Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-046

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Paul Johnston** **Mr. Les Marks**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted]** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.**
HEARING DATES:	**June 9 and 10, 2010, July 31, August 1, 2, 7, 8, 9 and 14, 2012.**
ISSUE(S):	**1. Whether the Appellant is entitled to reimbursement for the cost of a replacement worker.** **2. Whether the Appellant was properly assessed as being able to perform 33% of her work duties.** **3. Whether the Appellant's Income Replacement Indemnity benefits were properly terminated as of July 2, 2004.** **4. Whether the Appellant is entitled to further funding for chiropractic treatments.**
RELEVANT SECTIONS:	**Sections 81, 110(1)(a), 135, 136 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 APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

The Appellant was injured in a motor vehicle accident on February 13, 2003. At the time of the accident, the Appellant was a self-employed owner/operator of a [text deleted] business.

Following the accident, the Appellant sought various forms of treatment, including chiropractic treatment and treatment from her family doctor and specialists. Medical information confirmed that she was unable to continue performing the duties of her occupation as a result of her motor vehicle accident injuries, and the Appellant began receiving Income Replacement Indemnity ("IRI") benefits for MPIC. She was classed as a full-time earner at the time of the accident in a class of employment defined as a "Take-out Attendant – Fast Food" within the "Food and Beverage Serving Occupations" under Schedule C of Manitoba Regulation 39/94.

The Appellant also requested that MPIC provide reimbursement for labour costs incurred when the [text deleted] business had to hire additional help as a result of the Appellant's motor vehicle accident's injuries.

On October 23, 2003, the Appellant's case manager wrote to her setting out her entitlement to IRI benefits and indicating that an occupational therapist had completed a Percentage of Duties Report which indicated that she was able to complete 33% of her employment related duties. As a result, MPIC provided only a top-up of IRI benefits, taking into account the 33% of duties that it had determined the Appellant was able to perform.

The Appellant's case manager also indicated that coverage for labour cost reimbursement was only available to individuals who had been working for no remuneration in a family enterprise at the time of the motor vehicle accident and were required to hire replacement help and incurred a cost in doing so.

The case manager indicated that the Appellant did not fall within this category and did not qualify for replacement worker expense reimbursement.

The Appellant also sought further chiropractic care. On June 18, 2004, the Appellant's case manager wrote to her indicating that MPIC had reviewed her chiropractor's report requesting additional care. That report, dated April 28, 2004, had indicated that the Appellant's current inability to work had more to do with anemia and her gynecological condition as opposed to the ill effects of the motor vehicle accident. Accordingly, the case manager found that the Appellant would have been able to return to the employment she held at the time of the car accident had it not been for the unrelated diagnosed medical conditions of anemia/gynecology. Accordingly, her IRI benefits would be terminated, effective July 2, 2004, pursuant to Section 110(1)(a) of the MPIC Act.

Further, the case manager indicated that as the medical evidence supported that she had reached maximum therapeutic benefit, further passive therapies would no longer be a necessity and MPIC would not fund any further rehabilitative care past July 2, 2004.

The Appellant sought an Internal Review of these case management decisions.

On January 16, 2006, an Internal Review Officer for MPIC found that the Appellant was not entitled to receive reimbursement for a replacement worker, as she had not been working in a family enterprise without remuneration prior to the motor vehicle accident.

The Internal Review Officer also concluded that the occupational therapist had been correct in finding that the Appellant was capable of performing 33% of her job duties and this decision of the case manager was confirmed. Further, the Internal Review Officer found that, after

consultation with MPIC's chiropractic consultant, the Appellant's inability to work did not relate to the motor vehicle accident, but rather, was related to her anemia and her gynecological situation. Accordingly, the Internal Review Officer confirmed the case manager's decision to terminate the Appellant's IRI benefits because her physical inability to perform her job duties was not related to the motor vehicle accident.

The Internal Review Officer also confirmed that following consultation with MPIC's chiropractic consultant as well as a review of a third party chiropractic assessment, the case manager's decision to terminate the Appellant's chiropractic benefits should be upheld, as they were no longer medically required.

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

The hearing into the Appellant's appeal commenced on June 9 and 10, 2010. The Appellant was represented by the Claimant Adviser Office. The panel heard oral testimony from the Appellant, who was cross-examined. The Commission also heard evidence from an occupational therapist, [MPIC's occupational therapist #1], and a chiropractor, [Appellant's chiropractor #1]. Both were cross-examined. However, [Appellant's chiropractor #1]'s cross-examination was adjourned in order to obtain his clinical and chart notes, requested by counsel for MPIC.

Before the hearing was reconvened, the Appellant obtained new counsel, retaining [Appellant's representative]. Following a series of Case Conference Hearings, the parties agreed that [Appellant's representative] had received sufficient briefing from previous counsel, including a review of her hearing notes, to allow him to continue as counsel for the Appellant without the need to repeat the hearing dates and testimony which had already been heard by the Commission.

In the interim, counsel for MPIC obtained further videotape surveillance evidence of the Appellant which it sought to introduce as rebuttal evidence. Although counsel for the Appellant objected to the late filing of this surveillance material obtained after the beginning of the hearing, the panel advised that it would allow the videotaped evidence to be adduced only for the narrow purpose of rebutting the evidence which the Appellant had provided at the hearing on June 9 and June 10, 2010, regarding the use of her cane. The Appellant had testified that she started using the cane approximately five years after the motor vehicle accident and that she was using it because of the motor vehicle accident. She testified that her general practitioner had told her to use whatever she could to get around and that she could use a cane. Accordingly, the Appellant used a cane that her father-in-law had made for her but that MPIC had not paid for. The Commission indicated that it would allow, as admissible evidence, videotape evidence intended to rebut that portion of the Appellant's testimony and her credibility in that regard. The Appellant would be entitled, should she so choose, to respond to the evidence contained in the videotapes, but was under no obligation to provide further testimony. Should she choose to provide further oral evidence, the scope of any cross-examination in that regard would be limited to the issues touching upon her use of the cane.

The hearing was reconvened on July 31, 2012.

<u>Evidence for the Appellant:</u>

1. **The Appellant:**

The Appellant testified at the hearing of her appeal. She described her physical and emotional health prior to the motor vehicle accident as very good. She enjoyed working full-time in the family business, and enjoyed an active social and family life. She said that she had some health

issues like all people, but this had never stopped her from going to work. She described her history as a [text deleted] and working in the family [text deleted] business.

The Appellant had four children and explained that she started having some gynecological problems when she was approximately [text deleted] years of age. However, she was still [text deleted] full-time and these problems had never stopped her from going to work, either at [text deleted] or later, in the family business. She experienced some tiredness at that time, but had no real complaints of pain.

The Appellant also described a period of depression which she experienced following a bankruptcy of her husband in 2000. She described the episode as minor, requiring some treatment for a year, but explained that she still worked alongside her husband the whole time during that period. She talked to her doctor about it, and, with the assistance of some medication, was able to overcome her feelings and continue working.

The Appellant described the motor vehicle accident and the symptoms which she experienced afterwards. She had very limited range of motion, felt pain all the time in her neck and arms and could not do any repetitive physical work. She felt weak all the time and was not able to do housework or make the meals as she previously done.

She described the various treatments she had sought with her family physician, massage therapist and chiropractors.

The Appellant also gave a detailed description of her work in the [text deleted] business. She described everything from the purchasing of supplies, to the [text deleted] and other physical demands of running the business on a day to day basis. The business had a few different locations, which mostly consisted of kiosks [text deleted]. The business was small but efficient and it was not uncommon for one worker to staff a kiosk. The customer traffic was variable, with some locations having a steady stream of customers, and others seeing the customers come in waves. Working in the booth was very physically demanding, involving a lot of lifting pails, [text deleted] and lifting them on trays above the head, twisting, reaching. There was both standing and sitting involved. There were also some bookkeeping duties and the Appellant was planning to take an accounting course. After the motor vehicle accident, she found she could not do that and gave everything over to an accountant.

The Appellant described how her pain, fatigue and limited range of motion after the motor vehicle accident prevented her from performing her duties in the business.

The Appellant also described her meetings with the occupational therapist provided by MPIC, [MPIC's occupational therapist #2], who conducted an assessment of the duties involved in her job. This resulted in recommendations for some ergonomic assistance, which included a sit/stand stool, flooring mats, and structuring her work to involve frequent rest breaks. The Appellant explained that the flooring mats were helpful as they made standing on the cement more comfortable. However, the stool was awkward and she found it particularly challenging to accommodate the size of the stool in the small kiosks. She indicated that there were many instances where she had to stand up to [text deleted] or to get something down from the shelves and the stool would then get in the way. She also found that it was heavy and that she could not have lifted it up and carried it from one booth to another, as she did not work only at one kiosk.

The Appellant also explained that the recommended structure of working for five to fifteen minutes and then resting for a half-hour was not practical in her business. The only thing she found she could do according to this schedule was to give breaks to her staff. She explained that at least she felt somewhat productive taking over for her staff so that they could have a fifteen minute break. The Appellant indicated that while she was happy to meet with [MPIC's occupational therapist #2], she would have preferred for him to have met with her when they were actually having an event so he could see what the job was actually like, rather than just having him assess her when they were getting ready for an event, as he had done.

The Appellant described her assessment meeting with [text deleted], an independent chiropractic expert, who examined her for MPIC. She indicated that she felt vulnerable during this session and found the stretches which he asked her to do quite difficult.

The Appellant gave evidence, both in her direct examination, and on cross-examination regarding the fatigue and pain she felt following the motor vehicle accident. She explained that while she had sometimes suffered from tiredness at points previous to the motor vehicle accident, and had had some difficulty with depression (mostly due to her family's situation with bankruptcy), she never had any trouble working and never suffered from the kind of pain which she felt following the motor vehicle accident. She never had pain like that before the motor vehicle accident, and her complaints of fatigue, before the motor vehicle accident, came only after working hard during an eight hour day. She explained that she did not have low iron or anemia, but rather that she did have some gynecological problems with bleeding, which were resolved.

She described how the motor vehicle accident affected her work, family and social life. She was not the same person as she had been before. She could not do a lot of things she used to be able to do. Dinners didn't happen anymore, there were no social engagements, she could not work and her husband had to do everything, while she suffered from pain and fatigue. She sought assistance from various physicians and chiropractors and wished that MPIC would have been more patient with her and allowed her to get better.

2. [MPIC's occupational therapist #1]:

The parties agreed that [MPIC's occupational therapist #1] was qualified as an occupational therapist.

The panel reviewed a report provided by [MPIC's occupational therapist #1] on November 10, 2009, in addition to her oral testimony at the hearing. A review of [MPIC's occupational therapist #1]'s report dated November 10, 2009, along with her evidence at the appeal hearing indicates the following:

- [MPIC's occupational therapist #1] provided occupational therapy consulting services to MPIC between 1996 and 2005. During that time, she developed a tool called a Percentage of Duties Assessment. It was originally developed for use with self-employed farmers because of the complexity of what they do and the difficulty of assessing the job. In her experience, it was then also used when negotiating with claimants in order to arrive at an agreement to reduce claimant's entitlement to IRI benefits according to what they could still do.

- [MPIC's occupational therapist #1] was provided with the report from [MPIC's occupational therapist #2], including the Percentage of Duties Assessment, and a variety of medical and other documentation from the Appellant's file. As a result of this review, she came to the following conclusions, expressed in her report of November 10, 2009:

  - "The claimant's depression was in remission at the time of the MVA. The exacerbation of the condition was temporally connected to the accident (approximately one month post) and connected with respect to circumstance. These two connections are suggestive of a relationship between the depressive episode and the MVA.
  - ...as of September 18, 2003, the claimant's work restrictions were no heavy lifting, no prolonged repetitive tasks and no prolonged standing. However, on September 22, 2003, [text deleted] requested [MPIC's occupational therapist #2] assess the claimant's ability to perform her duties based on the prolonged standing restriction alone.

  However, based on the Physical Demands Analysis, the claimant's job requires her to perform the following:

  1. Movement of neck flexion for a total time of over 2.5 hours (at the least). Each neck flexion movement was approximately 15 seconds in duration. This means that the movement of neck flexion was required 18 times per minute for the entire eight hour shift. This would be considered a repetitive movement which was a work restriction.
  2. Neck rotation (right and left combined) for a total time of 5 hours (at the least) with each rotation lasting 5 seconds means that this movement was even more repetitive than the movement of neck flexion. This would be considered a repetitive movement which was a work restriction.
  3. Constant forward reaching less than 5 seconds. This would be considered a repetitive movement which was a work restriction.
  4. Constant manual handling. This would be considered a repetitive movement which was a work restriction.
  5. Constant shoulder to waist lift of 5 kg. This would be considered a repetitive movement which was a work restriction.
  6. Frequent carrying of 5 kg. This would be considered a repetitive movement which was a work restriction.

  In summary, the assessment of the portion of the duties the claimant could perform is based on only one of three restrictions. Considerable repetitive movements and frequent lifting and carrying were not considered in this assessment. If all restrictions were considered, the claimant would be totally restricted from pre-MVA employment.

- ...Without consideration for the questionable validity of the assessment method, all restrictions were not considered when completing the assessment. Based on this, the percentage of duties information is not valid.

  - The sit/stand stool recommended by [MPIC's occupational therapist #2] was not a practical solution to reduce the standing requirements upon the Appellant.

  - "[Independent chiropractor] concluded that the claimant's condition seems to be related to anemia and depression. MPI had previously refused to accept responsibility for the exacerbation of depression. The claimant's co-existing anemia had not restricted the claimant's work activities prior to the MVA.

  - In making decisions, all work restrictions were not considered, inconsistent information was not clarified, and missing information on reports was taken to mean that the physician agreed with MPI's position...

  - Information also suggests that the client was not able to return to her employment when the decision to end benefits was made."

- In [MPIC's occupational therapist #1]'s opinion, the ergonomic recommendations set out by [MPIC's occupational therapist #2] did not translate well to the real life situation which the Appellant faced in working at the [text deleted] kiosks and might be particularly difficult to translate into action in the case of a self-employed individual.

3. [Appellant's chiropractor #1]:

The parties agreed that [Appellant's chiropractor #1] was qualified as a chiropractor.

[Appellant's chiropractor #1] provided a report dated July 6, 2009, as well as clinical chart notes for the period from May 26, 2008 to September 1, 2010. A review of these reports and [Appellant's chiropractor #1]'s oral testimony at the hearing indicates the following.

- On July 6, 2009, [Appellant's chiropractor #1] reported:

> "Based on history, examination, and x-ray findings, it is of my opinion that [the Appellant] is suffering from Fibromyalgia like symptoms triggered by a traumatic injury, as in this case, a motor vehicle accident. This diagnosis is based on the fact that given the number of years that [the Appellant] has had these symptoms and given the numerous treatment modalities that she has received, there has been no consistent long-term improvement noted. When one reviews the definition of Fibromyalgia, the one common conclusion that most practitioners agree upon is there are no definitive treatment and no definition cures for this condition...
>
> In [the Appellant]'s case specifically, 30 chiropractic treatments were performed from May 26th, 2008 to September 24th, 2008...
>
> ...Those areas of discomfort found with chiropractic examination were extensively worked with no long-term change... Because of lack of improvement, care was mutually discontinued. I have since spoken to [the Appellant]'s husband who states that there has been no definitive change for the better since September 2008."

- Based on the Appellant's history, examination and X-rays, [Appellant's chiropractor #1] believed her to be a true historian of her problems. Although she had not been a patient of his prior to 2008, he found her to be a true historian of her problem and not a malingerer, and he treated her consistently with her injuries from the motor vehicle accident.

- [Appellant's chiropractor #1] did not find any neurological problems in the Appellant's condition. However, he indicated that she still had muscular and skeletal components to her pain resulting in his finding that she was suffering from a chronic pain condition. In the absence of a specific test for fibromyalgia, [Appellant's chiropractor #1] described the Appellant's diagnosis and assessment as "fibromyalgia-like". He described it as a type of pain presentation which falls into a chronic pain category, but is not quantifiable.

- In [Appellant's chiropractor #1]'s opinion, the Appellant was initially a candidate for chiropractic care, but after seeing no long-term benefit, he chose to discontinue her care.

He felt that she still suffered from problems due to the motor vehicle accident, but that she had plateaued, so he encouraged her to continue seeking other types of care that might help, including exercise and nutrition.

- Fibromyalgia is similar to myofascial pain. It is a chronic long-term syndrome including symptoms of multiple joint pains and aches, fatigue, inability to perform tasks, radiculopathy weakness in the legs, and nerve irritation. The terms fibromyalgia and myofascial pain can be used interchangeably as a constellation of symptoms and impairment which can be debilitating.

- As a chiropractor, [Appellant's chiropractor #1] does not feel qualified to diagnose and treat anemia. If he suspects a patient is suffering from anemia, he will request blood work from the family physician and request that the doctor go over it.

4. [Appellant's doctor #1]:

The parties agreed that [Appellant's doctor #1] was qualified as a family practitioner.

[Appellant's doctor #1] provided reports dated June 23, 2003, September 2, 2003, March 1, 2004 March 4, 2005 and clinic notes from the period of May 24, 2001 and September 11, 2003. He also testified at the hearing into the Appellant's appeal. A review of these reports and his testimony at the hearing indicates the following:

- [Appellant's doctor #1] has 44 years experience as a practicing family doctor and treated the Appellant between 2001 and 2008. He saw her between 250 and 300 times.
- [Appellant's doctor #1] referred the Appellant to a neurologist, who did not find any evidence of a neurological process and was of the impression that the Appellant's pain stemmed from musculoskeletal etiology, more of a myofascial type of pain.
- In [Appellant's doctor #1]'s opinion the Appellant was "not able to work in a prolonged standing position" (report of March 1, 2004).
- In his report of March 4, 2005, [Appellant's doctor #1] stated:

  "Since her motor vehicle accident of February 13, 2003, [the Appellant] cannot work at the previous occupation which was operating a [business] [text deleted]. She is unable to do twisting motions like serving people and looking after the stock because this gives her too much pain...
  You mentioned objectivity in your letter to [the Appellant]. My diagnosis has to be myofascial pain. Sure she happened to be depressed and sure she happened to have point tenderness compatible with fibromyalgia but the point is prior to the MVA of February 13, 2003 she did not have pain, she was able to function very well at the concessions."

- [Appellant's doctor #1]'s diagnosis of myofascial pain was based upon the Appellant's signs and symptoms following his examination. In his view, myofascial pain is pain to muscles, tendons, and surrounding muscle tissue. He considers this syndrome can be loosely interchangeable with the concept of fibromyalgia. However, [Appellant's doctor #1] believes that fibromyalgia patients have tender spots in certain parts of their bodies.
- Although the Appellant suffered some periods of depression and point tenderness prior to the motor vehicle accident, [Appellant's doctor #1] does not believe she suffered from fibromyalgia before the accident. In his view, she suffered from menorrhagia and some depressive episodes. References in his clinical notes to chronic fatigue were not referring to chronic fatigue syndrome, fibromyalgia or myofascial pain, but rather to isolated tiredness or fatigue.

- [Appellant's doctor #1] was of the opinion, after seeing the Appellant for over 250 visits, and after his 45 years in practice, that the Appellant was a reliable historian. It was [Appellant's doctor #1]'s opinion that as a result of the Appellant's myofascial pain condition, caused by the motor vehicle accident, the Appellant could not work at her previous occupation in the [text deleted], because she could not be frequently on her feet, standing, bending, stretching and lifting.

5. [Appellant's physiatrist]:

The parties agreed that [Appellant's physiatrist] was qualified as an expert in physical medicine and as a rehabilitation specialist.

[Appellant's physiatrist] provided reports dated February 13, 2006, April 6, 2006 and July 31, 2006. He also testified at the hearing into the Appellant's appeal. A review of [Appellant's physiatrist]'s reports and testimony indicates the following:

- On February 13, 2006, [Appellant's physiatrist] provided an impression of "long-standing mechanical, myofascial neck and back pain syndrome with reduced energy level and reduced endurance for any medium level of activities and work". She was instructed to continue self-management, dynamic lumbar stabilization exercises and avoid any extension strain on her spine.
- Following further investigation, [Appellant's physiatrist] provided his impression, on April 6, 2006 that the Appellant suffered:

  "flexion, extension and rotational injury to her spine resulting from the motor vehicle accident complicated by mechanical, myofascial neck and back pain syndrome. She has developed reduced energy level and reduced endurance for any medium level of activity and work."

- On July 31, 2006, [Appellant's physiatrist] provided the following treatment and recommendation notes:

  In summary, [the Appellant], in the motor vehicle accident of February 13, 2003 suffered flexion, extension and rotational injuries to her spine complicated by musculoligamentous strain, mechanical and myofascial neck and back pain syndrome. She has also developed sleep disturbances and non-restorative sleep leading to reduced energy level and reduced endurance for any medium level of activities or work. She has responded well to paraspinous blocks and myofascial trigger point injections with 1% Lidocaine. This intervention has given her good pain relief for 2-3 months and then the pain has reoccurred. Clinically, there has been no evidence of disc herniation causing nerve root compression/nerve root irritation leading to radiculitis or radiculopathy of the cervical and lumbar nerve roots. She has developed reduced endurance and reduced functional capabilities since the motor vehicle accident."

- [Appellant's physiatrist] provided a detailed description of the tests and indicators for myofascial pain and testified that he had conducted such objective testing upon the Appellant.

- [Appellant's physiatrist] concluded that as a result of her diagnosed myofascial pain syndrome the Appellant had developed reduced endurance and functional capabilities since the motor vehicle accident. She suffered from pain and low endurance and was unable to do many tasks, especially strenuous ones, on a repeated or heavy basis. He came to this conclusion on the basis of the Appellant's history, physical exam and response to treatment, and on this basis made his future treatment recommendations.

- In spite of thorough physical examination and testing, including blood tests, [Appellant's physiatrist] did not find any other systematic causes, outside of the motor vehicle accident, that would contribute to his findings in regards to the Appellant's condition. He indicated that trauma can be one of the causes of myofascial pain because any stretch on the muscles does cause trauma. Once the muscle has contracted and released, sometimes it cannot relax again and stays in its shortened state, leading to a myofascial pain condition.

- Although [Appellant's physiatrist] is qualified to diagnose anemia and has seen that condition on many occasions, he found that the Appellant did not suffer from anemia and that her levels blood levels and haemoglobin were within normal limits.

6. [Appellant's chiropractor #2]:

The parties agree that [Appellant's chiropractor #2] was qualified as a chiropractor.

[Appellant's chiropractor #2] provided reports dated September 16, 2003, November 25, 2003, November 28, 2003, December 19, 2003, January, 2004, April 28, 2004, and June 11, 2004. She also testified at the hearing into the Appellant's appeal. A review of these reports and [Appellant's chiropractor #2]'s testimony at the hearing indicates as follows:

- [Appellant's chiropractor #2] first saw the Appellant on September 16, 2003 and diagnosed lumbo sacro-gluteal muscular tendon strain and cervicothoracic disorder, following objective testing such as range of motion testing of the spine, and palpitation of muscle, tendon and soft tissues.
- Through verbal conversations with the Appellant, [Appellant's chiropractor #2] learned that the Appellant had previously been diagnosed with depression and that she suffered from severe menorrhagia.

- On April 28, 2004, [Appellant's chiropractor #2] noted the diagnosis of menorrhagia and indicated that since the Appellant was severely iron deficient due to this "20+ year drain of iron" from her body, she stated:

  > "...Now to the decision that [the Appellant] is capable of immediate return to work, as quoted by your occupational therapist on contract. [The Appellant] is not yet able to return to part-time work. Her circulating blood iron must first rise to a level compatible with ability to work and function physically at a normal level. This may take a little time. [The Appellant]'s gynaecologist can monitor her iron levels to when her iron status is suitably robust to return to work.
  >
  > Recently [the Appellant] worked two hours for each of three consecutive days. Her recovery from the ensuing exhaustion was two weeks wherein she could not function physically. This demonstrates [the Appellant]'s iron-debilitated state."
  >
  > MPIC might consider follow-up correspondence with [the Appellant]'s gynaecologist-surgeon to monitor and ascertain the iron level required for her to function in a working status..."

- During her testimony at the hearing, [Appellant's chiropractor #2] admitted that she was not qualified to diagnose iron deficiency or anemia and that she did not have access to any lab testing orders or lab tests when she wrote her report of April 28, 2004. She indicated that when she wrote this report, she felt under some pressure to ensure that the Appellant be qualified to receive further MPIC chiropractic benefits. She indicated that at that time, almost 10 years ago, MPIC required practitioners to rationalize further treatments in their reports. [Appellant's chiropractor #2] testified that she believed that at that time the Appellant's MPIC adjusters were questioning why her patient was not progressing more quickly and that she felt pressure from the adjusters to explain why the case was not progressing more rapidly. During the hearing, [Appellant's chiropractor #2] reviewed this report and disagreed with her comments therein, regarding the Appellant's low iron stores and anemia.

- [Appellant's chiropractor #2] indicated that she found the Appellant to be a reliable historian of her condition because she was straightforward, honest and reliable, and had a stable family situation.
- [Appellant's chiropractor #2] testified that the Appellant's inability to work occurred only after the motor vehicle accident. Her gynecological situation had occurred prior to that, while she was still working. Then the motor vehicle accident occurred and the patient could no longer work. Accordingly, [Appellant's chiropractor #2] is of the view that the motor vehicle was the tipping point which destroyed the equilibrium of the Appellant's condition, causing the trauma and damage which prevented her from working.

7. [Appellant's doctor #2]:

The parties agreed that [Appellant's doctor #2] was qualified as a family physician.

[Appellant's doctor #2] provided reports dated July 8, 2009 and October 25, 2009. He also testified at the hearing into the Appellant's appeal. A review of [Appellant's doctor #2]'s reports, as well as his oral testimony at the hearing indicates as follows:

- [Appellant's doctor #2] saw or examined the Appellant at least 20 times. On the basis of his physical exam, objective testing and the history provided to him by the Appellant, he diagnosed the Appellant as suffering from fibromyalgia.
- In a report dated July 8, 2009, he stated:

  > "A letter from [Appellant's neurologist] has been attached, which confirms little in the way of abnormal physical signs, which I would agree. However he does indicate a diagnosis of fibromyalgia which I would stress is a real organic condition. This lady has pain, and this has significantly changed her life and its quality. Chronic pain syndromes such as fibromyalgia are difficult to quantify biochemically, at this time, however this does not deny the existence of an organic pathology. She seems to have been well before the accident and unwell since. Fibromyalgia has often been documented as starting after a traumatic event and so is consistent with her history."

- Based upon [Appellant's neurologist]'s reassurance that no other organic factors were present, [Appellant's doctor #1]'s diagnosis of fibromyalgia was then confirmed. [Appellant's doctor #2] reviewed [Appellant's physiatrist]'s report containing a diagnosis of myofascial pain syndrome and does not disagree with this diagnosis, as he does not find it contradictory. In his view, this just reflects the use of different terminology for the same group of illnesses carrying the same code in the International Compendium of Disease. In [Appellant's doctor #2]'s view the distinction between myofascial pain and myofascial pain syndrome is just one of severity, in that a syndrome may fall more into one area and last a longer time.

- [Appellant's doctor #2] views myofascial pain and fibromyalgia to be real organic conditions. He recognized that in the past people may have considered that whole spectre of pain to perhaps be fabricated and a not a real disorder because it cannot be measured or diagnosed. Increasingly, the evidence shows that this is a real disease with real pain, both locally and centrally.

- [Appellant's doctor #2] was fairly certain that the Appellant was not faking her pain. He noted the absence of "tells" which show whether the patient may be putting on their illness. He noted that the Appellant had never engaged in drug seeking behaviour and that it took some persuasion to convince her to try medications.

- [Appellant's doctor #2] recognized the variability and changeability which can occur from day to day with this kind of illness. He was of the opinion, based upon the Appellant's history of being well and fully functional prior to the motor vehicle accident with change

following the motor vehicle accident, that the motor vehicle accident directly caused or materially contributed to the Appellant's fibromyalgia pain syndrome.

- [Appellant's doctor #2] is qualified to diagnose anemia and was of the view that chiropractors were not so qualified and did not have access to the blood tests used for such determination.

- Since beginning to look after the Appellant, [Appellant's doctor #2] has no record of her having anemia or of any iron deficient anemia leading to her chronic pain syndrome, in spite of having tested her blood on six occasions. Her haemoglobin on all six occasions was within the normal range.

8. [Appellant's gynecologist]:

The parties agreed that [Appellant's gynecologist] was qualified as an expert in gynecology and women's health.

[Appellant's gynecologist] provided a report dated September 9, 2011. He also testified at the hearing into the Appellant's appeal. A review of his reports and oral testimony at the hearing indicates the following:

- [Appellant's gynecologist] first saw the Appellant on March 23, 2004 and saw her for about 7 to 10 subsequent visits. She was referred to him by [Appellant's doctor #1] with long-standing heavy menstrual periods.

- On September 9, 2011, [Appellant's gynecologist] reported:

> "...The letter that [Appellant's chiropractor #2] wrote was dated April 28th, 2004, and during that time, [the Appellant] was under my care for the management of menorrhagia

> that was being managed medically. Because of the lack of success with medical management, she was slated for a [text deleted]. Her surgery was done on July 13th, 2004, and it was uncomplicated except for [text deleted]. This [text deleted] managed symptomatically until it slowly improved. The [text deleted] improved by March of 2005 on a visit, and she subsequently only came to me for ongoing [text deleted] management, and she had a complete recovery from her menorrhagia and her [text deleted] surgery.
>
> At no time was a lot of the musculoskeletal pain ever attributed to her gynaecologic condition, and I do not feel that she should have had her benefits removed based on a gynaecologic issue. When she stopped her menorrhagia, her natural iron stores would improve because she was not having any ongoing loss, and the need for iron, although maybe initially, was not needed long-term. I have no chiropractic expertise, and nor would I comment on chiropractic management of a patient, and I certainly feel that the loss of her MPIC Claim and her benefits had no bearing on a gynaecologic condition."

- [Appellant's gynecologist] last saw the Appellant on December 16, 2005.

- [Appellant's gynecologist] had been provided with results from the Appellant's blood tests. He concluded that there was no objective anemia or diagnosis of severe menorrhagia. Such diagnosis would require objective signs which the Appellant did not have. Accordingly, he disagreed with [Appellant's chiropractor #2]'s report of April 28, 2004.

- [Appellant's gynecologist] is qualified to diagnose iron deficiency and indicated that the Appellant's iron levels were not low, but rather, were within normal limits. The Appellant's menorrhagia would not likely have affected the Appellant's ability to work. It may have been considered a nuisance and disruptive personally, but would not have had any effect on her ability to stand or to function, and at those levels, would not have caused fatigue.

Evidence for MPIC:

MPIC asked the panel to review excerpts from video surveillance it had requested be conducted of the Appellant on several days between July 9 and September 13, 2010. The videos depicted the Appellant carrying out such activities of daily life as watering and tending to flowers in her

driveway, exiting her car and walking in store parking lots and shopping in stores. None of the excerpts shown to the panel occurred on consecutive days. The Appellant was shown:

- Bending into the back seat of her car unaided.
- Walking without the use of a cane or support.
- Carrying water to water plants, without aid.
- Bending to deadhead flowers without using a nearby wall for support.
- Walking in store aisles and looking at clothes.
- Kicking or nudging a small ball out of the way in a store aisle, to avoid tripping over it.
- Walking into [text deleted] with her purse over her right shoulder, without a cane.
- Walking in a parking lot with no mobility aids.
- Walking up stairs without using a railing or a cane.
- Taking off her jacket unaided.
- Shopping in a store and looking at items without hanging on to the buggy.

None of the video excerpts showed the Appellant engaged in vigorous activity. She moved slowly and carefully in carrying out activities of daily life, without the use of mobility aids.

The Appellant did not comment upon the video tape evidence.

[MPIC's occupational therapist #2]:

The parties agreed that [MPIC's occupational therapist #2] was qualified as an occupational therapist.

[MPIC's occupational therapist #2] provided reports dated July 20, 2003, September 22, 2003, January 16, 2004 and March 1, 2004 (in conjunction with [Appellant's doctor #1]). A review of these reports and [MPIC's occupational therapist #2]'s oral testimony at the hearing indicates the following:

- [MPIC's occupational therapist #2] prepared a Physical Demands Analysis regarding the Appellant's work in the [text deleted] kiosks. In preparing such reports, it is his procedure to visit the work site and review the actual job tasks with the individual or with individuals knowledgeable of the job. He tries to be as specific as possible regarding weights, measurements, distances walked, the environment and all it takes to do the job. The process is a standardized one dealing with an analysis of function, breaking down the tasks involved with the job and looking at the physical movements.

- [MPIC's occupational therapist #2] met with the Appellant at [text deleted] on July 18, 2003 and completed a report dated July 20, 2003. His report described the physical requirements and environment of the job, by assessing the work site in the kiosk at [text deleted]. He later attended the kiosk at [text deleted], in order to understand the work demands at that site. He did not recall the exact amount of time he spent with the Appellant, but noted that he is typically on site for approximately 1½ to 2 hours.

- [MPIC's occupational therapist #2]'s understanding was that the work restriction which affected the Appellant was that she could not stand for long periods of time.

- After reviewing the job and interviewing the Appellant, [MPIC's occupational therapist #2] concluded that out of an approximately 8 hours of work per event, and based on the Appellant's difficulty with standing, she was able to do 25% of her work.
- [MPIC's occupational therapist #2] also recommended some ergonomic improvements to assist the Appellant, such as anti-fatigue matting, a footrest, and a sit/stand stool. He indicated that if the Appellant had found that she benefited from such equipment, he would have recommended that it would be appropriate to purchase some extra ones, strategically placed in multiple work sites, rather than transport them between kiosks.
- In a report dated September 22, 2003 and entitled "Addendum - % of Duties" [MPIC's occupational therapist #2] concluded:

> "The physical demands analysis of July 20, 2003 notes that standing occurs on a constant basis. The duration, depending on location of work occurs from up to 5 hours at a time for a period of 8 to 10 hours. All standing activities are dynamic, where movement and a few steps occur within the work area.
>
> As stated in the July 20th, 2003 report, the work tasks occur sequentially. At that time it was estimated that [the Appellant] could work at approximately 25% of per (sic) duties.
>
> Based on [the Appellant]'s reported standing tolerance she would be able to work at a level of 33% of her duties. She reports the ability to stand for approximately 15 minutes followed by 30 minutes of sitting.
>
> You have requested that the ergonomic and body mechanic techniques presented in the July 20th, 2003 report be implemented. It is expected that this will increase [the Appellant]'s ability to stand. An updated percentage of duties can be provided at that time..."

- [MPIC's occupational therapist #2] indicated that he only completes Percentage of Duty Reports for MPIC, and he is not aware of any other insurers or entities requesting this particular kind of report.

[Independent chiropractor]:

The parties agreed that [independent chiropractor] was qualified as a chiropractor.

[Independent chiropractor] provided a Third Party Chiropractic Assessment report dated April 15, 2004. A review of this report and [independent chiropractor]'s oral testimony at the hearing indicates the following:

- [Independent chiropractor] conducted an examination and assessment of the Appellant, as part of a third party chiropractic assessment for MPIC. MPIC provided him with a number of documents from the Appellant's medical file, along with a list of questions for him to answer.
- [Independent chiropractor] found it difficult to establish a physical diagnosis of the Appellant with any degree of diagnostic certainty, based on her presentation. He described her responses as hypersensitive and not realistic regarding the stimulus provided, so it was difficult to establish a physical diagnosis. He noted impressions consistent with chronic pain and a somatization disorder, based upon the Appellant's behaviour during the assessment and the way she responded to tests. This was consistent with someone suffering from anxiety and pain modulated through some type of mood or social context, not consistent with any physical basis. The Appellant responded to requests to participate in certain tests with apprehension.
- [Independent chiropractor] concluded that there was no indication that the Appellant was realizing any significant benefit through chiropractic treatment and that she had derived maximal therapeutic benefit from chiropractic treatment. Further passive therapies were not indicated in the presence of a chronic pain condition.

- [Independent chiropractor] recommended that the Appellant's family physician, [Appellant's doctor #1], should assume primary management of the Appellant's condition which seemed to "mainly consist of anemia and depression".

His report of April 15, 2004 also noted:

> "Behaviourally weighted examination findings obfuscate a physical diagnosis. [The Appellant]'s presentation was mostly consistent with a chronic pain and somatisation disorder. This was marked by non-restorative sleep patterns, non-organic signs including prevalent Waddell indicators, behavioural symptom characteristics including an episode in June 2003 when her whole leg gave way, consistently unrelenting pain, and failure of symptoms to respond to usual remedies. Activity intolerance and extremely poor self-efficacy indicated by functional status inventory scores in the crippled range and a perceived capacity rating on a spinal sort that, is unrealistically low and well below the minimum for sedentary tasks are also features of the pain syndrome. [The Appellant]'s behaviours are clearly outside her conscious awareness.
>
> New information that was recently made available confirms that [the Appellant] suffers with anemia. This can explain her fatigue.
>
> **Causation:** The association between [the Appellant]'s chronic pain condition and the accident is not clear. Generalized pain conditions are distinct entities often driven by psychosocial components. There were no distinct physical injuries identified on assessment that would necessarily relate to the accident of February 13, 2003. The recent discovery of anemia and the resulting fatigue can be a contributing factor to [the Appellant]'s depression and pain condition. The anemia is not related to the accident."

[Independent chiropractor]'s final conclusion, set out in his report, was that:

> "**Impairment and Disability:** On balance, [the Appellant]'s disability is related to perceptions and fatigue and not to any musculoskeletal impairment resulting from the accident."

[Independent chiropractor] acknowledged that he was not an expert in myofascial pain or similar pain syndromes and that [Appellant's physiatrist], as a physiatrist, had a scope of expertise in this area beyond his own as a chiropractor. He also was not qualified to diagnose anaemia.

Submission for the Appellant:

Counsel for the Appellant noted that while the Appellant was still seeking reimbursement for the

cost of a replacement worker as well as further chiropractic treatment, the primary focus of his submission would be that the Appellant was entitled to IRI benefits as of July 2, 2004, when her benefits were terminated by MPIC.

Counsel indicated that the Appellant's coverage from MPIC for chiropractic treatment also ended on July 2, 2004 and that the Appellant was seeking reimbursement for over 30 treatments received from [Appellant's chiropractor #1] between May and September 2008, as well as continuing coverage for ongoing treatment.

In regard to IRI benefits, counsel submitted that the Appellant could not perform 33% (or even 25%) of her job duties, as a result of injuries sustained in the motor vehicle accident, which triggered a myofascial pain syndrome. Counsel submitted that the assessment conducted by [MPIC's occupational therapist #2], which indicated that the Appellant could perform 33% of her job duties was not realistic, and did not make sense in the real world. The ergonomic adjustments provided were not practical for an individual working in a small kiosk, and the sit and stand pattern which had been set out could not be applied to an individual working a shift, sometimes alone, in a busy event setting with variable demands.

Counsel reviewed the circumstances surrounding the motor vehicle accident and the Appellant's injuries in the period which followed. She was in receipt of IRI benefits from October 23, 2003 until her case manager wrote to her on June 18, 2004 indicating that following its investigations, the Appellant's "current inability to work has more to do with your anemia and your gynecologic situation as opposed to the ill effects of the motor vehicle accident."

Her case manager concluded:

> "Based on the foregoing, you would have been able to return to the employment held at the time of the car accident had it not been for the unrelated diagnosed medical conditions (anemia/gynaecologic). Your entitlement to IRI benefits ends as governed under Section 110(1)(a) of the Manitoba Public Insurance Act (attached), and will take effect two weeks following the date of this letter, ending July 2, 2004.

The Internal Review Decision which focused upon that letter and was dated January 16, 2006, again relied primarily on [Appellant's chiropractor #2]'s report, noting the Appellant's anemia:

> "[MPIC's chiropractor] reviewed your file and provided an opinion May 20, 2004. He states that [Appellant's chiropractor #2]'s letter of April 28, 2004 shows that your current inability to work was related to your anemia and your gynaecologic situation rather than your motor vehicle accident. After my review of [Appellant's chiropractor #2]'s report, I agree with [MPIC's chiropractor]. As a result, I am confirming your case manager's decision to terminate your IRI because your physical inability to perform your job duties was not related to your motor vehicle accident."

Counsel submitted that the Appellant had met the onus upon her, of showing on a balance of probabilities, that she was not able to return to her employment (either on a full-time or part-time basis) as a result of her injuries in the motor vehicle accident. The Commission heard testimony from five doctors who were strongly supportive of the Appellant's position. Counsel summarized the evidence of [Appellant's physiatrist] who provided his expert evidence that the Appellant suffers from a myofascial pain syndrome which, to a high degree of probability, had been triggered by the motor vehicle accident of February 2003, and which had led to reduced functional capabilities. [Appellant's physiatrist] also testified that he had reviewed the Appellant's blood work, that she had normal haemoglobin and was not anaemic.

He reviewed the evidence of [Appellant's doctor #2], who had seen the Appellant at least 20 times and described an overlap, in his view, of the conditions of fibromyalgia and myofascial pain. In his view, the Appellant suffered from fibromyalgia, which was a real organic condition, and he opined that there was a high probability that this condition was caused or triggered by the motor vehicle accident. The Appellant was well before the motor vehicle accident and unwell

afterwards. He made it clear that she was not anaemic and that there was no other condition, aside from fibromyalgia or myofascial pain, affecting the Appellant's condition.

Counsel summarized the evidence of [Appellant's doctor #1] who saw the Appellant over 50 times and who was of the opinion that the Appellant suffered from a myofascial pain syndrome which, to a very high probability, had been triggered by the motor vehicle accident of February 2003. In his view her inability to work had more to do with her myofascial pain syndrome than with any anemia.

Counsel summarized the evidence of [Appellant's chiropractor #1] who had diagnosed fibromyalgia-like symptoms. He also reviewed the evidence of [Appellant's chiropractor #2], another chiropractor, who was not qualified to diagnose anaemia and who had made it clear in her testimony that her information about anaemia and iron deficiency came only from verbal conversations which she had with the Appellant. In her testimony, she disagreed with her own letter of April 28, 2004, and conceded that she had misled the Corporation in that letter.

Counsel also summarized the evidence of [Appellant's gynecologist] who made it clear that there was no objective evidence that the Appellant had suffered from anaemia and that her haemoglobin and ferritin levels were fine, in blood tests taken in February of 2004. The Appellant has suffered from mild, not severe, menorrhagia which did not interfere with her ability to work or her ability to stand.

Counsel submitted that [independent chiropractor]'s reports and opinions were at odds with those of the caregivers noted above, and that he also, erroneously, concentrated on the Appellant's

alleged anaemia. In oral testimony he conceded that he was not an expert in anaemia and that he had not even seen any blood tests in that regard. Counsel submitted that the psycho-social components referred to in [independent chiropractor]'s report as the cause of the Appellant's "somatisation disorder" fell outside his area of expertise and that he was not qualified to opine in regard to such matters.

Counsel submitted that the Appellant was a credible witness, and that her caregivers had confirmed this. None were of the view that the Appellant was "faking it". They noted her lack of drug seeking behaviour and her positive attitude. All of her caregivers, some of whom had seen her many, many times, testified that she was a reliable and credible historian, and this was confirmed in a report provided by a psychiatrist, [Appellant's psychiatrist], on August 27, 2005. He noted that she was a forthright, cooperative historian who related her history in a credible and consistent fashion with no indication that she exaggerated or embellished her symptoms.

Counsel discounted any impact of the surveillance tapes which the Commission viewed. He noted that we saw only 35 minutes of surveillance spread out over several days, and that none of the video tapes shown, were conducted over consecutive, back to back days. The panel had heard evidence from [Appellant's doctor #2] that he had encouraged the Appellant to carry out certain activities of daily life, such as shopping and carrying bags. The surveillance video tapes were inconclusive and did not assist in any assessment of the Appellant's credibility.

In summary, counsel for the Appellant submitted that not only had the Appellant met the onus upon her of showing that she had developed myofascial pain as a result of the motor vehicle accident, on a balance of probabilities, but rather, the evidence was overwhelming. The Appellant had shown that there is a very high probability that her myofascial pain was a result of

the motor vehicle accident and was preventing her from returning to her occupation. As a result, counsel asked that the panel find the Internal Review Decision to be in error and should be overturned, entitling the Appellant to IRI benefits (as well as chiropractic benefits and reimbursement for a replacement worker) beyond July 2004, with interest.

Submission for MPIC:

Counsel for MPIC noted that the complaints expressed by the Appellant after the motor vehicle accident of February 2004 were of pain, tenderness, stiffness and neck tension. This continued up until approximately June of 2004. He noted that these symptoms are all subjective and are not objective findings. They were simply complaints and vocalizations of pain by the Appellant to her caregivers. Accordingly, for the Commission to accept that this symptomology is still affecting the Appellant, they must believe the Appellant's complaints as being true. This raises issues of credibility, as we are not dealing with objective physiological symptoms. The question which arises is whether the Appellant is believable and whether she has proven her case on a balance of probabilities. Counsel submitted that the inescapable conclusion for the Commission, based on all the evidence, is a resounding no.

Counsel submitted that from the beginning of June 2010, the Appellant's credibility has been seriously in doubt. He noted that she arrived at the first day of the Commission's hearings using a cane. There was no reference in any of the medical reports, or in the Appellant's entire file to show that any caregiver had prescribed or even suggested the use of a cane. On cross-examination, the Appellant indicated that [Appellant's doctor #2] had suggested that she should use a cane, but when [Appellant's doctor #2] testified, providing an opportunity for him to corroborate the Appellant's evidence, he did not make any reference to suggesting that the

Appellant use a cane.

Counsel submitted that the sole purpose of the Appellant's arriving at the appeal hearings with a cane was to garner the sympathies of the Commission and convey that she was still suffering from the effects of the motor vehicle accident. However, what it accomplished was just the opposite. Subsequent surveillance evidence showed that on several different dates the Appellant was not ever shown using a cane. The surveillance tapes showed that she had an unrestricted ability to climb and descend stairs without assistance or mobility aids, walking up and off of curbs without assistance. She was able to bend over at the waist and rise to an erect position without support and was shown walking deliberately and unaided without hesitation or difficulty. She was shown kicking a ball and carrying a container of water. Counsel submitted that this video evidence was the best representation of the Appellant's medical condition as it showed her outside a clinical setting as her natural uninhibited self, which was in stark contrast to what she had described to her caregivers and the Commission.

Counsel also submitted that the Commission should draw an adverse inference from the Appellant's failure to attend at the hearings on the dates when the surveillance evidence was shown and the evidence of [independent chiropractor] heard.

Counsel for MPIC also noted other issues with the Appellant's credibility, such as disparities in the income claimed from the [text deleted] business, and discrepancies in her reports to [Appellant's psychiatrist] and to the Commission regarding the extent of the social activity in which she participates.

Counsel submitted that the variety of testimonies from the Appellant's caregivers and by the

Appellant showed a lack of full disclosure by the Appellant to her caregivers. She had failed to provide all of her caregivers with information regarding her history of previous motor vehicle accidents. To some of her caregivers she only disclosed symptoms as affecting her currently, and neglected to advise that she had had difficulties with some of these symptoms, such as fatigue, in the past.

Counsel submitted that the Appellant was "driving the bus" and controlling what information she gave to her caregivers so as to indicate to them that all of her complaints and problems resulted from the motor vehicle accident. The selective information which she provided to these caregivers was biased and intended to distort their medical opinions by having them focus solely on the 2003 motor vehicle accident to the exclusion of her extensive past symptomology and the previous motor vehicle accidents in which she had been involved. She was not a true historian and did not provide a high degree of accuracy.

Counsel submitted that the expert evidence of [MPIC's occupational therapist #1] could be characterized as biased and indicated that she was a "true hired gun". She had done a poor paper review and had not even been advised regarding prior motor vehicle accidents in which the Appellant was involved or the significant effects of her previous medical conditions.

Counsel urged the panel to rely instead upon what was left – the reports of [MPIC's occupational therapist #2] and [independent chiropractor]. [MPIC's occupational therapist #2] had conducted a physical demands analysis which was very thorough and included workplace visits and interviews with the Appellant and her husband. This evidence indicated that the Appellant could reasonably be expected to perform 25, or even 33% of her duties, with the enhancements of assistive devices.

[Independent chiropractor] provided his evidence in a clear, consistent and logical manner based upon the Appellant's presentation and behaviour in his assessment of her. He concluded as a result that she was not reliable in her complaints and that there was no physiological basis for her symptoms. He was able to observe her for over an hour and compare her behaviour with her self-reporting. He concluded that she was overly sensitive and displayed pain apprehension, which limited full testing.

Counsel submitted that while the Appellant may be bothered by an evolving condition of fibromyalgia or myofascial pain, she was exhibiting signs of this condition prior to the motor vehicle accident and that the motor vehicle accident did not cause this condition in any way.

Counsel for MPIC asked the Commission to consider what all the evidence says when it comes together. If there had not been a motor vehicle accident on February 23, 2003, would that change what the Commission is dealing with today in terms of the condition presented by the Appellant? Counsel indicated that he did not know whether the Appellant can or cannot work, but that it is not due to the motor vehicle accident. The Appellant has a formative history that has been selectively withheld, some consciously and some unconsciously, from her caregivers, who were herded into concluding that the Appellant's problems emanated from the motor vehicle accident of February 2003, and only from that motor vehicle accident. The Appellant has not succeeded in showing that this motor vehicle accident caused, or even exacerbated, her symptoms or enhanced her medical condition. On the basis of all of the evidence, with the exception of the misdirected reliance on the Appellant's alleged anaemic condition, the decision of the Internal Review Officer should be upheld, as the termination of the Appellant's IRI benefits was well supported by the evidence heard by the Commission.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in denying the Appellant reimbursement for a replacement worker, further chiropractic benefits, and further IRI benefits.

1. Reimbursement for a replacement worker:

Reimbursement of expenses re family enterprise

> 135 Where a victim is at the time of the accident working without remuneration in a family enterprise and the victim is unable because of the accident to perform his or her regular duties in the family enterprise, the victim is entitled to the reimbursement of expenses of not more than $500. per week incurred during the first 180 days after the accident to have the duties performed during the 180 days.

Coverage is available under the MPIC Act to an individual that is working for no remuneration, in a family enterprise, at the time of the motor vehicle accident. If this person is unable to perform their regular duties as a result of the accident, the victim would then be entitled to the reimbursement of expenses incurred to hire a replacement worker to perform the duties.

However, the evidence established that the Appellant was not working without remuneration prior to the motor vehicle accident. She was in receipt of income and classified as a full-time earner at the time of the accident. As a result, she was in receipt of IRI benefits, but did not become entitled to reimbursement for expenses for hired help under Section 135 of the Act.

The Appellant received remuneration from her work as a [text deleted] and so is not entitled to benefits for a replacement worker under Section 135 of the MPIC Act. The Internal Review Decision is upheld in that regard.

2. Chiropractic benefits:

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.

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;

In order for the Appellant to establish entitlement to further chiropractic benefits, she must show that the treatment is medically required as a result of the accident. However, the evidence, and in particular the evidence of [Appellant's chiropractor #1], her chiropractor, established that the Appellant had reached maximum medical improvement in regard to passive chiropractic treatment. By July 2, 2004, the Appellant was deriving only temporary benefit from chiropractic

treatment. Accordingly, further chiropractic treatment beyond July 2, 2004 was not medically required and the Appellant was not entitled to further chiropractic treatments pursuant to Section 136 of the MPIC Act or Section 5 of Manitoba Regulation 40/94

The decision of the Internal Review Officer in regard to the matter of chiropractic treatment is upheld.

3. Income Replacement Indemnity Benefits:

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment;

(b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;

(c) the full-time earner is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

The panel has reviewed the extensive evidence presented at the hearing into the Appellant's appeal, as well as the medical evidence and other documents on the Appellant's indexed file.

The panel finds that [MPIC's occupational therapist #2]'s assessment that the Appellant could do

25% to 33% of her job duties was not a realistic or reasonable assessment of her ability to do the tasks required by her job, in the real world. Given the variety of duties and locations involved and the physical nature of the duties which included prolonged standing, bending, twisting, lifting, serving customers, and taking money, all within a confined space, sometimes with co-workers and sometimes working alone, the panel finds that this job did not lend itself to the structure suggested and set out by [MPIC's occupational therapist #2]'s report. The activities depended upon which of a variety of locations the Appellant was working at. In at least one venue, the duties were continuous, while in others there might be a big rush during certain periods of the game or event. Some of the ergonomic modifications recommended by [MPIC's occupational therapist #2] were also not practical, with some requiring transfer between different venues as well as incorporation into the small area of a kiosk.

While the panel notes that counsel for MPIC has made certain objections regarding [MPIC's occupational therapist #1]'s comments and reports regarding issues which may fall outside her expertise (such as the Appellant's depression), the panel finds that [MPIC's occupational therapist #1] is a qualified occupational therapist with experience in the area of physical demands analysis and percentage of duties reports. We find her comments, set out in her report of November 10, 2009 to be a useful summary of the weaknesses found in [MPIC's occupational therapist #2]'s report, when its findings are compared with the practical reality of the Appellant's workplace conditions and situations.

> "In the same report, [MPIC's occupational therapist #2] indicated that the business had four locations and a total of nine stands. If the claimant was required to work at more than one specific stand, the sit stand stool would have to be transported between locations. As can be seen, the item would be awkward to carry. The weight of the stand is approximately 20 lbs.
>
> The amount the claimant could work was based on her reported standing tolerance (maximum 15 minutes followed by a 30 minute recovery period in sitting). It was also documented that sometimes only one individual is working at a booth. It is

> doubtful that customers would arrive in the cycle described. Patrons at these venues tend to come in periodic large numbers at a time (during intermissions, etc.). It is not unreasonable to estimate that periods of standing required and sitting time available do not correlate with the claimant's abilities."

[MPIC's occupational therapist #1] also pointed out a limitation contained in [MPIC's occupational therapist #2]'s report which only appears to have addressed prolonged standing within the Appellant's restrictions, and failed to address other potential restrictions and difficulties that might arise as a result of other job duties involving repetitive movements, twisting, neck turning and other motions required [text deleted].

Counsel for MPIC submitted that findings regarding the Appellant's symptoms and condition arose solely as a result of the Appellant's subjective reporting, and that the Appellant was not a credible witness or reliable patient.

The panel agrees that the Appellant did show an inconsistent use of the cane between the first hearing dates, the video surveillance and the second set of hearing dates in 2012, when she did not use a cane. The Appellant attended at the hearing dates in 2010 using a cane and testified that her father-in-law had made it for her. While her doctor had not specifically told her that she must use the cane, he had encouraged her to use whatever she could to get around, and so she used that cane. She was not shown using a cane in the video tapes and did not use one at the hearing in 2012.

The panel also agrees that the videos did not show that the Appellant was totally disabled from the activities of daily living. The Appellant appeared to be fairly functional when performing these activities, although she did appear to move somewhat slowly and carefully.

We also find that the Appellant was not completely consistent in reporting all of her history and her symptoms (both past and current) to all of the medical professionals involved with her care and assessment. However, the panel recognizes that this reporting occurred over a lengthy period of time and that some of the Appellant's particular symptoms and concerns may have waxed and waned over this period of several years.

The panel finds that on the whole, over the eight year period following the motor vehicle accident, the evidence, and particularly that of all the Appellant's caregivers, shows the Appellant to be a credible historian:

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject the story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the possibilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions..." *Faryna v. Chorny* [1952] 2 DLR 354

While the panel finds that after the accident the Appellant may have been able to function in activities of daily living such as those depicted in the video tapes, and she was able to walk without a cane on those days, this is not the test applied in considering whether the Appellant was entitled to IRI benefits. The test is whether the Appellant was unable to perform the duties of her occupation, and the panel finds, based upon the preponderance of evidence, that the Appellant was unable to do so.

The general practitioners and specialists who cared for the Appellant over this period of several years were both educated and experienced. They assessed her condition and based their conclusions upon her subjective reporting and their evaluation of it, along with their own objective testing. We recognize that over the course of the Appellant's lengthy medical history, some inaccuracies or omissions in reporting may have occurred and that her symptoms may not always have remained constant throughout the entire period. However, we have relied upon the expertise of her caregivers, as experienced and knowledgeable professionals who provided opinion evidence that the Appellant was suffering from symptoms caused by myofascial pain syndrome or fibromyalgia as a result of the motor vehicle accident, preventing her from performing the essential duties of her job. [Appellant's physiatrist], [Appellant's doctor #2] and [Appellant's doctor #1] all gave clear evidence that in their expert opinion the Appellant's condition was caused, on a balance of probabilities, or even high probability, by the motor vehicle accident. [Independent chiropractor] took a different view, but we note that he was not one of the Appellant's caregivers and only met her once. He was a chiropractor who was not qualified to comment upon anaemia or other medical issues, yet took the opportunity to do so in his report. Nor is he a specialist in the area of fibromyalgia or myofascial pain.

The panel heard evidence that the Appellant had pre-accident complaints of feeling achy all over, fatigue, depression, or pain following exercise. These symptoms, as expressed, were somewhat vague, and the panel finds that the evidence established that she was still able to [text deleted], work, and carry out her activities of daily life in spite of these complaints.

We also find that the Appellant was not anaemic when the case manager, in June of 2004, found that any inability of the Appellant to perform her occupational duties was due to anaemia and not

to injuries suffered in the motor vehicle accident. The case manager based this decision upon reports from the Appellant's chiropractor, [text deleted], and from [independent chiropractor]. These reports were reviewed by MPIC's Health Care Consultant, [MPIC's chiropractor].

None of these chiropractors appear to have been qualified to opine regarding the Appellant's alleged anaemia or its impact upon her condition. The panel is concerned that [MPIC's chiropractor], in a report dated May 20, 2004, agreed that the Appellant's "current inability to work has more to do with anaemia and her gynecologic situation as opposed to the ill effects of the motor vehicle in question". [MPIC's chiropractor] was not qualified to diagnose such a condition or to comment upon its relevance, and he was clearly in error when he did so, as the evidence of [Appellant's doctor #1], [Appellant's doctor #2], [Appellant's physiatrist] and [Appellant's gynecologist] showed. The Commission finds that it was not reasonable in this case for MPIC to have relied on its chiropractic consultants in terminating the Appellant's benefits, and that the Internal Review Officer erred in upholding such a determination.

The Internal Review Officer found that the Appellant would have been able to return to the employment she held at the time of the motor vehicle accident had it not been for the unrelated diagnosed medical condition of gynecological anaemia. This decision was clearly in error. The Commission concludes that the Appellant was not anaemic and that anemia did not contribute to her symptoms or problems with working.

The Commission finds that the Appellant′s inability to perform her occupational duties was caused, not by anaemia, but rather by a condition of myofascial pain or fibromyalgia which developed as a result of her motor vehicle accident injuries. This condition prevented the

Appellant from performing the duties of her occupation as a "Take-out Attendant – Fast Food" within the Food and Beverage Serving Occupations category.

We find that the Appellant has established, on a balance of probabilities that the Internal Review Officer erred in finding that the Appellant's symptoms were caused by anaemia and not by the motor vehicle accident. We find that the Appellant has met the onus upon her of establishing, on a balance of probabilities, that she was unable to perform the essential duties of her occupation as a result of the condition of myofascial pain or fibromyalgia which developed as a result of her injuries in the motor vehicle accident. We also find that the Appellant was not properly assessed as being able to perform 33% of her work duties. We find that the Internal Review Decision of January 16, 2006 was in error and overturn that decision in regard to the Appellant's entitlement to IRI benefits after July 2, 2004.

The Appellant's appeal on the issues of reimbursement for a replacement worker and chiropractic benefits is denied. Her appeal regarding entitlement to IRI benefits after July 2, 2004 is allowed, with appropriate interest.

Dated at Winnipeg this 30th day of October, 2012.

LAURA DIAMOND

PAUL JOHNSTON

LES MARKS