Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-64

PANEL:	**Ms Laura Diamond, Chairperson** **Dr. Sheldon Claman** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Karen Stern and Mr. John Michaels;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.**
HEARING DATES:	**June 14, 15, and 24, 2010**
ISSUE(S):	**1. Entitlement to further physiotherapy treatment benefits.** **2. Whether the Appellant is entitled to further Personal Injury Protection Plan benefits.** **3. Are the Appellant's current complaints and symptoms related to the motor vehicle accident?**
RELEVANT SECTIONS:	**Sections 70(1), 71(1), 136(1)(a), 171 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 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 injured in a motor vehicle accident on January 5, 1996. As a result of her injuries, the Appellant was in receipt of Personal Injury Protection Plan ("PIPP") benefits, including Income Replacement Indemnity ("IRI") benefits. She also received treatment benefits and compensation for additional labour on the family farm.

At the time of the accident, the Appellant was employed by the [text deleted] where she worked, on a full-time basis, in addition to assisting her husband with duties on the family farm. She also took periodic leave from the [text deleted] (mostly in spring and fall) to assist with the farm duties.

At the time of the accident, the Appellant had a pre-existing condition of scoliosis and, as was later discovered, degenerative changes in her spine.

Following the accident, the Appellant was in receipt of IRI benefits on a full-time basis. She embarked upon a gradual return to work program and did return to work at the [text deleted], with modified duties, on a part-time basis following the accident.

The modified duties position which she occupied at the [text deleted] was then phased out due to restructuring. The Appellant started part-time employment at [text deleted]. This work eventually turned into full-time employment. However, throughout this time, the Appellant continued to have problems with her back symptoms and pain and when she started full-time duties at [text deleted] she was unable to continue. Her case manager investigated and accepted that the Appellant's functional deficits were related to the injuries she sustained in the motor vehicle accident and prevented her from continuing to work full-time. The case manager noted that she had been working full-time in spite of pre-existing degenerative changes and that her subjective symptoms had remained consistent over the years since the accident. As a result, IRI was reinstated to the Appellant in September of 2004.

The Appellant also continued with physiotherapy treatments, paid for by MPIC.

On December 10, 2004, the Appellant's case manager wrote to her indicating that MPIC no longer considered physiotherapy treatment a medical necessity and that it would no longer fund her physiotherapy treatment as of December 10, 2004.

This decision of the case manager was upheld by an Internal Review Officer on February 7, 2005.

A new case manager was then assigned to the Appellant.

On June 27, 2006, the Appellant's new case manager wrote to her indicating that MPIC's Health Care Services Team had reviewed information concerning her current complaints and their relationship to the motor vehicle accident of January 9, 1996. It was their opinion that the information did not medically support a probable cause and effect relationship between the Appellant's ongoing and current complaints and the injuries suffered in the motor vehicle accident.

As a result, MPIC would not continue to extend coverage through the PIPP plan and all entitlements would end as of June 27, 2006.

On February 12, 2009 an Internal Review Officer for MPIC upheld the case manager's decision confirming that the Appellant's current complaints and symptoms were not related to the motor vehicle accident and that the Appellant was not entitled to PIPP benefits and must reimburse MPIC a total of $185.63.

It is from these decisions of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal. She described her work history, which included working full-time at the [text deleted], beginning in 1966. She stayed home with her children for a few years and went back to work with the [text deleted], full-time, in 1977.

The Appellant also described the duties that she undertook on the family farm, which involved heavy work and long days. She explained her duties at home, which included extensive yard work, gardening and caring for horses, as well as her duties inside the home with housework, cooking and raising her children.

The Appellant also described an extensive social and recreational life which included cross-country skiing, horseback riding, snowmobiling, needlepoint, crochet, and community and church work and activities.

The Appellant testified that prior to the motor vehicle accident, she was healthy and always able to work full-time in addition to carrying out her duties on the farm, at home and in the community. She experienced some low back discomfort from time to time, every now and then, which was usually related to doing heavy work, such as lifting bales or chopping wood in the fall.

When she experienced some symptoms, she went to see her doctor, who did back x-rays and prescribed some anti-inflammatories. In December of 1983, an x-ray showed some deterioration in her lumbosacral spine, but she did not recall receiving any treatment for that and had no recollection of being off work at that time from the [text deleted] or from her duties at the farm.

Another x-ray in 1995 (of her back and thumb) showed little additional deterioration since the 1983 examination, and she also recalled having very few medical complaints from that time, aside from some occasional discomfort in her knees when she had been particularly active.

The Appellant's only recollection of complaints from this time was of minor discomfort, perhaps achiness due to an increase in activity, when she might feel stiff or sore, but, she testified it was nothing like what she experienced after the motor vehicle accident.

The Appellant then described the motor vehicle accident which occurred in January of 1996. She described her car stopping on the highway, waiting to turn, when she was rear-ended by a loaded three-ton grain truck travelling at 70 kilometres per hour. Her car was then hit head-on by an oncoming car. The car she was driving was "totalled". The seat she was sitting in broke in half and her upper body was extended back over the back seat with her legs jammed up under the dash.

The Appellant described the symptoms she felt after the accident which included dizziness, nausea, neck pain as well as pain in her cheek, arms, hands, chest and shoulder.

She was taken to hospital where she had x-rays and was given a neck brace, with instructions to go home and see her family doctor if she did not improve. She described the symptoms which she felt over the next couple of days which included achy shoulders, pain in her shoulder blades, pain from her ribs to her waist, a band of pain across her back which jabbed, throbbed and burned into her buttocks, as well as pain around her hips, groin and pelvis.

The Appellant saw her family doctor, [Appellant's Doctor], who prescribed anti-inflammatories and referred her to [text deleted] for treatment. She also tried a couple of chiropractic treatments but found that this did not help.

The Appellant described her treatment regimen as well as her attempts to return to work. She had expected to return to work by mid-April, but had a set-back in March when she was leaning against a door and her dog jumped on her, causing her to jerk and immediately aggravating all the pain in her lower back. She noted that her dog always did this in the past but it had never bothered her so much before.

She described another incident where she turned over in bed and something felt out of place, causing a recurrence of her symptoms.

This delayed her return to work by a few weeks, but she did return to work by mid-April. She was not able to stand to do [text deleted] duties and was given modified duties which allowed her to sit. Since she was only able to sit for 15 to 20 minutes comfortably and the pain was interfering with her ability to concentrate, she was only able to work about 3 ½ hours per day at the beginning. She worked her way up to about 4 hours a day by early May and then attempted some full-time hours. However, this caused a relapse of her symptoms.

By July of 1996, the Appellant testified that she was working 6 hours per day. She then went on holidays for a couple of weeks. During this time, she tried to keep up with her physiotherapy exercises, but was also busy at home doing housework and cooking for a family gathering. So, when she returned to work at the end of July, she suffered a major acute relapse. She was taken back off work in August of that year.

She did, however, return to work, to modified duties, about 3½ hours per day in September.

The Appellant described her inability to perform any farm duties after the accident. MPIC provided compensation for farm labour assistance as a result.

The Appellant described her treatment with [Appellant's Doctor], with physiotherapy, and with [Appellant's Neurologist #1], [text deleted], which the Appellant did not find helpful.

She continued working at [text deleted] part-time until March of 2000. At that time, [text deleted] went through a restructuring and the modified duties she had been performing were transferred to head office. At that time the only job left was that of a stand-up [text deleted] and the Appellant was not able to do standing work. So, after 30 years at [text deleted], she left that job.

She described her attempts at retraining and finding other work, including as a [text deleted] and a [text deleted], both of which were too physically demanding for her.

She continued in her attempts at finding work until she began work in March 2001, doing [text deleted] for [text deleted] for 4 hours per day.

She continued to receive her IRI top-up until February of 2002 when a raise she received from her new employers disqualified her from receiving further IRI benefits.

She described her work for this [text deleted] company. By November 2003 she was working full-time hours, but within a short time her symptoms started to get worse. She suffered increased lower back pain, leg pain, feelings of pins and needles in her legs as well as leg weakness and some numbness and tingling in her cheeks and arms. She took sick days and suffered a great deal of pain.

By November 2003, the Appellant felt that her pain was excruciating. She could not concentrate on her work and her pain was increasing, so she contacted MPIC to see if her IRI could be reinstated.

Her case manager, [MPIC's Case Manager #1], requested a CT scan, as well as updated reports from [Appellant's Doctor] and her physiotherapists. She was also seen by [Appellant's Neurologist #2], and different medications were tried, along with a referral to [Appellant's Orthopaedic Surgeon].

She was no longer able to work at [text deleted] and once again began receiving IRI benefits from MPIC. She continued with physiotherapy.

The Appellant testified that she still cannot perform any farm work nor do any of the previous recreational activities she participated in. Her injuries limit her social life and she can still no longer work on a full-time basis. However, she did seek other employment and was able to do some [text deleted] on a part-time basis, as well as some [text deleted] work.

The Appellant was cross-examined by counsel for MPIC, who discussed her pre-existing degenerative back condition and her condition prior to the motor vehicle accident. She noted

that she had some low back discomfort from time to time which was sporadic and usually related to activity. She was prescribed Arthrotec for these aches and pains, mostly in her knees and occasionally in her back. She had believed that these were due to her pre-existing scoliosis, but x-rays of her lumbar spine also revealed osteo-arthritis and degenerative narrowing.

However, the Appellant felt that the Arthrotec kept her symptoms under control and she was able to carry on with all her regular duties and functions.

On cross-examination, the Appellant was also asked about the physiotherapy treatments which she had received, which she acknowledged had been extensive. They had included home exercises, back and spinal education classes, a dynamic lumbar stabilization program, pilates classes, heat, TENS, and acupuncture. These treatments provided only short term relief, she acknowledged.

The Appellant also provided numerous reports, on her Indexed file, from caregivers such as [Appellant's Doctor], several physiotherapists, [Appellant's Neurologist #2] and [Appellant's Orthopaedic Surgeon] and [Appellant's Physiatrist].

Counsel for the Appellant took the position that the Appellant's new case manager did not have jurisdiction in 2006 to reverse MPIC's 1996 and 2004 decisions and terminate the Appellant's entitlement to benefits. Counsel referred to the Manitoba Court of Appeal decision in *Shier vs Manitoba Public Insurance Corporation,* 2007 MBCA 76 which held that in order to modify or terminate a claimant's entitlement to benefits, MPIC is limited to Subsections 171(1) and (2) of the MPIC Act. These Subsections provide that in order for MPIC to render a fresh decision,

there must be either new information which would justify MPIC making a fresh decision, or a substantive error must have been made in respect of the decision.

In rendering her decision to terminate the Appellant's benefits, the case manager did not indicate that she was relying on either Subsections 171(1) or (2) as the basis for terminating the Appellant's benefits.

It is that case manager who had made a substantive error as she had no jurisdiction to terminate the Appellant's IRI benefits.

The Internal Review Officer was the first to indicate that MPIC was reversing [MPIC's Case Manager #1's] 2004 decision on the basis that he made substantive errors in accepting the Appellant's claim for IRI benefits and, pursuant to Section 172(2) of the MPIC Act, MPIC was entitled to terminate benefits. The Internal Review Officer pointed to errors which she alleged [MPIC's Case Manager #1] made in reinstating the Appellant's benefits in 2004. However, counsel for the Appellant disputed these as errors.

Counsel reviewed the evidence of the Appellant and her work history, highlighting her high level of functioning prior to the motor vehicle accident and the problems which resulted thereafter. She reviewed the substantial investigation undertaken by [MPIC's Case Manager #1] in 2004. It took him 10 months to review the Appellant's file to determine if she was eligible for benefits on the grounds of relapse, and finally come to that conclusion after requesting further medical investigation and reports.

Counsel reviewed the evidence of many of the Appellant's caregivers, such as several physiotherapists, [Appellant's Doctor], [Appellant's Neurologist #3] (neurologist), [Appellant's Physiatrist], (rehabilitation specialist), [Appellant's Orthopaedic Surgeon], (orthopaedic specialist), and [Appellant's Neurologist #2] (neurologist).

She also reviewed the evidence and cross-examination of [MPIC's Doctor #1], who provided evidence at the hearing, as well as reports provided by [MPIC's Doctor #2].

Counsel emphasized the minor impact that the Appellant's pre-existing condition had had on her life and functionality before the motor vehicle accident, and reviewed the law regarding causation, and the impact of any pre-existing, asymptomatic conditions.

She also addressed MPIC's position that the Appellant could not point to any objective conditions preventing her from working, and that her disability was solely the result of subjective complaints.

Counsel for the Appellant summarized her position. The Appellant's benefits should be reinstated as of June 26, 2006 on the basis that:

a. Despite her pre-existing lumbar spine issues prior to her motor vehicle accident in 1996, [the Appellant] was fully functional and her condition in no way interfered with her working full-time at [text deleted], working full-time in her farming operation, performing all of her household duties and all of her extensive leisure activities;

b. X-ray reports show little deterioration between 1983 and 1996. As such, this would go against the opinion that her pre-existing spine condition was the sole cause of [the Appellant's] inability to work after July, 1996;

c. She was involved in a serious accident, in which she suffered significant injuries;

d. She has never achieved full recovery following the accident, and there are no reports indicating that she did;

e. Since her accident, she has never been able to return to perform physical work on the farm, participate in her former hobbies such as horseback riding, cross-country skiing and snowmobiling, or perform any heavy household cleaning or other activities;

f. Her subjective complaints involving the lumbopelvic region and her lower limbs have been consistent ant ongoing since the time of the accident;

g. Her functional limitations have been consistent and ongoing since the time of the accident, and include decreased ability to sit, stand, walk, bend, crouch, lift, carry, push and pull etc;

h. MPIC arranged for [the Appellant] to attend for two Functional Capacity Evaluations: one in March, 1997 and the second in March, 2004. Both confirmed that [the Appellant] had functional limitations which reduced her ability to sit, stand, walk, kneel, bend, lift, carry, push, pull etc., which prevented her from working on a full-time basis;

i. [The Appellant's] subjective symptoms are supported by the personal physical examinations, Functional Capacity Evaluations, and analysis of experienced medical professionals including, [Appellant's Doctor], [Appellant's Physiatrist], [Appellant's Orthopaedic Surgeon], [Appellant's Neurologist #2], [Appellant's Physiotherapist #1] and [Appellant's Physiotherapist #2]. They corroborate [the Appellant's] position with respect to her physical complaints and her inability to work full-time. They are all of the opinion that [the Appellant's] ongoing medical problems are caused or contributed to by the accident, and may have aggravated or worsened her pre-existing condition, but were not caused solely by her pre-existing condition;

j. The doctors and physiotherapists who have treated her over a long period of time, such as [Appellant's Doctor] who, as of January 2008, had seen her 63 times, [Appellant's Physiotherapist #1] 230 times and [Appellant's Physiotherapist #2] 93 times, are in a better position to assess her physical condition and ability to work than [MPIC's Doctor #1] who had only conducted a paper review and never examined her;

k. There is no legal requirement that there be a specific or organic pathology and functional deficits supported by objective evidence in order to be eligible for IRI Benefits;

l. [MPIC's Doctor #2], MPIC's medical consultant confirmed that [the Appellant's] symptom complaints have been consistent since the time of her accident;

m. [MPIC's Doctor #2], MPIC's medical consultant also confirmed that if [the Appellant] was her patient, she would be supporting her in working part-time.

Counsel submitted that it was clear that [MPIC's Case Manager #1] did not make any substantive errors in 2004 when he determined that the Appellant experienced a relapse of her injuries relating to her accident and was prevented from working full-time. There was therefore no legal basis for MPIC to terminate the Appellant's benefits in June 2006 and she is entitled to reinstatement of her IRI benefits.

Counsel also submitted that the Appellant's condition necessitated further physiotherapy in order to manage and maintain a stable condition.

Evidence and Submission for MPIC:

In addition to medical reports on the Appellant's Indexed File from [MPIC's Doctor #1], [Appellant's Physiatrist] and [MPIC's Doctor #2], [MPIC's Doctor #1] testified at the hearing into the Appellant's appeal. He reviewed his qualifications and his experience in family practice and in sports medicine. He was qualified as a physician with expertise in sports medicine and musculo-skeletal systems, with experience in assessing spinal cases and forensic file review.

[MPIC's Doctor #1] described the forensic review which he undertook in the Appellant's case regarding the question of whether her symptoms and complaints resulted from the motor vehicle accident. He reviewed the x-rays on file and CT scans which showed that prior to the motor vehicle accident the Appellant suffered from a pre-existing condition of generalized arthritis. He reviewed her history of treatment with prescriptions for Arthrotec.

[MPIC's Doctor #1] was also asked about an incident following the Appellant's motor vehicle accident, just prior to her return to work, when her dog jumped up on her and the Appellant

suffered what she described as a "setback". [MPIC's Doctor #1] indicated that it was very common to see seemingly minor incidents like this provoking symptoms in the lumbar spine. He compared it to a phenomenon whereby one is more likely to herniate a disc tying a shoelace than by lifting a 50 lb. object.

It is [MPIC's Doctor #1's] view, upon a review of all of the medical information on the Appellant's file, that the Appellant did not suffer from objective injuries resulting from the motor vehicle accident which were preventing her from working full-time. She suffered a WAD II associated whiplash disorder in the motor vehicle accident. As a result, she should have been able to return to work. She suffered only from subjective symptom complaints, with no objective findings, aside from the pre-existing scoliotic curve and osteo-arthritis which were present before the motor vehicle accident. Aggravations in her back were a result of the natural history of that condition. He noted an absence of structural lesions, and was of the view that despite her pain, it was safe for her to resume her activities despite persistent symptom reports and complaints. What was important were the objective findings and quantifiable impairments, and in the Appellant's case, she had an ongoing work capacity.

[MPIC's Doctor #1] also addressed the extensive physiotherapy treatment which the Appellant had received. In his view, she continued to have only "feel good therapies". By 2004 she had reached maximum medical improvement from physiotherapy treatment for any ongoing motor vehicle accident related injuries and, with a goal of decreasing her frequency and reliance upon such treatment, he was of the view that there was no medical requirement for further physiotherapy treatment from that point.

Counsel for MPIC reviewed the decision in *Shier vs MPIC* (supra), referred to by counsel for the Appellant. She took the position that the question of whether there was new information pursuant to Section 171(1) of the Act to allow MPIC to render a fresh decision, was moot, since it was clear that a substantive error had occurred in [MPIC's Case Manager #1's] decision and that Section 171(2) would apply to allow MPIC to reconsider [MPIC's Case Manager #1's] decision.

The substantive errors upon which she relied were those described by the Internal Review Officer in her decision of February 12, 2009. [MPIC's Doctor #2], in a file review dated July 19, 2004 had concluded that there was no organic basis for the Appellant's current symptom complaints relating back to her motor vehicle accident. She also stated that [Appellant's Physiatrist's] previous opinion that the Appellant was capable of light intensity work on a part-time basis was based on the Appellant's symptom complaints and not on any specific or organic pathology that related back to the motor vehicle accident. It was only a subjective perception of symptoms that was causing her complaints rather than any objective basis related to the motor vehicle accident. Therefore, the case manager made a substantive error when he declared that the Appellant's subjective symptoms had been consistent since the motor vehicle accident and that functional deficits did not allow her to continue working full-time.

In the alternative, counsel also submitted that there was new information (pursuant to Section 171(1) of the Act) which would allow the Corporation to make a fresh decision in respect of the Appellant's claim for compensation. This new information, she submitted, was contained in clinical notes from [Appellant's Doctor's] office, which were requested and reviewed by [MPIC's Doctor #1] in May of 2006.

Counsel reviewed the principles noted by the Court of Appeal and by the Commission in applying tests for new information including due diligence, relevance, credibility and whether the evidence if believed, when taken with other evidence adduced, could be expected to affect the result.

She submitted that these clinical notes provided the most detailed record of the Appellant's pre-existing condition and showed that in February of 1995, the Appellant suffered from symptoms of generalized arthritis in her back and knees, for which she was not receiving much relief from Arthrotec. This contradicts the Appellant's position that she was managing well prior to the motor vehicle accident and provides some colour regarding the degree to which she had suffered from these conditions before the motor vehicle accident. Counsel submitted that once MPIC received these chart notes, it acted with due diligence to obtain a review of them from [MPIC's Doctor #1] and the Appellant's benefits were ended on a timely basis. The notes were extremely relevant to the issue of causation and were credibly prepared notes written by the Appellant's family physician. She submitted that they could certainly be expected to affect the result of a consideration of the cause of the Appellant's complaints and whether they related to the motor vehicle accident.

Counsel also submitted that for policy reasons, the Commission should hear the case regarding the Appellant's entitlement to benefits on its merits, rather than relying upon Section 171 to find that MPIC did not have the authority to act in discontinuing her benefits.

Counsel then went on to review the question of causation. She made it clear that MPIC was not suggesting that the Appellant was a malingerer. It was not necessary to find that the Appellant was not credible in order to dismiss the appeal. The Appellant did suffer injuries in the motor

vehicle accident. However, counsel submitted that the pain and symptoms she was currently experiencing were due to her pre-existing condition.

Counsel emphasized the Appellant's pre-existing condition and noted that it was symptomatic before the motor vehicle accident. She suffered from scoliosis, lordosis, osteo-arthritis and degenerative arthritis. This was established by x-rays and by prescriptions and refills for Arthrotec to treat it.

She reviewed the injuries which the Appellant reported as a result of the motor vehicle accident. These were whiplash injuries, with no structural decline in her condition resulting.

The Appellant progressed through the recovery and returned to work.

However, she suffered from three post motor vehicle accident perturbations. The first was the incident where her dog jumped up on her, the second resulted from an incident in bed, and the third was connected to her activities during her summer vacation.

These perturbations which affected her pre-existing condition were not related to the motor vehicle accident, and this was confirmed by [MPIC's Doctor #1's] evidence.

In reviewing reports from the Appellant's caregivers, counsel for the Appellant pointed to a common thread. Many of these opinions relied upon the Appellant's self-reporting, and many came upon the scene after the fact, long after the Appellant's motor vehicle accident. It is not even clear whether they turned their opinion to the Appellant's pre-existing condition. But [MPIC's Doctor #1], who had a particular expertise in sport medicine and the musculoskeletal

system as well as experience with forensic review, reviewed the totality of evidence from all the medical reports and concluded that the Appellant had recovered from the motor vehicle accident as early as July 1996. Any current symptoms were not causally related to the motor vehicle accident but rather, to her pre-existing disc disease.

Counsel also reviewed the legal principles applicable, noting that the test for causation should be whether there was a change in the natural history of the Appellant's condition due to the motor vehicle accident. [MPIC's Doctor #1] had confirmed that this was not the case. The Appellant recovered from the motor vehicle accident and gained sufficient functional capacity to work at certain jobs for varying lengths of time. However, as medical experts had admitted, it was unlikely that the Appellant would have ever been able to continue working full-time until retirement, given the pre-existing conditions from which she suffered. Her condition now is very similar to what it had been post motor vehicle accident.

This held true in spite of the Appellant having had the benefit of in excess of 500 physiotherapy treatments. It was clear that there was no medical requirement for further treatment and no requirement for MPIC to pay for such treatments, as they were not medically required or related to the motor vehicle accident.

Counsel submitted that MPIC had treated the Appellant more than fairly and given her every benefit of the doubt. However, x-rays and clinical notes obtained showed that the Appellant suffered from a pre-existing condition and was now relying upon subjective complaints to support payment of further IRI benefits.

However, on the balance of probabilities, the Appellant's symptoms were not connected to the motor vehicle accident and the Appellant was not entitled to receive further benefits.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the decisions of the Internal Review Officer dated February 7, 2005 and February 12, 2009 were not correct and that the Appellant should be entitled to further physiotherapy and PIPP benefits.

> **Corporation may reconsider new information**
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> 171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.
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> **Claims corporation may reconsider before application for review or appeal**
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> 171(2) The corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider the decision if
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> (a) in the opinion of the corporation, a substantive or procedural error was made in respect of the decision; or
>
> (b) the decision contains an error in writing or calculation, or any other clerical error.

The Appellant takes the position that in 2006, the case manager had no jurisdiction to reverse MPIC's 1996 and 2004 decisions and terminate the Appellant's entitlement to benefits. The Appellant relied upon the Court of Appeal decision in *Shier vs MPIC* (supra), which held that in order to modify or terminate a claimant's entitlement to benefits, MPIC is limited to Subsections 171(1) and (2) of the MPIC Act. These Subsections provide that in order for MPIC to render a fresh decision there must be either new information which would justify MPIC making a fresh decision, or a substantive error must have been made in respect of that decision.

In rendering her decision to terminate the Appellant's benefits, the case manager did not indicate that she was relying on either Subsections 171(1) or (2) as the basis for terminating the Appellant's benefits.

The Internal Review Decision indicated that it was relying on Section 171(2) and that [MPIC's Case Manager #1], the initial case manager, had made a substantial error in finding that the Appellant was entitled to benefits as a result of a relapse of conditions and injuries arising out of the motor vehicle accident.

Counsel for MPIC submitted that the original case manager did err in his decision and that under Section 171(2) of the Act, MPIC had corrected this error within the appropriate time frame set out by the Manitoba Court of Appeal in the *Shier* decision. Accordingly, there was no need to consider the second question as to whether there was new information under Section 171(1) of the MPIC Act to support a fresh decision.

However, counsel for MPIC also maintained that after applying the Palmer principles referred to in the *Shier* Court of Appeal Decision, the new evidence upon which it was relying i.e. the clinical notes obtained by MPIC on May 9, 2006, were new information which would support a fresh decision.

Section 171(2)

The panel does not find that the original case manager, [MPIC's Case Manager #1], made an error in his decision to provide the Appellant with Income Replacement Indemnity ("IRI") benefits in 1996 or in 2004. A review of the material on the indexed file indicates that [MPIC's

Case Manager #1] undertook a full and thorough investigation following the relapse of the Appellant's symptoms.

[MPIC's Case Manager #1] wrote to [Appellant's Doctor] requesting imaging studies and asking whether the Appellant ever sought medical attention for neck or back complaints prior to the accident. He requested copies of consultation reports from [Appellant's Neurologist #1] and [Appellant's Physiatrist]. He met with the Appellant and her employer from [text deleted]. He wrote again to the physiotherapist and [Appellant's Doctor] and requested another report, including a functional capacity evaluation, from [Appellant's Physiatrist] and his colleagues at [Rehab Facility].

The panel is of the view that [MPIC's Case Manager #1] did a thorough investigation, which took him 10 months. Following a review of all the documents which resulted from his investigations and contact with the medical professionals involved in the case, he also sought the approval of his supervisor, [text deleted], who agreed that the Appellant's relapse with inability to work was a result of injuries suffered in the motor vehicle accident.

Further, upon review of the evidence on the indexed file, as well as that presented at the hearing, and the submissions of counsel, the panel is of the view that [MPIC's Case Manager #1's] decision that the Appellant's symptoms and complaints were a result of the motor vehicle accident, was correct. A more detailed review and analysis of the evidence considered by the panel and the reasons for this finding is set out below, following our review of the effect of Section 171(1) of the MPIC Act.

Section 171(1)

The panel has also considered the submissions of the parties regarding the application of Section 171(1) and whether MPIC has presented "new information" in accordance with that Section.

Counsel for MPIC submits that the clinical notes of [Appellant's Doctor], obtained by MPIC on May 9, 2006, constituted new information which would cause the Corporation to make a fresh decision in respect of the Appellant's claim for compensation.

The Commission applies four principles, which were articulated in the Supreme Court of Canada case of *R vs Palmer* [1980], SCR 759, in the context of determining whether evidence is new information which should be considered in making a fresh decision.

The four principles articulated in the *Palmer* case are:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied strictly in a criminal case as in civil cases…
2. The evidence must be relevant in a sense that it bears upon a decisive or potentially decisive issue in the trial.
3. The evidence must be credible in the sense that it is reasonably capable of belief.
4. The [evidence] must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The Manitoba Court of Appeal in *Shier vs MPIC* 2008 MBCA 97 reviewed the Commission's application of the *Palmer* principles and provided useful guidance regarding the interpretation of Section 171(1) of the MPIC Act.

> "When I read the decision as a whole, I am satisfied it is the latter and that the Commission is saying that for information to be "new information" under s. 171(1), it must be relevant and decisive to the issue and that the claimant must not be prejudiced by a lack of due diligence on the part of MPIC in bringing this information forward.
>
> I do not agree with MPIC that the Commission erred when it applied the *Palmer* principles in this way. These principles offer logical and reasonable considerations when exercising discretion under s. 171(1) to make a fresh decision because of new information, whether that exercise of discretion is by MPIC at first instance, or by the Commission on the hearing of an appeal. The purpose of s. 171(1) is to allow MPIC to render a fresh decision because it has received new information which affects and alters the original decision. I think it is important to remember that this section is about reconsideration of a decision and not re-evaluating a change in status of a claimant that is contemplated by other section of the *Act.* To accept MPIC's argument would permit MPIC to make a "fresh decision" on the basis of any piece of *de minimis* information, whether it be relevant or not. This could not have been what the legislature intended. Fairness is an underlying principle of the scheme of the *Act*. One only needs to look to s. 150, which requires that MPIC advise, assist, and inform claimants about their entitlement to claims for compensation. Section 171(1) must be interpreted in a just manner and I am of the view that the Commission correctly relied on the Palmer principles for guidance to do this."

Counsel for MPIC reviewed the *Palmer* principles, referred to in the *Shier* decision, for consideration of new information.

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.

Counsel noted that MPIC relied on the Appellant's self-reporting of pre-accident symptoms to its detriment. Although the Appellant had an obligation to provide full accurate information and this information was, at all times, within the knowledge control and power of the Appellant, the clinical notes contradict what the Appellant told MPIC. Once MPIC obtained the clinical notes on May 9, 2006, it exercised due diligence in referring the notes to [MPIC's Doctor #1] and ending entitlement to PIPP benefits.

> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

The issue before the Commission is whether the current complaints and symptoms are related to the motor vehicle accident. This is essentially an issue of causation. The clinical notes speak to the Appellant's pre-accident condition, explaining the circumstances surrounding the ordering of a lumbar spine x-ray and, as they are the first pre-existing written records on symptoms, they go to the core of the causation issue.

> (3) The evidence must be credible in the sense that it is reasonably capable of belief.

The clinical notes were written by a physician before the accident occurred and before there was any financial or other interest. Presumably, these notes were written contemporaneously with the patient's visits and serve as an accurate record of what was reported and observed.

> (4) It (the evidence) must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Counsel noted the requirement that the Appellant's pre-accident condition be considered to determine whether or not the accident aggravated the condition.

In the Appellant's case, the panel does not consider the clinical notes obtained on May 9, 2006 to be new information which would support a fresh decision regarding the Appellant's entitlement to benefits.

In our view, these clinical notes do not meet the tests, as explained by the Court of Appeal in *Shier*, to ensure that "any piece of *de minimis* information" not be used to re-evaluate a decision. The panel does not consider the clinical notes, which make minimal reference to some medications prescribed for minor symptoms of discomfort in the Appellant's back and knees in 1994 and 1995, to be relevant and decisive to the issue before MPIC and the panel.

The panel fails to see how these clinical notes are new information of a decisive nature that affected the result of MPIC's decision to terminate benefits. [MPIC's Doctor #1] provided an opinion on April 6, 2006 that the claimant's current clinical status was not causally related to the motor vehicle accident in question and that, in all probability the motor vehicle related injuries did not result in a reduced work capacity with respect to the Appellant's previous employment as a [text deleted] or other light duties. At that time, [MPIC's Doctor #1] noted that there were significant missing records in the medical file, including clinical notes for the two years prior to the motor vehicle collision in question.

After this opinion was provided, clinical notes were obtained from [Appellant's Doctor] on May 9, 2006 and referred to [MPIC's Doctor #1]. In a memorandum dated May 29, 2006, [MPIC's Doctor #1] noted that the newly submitted information did not change his previous opinion with respect to causation of the claimant's clinical condition.

Given the content of [MPIC's Doctor #1's] opinion of April 6, 2006, it is difficult for the panel to agree that clinical notes which merely confirmed that opinion could be considered information bearing upon a decisive issue which could be expected to affect the result.

Therefore, the panel has determined that [MPIC's Case Manager #1] did not commit a substantive or procedural error in his decision to allow benefits to the Appellant and that the clinical notes from [Appellant's Doctor] obtained on May 9, 2006 did not constitute new information which would support a fresh decision by MPIC. Therefore, the Commission finds that MPIC was not entitled to overturn [MPIC's Case Manager #1's] case management decision and terminate the Appellant's benefits, as it did through [text deleted] decision of June 27, 2006.

Causation:

However, in the alternative, the panel has also reviewed the evidence before it and the submissions of the parties on the question of whether the Appellant's current complaints and symptoms are related to the motor vehicle accident, such that she should be entitled to further PIPP benefits.

> **Definitions**
>
> 70(1) In this Part,
>
> **"bodily injury caused by an automobile"** means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, but not including bodily injury caused
>
> (a) by the autonomous act of an animal that is part of the load, or
>
> (b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile;
>
> **"victim"** means a person who suffers bodily injury in an accident.
>
> **Application of Part 2**
>
> 71(1) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

The onus is on the Appellant to show, on a balance of probabilities, that the symptoms and complaints which have continued to affect her are a result of the motor vehicle accident.

The onus is on the Appellant to show, on a balance of probabilities, that further physiotherapy is required and that she is entitled to further PIPP benefits as a result of injuries sustained in the motor vehicle accident.

The panel has reviewed the evidence of the Appellant and found her to be a credible witness.

While the Appellant admitted having suffered minor aches and pains in the past, and acknowledged that she had pre-existing conditions of scoliosis and degenerative abnormalities (osteo-arthritis), the Appellant described an active lifestyle prior to the motor vehicle accident. She worked full-time, caring for her children, home, lawn and garden, assisting her husband with farming duties, volunteering in the community and participating in a variety of active social and recreational activities.

Her work, duties and activities included:

- Working as a [text deleted] at the [text deleted].
- Assisting with seeding on the family farm in the spring.
- Applying liquid fertilizer to the fields in the spring. The Appellant testified that this was long heavy work of approximately 8 to 10 hours a day.
- Assisting with the harvest in the fall by driving the grain truck and assisting with unloading.
- Caring for horses in the summer including lifting bales weighing between 30 to 40 lbs.
- Cutting and splitting wood for fuel in the fall.
- Raising [text deleted] children and taking them to their activities.
- Horseback riding.
- Snowmobiling.
- Cross-country skiing.
- Entertaining family and friends.
- Household chores such as cooking, cleaning, laundry, spring cleaning, painting and wallpapering.
- Mowing a large yard with a push mower.

- Planting, weeding and caring for the large garden.
- Needlepoint and crochet.
- [Text deleted].
- [Text deleted].
- Member of [text deleted], involved in helping organize events and fundraisers.

The Appellant then described the motor vehicle accident and the injuries which followed. She described her attempts to return to work and the relapse and set-backs which occurred.

The Appellant went back to work at [text deleted] with modified duties, as her injuries precluded her from standing and working at the [text deleted]. She described some relapses when she worked too many hours, but she persevered until her modified job at the [text deleted], where she had worked for many years, was phased out. Although she had long-standing seniority, the Appellant could not perform any of the remaining positions at the [text deleted], since they required too much standing for her to perform.

The Appellant then described attempts she made to find other clerical work. The panel found her to be highly motivated in seeking other jobs and other kinds of training. She was trained as a [text deleted], but found that she could not meet the physical demands of this job. She then began doing [text deleted] work and found a part-time job at [text deleted]. She worked at this job for some time and was so successful that she received a raise in salary which, even for part-time hours, exceeded the amount of IRI to which she was entitled. However, this job became more demanding and the Appellant's hours were increased gradually to full-time status.

The Appellant testified that she could not maintain working at these hours and her health suffered. She experienced a resurgence of her symptoms and relapse of her condition.

Even after the Appellant left her [text deleted] position at [text deleted], she still tried to maintain some [text deleted] work on a private, self-employed basis and sought other work in offices in her area.

The Appellant impressed the panel as a credible, hard-working, industrious and motivated individual who was fully functional prior to the motor vehicle accident but could not maintain full-time employment, even with modified duties, following the accident.

The panel also evaluated the medical evidence on the Appellant's file as well as the oral testimony provided by [MPIC's Doctor #1] at the hearing.

The panel reviewed evidence from the following caregivers, doctors and specialists.

1. [Appellant's Physiotherapist #2], physiotherapist

[Appellant's Physiotherapist #2] treated the Appellant following the motor vehicle accident and provided reports, including a report dated January 23, 2008. She described the impact of the motor vehicle accident upon the Appellant.

> "[The Appellant], on January 9, 1996, was involved in a double impact collision that caused her seat to break in half. These externally applied forces or stresses had to have caused some tissue deformation (strain). Such strain would present minimally as microfailure (elongation of tissues), or, possibly, macrofailure or worse, complete rupture of involved structures. Evidence of such deformation is the significant left cervical neuropraxia [the Appellant] suffered following the accident. Neuropraxia is a temporary physiological block nerve roots due likely to mechanical deformation in this case. Furthermore, the severe hyperextended position she found herself in post collision would likely have resulted in strain to muscular, tendonous, ligamentous,

> osseous, neural and vascular structures in and around the vertebral column. Immediate severe and continuous low back, pelvic and lower extremity pain symptoms that [the Appellant] experienced following this accident are also evidence of significant tissue damage in these areas. In addition, her scoliosis and degenerative changes present would have not only predisposed her to greater tissue deformation (more than someone without such changes) but also reduced her adaptive potential for healing from such traumatic accident. Tissues in this area would have been under tension and/or compression already. Further insult would likely have caused increased damage resulting in macrofailure and, likely, pain…
>
> [The Appellant's] subjective symptoms' reports have remained consistent from the various professionals' assessment since the accident. Her symptoms increased with increased work demands and work hours preventing her from resuming full time duties. This aggravation of symptoms occurred repeatedly after several return to (fulltime) work attempts. Furthermore, she was never able to return to farming duties or recreational activities she had previously participated in. Medical findings, physiotherapy assessments and functional capacity evaluations revealed a decrease in active range of motion, neurological status and functional and ergonomic capabilities since the accident. Prior to the accident she was functioning normally. It is my professional opinion that [the Appellant's] motor vehicle accident had a direct impact on her condition and resulted in her current symptoms and decreased level of function."

2. [Appellant's Physiotherapist #1], physiotherapist

[Appellant's Physiotherapist #1], a physiotherapist with [text deleted], treated the Appellant and provided a report dated January 31, 2008. She describes the Appellant's difficulties from March to May of 1996:

> "These continued flare-ups throughout the time frame (from March and into early May) are definitely related to the original motor vehicle accident and demonstrate early that the tissue was not able to withstand normal forces placed upon it, along with a disruption in the healing phases. Her exacerbation in symptoms correlates to very slight increases in activity which would not normally induce a reoccurrence and/or decreased function. These more appropriate "exacerbations" in her pain response, evident at a very early stage in the healing phases show that there is a significant struggle for the body to function and that the tissues healing phases were not progressing well.
>
> Throughout the same timeframe, there is a direct correlation in return to full time status at work and problems within a short period of time, in contrast to the good tolerance of exercise, treatment and restricted work hours with part time duties. Her restricted level of function at the time of her exacerbations in March through out May cannot be attributed to underlying pathology and/or arthritis, as her activity level had remained very well controlled and well below her normal active levels of function experience prior to her motor vehicle accident. As well, there was always a correlation in her

> objective findings with a reduction in mobility and observed difficulty with gait patterns and sitting tolerance…
>
> The physiotherapy report dated July 23, 1996 has not been written by the attending, regular physiotherapist but by the interim therapist correlating progress to symptoms and treatment guidelines. "Symptoms are definitely aggravated by too much stressful work involving bending and lifting, vacuuming or pushing and pulling." It does not document on any information regarding extent of recovery or comments on functional limitations. She would not be in a position to comment on the status of recovery over such a short period of time given the chart information. It is very evident that [the Appellant] had not fully recovered from the effects of her motor vehicle accident by June or July of 1996 and continued to suffer ill effects…
>
> With regards to CT evaluation and stenotic changes, again these are slow to progress and when given time, adapt and incur minimal symptoms which are not acute. The history and clinical picture in this case is not the same type of pain pattern with the variability in symptoms and treatment response. The above trauma placed stress onto the soft tissue and ligamentous structures with two impacts at high velocities through separate levels of the spine creating an environment that was not capable of resolving. In the early period of time phase the inflammatory would contribute to the multitude of signs and symptoms and would respond with initial improvement. As the demands increased with return to work and further attempts at home activities, the system failed."

3. [Appellant's Physiotherapist #3], physiotherapist

[Appellant's Physiotherapist #3] was a physiotherapist who provided progress notes dated July 23, 1996 which [MPIC's Doctor #1] relied upon to conclude that the Appellant had recovered from the effects of her motor vehicle collision related injuries by July 1996.

As noted by [Appellant's Physiotherapist #1], [Appellant's Physiotherapist #3] was not the Appellant's regular treating physiotherapist but had acted as [Appellant's Physiotherapist #1's] replacement while she was away on holidays. She noted at that time (in July of 1996) that the Appellant's symptoms were aggravated by too much stress, full work involving bending and lifting, vacuuming or pushing and pulling, that treatment was occurring twice weekly and progression was occurring at a slow but steady rate.

4. [Appellant's Doctor], family physician

[Appellant's Doctor] was the Appellant's treating physician in 1994, two years prior to the motor vehicle accident. He continued to treat her following to the motor vehicle accident. In a report dated January 17, 2008, [Appellant's Doctor] stated that he did not agree with [MPIC's Doctor #1's] conclusions as to whether the Appellant's relapses were related to her pre-existing lumbar spine issues.

He noted that:

> "The x-ray reports apparently show little deterioration between 1983 and 1995. As such, this would go against the opinion that continual degenerative disc disease could have resulted in the disability of [the Appellant]."

[Appellant's Doctor] confirmed that despite the fact that x-rays showed that she had degenerative disc disease, during the two years prior to the accident, while the Appellant was his patient, she was fully functional and this condition in no way interfered with her actively participating in working full-time at [text deleted], working in farming, performing all of her household duties and all of her leisure activities. He indicated:

> "I disagree with [MPIC's Doctor #1's] assessment. The patient clearly functioned in a full-time manner in all spheres of function. After the accident, she has never functioned fully in any sphere. As such, there is no doubt in my mind that the accident resulted in a decrease in function…
>
> This relapse in July, 1996 would not have occurred if the accident had not happened."

5. [Appellant's Physiatrist], physiatrist

The Appellant was seen by [Appellant's Physiatrist], in consultation, in 1998, 2004 and 2006. In his report dated July 15, 1998, [Appellant's Physiatrist] indicated that his examination found the Appellant to have restriction of movement and revealed:

> "Marked tenderness throughout the lumbar spinous processes and the interspinous ligaments. There was quite marked tenderness in the lumbar paraspinals at L1-L3 level

> bilaterally. There is also lesser tenderness in the paraspinals in the buttock region. The right buttock musculature is more tender. The musculature contains myofascial trigger points at all levels."

Although [Appellant's Physiatrist] indicated that the Appellant's lumbar scoliosis may be a contributing factor to her ongoing lower back discomfort, he did not think it was the primary pain generator. He did identify multiple muscle myofascial pain syndrome and myomechanical low back pain.

With regard to causation, he noted:

> "My understanding of her situation is that she was involved in quite a significant double-impact collision. She had a longstanding pre-MVA spinal scoliosis for which she was not in need of medical care. Due to the MVA she suffered a WAD II injury to the low back, in addition to other injuries. I believe that due to the pre-existing condition of her spine, she was unable to recover fully in the manner that might be expected in a person with a "normal" pre-MVA spine. This might be referred to as the "thin skull" or, "crumbling skull" within the legal setting. As such, it is my opinion that the natural history of this lady's low back pain would have probably included gradual worsening over time, and possibly also included some degree of disability as well. However, prior to the MVA she did not complain of pain in the back was not seeking care and treatment for it. Subsequent to the MVA she did develop pain and disability which is quite plausible given the nature and severity of her pre-MVA spinal scoliosis and the description of her MVA.'

6. [Appellant's Orthopaedic Surgeon], orthopaedist

[Appellant's Orthopaedic Surgeon] is an orthopaedist who saw the Appellant in consultation in October 2006 and provided a medical report dated October 31, 2006. Upon examination of the Appellant he found limited range of motion and noted a hyperextension injury of the lumbar spine across the broken car seat with extension of her neck as well. He concluded:

> "There is no doubt that this lady has underlining scoliosis. 60 degrees scoliosis is rather severe scoliosis. However, there is no doubt that the problem was severely aggravated by the accident that she was involved in. There is no doubt that her working potential and especially the length of time that she would have worked was affected to the detriment by the accident. It is therefore clear that there is a portion of blame to be caused by the accident, as well as a partial apportionment of blame on the underlying scoliotic deformity. I would consider this to be approximately 50-50 apportionment."

7. [Appellant's Neurologist #2], neurologist

[Appellant's Neurologist #2] examined the Appellant in consultation on November 14, 2005, January 27, 2006 and December 6, 2006. He confirmed the Appellant's diagnosis of mechanical back pain, degenerative scoliosis, spinal stenosis and facet arthropathy. He concluded:

> "I completely agree with [Appellant's Orthopaedic Surgeon], in spite of the fact that [the Appellant] has already a pre-existing scoliosis, this was definitely worsened and aggravated by the accident."

He was also of the opinion that the Appellant was totally disabled from working.

8. [MPIC's Doctor #1]

[MPIC's Doctor #1] is a Health Care Consultant for MPIC's Health Care Services Team, who provided two opinions to MPIC on April 6, 2006 and on May 29, 2006. He also testified at the hearing into the appeal.

[MPIC's Doctor #1] reviewed the Appellant's pre-existing conditions, her injuries from the motor vehicle accident and the treatment which she received for them. He noted that she had returned to work in July of 1996. As far as [MPIC's Doctor #1] was concerned, the Appellant had recovered from the motor vehicle accident at that point. Any relapses the Appellant suffered, in terms of symptoms and complaints, were then related to her pre-existing scoliosis and osteo-arthritis, exacerbated by unrelated minor incidents, such as her pet dog jumping up on her. In his view, all of the Appellant's caregivers, who had attributed her symptoms and complaints to the motor vehicle accident, even in part, had based their findings only upon the Appellant's subjective symptom complaints. In his view, the only objective findings related to the Appellant's pre-existing conditions.

However, the panel notes that [MPIC's Doctor #1] did not have the opportunity to examine, assess or observe the Appellant. In spite of this, he rejected the conclusions of several specialists and caregivers, including physiotherapists, [Appellant's Doctor], [Appellant's Physiatrist], [Appellant's Orthopaedic Surgeon] and [Appellant's Neurologist #2], who examined, assessed and treated the Appellant, yet came to very different conclusions from [MPIC's Doctor #1].

Counsel for MPIC took the position that the Appellant suffered from a pre-existing condition and that the motor vehicle accident did not contribute to or cause the relapse of symptoms which occurred in 2003 and 2004. Based upon [MPIC's Doctor #1's] assessment of a lack of objective findings connected to the motor vehicle accident, MPIC concludes that the Appellant's symptoms and condition from 2003 to date do not relate to the motor vehicle accident.

The Appellant takes the position that the motor vehicle accident materially contributed to her injuries and exacerbated or aggravated her existing condition. Counsel referred to the Supreme Court of Canada decision in *Athey v. Leonati*, [1996] 3 S.C.R. 458 which explained the "thin skull" rule, where a tort feasor is reliable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition.

Counsel also quoted from Richard Hale's text "Disability Insurance Canadian Law and Business Practice" which provides a summary of law relating to chronic pain conditions which can be caused as a result of motor vehicle accidents.

> "Crippling pain, with minimal or no organic origins, is the source of significant proportion of long term disability claims. In some cases there is no discernible source for the pain at all; in other cases the pain originates in an accidental injury, an illness, a congenital condition, or in a surgical procedure.
>
> A survey of the reported disability insurance cases brings to light many instances in which there is a marked discrepancy between the extent of the insured's physiological

problem and the severity of the pain he reports. Physicians experienced in the treatment of pain have stated that it is common that the objective findings do not correlate with a patient's pain, and admit that medical understanding of the etiology of pain is still in its early states.

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 reason 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. <u>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.</u>

The courts are well aware that problems secondary to the pain often contribute to the insured's disability. Examples include sleeplessness, with its associated fatigue and inability to concentrate, as well as the distraction which results when the insured has to direct much of her energy and attention to coping with pain. In other cases, the insured's incapacity is exacerbated by drugs which he needs to deal with his pain, or by another illness.

An insured is considered disabled if his pain prevents him from performing work to the standard of a reasonable employer. This means that if the type of job under consideration is normally full-time, the insured must be able to work a full day consistently and regularly, and the courts do not expect the insured to find an employer who will accommodate his need for frequent breaks, flexible hours, special equipment and other departures from the normal conditions of work unless there is evidence that such employers actually exist.

Cases in which there is a "waxing and waning" character to the insured's pain are common. Thus a person who experiences chronic, disabling pain may have good spells, some of which last for days or even weeks, in which he is able to function normally. Since the standard of the reasonable employer applies, these individuals will be considered disabled so long as they lack the consistency and endurance needed in order to work under normal conditions of employment over an extended period."

Counsel for the Appellant also cited decisions from the Commission which adopted with approval principles such as those enunciated by Mr. Hale's text, in such cases as *[text deleted]* re 2005 MAICACD 36; *[text deleted]* re 2005 MAICACD 44; *[text deleted]* re 2004 MAICACD 51. Counsel submitted that in these situations, the Board considers whether the individual has complained of the symptoms over the duration of their medical and physiotherapy experience, and whether the subjective symptoms are supported by personal physical examination and analysis by an experienced medical professional.

Counsel for the Appellant also reviewed the Commission's decision in *[text deleted]* 2005 MAICACD 9, where the Appellant had degenerative changes which appeared on scans prior to the motor vehicle accident. However, he was asymptomatic, did not have a chronic back condition and was working full-time at the time of the motor vehicle accident.

The Commission considered the temporal relationship of the accident to his difficulties, and noted that since the accident, he could not do the things he used to do before. He did not have the same strength. He was prevented from working until September 2002, but then returned to work, with the same symptoms returning in August of 2003. The Commission held the symptoms were of the same nature that he had been continuing to experience since the accident and were connected to the accident. The Commission found he was entitled to ongoing IRI benefits.

In the case of re *[text deleted]* 2004 MAICACD 11, the Commission was asked to review a claim in which an individual's IRI benefits were discontinued on the basis of the MPIC consultant's review, which concluded that the claimant's disability was pre-existing and that the motor vehicle accident injuries did not contribute to her ongoing inability to return to work.

The Commission held that the motor vehicle accident caused or materially contributed to the Appellant's condition and precluded her from returning to her pre-accident employment.

Finally, the Appellant referred to the Commission's decision in *[text deleted]* AC-06-132. The Appellant in that case had a pre-existing history of degenerative change to the lumbar region and a pre-existing spondylolisthesis. Following whiplash injuries in a motor vehicle accident, with reports of increased lower back pain and lumbar spasms, his soft tissue injuries affecting his neck responded well to physiotherapy, chiropractic and medication treatment, while his lower back complaints had not responded as well. The Commission stated:

> 'The panel has reviewed the evidence of the Appellant at the hearing and compared it with the accounts reported by his caregivers. We found the Appellant to be a credible witness. He described a work history of heavy work on heavy equipment. He did not suffer from chronic back problems. He described temporary incidents where he suffered from back problems, often as a result of his work. However, these incidents quickly resolved following treatment with anti-inflammatories, analgesics, or a few visits to his chiropractor. This was confirmed by his chiropractor's report of December 20, 2004 which described two visits in April of 2003 and four visits in October and November of 2003 (October 28, November 3, November 7 and November 12) for back pain, following which he was discharged as essentially pain free and deemed recovered.
>
> This is also consistent with the lack of incidents of back pain noted in [Appellant's Doctor's] chart notes. The panel is left with the impression of an active individual who was working, with no back complaints, aside from a few temporary incidents of back pain which were fully resolved by a few chiropractic treatments.
>
> The panel finds that the Appellant did not have persistent back complaints prior to the motor vehicle accident. He had only intermittent and brief incidents of back pain, without chronic back pain, symptoms or complaints prior to the motor vehicle accident.
>
> Subsequent to the motor vehicle accident, the medical evidence shows that the Appellant suffers from chronic low back pain. He did not suffer from this pain prior to the motor vehicle accident. Therefore, the panel finds that the motor vehicle accident has enhanced or exacerbated the Appellant's pre-existing degenerative, previously asymptomatic condition of his lumber spine.

> As a result, the panel finds that the Internal Review Officer erred in finding that the Appellant's persistent lower back complaints and symptoms were not caused by the motor vehicle accident. We find that the decision of the Internal Review Officer dated May 26, 2006 should be overturned and the Appellant's specific entitlement to further PIPP benefits should be returned to the case manager for determination.'

The panel finds that the Appellant in this case was, prior to the motor vehicle accident, an active, hardworking, extremely industrious individual. We find that she did have pre-existing diagnosed conditions of scoliosis and osteo-arthritis, which caused her minor and infrequent discomfort, for which she periodically sought some treatment from her general practitioner, mostly in the form of Arthrotec and anti-inflammatories. These reduced or eliminated her symptoms. These pre-existing conditions did not affect her ability to work at her job, farm, garden, care for her home and children, participate in community volunteer work, or social and recreational activities and sports, prior to the motor vehicle accident.

Following the motor vehicle accident, the Appellant was no longer able to participate in many or most of these activities and was not able to sustain full-time employment or carry out the full duties of her previous occupation.

MPIC provided benefits, including IRI benefits to her and funded replacement labour for the family farm operation.

The bulk of medical opinion which the panel has reviewed supports the conclusion that the Appellant's symptoms and disabilities following the motor vehicle accident can be attributed to the injuries she suffered in that accident. The doctors and physiotherapists who assessed, examined and treated the Appellant were of the view that the motor vehicle accident materially contributed to or severely aggravated the Appellant's condition. She was unable to recover fully

from the motor vehicle accident. While the medical opinions recognized the existence of pre-existing conditions, these medical professionals were of the view that they were not the "primary pain generator" but rather that this pre-existing condition had been "definitely worsened and aggravated" or "severely aggravated" by the accident, and that the Appellant was disabled from working as a result.

Accordingly, the panel finds that the Appellant's symptoms and injuries, including the relapses in her condition, were attributable to the motor vehicle accident and that she is entitled to further Personal Injury Protection Plan benefits as a result. The Appellant's appeal from the Internal Review Decision of February 12, 2009 is allowed. The Appellant's entitlement to further PIPP benefits, including IRI, will be referred back to her case manager for determination.

Physiotherapy

The onus is on the Appellant to show, on a balance of probabilities, that further physiotherapy treatment is medically required.

> **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;
>
> (b) the purchase of prostheses or orthopedic devices;
>
> (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
>
> (d) such other expenses as may be prescribed by regulation.

Reimbursement of expense paid by other person

136(2) A person who pays an expense referred to in subsection (1) on behalf of a victim is entitled to reimbursement of the expense.

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;

Counsel for MPIC took the position that the Appellant had already received in excess of 275 physiotherapy treatments since the motor vehicle accident and that the medical documentation on file does not support that further advances in recovery are being gained with this modality of treatment.

[MPIC's Doctor #1] supported this view and in an opinion dated December 8, 2004 he noted that the Appellant had reached maximum medical improvement (MMI) with respect to injuries sustained in the motor vehicle collision in question. Ongoing in-clinic physiotherapy, he opined, was not medically necessary in the treatment of her injuries attributable to the motor vehicle collision.

[Appellant's Physiatrist], in a report dated March 19, 2004 also noted that the claimant had reached her maximum medical improvement (MMI) and it was not expected that further specific medical and rehabilitation treatments would provide any additional benefit.

Counsel for the Appellant took the position that physiotherapy was necessary to help the Appellant manage her pain. She pointed to a report from [Appellant's Doctor] dated November 8, 2004 which stated "the physiotherapy that she receives definitely provides her with benefit and maintains her level of functioning. I believe it would be prudent to continue funding of her treatments."

The physiotherapist, [Appellant's Physiotherapist #2], wrote on November 15, 2004 that:

> "It is my opinion that Physiotherapy treatments significantly help this woman in decreasing her pain level and maintaining her current level of function. Should these treatments be discontinued, I do not believe that this woman's level of function will deteriorate and prevent her from being able to work the fifteen hours per week that was recommended by [Appellant's Physiatrist]."

The panel has reviewed this evidence and the submissions of counsel and finds that after 275 physiotherapy treatments, without specific evidence of improvement and progress, continued physiotherapy treatment for the Appellant cannot be considered medically required. Although reports from [Appellant's Doctor] and [the Appellant's Physiotherapist #2] do recommend further physiotherapy for relief of pain and enhancement of function, the Appellant has not provided sufficient detailed evidence to meet the onus upon her of showing, on a balance of probabilities, that further physiotherapy treatment after December 10, 2004 was medically required.

The Commission agrees with the evidence of [MPIC's Doctor #1] and [Appellant's Physiatrist] that the Appellant has not achieved further significant gains or improvements through physiotherapy and has reached maximal improvement from that modality of treatment. Accordingly, the Appellant's appeal from the Internal Review Decision of February 7, 2005 is dismissed.

Her appeal from the Internal Review Decision of February 12, 2009 is allowed and will be referred back to the case manager for determination.

Dated at Winnipeg this 30th day of August, 2010.

LAURA DIAMOND

DR. SHELDON CLAMAN

PAUL JOHNSTON