrase “without valid reason” in clauses (a) and (b) of Section 160 of the MPIC Act means that any conduct that falls within either of these two (2) clauses triggers strict consequences without any consideration of the reasons for the behaviour. Under this theory of Section 160, a person who engages in conduct that fits the circumstances in either of clauses (a) or (b) automatically must have his or her entitlement affected (ie: refused, reduced, suspended or termination). By contrast, conduct that falls within the meaning of clauses (c) through (g) includes the possibility of advancing a defense within the scope of “valid reason.”

The panel has reviewed the submissions of the parties in this regard, as well as the provisions of the MPIC Act and the *Interpretation Act*.

In our view it is well within the Commission’s authority to take into account an Appellant’s reasons or explanations, before the Commission comes to a final decision as to whether a refusal, reduction, suspension or cancellation of benefits under Section 160 should be upheld.

Section 160 (a) through (h) establishes a series of circumstances under which a claimant's entitlement may be affected. If any of those circumstances apply, the claimant's entitlement may be refused, reduced, suspended or terminated.

Pursuant to principles of statutory interpretation, it is commonly recognized that when a legislated power is preceded by the term "may" a decision-maker has been given a discretionary decision-making power. This is in direct contrast to a legislated power that is preceded by the term "shall" or "must", where the decision-maker is compelled to apply a certain result, without discretion.

This distinction between the terms "shall" and "may" is reflected in Section 15 of the *Interpretation Act*.

Imperative and permissive language

15 In the English version of an Act or regulation, "shall" and "must" are imperative and "may" is permissive and empowering. In the French version, obligation may be expressed by using the present indicative form of the relevant verb, or by other verbs or expressions that convey that meaning; the conferring of a power, right, authorization or permission may be expressed by using the verb "pouvoir", or by other expressions that convey those meanings.

Section 160 of the MPIC Act, provides that the corporation may refuse to pay compensation or refuse to pay compensation or reduce, suspend or terminate an indemnity in certain circumstances. This wording refers only to the corporation. However, the Commission is of the view that, under Part 2 of the MPIC Act, wherever the word corporation appears in a decision-making power that makes its way to the Commission on appeal, that provision should be read as though it refers to the Commission as well. Section 184(1) of the MPIC Act provides:

Powers of commission on appeal

- 184(1)** After conducting a hearing, the commission may
- a) confirm, vary or rescind the decision of the corporation;
 - or
 - b) make any decision that the corporation could have made.

In *Dean v. MPIC, 2006 MBCA 97*, the Manitoba Court of Appeal dealt with a different discretionary power found elsewhere in Part 2 of the Act. However, that case made it clear that the Court of Appeal generally sees the Commission as the ultimate discretionary decision-maker under Part 2 of the Act. The Court noted, in paragraph [11] of *Dean v. MPIC*, supra that:

The Commission, of course, has been given the authority to make the final determination of what costs will be reimbursed by MPIC.

Further the Court noted:

The idea seems to be to allow the Commission to make a pragmatic determination whether a claim for reimbursement falls under one of these headings, taking into account the particular circumstances surrounding the claim. It must be emphasized that the Commission is to exercise a discretion concerning these matters. The opening sentence of s. 10(1) states that the corporation “may provide the victim with any one or more of the following” (emphasis added). That discretion is re-emphasized under clause (d), where reimbursement is stated to be “at the sole discretion of the corporation.” Just because a particular item falls within the description of, for example, “communication aides” does not require the Commission to order reimbursement. I suppose that hearing aides could fall within the term “communication aides” and so might a laptop computer. But reimbursement for hearing aides would only be approved for a person who would profit from their use, and a laptop computer would be allowed only in a case of unique circumstances. These, however, are the kind of discretionary decisions that first MPIC, but ultimately the Commission, is called upon to decide. (paragraph 14)

The Court defined the real issue as “whether the Commission exercised discretionary authority appropriately.” (see paragraph 19)

The Commission is of the view that it must first determine factually whether the circumstances in any one of Sections 160(a) through (h) have been met. In this case, the Commission must make a determination as to whether or not the Appellant has knowingly provided false or

inaccurate information to the corporation under Section 160(a) and/or refused or neglected to provide information when requested by the corporation in writing under Section 160(b)..

If the Commission finds that either of the factual circumstances under Section 160(a) or (b) has been met, then it may go on to consider whether, on the whole, the Commission is satisfied that the overall circumstances warrant a refusal, reduction, suspension or termination of benefits. If the Commission finds that the Appellant has provided a valid reason for the conduct complained of, this is one of the circumstances which the Commission may take into consideration in its deliberations regarding the Appellant's entitlement to benefits.

Section 160(a)

The panel has carefully reviewed the testimony of the witnesses as well as the objective medical evidence on the Appellant's file. We have concluded that the reports from [Appellant's doctor #2], [Appellant's doctor #3], [Appellant's doctor #5], [Appellant's doctor #4], [Appellant's doctor #1] and [Appellant's psychiatrist], as well as the functional capacity evaluation and reports from [rehab clinic] have established that the Appellant suffered serious injuries in the motor vehicle accident, with symptoms and disabilities which persisted, and continue to persist (to varying degrees) to the present time.

The panel finds that MPIC, operating under a very narrow interpretation of Section 160(a), interpreted what amounted to a few minutes of video surveillance of the Appellant walking, pivoting, opening a door, and carrying grocery bags or a case of beer, to conclude that the Appellant was falsely exaggerating his symptoms. The Appellant testified that, within limits, he could do certain things, and he had expressed this to his case manager. MPIC knew, or should have known, from the [rehab clinic] report, that the Appellant could walk short distances without

his cane. He advised his case manager of this as well, although continuing to express concern over the effect his injuries continued to have upon his ability to work. The medical evidence was quite clear and consistent in finding that he had serious functional limitations and disabilities and that he could not work on anything but a light or a sedentary basis.

Based upon the medical evidence and the evidence presented at the hearing, including the Appellant's evidence and our view of the videotapes, the panel finds that the Appellant has established, on a balance of probabilities, that he did not provide false information to MPIC. Further, having regard to the psychiatric evidence on file and the evidence regarding the interaction between the Appellant's psychological condition and his physical injuries, we do not find that the Appellant knowingly provided false information regarding his condition.

Section 160(b)

The evidence was clear that although a request was made to the Appellant to provide income tax returns and information by September 30, 2004, the Appellant did not provide this information until August of 2008.

Accordingly, the panel finds that the Appellant did refuse or neglect to produce information when requested by the corporation in writing.

As noted above, the Commission is of the view that, contrary to the submission of counsel for MPIC, the Commission has the discretion to determine whether the overall circumstances before us warrant the decision to suspend the Appellant's PIPP benefits for refusing or neglecting to provide his income tax information.

In this regard, we have considered the evidence of the witnesses who testified regarding the effects of the motor vehicle accident on the Appellant. This evidence, including the evidence of the Appellant's brother, described the Appellant's emotional devastation following the motor vehicle accident. His testimony showed that the Appellant was dealing with stress, chronic pain and depression to the point that he attempted suicide. Although he attempted to comply with MPIC's "protocols", he often was unable to leave the house, comply with MPIC's requests, or even manage social situations.

The panel also heard the evidence of the Appellant and had the opportunity to observe his demeanour and affect.

We have reviewed the report of the Appellant's general practitioner, [Appellant's doctor #1], who advised, on January 24, 2007, the Appellant suffered generalized anxiety mixed with grief and depression, and that his depression and anxiety were quite significant. It was his belief that the Appellant was suffering from an on-going issue of post-traumatic stress disorder and that his psychological condition as a result of the accident severely impacted his ability to comply with the rehabilitation program.

The psychiatrist, [Appellant's psychiatrist], provided an opinion dated April 4, 2008. It was his view that the Appellant suffered from post-traumatic stress disorder as a result of the motor vehicle accident. Anxiety and panic attacks were exacerbated by the accident in addition to developing a host of new symptoms with a need of increased dosages of medications. [Appellant's psychiatrist] stated:

... yes, I would say, that on a balance of probabilities, his psychological condition did affect his ability to comply with the rehabilitation program in 2004. This conclusion is based on the fact that he has missed a number of appointments with

me, and that he has also missed appointments with the other psychiatrist to whom he was referred, [text deleted]. ... I think his tendency to miss appointments is partly psychological and partly physical. He has a fear of going out of his apartment, he does not trust people, and he has a lot of pain and swelling in his right knee which occasionally prevents him from walking...

Based on the medical and psychological evidence, and the testimony of the Appellant and other witnesses, we find that, on a balance of probabilities, the Appellant has established that his psychological condition affected his ability to comply, not only with the rehabilitation, but also with any other requests and/or demands made of him by MPIC.

We find that the Appellant's level of depression, anxiety disorder and post-traumatic stress, resulting from the motor vehicle accident, led to his inability to comply with MPIC's request for his income tax information. Therefore, given the Appellant's psychological condition and its effect on his ability to comply with MPIC's request for this information, we find that the overall circumstances in this case did not warrant MPIC's suspension of the Appellant's benefits between March 2004 and August 2008.

Accordingly, the Commission finds that the Internal Review decision dated March 31, 2005 should be overturned and the Appellant's appeal allowed.

It appears from the decision of the case manager and the Internal Review Officer that the suspension of the Appellant's benefits was imposed retroactively on November 3, 2004 and that MPIC took the position that he was responsible for reimbursing MPI the amount of \$12,571.92, which is the amount of monies paid to him as Income Replacement Indemnity (IRI) subsequent to March 4, 2004.

The Commission did not hear evidence regarding whether this amount was paid by the Appellant to MPIC or whether he returned any payments.

Further, as noted by counsel for the Appellant, the revocation of the suspension and termination of the Appellant's benefits may lead to entitlements in other areas, such as determinations of employment or permanent impairment benefits.

Accordingly, the Commission orders that Appellant's entitlement to PIPP benefits be reinstated from March 2004 to date. The assessment of benefits, other than IRI benefits, will be referred back to the case manager for determination.

The calculation of the Appellant's entitlement to IRI benefits between March 2004 to date, shall be referred back to the Appellant's case manager for calculation and we will retain jurisdiction, in the event that the parties have difficulty in reaching agreement regarding this calculation or arriving at the amount of IRI benefits to which the Appellant is entitled in accordance with our decision.

Dated at Winnipeg this 9th day of February, 2009.

Ms. Laura Diamond

Ms. Diane Beresford

Ms. Sandra Oakley