Manitoba

# Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]**
**AICAC File No.: AC-03-86**

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| **PANEL:** | **Mr. Mel Myers, Q.C., Chairperson**<br>**Mr. Trevor Anderson**<br>**Mr. Paul Johnston** |
| **APPEARANCES:** | **The Appellant, [text deleted], was represented by [text deleted];**<br>**Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.** |
| **HEARING DATE:** | **April 8 and 9, 2010** |
| **ISSUE(S):** | **1. Termination of the Appellant's Income Replacement Indemnity benefits on December 7, 2003.**<br>**2. Entitlement to funding for a medically required bed.** |
| **RELEVANT SECTIONS:** | **Sections 110(1)(a), 136(1) and 160 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) and Section 10(1) of Manitoba Regulation 40/94** |

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

## Reasons For Decision

[The Appellant] was involved in a motor vehicle accident on June 14, 1994. For a period of three years prior to the motor vehicle accident, the Appellant was in receipt of a monthly disability payment pension plan (CPP) for disability in respect of a heart condition. As a result of her motor vehicle accident injuries on June 14, 1994, the Appellant received Personal Injury Protection Plan ("PIPP") benefits under the MPIC Act which initially amounted to a lump sum student indemnity and effective June 1, 1996 to Income Replacement Indemnity ("IRI").

[Independent Physiatrist] conducted an independent medical examination of the Appellant on May 5, 1999 and diagnosed the Appellant's medical problems as follows:

- Aortic Valve Replacement
- Reflex Sympathetic Dystrophy – Right Lower Extremity
- Myofascial Pain Syndrome – Hand and Neck Musculature – Mild to Moderate
- Myofascial Pain Syndrome – Gluteal Area – Mild to Moderate

[Independent Physiatrist] further stated:

> "The subjective complaints are consistent with the medical history and objective findings. Symptom magnification was not evident."

[Independent Physiatrist] provided the following prognosis in respect of the Appellant:

> "The examinee's prognosis for complete resolution of pain complaints is poor. The painful condition has now been present a number of years, and the pre-existing pains related to cardiac surgery as well as RSD impair this lady's ability to resolve her soft tissue pain complaints arising from the motor vehicle accident. The examinee has not yet reached her Maximal Medical Improvement (MMI) from a physical point of view. It is provable that the examinee will achieve further symptomatic reduction with medical, or other rehabilitative efforts.
>
> The examinee's prognosis for complete restoration of function is fair. I am of the opinion that in her present condition the examinee is **not yet capable** of resuming her pre-accident occupation.
>
> The overall prognosis is guarded."

Although [Independent Physiatrist] found the Appellant had a sedentary work capacity he did not recommend that she immediately return to work, rather he stated that the therapeutic recommendations he had made be fully explored and that the Appellant's treating practitioners re-evaluate her work potential at six month intervals.

On October 14, 1999, [Rehabilitation Coordinator] from [text deleted] was retained by MPIC to coordinate the Appellant's rehabilitation for the injuries she sustained in the June 14, 1999 accident.

On November 3, 1999 the Appellant began to see [Appellant's Physiatrist #1] for regular "needling" or trigger point injections.

On August 14, 2000, the Appellant was involved in a second motor vehicle accident.

As a result of the motor vehicle accident and injuries the Appellant sustained on June 14, 1994 she commenced to see [Appellant's Physiatrist #1] at the [Hospital]. The Appellant complained of severe headaches and soft tissue injuries.

On September 21, 2000, [Rehabilitation Coordinator] prepared a summary of a PRO team meeting which included [Appellant's Physiatrist #1], [Appellant's Rehabilitation Psychologist], and [Appellant's Chiropractor]. At this meeting the Appellant described her injuries following the August 14, 2000 accident as ringing in her right ear, pain to the right side of her body and exacerbation of her right leg pain. She further stated that she continued to experience headaches, dizziness, light-headedness and stomach upset.

At the request of [Rehabilitation Coordinator], [Appellant's Physiotherapist] conducted a Functional Capacity Evaluation on the Appellant on September 20, 2001 and provided a report to [Rehabilitation Coordinator] dated September 21, 2001. [Appellant's Physiotherapist] reported that in her view the Appellant was able to carry out part-time sedentary employment (with

discomforts) and a graduated re-entry and recommended in conjunction with the occupational therapist recommendations.

[Independent Physiatrist] issued a report to [Rehabilitation Coordinator] dated March 22, 2002 in respect of his examination of the Appellant on March 5, 2002 stated:

1. That he reiterated his diagnoses from his June 14, 1999 report and found that the Appellant's complaints were consistent with the medical history and objective findings.
2. "symptom magnification was not evident".
3. Myofascial pain syndrome seems to have arisen from the first motor vehicle accident and became aggravated with the August 14, 2000 accident.
4. The Appellant's prognosis for complete resolution of pain was poor.
5. It is probable that she would achieve further symptomatic reduction with medical or other rehabilitative efforts.
6. The overall prognosis was guarded due to chronicity of pain, prolonged absence from occupational endeavours and incomplete medical treatment.
7. The Appellant had a sedentary work capacity.

**Case Manager's Decision – April 17, 2002:**

On April 17, 2002, the case manager wrote to the Appellant and advised her that since she was capable of holding employment her entitlement to IRI benefits would be terminated on April 28, 2002. The case manager relied on the medical report of [Independent Physiatrist] dated March 5, 2002 which stated that the Appellant was capable of performing a full-time sedentary job.

The Appellant filed an Application for Review of this decision.

Over a period of 20 visits between November 1999 and May 2002 to [Appellant's Physiatrist #1], the Appellant received trigger point injections. [Appellant's Physiatrist #1] referred the Appellant to [Appellant's Pain Management Specialist] at the [text deleted] Clinic who saw her on June 26, 2002. [Appellant's Pain Management Specialist] recommended that [Appellant's Physiatrist #1] carry out a medial branch block of the C2-3 facet joint. In a report to MPIC, [Appellant's Physiatrist #1] indicated that the Appellant was not capable of returning for full time employment or full time student status.

On September 9, 2002, the Internal Review Officer received a report from [MPIC's Doctor #1] and [MPIC's Doctor #2], MPIC's Medical Director of Health Care Services. In this report, the doctors reviewed surveillance videos from February 6, 7 and 8, 2002 and March 4 and 5, 2002 and also reviewed all of the relevant medical reports that were contained in the Appellant's MPIC medical file. The doctors concluded that the Appellant was capable of completing the necessary tasks of a sedentary occupation. The doctors made several recommendations, including:

> "1) Given that [the Appellant] is now expressing anxiety and symptoms of chronic pain syndrome, follow-up with psychology would be useful to address these issues.
>
> 2) Should [Appellant's Pain Management Specialist's] zygoapophyseal joint treatments not be efficacious, consultation with a neurologist specifically on the possibility of migraine headaches and the utility of any migraine treatments should be considered." (underlining added)

**Internal Review Officer's Decision – May 15, 2003:**

An Internal Review Decision was issued on May 15, 2003 which overturned the case manager's decision of April 17, 2002 and reinstated the Appellant's IRI benefits. The Internal Review Officer indicated that subsequent to the case manager's decision a great deal of information had been submitted to MPIC which was reviewed by [MPIC's Doctor #2] and [MPIC's Doctor #].

Further to her review of September 9, 2002, the Internal Review Officer concluded that the Appellant was capable of performing the duties of sedentary work but because the Appellant had been off work for seven or eight years after her motor vehicle accident, she would require a gradual return to work program before she was fully capable of performing full time, full duties of a sedentary occupation. In her decision the Internal Review Officer stated:

> "…You will be able to start at a part-time level and then after four to six weeks of increasing your hours you should be able to work at a full-time sedentary level…From the date that your case manager arranges a gradual return to work program for you, you will then continue on with IRI benefits up to six weeks from that date, at which time your entitlement to IRI benefits should end. <u>This means, that you will have just over one year of IRI benefits and those benefits will continue uninterrupted until a gradual return to work program is completed. Should you elect not to attend a gradual return to work program your case manager would have to make a decision as to whether Section 160 would apply in your situation for non-compliance</u>." (underlining added)

On July 28, 2003, [Appellant's Physiatrist #1] wrote to MPIC's case manager advising her that on his recommendation, [Appellant's Pain Management Specialist] had carried out a remedial nerve branch block three months previously. He further states that:

1. The Appellant now required a percutaneous neurotomy on the right and left sides for innervations at C2-3 facet joints.
2. This was planned by [Appellant's Pain Management Specialist] for September 8, 2003.
3. Medial branch neurotomies would be carried out right and left sides for innervation to C2-3 facet joints.
4. In the meantime the Appellant continued to have ongoing headaches, nausea, emesis, neck pain and dysfunction related to these symptoms.

He also stated:

> "I will continue to see her if she has any further acute flare up headache and pain symptoms between now and September. It has been a few months since I had to treat her last and hopefully any further treatment will not need to be frequent.

> She also requires further assessment for residual pain symptoms with objective physical findings in the thoracic region and left shoulder girdle but the overriding problem has been her severe and constant headaches as well as neck pain and this requires effective treatment prior to any other considerations."

Pursuant to the decision of the Internal Review Officer determining that the Appellant would be able to work after a gradual return to work program, MPIC retained [Appellant's Occupational Therapist] of [text deleted] to conduct a six week return to work program with the Appellant. On July 29, 2003, [Appellant's Occupational Therapist] wrote to the case manager stating that:

1. he had met with the Appellant on July 28, 2003 and outlined a six week schedule of the program;
2. the start date for the program would be August 5, 2003 and the Appellant would report to [text deleted];
3. he would monitor the Appellant's progress on a regular basis and be available to address any issues or concerns that the case manager or the Appellant might have;
4. the Appellant was advised of the work schedule.

On August 6, 2003, the case manager indicated in a note to file that [Appellant's Occupational Therapist] had called at 3:58 pm and advised the following:

- At 2:00 pm he was [text deleted] waiting for the Appellant
- At 2:15 he called his office to pick up his messages.
- The Appellant had left a message at 1:45 pm saying that she had seen [Appellant's Pain Management Specialist] and that she would not be attending at [text deleted] as she was advised by him not to go to work until all her treatments had been received.

In a letter to the case manager on August 6, 2003 [Appellant's Pain Management Specialist] stated:

> "I saw [the Appellant] in follow-up August 5, 2003, at the [text deleted] Clinic. She continues to experience severe left-sided neck pain and headaches, in addition to pain radiating into her upper back and leg.

> She has responded to the diagnostic injections and I do plan on proceeding with a medial branch rhizotomy of the left C2-3 facet joint. I am scheduling this procedure in hopefully the not too distant future.
>
> In the meantime, I recommend that [the Appellant] not begin a return to work program until we can assess the results of the rhizotomy. She is obviously experiencing considerable discomfort at the present time and requiring opioid analgesics for pain control. While we are awaiting the appointment for the rhizotomy, I recommended a trial of the Duragesic patch to see if this can provide more consistent and stable analgesia.
>
> [The Appellant] also mentioned that she was having considerable difficulty sleeping at night and we discussed the possibility of changing her bed to a more appropriate and supportive bed to help with her sleep. She does have a model in mind and I will provide you with the particulars as soon as I receive this information from [the Appellant]." (underlining added)

The Appellant was advised in a letter dated August 8, 2003 from the case manager that the return to work program would be delayed and MPIC would continue payments while she was awaiting treatment by [Appellant's Pain Management Specialist]. The case manager stated:

> "This letter will confirm our conversation of August 8, 2003.
>
> You indicated in your telephone message of August 5, 2003 that [Appellant's Pain Management Specialist] advised you to hold off your graduated return to work program until the Z-Joint treatment was completed.
>
> As we discussed, Manitoba Public Insurance will continue benefits while you are awaiting treatment by [Appellant's Pain Management Specialist] …
>
> We will be arranging your graduated return to work program to coincide with your treatment with [Appellant's Pain Management Specialist]." (underlining added)

A rhizotomy was performed on the Appellant on September 2, 2003. In a letter to the case manager on February 5, 2004 [Appellant's Pain Management Specialist] stated:

> "In response to your letter dated January 16, 2004, [the Appellant] was taken to the operating room on September 02, 2003, and a rhizotomy at the left C2 – 3-level was performed. This procedure was performed with the patient in the prone position. Under fluoroscopic guidance a number 20-guage curved rhizotomy needle with a 10 mm exposed tip was positioned at the third occipital nerve on the left side. After confirming proper position under fluoroscopic guidance and using both sensory and motor testing, a lesion was performed at eighty degrees Celsius for ninety seconds. This procedure was repeated both above and below the C2 – 3-joint level in order to

> insure coverage of the third occipital nerve. Bupivicaine 0.5% one-half cc was injected prior to the rhizotomy itself for patient comfort.
>
> The patient tolerated the procedure well and was taken to the post-anesthesia recovery room for recovery.
> I hope that you find this information satisfactory."

On September 18, 2003 [Appellant's Occupational Therapist] provided a second report to the case manager and stated:

> "It was determined that [the Appellant] would start on August 5th, 2003 and a copy of the work schedule was forwarded to MPI and [the Appellant].
>
> On Friday August 1st, 2003 [the Appellant] contacted this consultant and advised that she is not going to attend work on August 5th, as she had a doctors appointment scheduled for 11 am. She stated she was going to get a doctors note from [Appellant's Pain Management Specialist]. She also reported that she would be provided a letter from [Appellant's Physiatrist #1] indicating that she is not able to work. She stated that she would not be able to participate in work until her treatment was completed.
>
> I (sic) was determined that [text deleted] was willing to have [the Appellant] come in at a later time on the originally scheduled start date of August 5th, 2003. I contacted [the Appellant] and advised her that she could come in for 2 pm and that I would meet her there.
>
> On August 5th, 2003, [the Appellant] did not show up at [text deleted] at 2 pm. [The Appellant] left a voice mail message at 1:45 pm stating she would not be meeting me at 2 pm.
>
> Medical documentation was provided from [Appellant's Pain Management Specialist] stated that she not begin a return to work program."

In a faxed message to [Appellant's Pain Management Specialist] dated August 6, 2003, the case manager stated:

> "In your report of August 6, 2003, you recommended [the Appellant] not start a return to work program until you could assess the results of the rhizotomy. She had her first treatment on September 2, 2003.
>
> <u>As there are no further treatments scheduled, we will have [the Appellant] commence a graduated return to work in a sedentary capacity. I have attached a proposed return to work plan outlined by [Appellant's Occupational Therapist], of [text deleted].</u>

> Should there be any medical reason relating to her motor vehicle accident injuries precluding her from participating in this program, please notify me immediately." (underlining added)

On October 10, 2003 the case manager wrote to the Appellant to advise her that she was required to attend a return to work program commencing October 21, 2003.

In a letter to MPIC on October 15, 2003 the Appellant stated:

> "This is absolutely ludicrous. I am currently receiving extreme treatments of nerve burning in my neck, face, and back. I am under the care of two specialists Doctors – [Appellant's Physiatrist #1] and [Appellant's Pain Management Specialist] – who have provided further documentation attached, to verify my conditions, the prognosis, and recommended course of action." (underlining added)

In a memo to file dated October 29, 2003, [text deleted], MPIC's Claims Management Supervisor after discussions with the Appellant who reported that she objected to a return to work program because she was having further treatments. :

> "I advised that the medical evidence/information does not preclude her from starting a GRTW. I advised her that [Appellant's Occupational Therapist] would be contacting her to arrange for the GRTW on October 20/03. She advised me that she can not RTW. She is still undergoing treatment. While I mentioned that there were not further treatments with [Appellant's Pain Management Specialist], she said she will be having more treatments with him. She asked me if I need another letter from him, and she repeated by saying DO YOU. Again the medical evidence does not preclude her from starting the GRTW.
>
> I confirmed with her that her GRTW program will be made available and it should start on October 20/03." (underlining added)

In this letter, the Appellant referred to previous letters from [Appellant's Pain Management Specialist] and [Appellant's Physiatrist #1].

On October 15, 2003 [Appellant's Pain Management Specialist] wrote to the case manager and advised that he saw the Appellant on October 14, 2003 and that the Appellant should not

participate in a return to work program because she was receiving further medical treatments. He indicated that the Appellant had experienced improvement in the pounding headache since the rhizotomy but was experiencing increasing muscular pain along the left side of her neck and upper back. He had written to [Appellant's Physiatrist #1] and understood that [Appellant's Physiatrist #1] would be continuing to assist her with respect to her myofascial pain. He further stated:

> "Also since the rhizotomy [the Appellant] has been experiencing a number of different symptoms including sensations of numbness, weakness and tingling involving the left side of her face, neck, throat and even radiating into her left arm and hand. These symptoms are naturally very worrisome for [the Appellant], although I do not have a good explanation as to why she is experiencing these symptoms, I would like to refer her to [Appellant's Neurologist] for an assessment and thoughts on further investigation of these symptoms.
>
> I would therefore recommend that she not begin the graduated return to work program at the present time even in a sedentary capacity as physically there are still some issues that need to be addressed.
>
> In addition to her physical state, there have been a number of stresses in her life which have added to her overall suffering. She has had some major family problems arise since the rhizotomy and I feel that the combination of her emotional and physical state at the present time preclude her beginning the graduated return to work program." (underlining added)

In a note to file dated October 29, 2003, [MPIC's Claims Management Supervisor] indicates that [Appellant's Pain Management Specialist] had requested a neurological assessment from [Appellant's Neurologist] which had been scheduled for January 7, 2004 at 11:30. This was the earliest appointment available.

[MPIC's Claims Management Supervisor] wrote to the Appellant on November 5, 2003 and referred to their meeting of October 16, 2003 wherein she stated that she would not be attending a gradual return to work opportunity which she was still available to her. The Appellant indicated to him that she was not ready to go back to work because of her pain and stress along

with her recent move and referred to [Appellant's Pain Management Specialist's] letter of October 15, 2003. This letter referenced a number stresses in her life and family problems since the rhizotomy. [MPIC's Claims Management Supervisor] stated:

> "Notwithstanding the above, the prior available medical information indicates that you are capable of entering this program. Upon attempting to contact [Appellant's Pain Management Specialist], we were unsuccessful in speaking to him to clarify the statements made in his report. Without further information, there is no basis to defer the gradual return to work program."

In a letter to the Appellant of November 19, 2003, [MPIC's Claims Management Supervisor] states:

> "I would remind you that the prior decision of April 16, 2002, outlined that you were capable of returning to sedentary employment. A gradual return to work program was recommended which was stated in the Internal Review Decision of May 15, 2003.
>
> As you are aware, [Appellant's Occupational Therapist] from [text deleted] was retained to assist you. A gradual return to work program was arranged with [text deleted] over a six week period. This opportunity is still available for you…
>
> We have asked that you reconsider your decision not attending the gradual return to work program in our letter of November 5, 2003. I have confirmed with [Appellant's Occupational Therapist] that you have not telephoned him in this regard.
>
> Under Section 160(c)(f)(g), Manitoba Public Insurance may refuse to pay compensation to a person or may reduce the amount of an indemnity, suspend, or end the indemnity where a person without valid reason does not attend their rehabilitation program. <u>There is no medical information on file to indicate that you are unable to participate in this gradual return to work program as a result of your accident related injuries</u>…
>
> <u>We again urge you to re-consider your decision and remind you of your obligations in your rehabilitation. The gradual return to work program is still available to you. We remain committed to working with you throughout your rehabilitation period. If you do not however, wish to comply or participate in the rehabilitation plan by November 28, 2003, you will no longer qualify for entitlement to Income Replacement Indemnity benefits</u>." (underlining added)

In a progress note to file dated November 21, 2003, [Appellant's Pain Management Specialist]

states that:

1. He spoke to [MPIC's Claims Management Supervisor] at MPIC and the possibility of the Appellant beginning a graduated return to work program.
2. [The Appellant] continued to experience neck pain and episodes of numbness and tingling for which he referred her to [Appellant's Neurologist].
3. The Appellant has had further therapy with [Appellant's Physiatrist #1] and is actually planning to have some therapy on the right side of her neck as most of the previous therapy was on the left side.
4. The Appellant had many family stresses that had been contributing to her overall suffering.
5. Many of the Appellant's complaints are subjective and that there are no imaging techniques that can provide objective evidence for many different types of chronic pain and it is therefore very difficult to advise whether or not she can begin a return to work program due to her ongoing pain and stresses in her life.
6. [MPIC's Claims Management Supervisor] mentioned the return to work program had been delayed over a significant period of time and that he simply would like the Appellant to try the program in hopes that she might find it tolerable and able to progress further.
7. "I was unable to provide him with anymore specific information as to her suitability for initiating this return to work program since I am awaiting [Appellant's Neurologist's] assessment and updates on her condition after further treatment by [Appellant's Physiatrist #1]."

In a letter to [Appellant's Pain Management Specialist] dated November 26, 2003, [MPIC's Claims Management Supervisor] advised that he was confirming his telephone discussion of

November 21, 2003 with [Appellant's Pain Management Specialist] and stated:

> "In our discussion you confirmed that your opinion is based on subjective information provided by [the Appellant]. You confirmed that you did not have any objective evidence concerning her condition as related to the 1994 motor vehicle accident."

**Termination of IRI benefits – December 3, 2003:**

[MPIC's Claims Management Supervisor] wrote to the Appellant on December 3, 2003 and stated:

> "The Internal Review Office's decision of May 15, 2003, (copy attached) confirmed you were capable of returning to sedentary employment following a required gradual return to work program. IRI was reinstated from April 28, 2002 to the present time so that a gradual return to work program could be arranged.
>
> In that decision, it was stated that because you were off work for seven to eight years, you would require a gradual return to work program. It was recommended that you begin part time and then after four to six weeks of increasing your hours, you would be capable of performing full time, full duties of a sedentary occupation.
>
> The decision went on to state that from the date your case manager arranges a gradual return to work program, you will continue IRI benefits up to six weeks from that date, at which time your entitlement to IRI benefits should end. It was pointed out that should you elect not to attend a gradual return to work program, your case manager would have to make a decision as to whether Section 160 would apply in your situation for non-compliance."

[MPIC's Claims Management Supervisor] further indicated that:

1. the Appellant chose not to participate in the return to work arranged with [text deleted];
2. under Section 160 of the MPIC Act, MPIC may end the IRI if a person does not attend the rehabilitation program without valid reason;
3. since she chose not to attend the graduated return to work program arranged for her, entitlement to IRI ends on December 7, 2003 pursuant to Section 160 of the MPIC Act.

In a letter dated December 4, 2003 to MPIC, [Appellant's Pain Management Specialist] stated:

> "The rhizotomy involving the left C2 facet joint did appear to improve some of [the Appellant's] pain. The left side was done initially as this seemed to be the more painful

> side. I will be proceeding with diagnostic injections on the right side and if there is the same degree of success on the left side, I will be proceeding with rhizotomy for the right side also.
>
> [The Appellant] is still awaiting her follow up with [Appellant's Neurologist] and hopefully this can provide some additional information and guidance as to some of her symptoms." (underlining added)

In a December 10, 2003 letter to the case manager, [Appellant's Occupational Therapist] outlines attempts to have the appellant participate in a return to work program. He states that on October 20, 2003 the Appellant had contacted him advising she had a note from [Appellant's Pain Management Specialist] and as a result would not be attending the appointment for the return to work placement. [Appellant's Occupational Therapist] further stated:

> "On November 25, 2003, 4:42 pm, I received a call from [the Appellant] stating she had received a letter from MPI and that [Appellant's Pain Management Specialist] states she can not return to work at this time. She stated she will follow her doctors orders." (underlining added)

He further stated that the Appellant contacted him on December 8, 2003 and informed him her benefits had been terminated. She further advised him that another rhizotomy would be taking place but she has no date for the treatment as yet. She also informed him that she would be appealing MPIC's decision.

**Application for Review of Case Manager's Decision:**

On December 30, 2003 the Appellant made an Application for Review of the case manager's decision to terminate her IRI benefits effective December 7, 2003. Attached to the Application for Review was a letter from the Appellant to the Internal Review Officer dated December 29, 2003. In this letter, the Appellant states in part:

> "From May 21st, 2003 to date I have undergone both needlings and a Rhizotomy on my left side. I have been waiting for operating time availability to undergo a second

> Rhizotomy on my right side. You have received medical documentation to confirm this.
>
> I still experience extreme weekly bouts of vomiting, diarrhea and severe weight loss and have "stroke-like" symptoms such as numbing of my limbs and face since receiving the Rhizotomy.
>
> I have been referred t a Neurologist by [Appellant's Pain Management Specialist] – [Appellant's Neurologist] (sic) – On January 7th, 2004 @ 11:30 a.m. – which you also have documentation on."
>
> I was advised of the graduated program but considering my medical situation, it was not an appropriate option. We provided you with valid documentation stating I should not participate in the program at this time, from a highly respected medical professional in this field." (underlining added)

The case manager wrote to [Appellant's Pain Management Specialist] on January 16, 2004 and stated:

> "I understand [the Appellant] underwent a rhizotomy procedure performed by you on September 2nd, 2003 to her C2-3 level, left side. Please provide a copy of your procedure notes along with any images taken."

[Appellant's Pain Management Specialist] provided MPIC with a report of the procedure on February 5, 2004.

In a letter dated February 10, 2004 to [Appellant's Pain Management Specialist], the case manager requested clarification regarding a prescription for Nabalone provided to the Appellant on October 10, 2003 and when her next appointment for a rhizotomy treatment would be. In a letter dated February 17, 2004, [Appellant's Pain Management Specialist] replied:

> "In response to your letter dated February 10, 2004, the prescription for Nabilone was provided as part of [the Appellant's] chronic pain management related to her motor vehicle accident injuries to her head and neck. The medication was not provided for symptoms of abdominal pain, nausea, vomiting, diarrhea, headache, related to other medications such as Coumadin…
>
> [The Appellant] and I decided to await the MRI scan result before proceeding with further injections in order to assure ourselves that there is no other cause for her current symptoms of neck pain, numbness, and tingling involving the left side of her face, neck, arm, and had. She has also been experiencing some problems with her balance recently, and hopefully t he MRI scan can provide some additional information

regarding these symptoms." (underlining added)

On February 19, 2004, a letter was sent to [Appellant's Pain Management Specialist] from [MPIC's Doctor #2], MPIC's Medical Director, requesting certain information including the reason for the delay of treatment. On March 17, 2004, [Appellant's Pain Management Specialist] responded in respect of the delay of treatment stated:

> "The delay in performing the C2-3 diagnostic injection on the right side is simply due to the fact that [the Appellant] is scheduled for an MRI scan due to her ongoing face, neck, arm, and hand symptoms. I felt that it was prudent to wait for the results of this scan before proceeding with further injections. This delay is not in any way related to the availability of fluoroscopy time." (underlining added)

**Internal Review Officer's Decision:**

In a decision dated June 21, 2004, the Internal Review Officer reviewed arrangements made by MPIC to provide a gradual return to work program for the Appellant from October 20 to November 28, 2003. The case manager had advised the Appellant on December 3, 2003 that she chose not to attend her rehabilitation without a valid reason and that her benefits would be terminated as per Section 160(c)(f)(g). The Internal Review Officer confirmed the case manager's decision and stated:

> "In reviewing all of this information with respect to this issue, it is my opinion that Manitoba Public Insurance took every available step to have you enter the gradual return to work program. You told them that you would not be entering the program and you were relying on [Appellant's Pain Management Specialist's] medical report. You were then written a letter November 5 advising that, in spite of [Appellant's Pain Management Specialist's] opinion, Manitoba Public Insurance still required that you enter the program. You did not even attempt one day in the gradual return to work program despite the consequences that you knew would be forthcoming as a result of your non-participation. [MPIC's Claims Management Supervisor] further spoke to [Appellant's Pain Management Specialist] and discovered that his October 15 opinion was based o (sic) your subjective information and without any objective medical evidence that you were incapable of working in the gradual return to work program. After this information was obtained your benefits were terminated according to Section 160 because it was felt that you did not participate in your rehabilitation program without a valid reason. You have told me that [Appellant's Pain Management Specialist] feels that [MPIC's Claims Management Supervisor's] interpretation of their conversation of November 21, 2003 is incorrect, but he will not provide me with any direct information from himself in support

> of that position. Therefore, the evidence and information on the file show that you did not participate in a gradual return to work program that was made available to you and that you had no valid reason to effuse to enter that program. As a result, I am confirming [MPIC's Claims Management Supervisor's] decision and dismissing your Application for Review dated December 30, 2003."

In a letter to [MPIC's Doctor #2] on July 27, 2004, [Appellant's Pain Management Specialist] stated:

> "I saw [the Appellant] in follow-up today and she informed me that she was in an additional motor vehicle accident in June. She has been experiencing worsening left sided neck and occipital pain in addition to the previous right sided pain which we were planning to address after her MRI scan. I did receive a note from [Appellant's Neurologist] reporting that there was no interval change in the MRI scan of April 29, 2004 compared to the previous one of June 4, 1999.
>
> I will be arranging for bilateral C2-3 facet joint blocks under fluoroscopic guidance in the very near future and I will keep you informed of her progress."

On August 11, 2004, [Appellant's Pain Management Specialist] wrote to the Appellant in response to a letter of August 3, 2004 that she had sent to him and stated:

> "There is wide variation in an individual's response and recovery time after a rhizotomy. Some individuals experience significant improvement immediately after the rhizotomy, whereas other individuals may require a number of weeks in order for the inflammatory process after the rhizotomy to settle and experience improvement in their pain. The recovery period from side effects of a rhizotomy would depend on the particular side effect. As I mentioned, for example, inflammatory reaction to a rhizotomy can take days to weeks to resolve depending on the individual…
>
> I did recommend a delay in returning to the graduated return to work program due to the fact that additional assessments and treatments were being scheduled. (underlining added)
>
> I do feel that the prognosis for you returning to a pre-accident status is poor due to the ongoing chronic pain that you have been experiencing and the fact that more satisfactory control of your pain has not yet been achieved."

In a note to file dated December 8, 2004, [text deleted] of MPIC reported a call received from [text deleted], the Appellant's husband, who stated:

> "At 5:30 am, [the Appellant] was taken by ambulance to hospital for a seizure. They did a CAT scan and blood work and everything reported as normal.
>
> He stated that as a result her driver's license has been suspended. He suggested that the seizure activity was a result of the rhizotomy." (underlining added)

On March 17, 2005, the Appellant wrote to the Director of Appeals of the Automobile Injury Compensation Appeal Commission and stated:

> "On December 8, 2004 I was taken to [Hospital] by ambulance as I had suffered a Tonic Clonic (grand Mal) Seizure. Subsequently, the seizure has left me with short-term memory loss.
>
> I have also had another Z-Joint treatment (injections on my C2 & C3) on November 29, 2004 to try to eliminate some of the severe symptoms (headaches, nausea, vomiting, diarrhea, extreme weight loss, and severe left-side stroke like symptoms) that I have been experiencing since the accidents.
>
> I am doing my best to prepare for the Appeal under the circumstances, and I will call you as soon as I am ready."

In a letter dated May 3, 2005 from [Appellant's Doctor #1] (the Appellant's doctor since March 14, 1998) to the Regional Director of Income Security Programs, Human Resources Development Canada, supported the Appellant's application for chronic disability and stated.

> "I have in my possession her chart prepared by her previous doctors including [Appellant's Doctor #2], who was her family physician before. The patient was seen on multiple visits regarding her health conditions problems. The visit on November 19, 2004 was regarding her new attacks of epileptic seizures and sudden loss of consciousness. She was taken by ambulance to [Hospital] emergency department where multiple tests have been done, including a brain CT Scan.
>
> The patient was subsequently seen by [Appellant's Neurologist] who did EEG, Sleep Deprived EEG, MRI. The patient's MRI was not diagnostic but the Sleep Deprived EEG confirmed Epilepsy. The patient suffered another epileptic seizures attack on several occasions and was taken to hospital on March 23, 2005, feeling dizzy and had another episode of convulsions." (underlining added)

[Appellant's Doctor #1] reviewed the medical history of the Appellant since the motor vehicle accident in 1994 and concludes his letter by stating:

> "In summary, [the Appellant] is completely disabled and is not able to return to fulltime work. She is struggling to restore her health by proper rehabilitation treatment. She is still at the stage of extensive evaluation and testing for her new onset of epilepsy." (underlining added)

[Appellant's Physiatrist #2's] report of October 5, 2005 is consistent with [Appellant's Doctor #1's] report of May 3, 2005 in respect of the Appellant's inability to return to work. In this letter dated October 5, 2005 from [Appellant's Physiatrist #2], who is a Physiatrist and member of the Physical Medicine and Rehabilitation department at [text deleted] indicated that [Appellant's Physiatrist #1] started treating the Appellant in 1999 with trigger point injections. [Appellant's Physiatrist #2] was a colleague of [Appellant's Physiatrist #1] (who had retired from practice) and stated:

1. He had assessed the Appellant on November 30, 2004 and he described the chronic pain the Appellant had in her neck, left chest, abdomen and back.

2. The probability that the Appellant would receive permanent pain relief was reported to be very unlikely.

3. She was reassessed on January 10, 2005 when she reported to him that she had suffered a seizure in December 2004 and that she had been seen by [Appellant's Neurologist], for this condition and had just completed a sleep deprived EEG.

4. The Appellant was last seen in his office on June 16, 2005 when the Appellant reported she had been put on an anticonvulsant (Carbamezepine) by [Appellant's Neurologist].

5. She had not had a seizure since her last appointment.

6. The risk of further seizures in this situation should be seen as high and that she will continue to be followed by [Appellant's Neurologist].

[Appellant's Physiatrist #2] further stated:

> "The pain in her neck and shoulders is related to the continued muscle spasm and pain which originated after the collision. Her chest pain was considerably aggravated by her collision. Her chest pain increased considerably post collision and [Independent Physiatrist] alludes to the fact that the collision altered the position of the wires in her sternum necessitating the need for their removal. The sternum had not completely healed at the time of the impact. The ongoing pain in the right leg was a result of events outside of the collision.
>
> It is my impression after reviewing [the Appellant] on 3 occasions that she is severely limited in her functional capacity. She has as much as she can handle just looking after her own needs. Her ability to cope with more complex demands is low. The more she is stressed, the more her pain levels will increase and the more problems she has cognitively. There is certainly a contribution to her reduced functional capacity as a result of the pain in her right leg (not collision related) but the major concerns she has at this time with function are the result of the pain in her neck, shoulders and back region. These areas, as far as I can determine, became an issue after the collision of 1994.
>
> To my opinion (sic), [the Appellant] is not fit to return to school and she is not employable in any work of any description. This is due largely to the prolonged and severe nature of her ongoing pain condition. It is my opinion that she is not going to have much more relief from her symptoms in the future and that she will definitely be left with a permanent level of pain in her neck, shoulders, abdomen and back which will significantly reduce her functional abilities life long. The degree to which narcotics and anticonvulsants will reduce her symptoms further is at best small. Physical treatments will have only short term results. Her present level of function can be seen as her maximum level of recovery." (underlining added)

The Commission notes that [MPIC's Doctor #2], Medical Director of MPIC's Health Care Services, in his report to the Internal Review Officer dated May 15, 2006 disagreed with [Appellant's Doctor #1's] and [Appellant's Physiatrist #2's] opinions that the Appellant was incapable of holding sedentary employment or to begin a graduated return to work program.

In his narrative report to the Internal Review Officer, [MPIC's Doctor #2] reviewed all of the medical evidence which was located on the Appellant's MPIC file. As well, [MPIC's Doctor #2] reviewed the video surveillance tapes which MPIC received in 2001, 2002, 2003 and 2005. [MPIC's Doctor #2] stated:

"In relationship to the patient's ability to return to work/school, our analysis in September 2002 examined 4 separate parameters.

a. The patient has to be able to get to and from the workplace.

   At this point, the separate issue of the patient's epilepsy may prevent her from being allowed to drive. Otherwise, I am unaware of any evidence which would prevent her from taking public transportation should she remain unable to drive as a result of her seizure disorder. Therefore, the patient can still get to and from work. She drove a lot while under surveillance.

b. Being able to perform her job/education without harming others. The understanding at the time was that the patient's work would be sedentary in nature.

   At this time, there would no (sic) evidence that a sedentary occupation would harm the patient or others.

c. Being able to perform her work/education without worsening her medical condition.

   At this time, there would be insufficient evidence in my opinion that this patient would worsen her medical condition by performing sedentary/training activities.

d. Being able to perform the essential tasks for occupation/education.

   At this point, from an objective physical perspective, there has been insufficient evidence that the patient would be unable to perform the essential tasks of sedentary/educational activities. The difficulties that have been raised are in relationship to cognitive/chronic pain issues. These issues are difficult to validate. There is tremendous suffering described with emotional and psychosocial stressors. Her health has been complicated by a seizure disorder. Based on the two functional assessments by [Independent Physiatrist] and [Appellant's Physiotherapist], the patient can perform sedentary duties. The surveillance video tape indicates substantial functional ability over all the days documented.

   In my opinion, on the balance of probability and with a reasonable degree of medical certainty, this patient could perform sedentary duties despite her pain and suffering."

[MPIC's Doctor #2] stated that the issue he was required to determine was:

"Whether the actions and status of [the Appellant] as recorded in the video surveillance footage of December 16, 22, 23, 2005 and October 12, 13, and 14, 2003, as well as July 4, 5, 14, and 15, 2003 would enable her to hold sedentary employment or begin a graduated return to work on December 3, 2003. (underlining added)

[MPIC's Doctor #2] concluded that the Appellant's behaviour and functional capacity on the surveillance video tapes was largely normal and that there was little demonstration of pain

behaviour, nor was there any demonstration of impairment. The Appellant was able to drive a vehicle, and she had a largely normal gait and could walk up to minutes. He further reported that the Appellant was able to engage in conversation for long periods of time with multiple companions and her cervical range of motion and her lumbar spine range of motion was largely unrestricted. [MPIC's Doctor #2] concluded that, in his opinion, the video tape indicates that the Appellant would have been able to begin a graduated return to work program in 2002. He stated that his opinion was corroborated by the opinions of [Independent Physiatrist] and [Appellant's Physiotherapist].

**Appeal:**

The relevant portions of the MPIC Act in respect of this appeal are:

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

The appeal hearing took place on April 8 and 10, 2010. The Appellant testified that she was involved in two motor vehicle accidents on June 14, 1994 and April 14, 2000. The Appellant testified that:

1. Prior to the motor vehicle accident, she was in receipt of a disability payment under the Federal Canada Pension Plan for a disability in respect of her heart condition.
2. As a result of her initial motor vehicle accident on June 14, 1994, she was initially in receipt of student indemnity payments and subsequently income replacement indemnity ("IRI") payments.
3. She confirmed [Independent Physiatrist's] diagnosis of her medical problems in the month of May 1999 as follows:

- Aortic Valve Replacement
- Reflex Sympathetic Dystrophy – Right Lower Extremity
- Myofascial Pain Syndrome – Hand and Neck Musculature – Mild to Moderate
- Myofasical Pain Syndrome – Gluteal Area – Mild to Moderate

4. [Appellant's Physiatrist #1] treated her with trigger point injections for her severe headaches and soft tissue injuries.
5. As a result of the chronic pain which arose from the first motor vehicle accident was aggravated by the injuries she sustained in the second motor vehicle accident on August 14, 2000.
6. Having regard to her complaints of chronic pain and headaches, [Appellant's Physiatrist #1] referred the Appellant to [Appellant's Pain Management Specialist] who commenced to treat her in May 2003.

She further testified that:

1. She met with [Appellant's Occupational Therapist] who had been retained by MPIC to monitor a six week schedule in respect of her return to work program.

2. She informed [Appellant's Occupational Therapist] that she would not attend the initial return to work program on August 6, 2003 at [text deleted].
3. She had been advised by [Appellant's Pain Management Specialist] not to go to work until all her treatments had been received.
4. As a result of [Appellant's Pain Management Specialist's] intervention the commencement of the return to work program was delayed.

The Appellant testified that the primary reason for her refusing to participate in the return to work program was based on the advice of [Appellant's Pain Management Specialist] who instructed her not to enter into this program until she had completed treatment. The Appellant also testified that part of her reason for not participating in the return to work program was related to her belief that she wanted to be successful in returning to work and having regard to her present health feared that she would fail if she participated in the return to work program.

She further testified that:

1. Notwithstanding she was still under treatment, she was advised by MPIC that her IRI benefits would terminate at the end of December 2003 because she had refused to attend the return to work program.
2. In her Application for Review of the case manager's decision, she advised MPIC that she was waiting to receive further medical treatments from [Appellant's Pain Management Specialist].

The Appellant was cross-examined by MPIC's legal counsel. MPIC's legal counsel indicated that the Appellant had not even attempted to try at least one day of the return to work program. In response the Appellant testified that she was following doctor's advice not to participate in the

return to work program until her treatment had been completed.

MPIC's legal counsel questioned the Appellant in respect of the video surveillance tape which indicated the Appellant appeared to be walking normally, moving her arms and legs normally and operating a motor vehicle without difficulty. In response the Appellant indicated there were days when she felt quite well and was able to perform the activities as disclosed on the video surveillance tapes.

MPIC called [MPIC's Doctor #2] to testify in respect of his interdepartmental memorandum to the Internal Review Officer dated May 15, 2006. [MPIC's Doctor #2] was requested to determine:

1. Whether there was any new medical evidence provided in the MPIC file in respect of the Appellant which would cause him to change his medical opinion of September 9, 2002.
2. The actions and status of the Appellant as recorded in video-tapped (sic) surveillance footage would enable her to hold sedentary employment or to begin a graduated return to work program in December of 2003.

In his testimony, [MPIC's Doctor #2] testified that:

1. In his medical opinion of September 2002, that the Appellant's chronic pain syndrome was probably causally connected to the 1994 motor vehicle accident.
2. Upon reviewing his medical evidence he concluded that the Appellant had a chronic pain syndrome prior to the 1994 motor vehicle accident.
3. On the balance of probabilities and with a reasonable amount of medical certainty, the Appellant could perform these sedentary duties despite her pain and suffering.

4. In his opinion the videotape of the surveillance done in October and July of 2003 indicated that the Appellant would be able to begin a graduated return to work program in 2002.

**Submission:**

MPIC's legal counsel submitted that [MPIC's Doctor #2's] medical opinions corroborate the Internal Review Officer's Decision dated June 21, 2004 that the Appellant did not have a valid reason to refuse to enter into the return to work program. MPIC's legal counsel submitted that:

1. In refusing to participate in the return to work program, the Appellant was relying on the clinical opinion of [Appellant's Pain Management Specialist] which was based on subjective information and there was no objective medical evidence available to [Appellant's Pain Management Specialist] to determine that the Appellant was incapable of participating in the graduated return to work program.
2. Having regard to the reports of [Independent Physiatrist], [Appellant's Physiotherapist], and [MPIC's Doctor #2], the Appellant did have the functional capacity to return to a sedentary job and to participate in the return to work program. MPIC's legal counsel submitted that notwithstanding the advice of [Appellant's Pain Management Specialist] the Appellant was fully capable of carrying out a sedentary job and therefore she had no valid reason for refusing to participate in the return to work program.
3. MPIC did everything possible to accommodate the Appellant and delayed the implementation of the return to work program until it was satisfied that the Appellant had completed her treatments with [Appellant's Pain Management Specialist] and at that time instituted the return to work program which the Appellant refused to participate in.
4. In these circumstances the decision of the Internal Review Officer was correct, the Appellant had no valid reason for refusing to participate in a rehabilitation program

pursuant to Section 160(g) of the MPIC Act and that the appeal should be dismissed and the decision of the Internal Review Officer dated June 21, 2004 confirmed.

The Appellant's legal counsel submitted that:

1. MPIC had determined that because the Appellant had the physical capacity to participate in sedentary employment and a return to work program the Appellant did not have a valid reason to refuse to participate in the program.
2. The Appellant's physical capacity to carry out a sedentary job or participate in the return to work program was not relevant to determine whether or not the Appellant had a valid reason for refusing to participate in a return to work program.
3. There was ample evidence before the Commission to establish on the balance of probabilities that the Appellant did have a valid reason based on [Appellant's Pain Management Specialist's] advice not to participate in the return to work program.

The Appellant's legal counsel further submitted that [Appellant's Pain Management Specialist] had advised MPIC:

1. On several occasions that the Appellant had significant medical problems and that she had been receiving medical treatments from both himself and [Appellant's Physiatrist #1].
2. He had referred the Appellant to [Appellant's Neurologist], for the purpose of providing an assessment regarding the Appellant's headaches and numbness and tingling in her hands.
3. The date for the Appellant's meeting with [Appellant's Neurologist] had been set for January 7, 2003, (sic) the earliest date possible.
4. Until The Appellant has completed her treatment she would not be in a position to

participate in the return to work program or be employed in a sedentary job.

The Appellant's legal counsel further submitted:

1. Notwithstanding the objections of the Appellant and [Appellant's Pain Management Specialist], MPIC was determined to set a date for the Appellant's participation in the return to work program
2. When the Appellant informed MPIC that based on the advice of [Appellant's Pain Management Specialist] she would not participate in the return to work program, MPIC terminated the Appellant's IRI benefits on December 7, 2003 prior to the completion of the medical treatments the Appellant was receiving from [Appellant's Pain Management Specialist] and her meeting with [Appellant's Neurologist] on January 7, 2004.

The Appellant's legal counsel submitted that MPIC had acted unreasonably in the circumstances and requested that the Commission rescind the decision of the Internal Review Officer dated June 24, 2004 and allow the Appellant's appeal.

**Discussion:**

The Commission determines that the Appellant did have a valid reason for not participating in the return to work program and as a result finds that MPIC erred in terminating the Appellant's IRI benefits on December 7, 2003 pursuant to Section 160(g) of the MPIC Act. The Commission also determines the Appellant did not delay her recovery by her activities contrary to Section 160(f) of the MPIC Act.

The grounds upon which the Internal Review Officer concluded that the Appellant did not have a

valid reason for not participating in the return to work program were as follows:

1. MPIC took every available step to have the Appellant enter the gradual return to work program but based on [Appellant's Pain Management Specialist's] medical advice the Appellant refused to participate in the program until all of her medical treatment were completed.
2. MPIC concluded that [Appellant's Pain Management Specialist's] advice to the Appellant not to participate in the return to work program was based on subjective information without any objective medical evidence that the Appellant was incapable of working in a graduated return to work program. As a result, MPIC terminated the Appellant's IRI benefits pursuant to Section 160 of the MPIC Act.

**The Commission finds that the Internal Review Officer erred in concluding that MPIC took every available step to have the Appellant enter the gradual return to work program.**

An examination of the conduct of MPIC between July 29, 2003 when MPIC arranged for the Appellant to commence a six week return to work program effective August 5, 2003 and MPIC's decision to terminate the Appellant's IRI on December 7, 2003 for not having a valid reason to refuse to participate in the return to work program clearly indicates that MPIC failed to take reasonable steps to have the Appellant enter the graduated return to work program.

MPIC ignored [Appellant's Pain Management Specialist's] medical advice that the Appellant should not participate in a return to work program until she had completed all medical treatment. As well MPIC improperly urged the Appellant to ignore [Appellant's Pain Management Specialist's] medical advice and to participate in a return to work program before her treatments were completed. As a result, MPIC did not take every available step to have the Appellant enter the graduated return to work program.

On July 29, 2003, MPIC arranged for the Appellant to commence a six week return to work program effective August 5, 2003.

On August 6, 2003 the Appellant did not attend the commencement of the return to work program because she was advised by [Appellant's Pain Management Specialist] not to go to work until all her treatments had been received.

[Appellant's Pain Management Specialist] wrote to MPIC's case manager on August 6, 2003 indicating that he had seen the Appellant on August 5, 2003 and that he was planning on proceeding with a rhizotomy of the left C2-3 facet joint and that he would be scheduling this procedure hopefully in the near future. [Appellant's Pain Management Specialist] further stated:

> "In the meantime, I recommend that [the Appellant] not begin a return to work program until we can assess the results of the rhizotomy. She is obviously experiencing considerable discomfort at the present time and requiring opioid analgesics for pain control. "(underlining added)

[Appellant's Pain Management Specialist] also reported that the Appellant was complaining about difficulty sleeping at night. In response, MPIC advised the Appellant in a Letter dated August 8, 2003 as follows:

> "As we discussed, Manitoba Public Insurance will continue benefits while you are awaiting treatment by [Appellant's Pain Management Specialist]…
>
> We will be arranging your graduated return to work program to coincide with your treatment with [Appellant's Pain Management Specialist]." (underlining added)

A rhizotomy was performed by [Appellant's Pain Management Specialist] on the Appellant on September 2, 2003.

On October 6, 2003 the case manager forwarded a faxed message to [Appellant's Pain Management Specialist] stating that since no further treatments were scheduled after September 2, 2003 MPIC intended to commence a graduated return to work program for the Appellant in a sedentary capacity. The case manager stated:

> "Should there be any medical reason relating to her motor vehicle accident injuries precluding her from participating in this program, please notify me immediately." (underlining added)

On October 8, 2003 MPIC advised the Appellant that a return to work program was scheduled to start on October 20, 2003.

In response the Appellant wrote to MPIC on October 15, 2003 objecting to the commencement of this program and stated:

> "This is absolutely ludicrous. I am currently receiving extreme treatments of nerve burning in my neck, face, and back. I am under the care of two specialists Doctors – [Appellant's Physiatrist #1] and [Appellant's Pain Management Specialist] – who have provided further documentation attached, to verify my conditions, the prognosis, and recommended course of action."

On October 15, 2003 [Appellant's Pain Management Specialist] wrote to the case manager and advised that he had seen the Appellant on October 14, 2003 and advised her that she should not participate in a return to work program because she was receiving further medical treatments. He also stated that he was referring the Appellant to [Appellant's Neurologist] for a neurological assessment in respect of her complaints of numbness, weakness and tingling of the left side of her face, neck, throat and even radiating into her left arm and hand.

MPIC was advised on October 29, 2003 by [Appellant's Pain Management Specialist] that he had arranged for a neurological assessment by [Appellant's Neurologist] on January 7, 2004 being the earliest date available.

[Appellant's Pain Management Specialist] referred the Appellant to [Appellant's Neurologist], because of her complaints relating to migraine headaches. [Appellant's Pain Management Specialist] made the judgement not to continue with the rhizotomy treatments until after he had received a report of an MRI from [Appellant's Neurologist].

In response to [Appellant's Pain Management Specialist's] letter of October 15, 2003 MPIC indicated they intended to delay the implementation of the return to work program and continue the benefits to the Appellant while she was awaiting treatment from [Appellant's Pain Management Specialist].

On October 15, 2003, [Appellant's Pain Management Specialist] advised MPIC that the Appellant was complaining of numbness, weakness and tingling of the left side of her face and throat and radiating into her left hand and arm, therefore does not recommend she begin a graduated return to work program at the present time even in a sedentary capacity. [Appellant's Pain Management Specialist] indicated that there were a number of stresses in her life had added to her overall suffering and that the combination of her emotional and physical state preclude her from beginning the graduated return to work program.

Notwithstanding the objections of the Appellant and of [Appellant's Pain Management Specialist] that the Appellant should not participate in a return to work program, MPIC's case manager wrote to the Appellant on November 19, 2003 requesting that the Appellant reconsider her decision to attend the gradual return to work program and informed her that under Section 160 of the MPIC Act, MPIC could terminate her IRI benefits. The case manager further stated:

"There is no medical information on file to indicate that you are unable to participate in

> this gradual return to work program as a result of your accident related injuries." (underlining added)

The Commission finds that in arriving at that conclusion, MPIC's case manager ignored the complaints of the Appellant and the reports of [Appellant's Pain Management Specialist] describing the medical condition of the Appellant and the treatment that was being provided by [Appellant's Physiatrist #1] and himself. Contrary to the case manager's decision, the Commission finds there was ample medical information provided to MPIC from [Appellant's Pain Management Specialist] to indicate the Appellant was receiving medical treatment and was unable to participate at that time in the graduated return to work program.

On November 21, 2003 [Appellant's Pain Management Specialist] prepared a progress note outlining his discussions with the case manager and he advised him that:

1. The Appellant was continuing to have neck pain and episodes of numbness and tingling and was referred to [Appellant's Neurologist].
2. The Appellant was also receiving further therapy from [Appellant's Physiatrist #1].
3. The Appellant had many family stresses which ere contributing to her overall suffering.

**Case Manager's Decision – Termination of IRI Benefits:**

On December 3, 2003 the case manager wrote to the Appellant terminating her IRI benefits effective December 7, 2003. In this letter the case manager confirmed that the Appellant was capable of returning to a sedentary employment following a required graduated return to work program. However, as the Appellant had refused to attend the return to work program, the IRI benefits would end December 7, 2003 pursuant to Section 160 of the MPIC Act.

The Commission finds that MPIC rushed to judgement in terminating the Appellant's IRI

benefits on December 7, 2003. The Appellant had significant medical problems and was being treated by [Appellant's Physiatrist #1] and [Appellant's Pain Management Specialist] and subsequently by [Appellant's Neurologist] in 2004 and 2005. The Appellant's medical treatments continued after the termination of the IRI benefits. Based on the advice of [Appellant's Pain Management Specialist] MPIC should have delayed implementing the return to work program until all medical treatments in respect of the Appellant had been completed but MPIC refused to do so.

On December 4, 2003, [Appellant's Pain Management Specialist] wrote to MPIC's case manager advising him that rhizotomy treatments were continuing and that he was awaiting a report from [Appellant's Neurologist], and this hopefully would provide some additional information and guidance as to some of her symptoms.

On February 17, 2004, [Appellant's Pain Management Specialist] advised the case manager that he had delayed performing the rhizotomy until he had received a report of the MRI scan from [Appellant's Neurologist]. On March 17, 2004 [Appellant's Pain Management Specialist] responded to a letter from [MPIC's Doctor #2], MPIC's Medical Director, confirming that the delay in performing the C2-3 diagnostic injection was simply due to the fact that the Appellant was scheduled for an MRI scan due to her ongoing face, neck, arm and hand symptoms.

On August 11, 2004, [Appellant's Pain Management Specialist] wrote to the Appellant explaining why he had delayed the treatment and stated:

> "I did recommend a delay in returning to the graduated return to work program due to the fact that additional assessments and treatments were being scheduled. (underlining added)

> I do feel that the prognosis for you returning to a pre-accident status is poor due to the ongoing chronic pain that you have been experiencing and the fact that more satisfactory control of your pain has not yet been achieved."

It should be noted that [Appellant's Pain Management Specialist's] referral of the Appellant to [Appellant's Neurologist] for a neurological assessment on January 7, 2004 is consistent with the medical report of [MPIC's Doctor #2], MPIC's Medical Director and [MPIC's Doctor #1] in a report to MPIC dated September 9, 2002 wherein they made the following recommendations:.

> "1) Given that [the Appellant] is now expressing anxiety and symptoms of chronic pain syndrome, follow-up with psychology would be useful to address these issues.
>
> 2) Should [Appellant's Pain Management Specialist's] zygoapophyseal joint treatments not be efficacious, consultation with a neurologist specifically on the possibility of migraine headaches and the utility of any migraine treatments should be considered." (underlining added)

In [MPIC's Doctor #2's] interdepartmental memorandum to the Internal Review Officer dated May 15, 2006, he does not challenge the medical treatment provided by [Appellant's Pain Management Specialist] to the Appellant nor does he criticize the reason why [Appellant's Pain Management Specialist] delayed the rhizotomy treatments until he received the results of the MRI scan from [Appellant's Neurologist]. However, MPIC was not prepared to accept [Appellant's Pain Management Specialist's] explanation for delaying the rhizotomy treatments and proceeded to terminate the IRI benefits.

The Commission finds that the Appellant did not delay her recovery by her own activities. The delay in her treatment was caused by [Appellant's Pain Management Specialist] and not by the Appellant.

**Internal Review Decision – June 21, 2004:**

On June 21, 2004 the Internal Review Officer issued a decision agreeing with the reasons provided by the case manager in the decision of December 3, 2003. The Internal Review Officer dismissed the Appellant's Application for Review.

The Appellant continued to have medical treatments provided by [Appellant's Doctor #1] and [Appellant's Physiatrist #2].

[Appellant's Doctor #1], the Appellant's doctor since March 14, 1998, reports that the Appellant visited him on November 19, 2004 regarding her new attacks of epileptic seizures and sudden loss of consciousness. He further states:

> "She was taken by ambulance to the [Hospital] emergency department where multiple tests have been done, including a brain CT Scan.
>
> The patient was subsequently seen by [Appellant's Neurologist] who did EEG, Sleep Deprived EEG, MRI. The patient's MRI was not diagnostic but the Sleep Deprived EEG confirmed Epilepsy. The patient suffered another epileptic seizures attack on several occasions and was taken to hospital on March 23, 2005, feeling dizzy and had another episode of convulsions." (underlining added)

[Appellant's Doctor #1] reviewed the medical history of the Appellant since the motor vehicle accident in 1994 and concludes his letter by stating:

> "In summary, [the Appellant] is completely disabled and is not able to return to fulltime work. She is struggling to restore her health by proper rehabilitation treatment. She is still at the stage of extensive evaluation and testing for her new onset of epilepsy." (underlining added)

In a report to MPIC dated October 5, 2005 the [Appellant's Physiatrist #2], indicated that the Appellant was suffering from chronic pain and that the probability of permanent pain relief was unlikely. He further stated that he reassessed her on January 10, 2005 when she reported to him that she had suffered a seizure in December 2004 and that she had been seen by [Appellant's

Neurologist], for this condition and had just completed a sleep deprived EEG.

[Appellant's Physiatrist #2] further stated:

1. The Appellant was last seen in his office on June 16, 2005 when the Appellant reported she had been put on an anticonvulsant (Carbamezepine) by [Appellant's Neurologist].

2. She had not had a seizure since her last appointment.

3. The risk of further seizures in this situation should be seen as high and that she will continue to be followed by [Appellant's Neurologist].

[Appellant's Physiatrist #2] concluded that after reviewing the Appellant on three occasions, she was severely limited in her functional capacity and that she was not fit to return to school and she was not employable in any work of any description. She states this is largely due to the prolonged and severe nature of her ongoing pain condition.

The Commission finds that MPIC erred in concluding that it took every available step to have the Appellant enter the graduated return to work program. Initially, MPIC had agreed to delay implementation of the return to work program until [Appellant's Pain Management Specialist] had completed treatments. It appears that MPIC had lost patience and was not prepared to wait until the treatments provided by [Appellant's Physiatrist #1], [Appellant's Pain Management Specialist] and [Appellant's Neurologist] were complete.

Subsequent to the termination of the Appellant's IRI benefits on December 7, 2003, the Appellant continued to suffer from chronic pain and continued to be treated by [Appellant's Pain

Management Specialist] and [Appellant's Neurologist]. The medical opinions of [Appellant's Doctor #1], the Appellant's personal physician and [Appellant's Physiatrist #2], corroborate [Appellant's Pain Management Specialist's] medical opinion that the Appellant was not capable of returning to work at the time the IRI benefits were terminated. MPIC, having regard to the medical condition of the Appellant and the medical reports of [Appellant's Pain Management Specialist], should have delayed the termination of the IRI benefits pending reports from [Appellant's Pain Management Specialist] that the Appellant's medical treatments had been completed and she was capable of participating in the return to work program.

**Subjective Evidence:**

The Commission finds that the Internal Review Officer erred in concluding that the Appellant was not justified in complying with [Appellant's Pain Management Specialist's] advice not to participate in the return to work program because the basis of [Appellant's Pain Management Specialist's] opinion was subjective information rather than objective information.

In his decision dated June 21, 2004, the Internal Review Officer stated:

> "[MPIC's Claims Management Supervisor] further spoke to [Appellant's Pain Management Specialist] and discovered that his October 15 opinion was based on your subjective information and without any objective medical evidence that you were incapable of working in the gradual return to work program. After this information was obtained your benefits were terminated according to Section 160 because it was felt that you did not participate in your rehabilitation program without a valid reason." (underlining added)

In a progress note to file dated November 21, 2003, [Appellant's Pain Management Specialist] reports the discussion he had with MPIC's case manager, [MPIC's Claims Management Supervisor] about the possibility of the Appellant beginning a graduated return to work program. In this discussion [Appellant's Pain Management Specialist] stated many of the Appellant's

complaints are subjective and that there are no imaging techniques that can provide objective evidence for many different types of chronic pain and it is therefore very difficult to advise whether or not she can begin a return to work program due to her ongoing pain and stresses in her life. [MPIC's Claims Management Supervisor] mentioned the return to work program had been delayed over a significant period of time and that he simply would like the Appellant to try the program in hopes that she might find it tolerable and able to progress further. [Appellant's Pain Management Specialist] further stated:

> "I was unable to provide him with anymore specific information as to her suitability for initiating this return to work program since I am awaiting [Appellant's Neurologist's] assessment and updates on her condition after further treatment by [Appellant's Physiatrist #1]."

In a letter to [Appellant's Pain Management Specialist] dated November 26, 2003, [MPIC's Claims Management Supervisor] advised that he was confirming his telephone discussion of November 21, 2003 with [Appellant's Pain Management Specialist] and stated:

> "In our discussion you confirmed that your opinion is based on subjective information provided by [the Appellant]. You confirmed that you did not have any objective evidence concerning her condition as related to the 1994 motor vehicle accident."

The case manager gave no weight to the medical opinion of [Appellant's Pain Management Specialist] and as a result terminated the Appellant's IRI benefits on December 7, 2003. The Commission finds that the Internal Review Officer erred in adopting the decision of the case manager because there was no objective evidence provided by [Appellant's Pain Management Specialist] that the Appellant was justified in following his advice not to participate in the return to work program. The Internal Review Officer failed to recognize that chronic pain is subjective in nature and should have considered that the Appellant's complaints of chronic pain were bona fide but failed to do so.

The Commission has in the past recognized that as a result of chronic pain a claimant would be entitled to receive IRI benefits. In the case of [text deleted] (AC-03-66) the Commission, on page 9 stated:

Despite the Appellant's ongoing complaints of pain, little weight was given to her subjective concerns. Judicial treatment of subjective pain complaints in disability cases is considered by Richard Hayles in his book, Disability Insurance, Canadian Law and Business Practice, Canada: Thomson Canada Limited, 1998, at p. 340, where he notes that:

Courts have recognized that pain is subjective in nature. They have also acknowledged that there is often a psychological component in chronic pain cases. Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary*, Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:

In my view it is not of any particular importance to determine the precise medical nature of the plaintiff's pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.

In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.

The Supreme Court recognized the validity of chronic pain in its decision of *Nova Scotia (Worker's Compensation Board) v. Martin et al [2003]* S.C.J. No. 54 wherein Mr. Justice Gonthier stated:

1 Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event.

Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians. . .

In the case of [text deleted] (AC-04-115) the Commission referred to the text Disability Insurance, Canadian Law and Business Practice, (Supra) wherein the author at p. 340 stated:

. . . Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary,* Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:

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In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.

*McCulloch v. Calgary (City) (1985), 16 C.C.L.I.222 (Alta. Q.B.)*

The Commission notes that [MPIC's Doctor #2], MPIC's Medical Director of Health Care Services, in a joint report with [MPIC's Doctor #1] dated September 9, 2002, found that the Appellant was suffering from chronic pain syndrome. In arriving at that conclusion this report does not appear to indicate that [MPIC's Doctor #2] or [MPIC's Doctor #1] had any objective evidence that the Appellant was suffering from chronic pain syndrome.

[MPIC's Doctor #2's] assessment of chronic pain is consistent with the diagnosis of the two physiatrists, [Independent Physiatrist] and [Appellant's Physiatrist #1] as well as the diagnosis of [Appellant's Pain Management Specialist]. [Appellant's Pain Management Specialist] did explain to the case manager that there were no imaging techniques that could provide objective

evidence for many types of chronic pain. The case manager and the Internal Review Officer mistakenly believed that without objective evidence of chronic pain the Appellant could disregard [Appellant's Pain Management Specialist's] medical advice to participate in a return to work program.

A medical practitioner treating a patient is required to determine whether the complaints they are making are credible. The medical practitioner will conduct an interview with the patient, obtain the medical history of the patient and carefully listen as to the manner in which the patient describes his or her symptoms. Based on examination of the relevant medical reports and the interview with the patient a doctor will make a determination on whether the patient's complaints were consistent with the patient's medical history and objective findings (if they exist) and whether or not the patient was exaggerating his or her symptoms.

The Commission notes that [Independent Physiatrist], [MPIC's Doctor #2], [Appellant's Pain Management Specialist], and [Appellant's Physiatrist #1] all concluded that the Appellant suffered from chronic pain. The Commission finds that medical practitioners will often make a diagnosis of chronic pain without any objective evidence of such pain based on their assessment that the patient is credible and is not exaggerating symptoms. [Independent Physiatrist] found that the Appellant was credible since her complaints were consistent with the medical history and objective findings and that she was not exaggerating her symptoms.

Although [MPIC's Doctor #2] concluded that the Appellant suffered from chronic pain was of a view contrary to the opinions of [Appellant's Pain Management Specialist], [Appellant's Doctor #1] and [Appellant's Physiatrist #2] that the Appellant did have the physical capacity to participate in the return to work program and be employed at a sedentary job. [MPIC's Doctor

#2] came to this conclusion primarily after reviewing the video surveillance footage recording the events of the Appellant's activities over three days in December 2005, three days in October 2003 as well as four days in 2004. Based on his review of the video surveillance footage he concluded that the Appellant did have the physical capacity to participate in a return to work program and be employed in a sedentary job.

It should be noted that [Independent Physiatrist], [Appellant's Physiatrist #1], [Appellant's Pain Management Specialist], [Appellant's Physiatrist #2] and [Appellant's Doctor #1], unlike [MPIC's Doctor #2] had the opportunity of meeting with the Appellant and interviewing her to determine whether or not, in their view, she was a credible witness. Since [MPIC's Doctor #2] conducted a paper review he was unable to assess the Appellant's credibility.

The Commission finds that the Appellant testified in a clear and unequivocal fashion and was consistent throughout her testimony in all material respects. The Commission determines that the Appellant was a credible witness and accepts her testimony in respect of the physical complaints she had for which she was being treated by [Appellant's Physiatrist #1], [Appellant's Pain Management Specialist] and subsequently by [Appellant's Neurologist].

The Commission also accepts the Appellant's testimony that the activities recorded on the video surveillance tapes are for the days when she was feeling better and was able to carry out the activities of walking and talking and driving a car in a relatively normal fashion as disclosed on the video tapes. The Commission also accepts her testimony that on other days because of her physical and emotional difficulties she struggled to carry out her daily activities.

The Commission determines that the testimony of the Appellant in respect of her physical

complaints, as of the date of the termination of the Appellant's IRI benefits on December 7, 2003, is corroborated by the medical reports of [Appellant's Physiatrist #1] and [Appellant's Pain Management Specialist].

MPIC's legal counsel submitted that the medical reports from [Independent Physiatrist], [Appellant's Physiotherapist] and [MPIC's Doctor #2] indicated that the Appellant was physically capable of performing a sedentary job and participating in a graduated return to work program and as a result she had no valid reason for refusing to participate in the return to work program. The issue before the Commission is not whether or not the Appellant had the functional capacity to carry out a sedentary job or participate in a return to work program, but rather, whether she had a valid reason for refusing to participate in such a program.

The Appellant's IRI benefits were not terminated based on Section 110(1)(a) of the MPIC Act which permits MPIC to terminate the Appellant's IRI benefits that the Appellant was capable of carrying out the employment she held previous to the motor vehicle accident. On the contrary, the Appellant's IRI benefits were terminated because she purportedly did not provide a valid reason for participating in a return to work program pursuant to Section 160(f)(g) of the MPIC Act.

In a response to a question from the Commission, [MPIC's Doctor #2] acknowledged that a person could be physically capable of participating in a return to work program, but could have valid reasons for not participating in such a program.

In his submission, MPIC's legal counsel relied on [MPIC's Doctor #2's] interdepartmental memorandum to the Internal Review Officer dated May 15, 2006. [MPIC's Doctor #2] was

requested by MPIC to determine whether the actions and status of the Appellant as recorded in video-tapped (sic) surveillance footage would enable her to hold sedentary employment or to begin a graduated return to work program in December of 2003. [MPIC's Doctor #2] was not asked MPIC to determine whether or not the Appellant had a valid reason for refusing to participate in the graduated return to work program in December of 2003. As a result, [MPIC's Doctor #2] did not address the issue that was under appeal, but dealt with the Appellant's physical capacity to participate in the return to work program as recorded in the video tapped (sic) surveillance footage.

On the other hand, [Appellant's Pain Management Specialist] on a number of occasions advised MPIC that having regard to the Appellant's medical condition she should not be required to participate in a return to work programs until her medical treatments was completed. Following her doctor's advice, the Appellant refused to participate in the return to work program. The Appellant's legal counsel submission to the Commission was that in following her doctor's advice the Appellant had a valid reason to refuse to participate in the return to work program and as a result MPIC erred in terminating the Appellant's IRI benefits pursuant to Section 160 of the MPIC Act.

It should further be noted that in examination in chief, [MPIC's Doctor #2] was not asked by MPIC's legal counsel whether in his view the Appellant had a valid reason for refusing to participate in the graduated return to work program. However, in cross-examination, [MPIC's Doctor #2] was asked whether in his view a patient should follow the advice of his or her doctor and [MPIC's Doctor #2] readily agreed that a patient should do so. The Commission finds that [MPIC's Doctor #2] is correct in concluding that it is only reasonable that a patient should follow the advice of his or her medical practitioner.

The Commission also finds that MPIC erred in concluding that the Appellant should have disregarded the medical advice of [Appellant's Pain Management Specialist] not to participate in the return to work program.

The Commission in two previous decisions, AC-97-33 and AC-98-4, concluded that since the Appellant followed the medical advice of their doctors they did respectively have valid reasons for not complying with the return to work program or a program relating to functional rehabilitation, pursuant to Section 160 of the MPIC Act. In both decisions the Commission rejected MPIC's position that following the medical advice of a medical practitioner by the Appellant does not constitute a valid reason under Section 160 of the MPIC Act.

The Commission therefore concludes that having regard to the documentary evidence, the testimony of [MPIC's Doctor #2] and the Appellant, that the Appellant has established on a balance of probabilities that:

1. by relying on the medical opinion of [Appellant's Pain Management Specialist] she had a valid reason for refusing to participate in the return to work program;
2. she did not delay her recovery by her activities.

The Commission finds that MPIC violated Section 160(f)(g) of the MPIC Act by terminating the Appellant's IRI benefits. As a result, the Commission rescinds the decision of the Internal Review Officer of June 21, 2004 and allows the appeal. The Commission directs that the Appellant's IRI benefits be reinstated, together with interest.

**Medically Required Bed:**

The Appellant has requested that she be reimbursed for the cost of a medically required bed pursuant to the provision of Section 136(1) and Sections 5 and 10(1) of Manitoba Regulation 40/94 which are:

> **Reimbursement of victim for various expenses**
>
> 136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:
>
> (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
>
> (d) such other expenses as may be prescribed by regulation.

Manitoba Regulation 40/94 provides:

> **Medical or paramedical care**
>
> **5** Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:
>
> (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;
> (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.
>
> **Rehabilitation expenses**
> **10(1)** Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:
>
> (d) reimbursement of the victim at the sole discretion of the corporation for
> (iii) medically required beds, equipment and accessories,

On August 22, 2003 the Appellant wrote to [Appellant's Pain Management Specialist] advising

him that she had conducted some research in respect of obtaining a bed to deal with her complaints and recommended an adjustable bed.

On September 8, 2003, [Appellant's Pain Management Specialist] wrote to the case manager and stated:

> "With regards to the bed, [the Appellant] has done most of the research on this subject an since pain is a fairly subjective problem, if she subjectively feels improvement with this type of adjustable bed, it is probably helping got (sic) relax and reduce some of the stresses on her neck while lying and sleeping. She has provided me with some information on the specific bed that I will copy to you and if I can provide any further information, please do not hesitate to contact me at the [text deleted] Clinic."

[Appellant's Pain Management Specialist] wrote to the case manager on October 15, 2003 recommending a bed for the Appellant and stated:

> "Although she has experienced improvement in the pounding headache since the rhizotomy she has also been experiencing increasing muscular pain along the left side of her neck and into her upper back…
>
> Also since the rhizotomy [the Appellant] has been experiencing a number of different symptoms including sensations of numbness, weakness and tingling involving the left side of her face, neck throat and even radiating into her left arm and hand…
>
> In addition to her physical state, there have been a number of stresses in her life which have added to her overall suffering…"

He further recommended that MPIC fund the purchase of a bed for the Appellant on the following grounds:

> "I previously wrote to you regarding a bed that may provide [the Appellant] with a greater ability to relax her painful muscles and support her neck and back while lying and sleeping. I would recommend that funding be provided for this bed as one measure to help improve her symptoms overall..."

MPIC requested that [MPIC's Doctor #2] review [Appellant's Pain Management Specialist's] report of September 8, 2003. In an interdepartmental memorandum to MPIC dated September

22, 2003, [MPIC's Doctor #2] stated:

1. The prescribed device is not medically required in the treatment of the Appellant's motor vehicle accident injuries.
2. [Appellant's Pain Management Specialist] indicated in his September 8, 2003 letter that the Appellant had done most of the research on this issue and that the area was a fairly subjective one.
3. He had conducted a review of the medical literature in the national Library of Medicine database and found that there was very little medical evidence regarding the use of particular mattresses in relationship to neck pain.

[MPIC's Doctor #2] concluded that there was a complete lack of any evidence indicating that mattresses or pillows for neck pain could be described as a medical requirement. Subsequently, [MPIC's Doctor #2] was again requested to comment on the Appellant's request for funding of a bed. In an interdepartmental memorandum January 19, 2004, [MPIC's Doctor #2] stated:

> "I have been asked to comment on the prescribed S-Cape adjustable sleep system for this patient.
> In my opinion, the prescribed device cannot be described as medically required in the treatment of the patient's collision-related injuries."

In a decision dated June 21, 2004, the Internal Review Officer rejected the Appellant's application for funding of a bed based on [MPIC's Doctor #2's] medical opinion as set out in his letter of September 22, 2003. The Internal Review Officer stated:

> "I see no reason to disagree with [MPIC's Doctor #2's] opinion. Therefore, although [Appellant's Pain Management Specialist] has prescribed a bed for your use, it is not a medical requirement and there is no evidence in the medical literature that it would be required in your situation. As a result, I am confirming your Case Manager's decision which resulted in a final decision by [MPIC's Claims Management Supervisor] dated January 23, 2004 that your bed would not be funded by Manitoba Public Insurance in relation to your accident of June 14, 1994."

It should be noted that in rejecting the Appellant's application for funding, the Internal Review Officer adopts [MPIC's Doctor #2's] opinion as set out in his letter of September 22, 2003. In this letter, [MPIC's Doctor #2] analyzes [Appellant's Pain Management Specialist's] letter of September 8, 2003 and concludes quite correctly that [Appellant's Pain Management Specialist] does not provide any medical evidence that the bed was medically required and that it was

necessary and advisable for the rehabilitation of the Appellant in accordance with Section 5(a)(b) and Section 10(1) of Manitoba Regulation 40/94.

The Commission notes that [Appellant's Pain Management Specialist's] comments in his September 8, 2003 indicate that the bed was probably going to help relax the Appellant and reduce some of the stresses in her neck while lying and sleeping. [Appellant's Pain Management Specialist's] comments suggest that the purpose of the bed was to maintain the Appellant's medical condition and not for the purpose of improving the Appellant's health. The Commission therefore agrees with the Internal Review Officer's decision that the medical opinion expressed in [Appellant's Pain Management Specialist's] letter of September 8, 2003 does not establish a medical necessity pursuant to Section 136(1) of the MPIC Act and Section 5 and 10(1) of Manitoba Regulation 40/94.

The Commission further notes that the only comment [MPIC's Doctor #2] makes in respect of [Appellant's Pain Management Specialist's] medical opinion as set out in the letter to MPIC on October 15, 2003 is stated in his interdepartmental memorandum dated January 19, 2004. In this memorandum [MPIC's Doctor #2] does not review [Appellant's Pain Management Specialist's] medical opinion but states only:

> "I have been asked to comment on the prescribed S-Cape adjustable sleep system for this patient.
>
> In my opinion, the prescribed device cannot be described as medically required in the treatment of the patient's collision-related injuries."

The comments that [Appellant's Pain Management Specialist] makes in his letter of October 15, 2003 in respect of the bed are substantially different than the comments he made in his September 8, 2003 letter. In the June 21, 2004 decision, the Internal Review Officer appeared to

rely solely on [MPIC's Doctor #2's] comments in his letter of September 22, 2003 in which he reviewed [Appellant's Pain Management Specialist's] opinions in his letter of September 8, 2003. Although the Internal Review Officer referred to [MPIC's Doctor #2's] letter of January 19, 2004 in her decision, she did not review [Appellant's Pain Management Specialist's] comments in his letter of October 15, 2003. As a result, in rejecting the Appellant's request for a medically required bed the Internal Review Officer failed to consider the medical opinion of [Appellant's Pain Management Specialist] as set out in his letter of October 15, 2003.

The Commission concludes on review of [Appellant's Pain Management Specialist's] October 15, 2003, that after describing the Appellant's symptoms to her neck and back while lying and sleeping he recommended funding be provided for this bed "as one measure to help improve her symptoms overall". The Commission therefore determines that in this letter [Appellant's Pain Management Specialist] was recommending funding for a bed which was medically required for the purpose of improving the Appellant's health and not for the purpose of maintaining her existing medical condition. In the Commission's view this letter constitutes a prescription by the Appellant's physician pursuant to Section 5(a) of Manitoba Regulation 40/94. For this reason, the Commission determines that the Appellant has established, on a balance of probabilities, pursuant to Section 5(a) and Section 10(1) of Manitoba Regulation 40/94 that the bed recommended by [Appellant's Pain Management Specialist] was medically required. As a result MPIC is required to reimburse the Appellant for the purchase of this medically required bed.

The Commission therefore rescinds the decision of the Internal Review Officer dated June 21, 2004 in respect of the medically required bed and allows the Appellant's appeal in this respect.

Dated at Winnipeg this 27th day of May, 2010.

**MEL MYERS, Q.C.**

**TREVOR ANDERSON**

**PAUL JOHNSTON**