Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-04-195

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Neil Cohen** **Ms Janet Frohlich**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Darlene Hnatyshyn and Mr Ken Kalturnyk of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATES:	**September 10 and 11, 2013**
ISSUE(S):	**1. Entitlement to reimbursement of chiropractic treatments beyond May 28, 2004;** **2. Whether the Appellant had a reasonable excuse for the late filing of his application for review;** **3. Entitlement to Income Replacement Indemnity benefits;** **4. Whether the Appellant was properly classified as a non-earner;** **5. Entitlement to Personal Injury Protection Plan benefits as a result of the November 28, 2005 motor vehicle accident or the cumulative effect of the Appellant's prior motor vehicle accidents.**
RELEVANT SECTIONS:	**Sections 85(1), 110(1)(a), 136(1) and 172 of The Manitoba Public Insurance Corporation Act ('MPIC Act'), Section 5 of Manitoba Regulation 40/94, and Section 8 of Manitoba Regulation 37/94.**

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

Background:

The Appellant was injured in motor vehicle accidents on March 20, 2001, March 2003, May 13, 2003, October 25, 2003, and November 20, 2005.

The Appellant's appeals arose out of Internal Review decisions issued on September 1, 2004, March 21, 2006, July 6, 2006 and April 18, 2008.

1. September 1, 2004 – Internal Review Decision (Chiropractic Care):

On October 25, 2003, the Appellant was rear-ended by another vehicle and sustained a soft tissue injury to his neck and back, along with headaches. He saw his regular chiropractor, [Appellant's Chiropractor], on October 29, 2003, following the motor vehicle accident. The Appellant had been treated by [Appellant's Chiropractor] as a result of injuries sustained in previous motor vehicle accidents in March 2001, March 2003 and May 2003, seeing him on average two to three times a week, when the October 2003 accident occurred.

[Appellant's Chiropractor] provided a treatment plan report, recommending ongoing treatment in the way of 8 to 10 times a month for 90 days, 6 to 8 times a month for 90 days, 4 to 6 times a month for 90 days, 2 to 4 times a month for 90 days and 1 to 2 times a month for 90 days, with an estimated discharge of March 2005.

The Appellant then attended for an independent chiropractic examination with [Independent Chiropractor] on February 5, 2004. [Independent Chiropractor] provided a report dated March 5, 2004 with recommendation for a further six weeks of care, declining in frequency. He set out his view of a reasonable schedule of 2 visits per week for 3 weeks, followed by weekly visits to the

end of April 2004. He expressed concern that prolonged passive treatments beyond that point would disadvantage the Appellant by diminishing his independent coping skills and could promote disability and dependence.

The chiropractors' reports were reviewed by the chiropractic consultant for MPIC's Health Care Services team on March 18, 2004. He commented that treatment beyond April 2004 would have to be based on a demonstration of improvement.

[Appellant's Chiropractor] provided another treatment plan report on April 19, 2004, estimating a discharge date of December 2004. A further review by MPIC's Health Care consultant indicated that, there had been no demonstration of improvement in clinical status. The Appellant had received substantial chiropractic care, exceeding 60 visits since the date of loss and, in the absence of ongoing improvement, further chiropractic care should be discontinued.

The Appellant's case manager issued a decision letter on May 19, 2004 indicating that the medical information on file indicated that the Appellant had reached a plateau in his recovery and that additional chiropractic care was not a medical necessity. MPIC would not consider the cost of further treatment effective May 28, 2004.

An Internal Review Officer for MPIC reviewed the information on the Appellant's file, noting that MPIC had already funded approximately 97 chiropractic treatments since the Appellant began treatment in July of 2003. This was beyond what was considered reasonable in relation to the injuries sustained by the Appellant. The Internal Review Officer upheld the decision of the case manager that further chiropractic care was no longer medically required.

2. March 21, 2006 – Internal Review Decision (IRI Benefits and Reasonable Excuse):

The Internal Review decision of March 21, 2006 considered the Appellant's entitlement to Income Replacement Indemnity ("IRI") benefits. It referred to the motor vehicle accidents of March 20, 2001, May 13, 2003 and October 25, 2003. At the time of the accidents the Appellant was employed with [text deleted] as a customer service representative [text deleted]. Although he returned to work following the first accident, he was off work from March 11, 2002 to June 2, 2002 because of ongoing headaches, collecting IRI benefits during that period.

Following the May 13, 2003 accident, the Appellant suffered from migraines, nausea, pain in the lower, mid, upper back and neck, ringing in the ears, numbness and tingling in his various extremities. He had difficulty concentrating and blurred vision. The Appellant returned to work for three months following that accident, but stopped working on approximately August 19, 2003. He was subsequently terminated by his employer for absenteeism, on December 4, 2003.

When the Appellant asked his case manager to send him to a neuropsychologist, the medical information on the Appellant's file was reviewed by the psychological consultant with MPIC's Health Care Services team. It was also reviewed by a medical consultant.

The psychological consultant, [MPIC's Neuropsychologist], indicated that there was no evidence to support that the Appellant would have had a head injury which would have resulted in compromised cognitive functioning, due to the motor vehicle accident. Although a neurologist had noted that the Appellant may have cognitive difficulties possibly related to a combination of factors, including headaches, pain and stress at work, he was found to have had normal neurological functioning. As a result, the psychological consultant did not find any evidence to indicate that there was a cognitive impairment which could be directly related to any injuries

sustained in the motor vehicle accident which would have precluded the Appellant from working in his employment.

The medical consultant, [MPIC's Doctor #1], noted the Appellant's physical symptoms of neck and back pain and ongoing headaches following the motor vehicle accident. However, after reviewing [Independent Chiropractor's] assessment, he concluded that it was unlikely that the physical injuries sustained in the motor vehicle accidents would have caused a physical impairment of function that would have affected the Appellant's ability to continue to perform the essential duties of his position as a customer service representative.

The Appellant's case manager issued a decision on March 30, 2005, indicating that the medical information on file showed no objective medical information to support a physical impairment of function that would preclude the Appellant from performing the duties of a [text deleted] representative, and denied his request for IRI benefits from August 2003.

The Appellant sought an Application for Review from this decision. However, he did not comply with the deadline under Section 172(1) of the MPIC Act for filing an Application for Review within 60 days. The Appellant explained to the Internal Review Officer that he failed to comply with the filing deadline because he had issues with his residence, [text deleted].

The Internal Review Officer found that this did not constitute a "reasonable excuse" for failing to meet the deadline and rejected the Appellant's Application for Review. Further, in regards to the merits of the Appellant's claim for IRI benefits, the Internal Review Officer agreed with [Independent Chiropractor] and [MPIC's Doctor #1] that the Appellant did not have a physical impairment or physical injuries arising from the motor vehicle accidents that would have

affected his ability to continue to perform his sedentary duties as a customer service representative. He also agreed with the opinion of [MPIC's Neuropsychologist] that there was no evidence on file to support the need for a neuropsychological assessment. The case manager's decision of March 30, 2005 was confirmed.

3. July 6, 2006 – Internal Review Decision (IRI – Non-earner Status):

Following the Appellant's motor vehicle accident of November 28, 2005, the Appellant sought benefits from MPIC. However, on March 10, 2006, his case manager indicated that he was not entitled to Income Replacement Indemnity ("IRI") benefits, as he was unemployed when the motor vehicle accident took place. Since he was unemployed, yet capable of working, the case manager found that the Appellant should be classified as a non-earner who had not established that he would have held employment. As such, there was no entitlement to IRI benefits.

The Appellant sought an Internal Review of this decision. On July 6, 2006, an Internal Review Officer for MPIC noted that the Appellant had confirmed that he was not employed at the time of the accident. Although the Appellant took the position that he was not employed at the time of the accident because of injuries sustained in his three prior motor vehicle accidents, the Internal Review Officer found that there was no suggestion in any of the material provided by the Appellant that he would have held employment during the first 180 days after the accident. The Internal Review Officer agreed with the finding of the case manager that the Appellant was a non-earner at the time of the accident. He was not employed but was able to work and could not show that but for the accident, he would have held employment during that time period. Accordingly, the Internal Review Officer found that the Appellant was not entitled to IRI benefits.

4. April 18, 2008 – Internal Review Decision (Entitlement to PIPP Benefits):

Following the November 28, 2005 motor vehicle accident, the Appellant's case manager wrote to him on December 18, 2006. That case manager's decision denied a variety of PIPP benefits which the Appellant was seeking, including:

- Funding for a second neuropsychological examination/testing
- Permanent Impairment Award
- Occupational Therapy Assessment
- 180 Day Determination of employment
- Physical Rehabilitation/therapies
- Massage Therapy
- Disability Assessment
- Personal Care Assistance
- Pillow

On April 18, 2008, an Internal Review Officer for MPIC reviewed these issues of various benefits under the PIPP plan. The Internal Review Officer concluded that the Appellant's minor motor vehicle accident had not resulted in injuries which would necessitate any of the benefits requested. The medical information on file, he opined, lacked objective substantiation in support of his claim for a neuropsychological examination, a permanent impairment award, occupational therapy assessment, a 180 day determination of employment, physical rehabilitation program, massage therapy or disability assessment. He noted that [MPIC's Doctor #2], medical director of MPIC's Health Care Services team, was of the opinion that the medical evidence did not indicate that the Appellant had been diagnosed with a medical condition that developed secondary to the accident in question for which any of the benefits he had requested would be viewed as a medical requirement.

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

Appeal Hearing

Evidence and Submission for the Appellant:

At the appeal hearing, the Commission reviewed medical reports and heard evidence from the Appellant's chiropractor, [Appellant's Chiropractor]. It also heard evidence from the Appellant and a friend, his sister, and a former co-worker.

In addition, medical reports from various practitioners were reviewed, including reports from [Appellant's Physiatrist], [Appellant's Neurologist], [Appellant's Psychologist], [Appellant's Doctor #1] and [Appellant's Neuropsychologist].

[Appellant's Chiropractor] was qualified as an expert witness in chiropractic medicine with an emphasis in personal injury. The panel was provided with [Appellant's Chiropractor's] chart notes for the period July 25, 2003 to May 13, 2013, initial healthcare and treatment plan reports, and chiropractic reports dated January 9, 2007, April 8, 2013 and April 15, 2013. [Appellant's Chiropractor] also testified at the appeal hearing. In his reports and his testimony, [Appellant's Chiropractor] described the injuries which the Appellant had suffered in the motor vehicle accidents. His letter of April 15, 2013 indicated:

> "[The Appellant] continues to suffer from several acceleration-deceleration injuries to his Cervical, Thoracic and Lumbopelvic spine. The repeated events have created superimposed scarring to the soft tissue, including muscles, ligaments, vasculature, and neural tissues. Progressive degenerative changes are noted to the supporting ligaments and osseous components of the spine. On at least three of his collisions he suffered a force resulting in compounding complications of Mild Traumatic Brain Injuries (MTBI). He continues to suffer complications relative to these injuries effectively limiting his social, physical and emotional potential. [The Appellant] has gradually been forced to seek diminished levels of existence as a result of his injuries."

The letter of April 15, 2013 also addressed the question of whether there was a causal relationship between the motor vehicle accidents and the Appellant's signs and symptoms beyond May 28, 2004 and August 28, 2006. The letter provided an approximately five page explanation regarding the mechanism of injury and forces upon the Appellant's body. [Appellant's Chiropractor] concluded that on the balance of probability, the Appellant's symptoms would most likely be from an MTBI (mild traumatic brain injury) from the G-force, ligament, nerve and muscular damage. He concluded that on a balance of probabilities the injuries were causally related to the motor vehicle accidents based on the simple math that he had sustained exacerbation and aggravation to the compounded injuries of the other accidents.

[Appellant's Chiropractor's] report also opined that on a balance of probabilities the Appellant had not reached maximum therapeutic benefit from chiropractic care by either May 28, 2004 or August 28, 2006. He recommended continued supportive care, indicating that based on periods of trial separation and correlative data the Appellant himself kept, there was subjective evidence of failure to sustain his benefit from care. For example, [Appellant's Chiropractor] stated:

> "The effects of the MTBI are still of grave concern as the methods of coping are becoming steadily less effective. The primary symptoms of headaches, feeling tired, difficulty thinking and being irritable, dizziness, having trouble remembering, and being forgetful plague him on a daily basis.
>
> When he is adjusted, the headaches, dizziness and fatigue leave for hours and sometimes days. The rest of the symptoms remain consistent. We have been trying to find the optimal frequency that he can live with. I feel that once a week is sufficient he would like a little more frequent visits. We have come to the understanding that waiting for a week with severe Migraine headaches is not acceptable nor are periods of numbness and pain into his arms.
>
> Medically acceptable, is not the requirement here, it is what gets and keeps him functioning despite the difficulties he is undergoing."

[Appellant's Chiropractor] elaborated upon these comments when testifying at the hearing. He provided extensive evidence regarding damage to the Appellant's soft tissues, as well as the

myelinated fibres inside of the nerves, explaining the sensitivity of the traumatized cells. He indicated the Appellant may have sustained a concussion or had some trauma to the brain, which, along with his physical pain, was exacerbated with every motor vehicle accident. [Appellant's Chiropractor] saw an increase in the exacerbation of symptoms, both in pain and from the MTBI. He watched the Appellant go from a productive young man, seeing him vastly decay from what he was.

He emphasized that there are other ways of getting a concussion, other than hitting one's head, and that there was also no correlation between the damage to the Appellant's car and the amount of damage to his body. Personality changes could be accounted for by both post-concussion syndromes and a chronic pain syndrome affecting the Appellant. The Appellant had good days and bad days, and [Appellant's Chiropractor] continued to treat him, even when MPIC's funding ended, based upon an arrangement he made with the Appellant regarding payment.

[Appellant's Chiropractor] also testified regarding temporary withdrawals of care which had been attempted for the Appellant, and which, according to [Appellant's Chiropractor] and the Appellant, showed that he required supportive care. Although during one of the temporary withdrawals of care (during the month of July) the Appellant had attended at his office, [Appellant's Chiropractor] testified that no treatment or adjustment was provided on this visit. However, further questioning upon cross-examination demonstrated some confusion by [Appellant's Chiropractor] in interpreting his chart notes and the evidence he provided upon this issue was not found to be reliable by the panel.

[Appellant's Chiropractor] was firmly of the opinion that the Appellant did suffer as a result of withdrawals from treatment and did continue to require chiropractic treatment. The Appellant

also benefited from checking in with [Appellant's Chiropractor], who understood and could give him coping skills and support in a directional manner, helping the Appellant to keep moving forward. [Appellant's Chiropractor] indicated that he tried to provide this support, in addition to the regular chiropractic treatment, to address the Appellant's pain.

The Appellant's sister also testified at the appeal hearing. She described a close relationship with her brother and provided her recollection of the Appellant prior to the first motor vehicle accident in March of 2001. She described him as an A+ student interested in electronics, math and science. He was in a long-term relationship, had a good job, and engaged in activities such as volunteer coaching, helping with catholic school and activities with her own children.

She explained that this deteriorated after the motor vehicle accidents. The Appellant complained of pain and blurred vision, was not able to sit or stand for long, had difficulties with academic learning and had to be dragged out of the house. She noticed changes in his personality, with anxiety, nervousness and reluctance to go into public places. He no longer participated in sport or volunteer work, or other activities.

The Appellant testified at the hearing into his appeal. He described his life prior to the motor vehicle accident when he was working, looking at going back to school, had a relationship, was involved in coaching and was active in sport and at the gym. He was planning to buy a house and was saving for a down payment, with a good credit rating. He was doing well at his job and doing well in bonus plans there. He described an active social life.

The Appellant described the motor vehicle accidents as well as the symptoms which followed. He described headaches, migraines, strange pains and sensations throughout his back and his

neck, as well as numbness and tingling, problem sitting for long periods, ringing ears, earaches, jaw aches, hot and cold sensations and more. He also described how difficult it was for him to get through the day. He spent long periods of time in bed. He kept working for some time after the motor vehicle accident, but eventually started missing time from work due to difficulties sitting and standing for long periods and due to his migraines and pain. He took some time off work as a result. He saw some specialists.

The Appellant then described similar issues following the second motor vehicle accident, including additional symptoms like cloudiness in his vision. He described the treatment he sought after both motor vehicle accidents. This included chiropractic treatment, physiotherapy, athletic therapy, visits to his family doctor, to [Appellant's Physiatrist] and a couple of neurologists.

By the time of his third motor vehicle accident, all the Appellant's symptoms came back and worsened. He also started having major memory issues, which caused problems at work. He continued to see various doctors and tried to continue working until 2003, when he described going on a leave of absence for medical reasons because of memory issues and back and neck pain.

By this time, he no longer had any social life. He also had problems speaking, reading, writing and communicating. He suffered from short term memory problems.

The Appellant testified that he doesn't think he has had a job for about 3 or 4 years. He attended some interviews, but found it hard to answer the questions. However, the Appellant has now been working at a [text deleted], full time, for about 2 years, although he has been missing quite

a bit of work due to mobility issues. He described a few jobs that he had held before the current [text deleted] job, including working at [text deleted] for 3 weeks before he was laid off, at a [text deleted] and [text deleted] for several months and then working at [text deleted] in inventory, for approximately one year.

The Appellant explained that he was late in filing his Application for Review in November of 2005, because he was having difficulty dealing with paperwork due to his symptoms from the motor vehicle accidents. He had memory problems, difficulty reading and difficulty following words on a page. He did not understand many of the documents and needed his girlfriend's help. She was looking after his paperwork and reminding him of things, taking care of everything. However, he and his girlfriend started having problems with their relationship and he moved out of the house. During that time his girlfriend misplaced some of his mail and other things. Eventually, she gave him his things, which included a couple of boxes which he had to go through. That's when he found the case manager's decision and asked her to help him work through the paperwork. That is how he filed the Application for Review.

Although the Appellant had been dealing with his case manager by telephone, he was not able to understand or complete the required documentation without his girlfriend's assistance. He also indicated that the case manager did not always return the messages that he left for her.

The Appellant indicated that he did not understand how he could have been classified as a non-earner at the time of the 2005 motor vehicle accident. Although he may not have been working at the time, he was still having issues with daily tasks, and this was due to the motor vehicle accidents. That was the reason why he was not working. Although he testified that he was looking for work wherever he could, he really wasn't able to find or sustain work.

The Appellant explained that with the help of [Appellant's Chiropractor], chiropractic care allowed him the mobility to now go to work on a daily or regular basis. He still does miss some time because he is still having a lot of symptoms. His memory has gotten better but he still has some problems taking care of himself. He has a bit more of a social life and a bit more functioning than he did right after the motor vehicle accidents, but he still does silly things and has trouble focusing 100% on a task. Multi-tasking is difficult and he makes many mistakes.

As a result of the accident and his symptoms, he has suffered some feelings of depression, has lost friends and finds it difficult to take care of himself. He has difficulty maintaining a relationship as well.

The panel also heard evidence from a friend and former co-worker of the Appellant. The two started working together and "hanging out" in approximately 1998, when they were working together in [text deleted] positions. They have kept in fairly close contact over the years. The witness recalled that prior to the first motor vehicle accident, the Appellant rarely missed work and would also go out after work to hang out with his co-workers, playing basketball pick-up games and weight training. He was active within his circle of friends. He had good sales figures at work, sometimes meeting targets for the [text deleted] sales team.

After the motor vehicle accident in 2001, the witness noticed that the Appellant no longer came out to play basketball, and when he did go out he complained of back pain. Often he would be lying on the couch with difficulty moving around and complaining of headaches. He had become more withdrawn and has been distant over the past 10 years. He forgets things he shouldn't and is just not the same person. He is disconnected from his friends and often does not

return calls. He also noticed that the Appellant started missing work and eventually either quit or was fired.

Counsel for the Appellant submitted that this was a complex case, with the Appellant injured in five motor vehicle accidents in less than five years. Various diagnoses and treatment modalities had resulted. However, there was a consistent thread throughout, with the Appellant complaining of severe headaches and cognitive difficulties after the motor vehicle accidents. Regardless of what diagnostic label is applied to these signs and symptoms, the Appellant's life changed dramatically after the motor vehicle accidents.

Prior to the first motor vehicle accident in March of 2001, the Appellant had a good job, a good credit rating, was in a long-term relationship, had plans to buy a house and settle down and was physically active at the gym, playing and coaching basketball, and was socially active with friends and family. This was confirmed by his sister and his friend, as well as by the evidence of the Appellant.

Following the first motor vehicle accident, the Appellant suffered migraines, nausea, dizziness, trouble concentrating, memory problems, neck and back pain, disrupted sleep, fatigue and trouble with sitting and standing for extended periods.

His symptoms worsened after each motor vehicle accident. This led to losses. He lost his job and opportunities for career advancement. He lost his girlfriend, savings, social activities, physical fitness and involvement in sports.

The Appellant turned to chiropractic care. He also tried various other modalities, such as physiotherapy, massage and medication.

[Appellant's Chiropractor] testified that the Appellant's symptoms kept worsening, and that they especially did so during the month of long term withdrawal from care in September and October of 2010. In a report dated April 15, 2013, [Appellant's Chiropractor] described the diminishing capacity which the Appellant suffered following cessation of coverage in May 2004 and August of 2006. He set out objective findings to show that the Appellant improved, although at a slow rate, with care.

[Appellant's Chiropractor] also established the lack of relationship between the amount of vehicle damage and the degree of bodily injury suffered in the motor vehicle accident.

[Appellant's Chiropractor] addressed the view of [MPIC's Chiropractor], MPIC's health Care consultant, that the delivery of care to the Appellant by [Appellant's Chiropractor] was "patient driven". This was not the case. [Appellant's Chiropractor] understood the risks of supportive care and responded that none of these applied to the Appellant. He had been treating the Appellant for many years, and had more contact with him than any of his caregivers. He got to know him and his condition and had been able to assess him on a variety of levels. He was in the best position to decide the duration and frequency of treatment that the Appellant should receive and should carry greater weight than [MPIC's Chiropractor], who only did a paper review of the file or [Independent Chiropractor] who saw the Appellant only briefly for a third party evaluation.

[Appellant's Chiropractor's] diagnosis and his recommendations for treatment of the Appellant's signs and symptoms should be accepted by the panel.

Counsel also submitted that the Appellant had a reasonable excuse for filing his Application for Review in 2005 five months late. She submitted that five months was not an inordinately long period of time to be late. The late filing was not prejudicial to MPIC.

Counsel explained that the Appellant had serious financial issues around this time and, due to the difficulties with the girlfriend he depended upon, he was not reliably getting his mail. He fell behind in his rent and had numerous difficulties. The Appellant testified that he tried to contact MPIC during this time but that his case manager did not return his calls. It was only when he got the decision letter which had been misplaced by his girlfriend, found in a box of papers at a much later date, that he was able to obtain her assistance in filing the Application for Review.

Counsel submitted that this was a reasonable excuse and explanation for the late filing.

In regards to the Appellant's entitlement to IRI benefits, counsel noted that the Appellant did collect IRI benefits when he was off work between March 11 and June 10, 2002. However, after he returned to work in June of 2002, he had two more motor vehicle accidents. In a statement dated May 2003, the Appellant had explained that following the motor vehicle accident, he suffered from an increase in cognitive symptoms. However, he tried to hold on as long as he could at his employment, until he couldn't do it anymore, going off work between August 19, 2003 and September 15, 2003. This was supported by a Certificate from his family doctor, [Appellant's Doctor #1], dated August 21, 2003, confirming that the Appellant was unable to attend work at that time. A further certificate from [Appellant's Doctor #1] for the period

between September 12 and October 12, 2003 indicated that the Appellant still could not work. This continued up until the next motor vehicle accident suffered by the Appellant in October of 2003. Finally, he was terminated by his employer on December 4, 2003.

Counsel pointed to an EEG report from [Appellant's Doctor #2] and a neurology report from [Appellant's Neurologist] dated December 3, 2003 supporting the position that there was a causal link between the Appellant's cognitive signs and symptoms and the motor vehicle accident. It was the Appellant's position that a traumatic brain injury was caused by the motor vehicle accident. [Appellant's Neurologist] referred to the Appellant's normal neurological exam indicating

> "He has a normal neurological exam. I told him that his hardwiring was fine but that he had some problems with softer wiring. It is not unusual for people to have these kinds of cognitive defects following trauma, especially multiple trauma. However, any dysfunction at work will increase the negative feedback, in turn aggravating stress, in turn affecting his concentration. I think he is in a vicious cycle to some extent."

Counsel also pointed to a psychologist's report provided by [Appellant's Psychologist] and dated June 20, 2005. [Appellant's Psychologist] noted the Appellant's difficulties and stated that in his professional opinion, the Appellant was not capable of being substantially employed due to the combination of physical medical problems and the psychological factors outlined above, including his chronic pain and deficits in cognitive functioning.

[Appellant's Neuropsychologist's] report of May 11, 2012 also indicated that, although there were no measurable cognitive impairments and no available evidence that the Appellant had sustained a clinically significant brain injury or concussive injury, the Appellant required psychological treatment providing a clear identification of somatization and pain disorder. Counsel submitted that this pain syndrome made the Appellant unable to work.

Accordingly, counsel for the Appellant was seeking IRI benefits from August 19, 2003 until an indefinite end date when the Appellant was able to go back to work, which unfortunately, was not completely clear from the evidence before the panel. It was submitted that it was clear that the Appellant was unable to work following August 19, 2003, however, the question should be referred back to the case manager to determine the exact dates when the Appellant did and did not work, and accordingly, the IRI entitlements resulting.

In regard to the Appellant's classification as a non-earner, counsel submitted that had it not been for the effects of the previous three motor vehicle accidents, the Appellant would have been employed at the time of the motor vehicle accident on November 28, 2005. Anytime the Appellant was unemployed he was actively looking for work because he was financially bereft. He would have been working had it not been for those three prior motor vehicle accidents and if all of this had occurred on one MPIC file, the non-earner determination never would have happened.

Further, counsel submitted that the Appellant should be entitled to the PIPP benefits listed in the Internal Review decision of April 18, 2008, and that psychological treatment benefits should be included in these benefits. The need for these benefits was causally related to the motor vehicle accident, it was submitted. Counsel pointed to a report provided by the neurologist, [Appellant's Neurologist], and dated June 12, 2004. [Appellant's Neurologist] opined that, on a balance of probabilities, the Appellant's complaints were directly attributable to the injuries of several motor vehicle accidents. He noted that the Appellant's complaints were post-traumatic in nature and that it was not unusual for people to have some degree of cognitive impairment following trauma, especially multiple trauma.

It was submitted that both [Appellant's Neurologist] and [Appellant's Neuropsychologist] agreed that there was a link between the motor vehicle accident and the Appellant's pain disorder, and whatever degree of cognitive impairment followed. She quoted from [Appellant's Neuropsychologist's] report of May 11, 2012 which stated:

> "The Pain Disorder appears to be, on balance, associated with physical symptoms that were initiated by the initial motor vehicle accident of March 20, 2001 but has been complicated and exacerbated by the subsequent accidents that he had been involved in and, workplace issues. The psychological factors relate to workplace stresses, his low stress tolerance, his subjective experience of cognitive difficulties, and relational problems as these have unfolded over the course of time...
>
> Having said this, however, he does require medical review regarding his metabolic functioning, to determine whether or not he needs to be on thyroid replacement, and as he has not had psychological treatment at any time in regards to the clear identification of somaticization and, a Pain Disorder, he does require a course of treatment that would be cognitive behavioral symptom management-based and activating in terms of developing a more healthy, adaptive, and prosocial lifestyle, and in reviewing him in regards to the possible use of medication to treat his somatic symptom focus and, depressive symptoms."

Counsel also submitted that [Appellant's Chiropractor's] opinion regarding the traumatic brain injury should be given greater weight than any of the doctors or psychologists who had opined on this issue. It was her submission that because [Appellant's Chiropractor] was so involved with the Appellant's care over the years and had himself experienced these types of injuries; he was coming from an experiential as well as professional background. His research supported his diagnostic theory, and this, coupled with the opportunity he had to observe the Appellant on numerous times when providing treatment, allowed him to make an informed assessment. Thus, his opinion should be given appropriate weight.

Counsel submitted that because of the multiple motor vehicle accidents which had occurred and the Appellant's consistency in symptom reporting of headaches, pain and their effect on his

ability to function in every sphere of his life, supported by his caregivers, the Internal Review Officer's decision should be overturned and the Appellant's appeals allowed.

Evidence and Submissions for MPIC:

Counsel for MPIC did not call on any witnesses to provide testimony at the appeal hearing. However, he relied upon documents and reports provided by [Independent Chiropractor], [Appellant's Physiatrist], [MPIC's Doctor #2], [Appellant's Neurologist], and [MPIC's Chiropractor], as well as reports from [Appellant's Psychologist], [Appellant's Neuropsychologist] and [MPIC's Neuropsychologist].

Counsel for MPIC noted that MPIC accepts the symptoms that the Appellant has been reporting. Clearly the Appellant has problems and has had them for some time. Unfortunately, the Appellant also appears to suffer from memory issues, and, therefore counsel urged the panel to prefer the objective measures and materials contained in the Appellant's indexed file, which formed a more solid evidentiary record than the Appellant's recollections.

In regards to the Appellant's claim for chiropractic treatment, counsel for MPIC noted that the Appellant had received 470 chiropractic treatments between 2004 and 2012, not including those which had already been funded by MPIC. Therefore, it was not necessary to speculate upon the outcome of the treatments, as this could be evaluated by simply looking at the treatment results.

In order to be medically required, the treatment must result in positive advances or be deemed to be of a supportive nature. Counsel noted that the first required advancement towards recovery. However, in the Appellant's case, years of regular treatment had occurred without significant improvement. A comparison of the symptoms noted by [Appellant's Chiropractor] in his Initial

Health Care Report dated October 31, 2003, with the Initial Health Care Report provided by him on November 29, 2005 and his final report dated April 15, 2013, showed the same listing of symptoms. In fact, the same symptoms were reported broadly across all [Appellant's Chiropractor's] reports over this 10 year period, despite a significant amount of ongoing treatments. Even [Appellant's Chiropractor] admitted, upon cross examination, that there was a continuity in the symptoms. He argued that with regular chiropractic treatment they were somewhat diminished, showing an advancement towards recovery. However, counsel noted that the improvement [Appellant's Chiropractor] was noting occurred over a very long timeframe and was not clinically significant on a standard scale. Although [Appellant's Chiropractor] had argued it was significant on a "value added scale", he failed to provide such evidence to be reviewed by MPIC or the panel.

This may have resulted from [Appellant's Chiropractor's] view, expressed during cross-examination, that it was often best not to put things down on paper, due to his past experience with consultants. The doctor had referred to his clear practice of not recording pertinent information regarding his patient's condition that would enable independent review by consultants, as a result of his own view that reviewing doctors and panels should be denied the opportunity to objectively review his impressions. Accordingly, counsel submitted that [Appellant's Chiropractor's] opinions should be viewed skeptically, as his record keeping practices made his impressions and findings unreviewable. His reports lacked reliability, and he had difficulty in explaining his chart note notations as they were, during his testimony.

Counsel submitted that all of the doctors who had reviewed the Appellant's file believed that there was no further benefit to chiropractic care, including [Independent Chiropractor], [MPIC's Neuropsychologist] and [Appellant's Physiatrist].

Even in the realm of supportive care, counsel noted that the Appellant's case did not meet the requirements set out by the Commission in *[text deleted]* (AC-06-159), to show objective evidence of deterioration. In this case, the anecdotal estimates provided by [Appellant's Chiropractor] did not meet this standard.

Further, the requirement that the patient attempt a trial withdrawal of cessation of care could not be met, as a result of difficulties with the reliability of [Appellant's Chiropractor's] evidence which, due to the confusion and contradictions therein, were too problematic to be relied upon.

Further, counsel submitted that if the Appellant's condition had been deteriorating due to a lack of care, one could reasonably expect the treatment frequency to increase afterwards in order to return him to his pre-withdrawal levels. However, a review of [Appellant's Chiropractor's] notes does not support that this occurred. Even following the two month period around October 2010, care was not materially increased. There were also difficulties with [Appellant's Chiropractor's] measurements of range of motion etc. to support his impression of widespread dysfunction throughout the body after withdrawal of care. [Appellant's Chiropractor] also failed to address concerns regarding treatment dependence, pain focus and reliance upon treatment. His assertion that the Appellant was not dependent upon him personally failed to address the question of whether the Appellant was dependent upon chiropractic treatment in general. Accordingly, counsel submitted that [MPIC's Chiropractor's] objective review, along with [Appellant's Physiatrist's] opinion that chiropractic care was no longer helpful or necessary, should be preferred and the Appellant's claim for further chiropractic care should not be allowed.

Counsel noted that [Appellant's Chiropractor] was of the opinion that the Appellant had suffered a mild traumatic brain injury. Counsel maintained that the evidence does not prove that injury on a balance of probabilities. No imaging evidence supported that diagnosis. Further,

[Appellant's Neuropsychologist], in his neuropsychological report dated May 11, 2012, extensively set out the specific control tests he performed, as well as validity testing. [Appellant's Chiropractor] had admitted, on cross-examination, that he did nothing of the sort. Yet still, [Appellant's Neuropsychologist] was not able to document any clinically significant brain injury resulting from any of the Appellant's five motor vehicle accidents. A neuropsychological assessment showed valid normative function and the Appellant's subjective reports were not mirrored by a finding of a neuropsychological abnormality.

[Appellant's Neuropsychologist] concluded that there was no available evidence that the Appellant had sustained any clinically significant brain or concussive injury at any time from the motor vehicle accidents, that would lead to long-term effects on his cognitive functioning.

In older reports, [Appellant's Neurologist] noted some neurological problems, but his more recent report of July 19, 2006 showed an essentially normal neurological exam. He indicated he was not convinced that the Appellant had ever suffered a concussion:

> "Finally, I am not convinced that he actually had a concussion. He had a whiplash and he did not lose consciousness. He has a host of symptoms which could, in isolation, be post-concussive in etiology but, taking into account the entire pattern of this man's history, I believe that his underlying Achilles heel is a personality profile that tends to magnify bodily sensations and also to oversomatize."

Reviews of [Independent Chiropractor's] reports show that he did not believe a traumatic brain injury had occurred. Nor was it established by [Appellant's Psychologist's] reports. Reports from [MPIC's Neuropsychologist], an MPIC neuropsychologist who reviewed the file, did not make any finding of traumatic brain injury.

Although several experts did believe the Appellant was suffering from a psychological condition, counsel submitted that the psychological condition was not caused by the motor vehicle accidents. In this regard, he pointed to reports from [Independent Chiropractor] and [Appellant's Neuropsychologist] as being key reports. Both provided a similar diagnosis. [Independent Chiropractor] noted a diagnosis of a chronic pain syndrome after examining the Appellant a few times.

[Appellant's Neuropsychologist] reported noted in his report of May 11, 2012:

> "More likely than not, on balance, given the reports of the informants, including [Appellant's Physiatrist], and his own report of pre-to post-accident changes in his functioning, the Pain Disorder with psychological factors and a general medical condition most likely is a function of the chronicity of his physical symptoms since the initial accident of March 20, 2001, the causal link here was identified as probable in the initial MPI medical opinion of January 2003, in the context of workplace stressors that reportedly were present following the March 20, 2001 motor vehicle accident, with this becoming more potent in affecting his functioning by the time he was seen for the 2nd independent chiropractic examination as of April 2006, in contrast to the initial examination of March 2004, and in the July 2006 examination findings from [Appellant's Neurologist], neurologist, over and above the findings that were noted as of December 3, 2003 and, the opinions as outlined by [Appellant's Neurologist] in his summary report of June 2004, where he indicated that, "on balance of medical probabilities, it is my opinion that his complaints are directly attributable to the injuries of several motor vehicle accidents, most notably March 2001."

[Appellant's Neurologist] addressed the Appellant's headaches in his report of June 24, 2002, but noted a normal result from a non-enhanced CT scan of the brain.

[Appellant's Neuropsychologist] had suggested that the Appellant's headaches may have been a triggering factor in the Appellant's chronic pain, but counsel for MPIC submitted that [Appellant's Neuropsychologist] would be wrong in finding a causal link between the motor vehicle accidents and the Appellant's chronic pain. He relied upon [Independent Chiropractor's] opinion that the Appellant's pain symptoms were not due to the motor vehicle accident, but

rather were due to deconditioning and posturable problems. The Appellant's pain condition was a syndrome on its own and was not necessarily an extension of any acute pain or any result from the motor vehicle accident.

[MPIC's Neuropsychologist], [text deleted] preferred the opinion of [Independent Chiropractor] on that particular question. His most recent report of August 28, 2013 noted that he had earlier accepted that there was a chronic pain condition, but that he did not accept that there was any traumatic brain injury.

Although [Appellant's Psychologist] had reported along the same lines as [Appellant's Neuropsychologist], [MPIC's Neuropsychologist], in his report dated November 20, 2006, noted problems with [Appellant's Psychologist's] methodology, concluding that the five tests ran (sic) by [Appellant's Psychologist] were not adequate to determine a cognitive disorder.

In regard to the late filing of the Appellant's Application for Review regarding IRI benefits, counsel submitted that no reasonable excuse had been provided. Although the Appellant testified that he had had difficulty at that time with reading, had relied upon his ex-girlfriend's help, and that further difficulties appeared when the ex-girlfriend kept his mail from him, counsel noted that at that time, by the Appellant's own admission, he was in contact with MPIC and with the case manager. Accordingly, he should have been able to file the Application for Review in good time.

Counsel also addressed the Appellant's entitlement to IRI benefits, noting that his comments regarding causation applied in this regard as well. The Appellant was in receipt of IRI benefits due to the headaches he was suffering between March and June of 2002. However, between

June of 2002 and March of 2005, the Appellant was able to work at full duties. Caregivers such as [Appellant's Chiropractor] did not select the requirement for modified duties when completing forms. Nor did the Treatment Plan Report provided by [Appellant's Chiropractor] on August 20, 2003 indicate that the Appellant was unable to work. Sick certificates provided by [Appellant's Doctor #1] indicated that the Appellant should remain off work but did not make any specific statements connecting this inability to work to the motor vehicle accident.

Although counsel recognized that [Appellant's Neurologist] identified dysfunction at work and increasing negative feedback in his report of December 3, 2003, he did not say that the Appellant was disabled from work at that point.

In a report dated January 5, 2004, the Appellant's general practitioner, [Appellant's Doctor #1], indicated that:

> "A portion of his time off work could be from his May crash. It could also be due to his March 2003 crash. He more recently was in a crash in Oct. and the latter portion of his time away from work could be due to that crash."

This presents only possibilities and not probabilities, it was submitted. In January of 2004, the Appellant's previous team leader at [text deleted] indicated that he had not reported any difficulties he was experiencing at work. Nor did he report ongoing headaches prior to or after May 13, 2003. [Independent Chiropractor's] report of March 5, 2004 did not identify any physical impairment that would disable the Appellant from doing his job. [MPIC's Neuropsychologist], on October 13, 2004, and [MPIC's Doctor #1] on March 14, 2005 confirmed that there was no evidence indicating that the Appellant was unable to work.

The panel heard evidence that the Appellant was looking for work during this time period and telling employers that he was able to work. He had the ability to conduct a job search.

Although [Appellant's Psychologist] stated that the Appellant's psychological symptoms would have made the Appellant disabled regarding employment, [MPIC's Neuropsychologist] expressed concerns regarding [Appellant's Psychologist's] report. [Appellant's Neuropsychologist's] report found no evidence of brain injury or impairment of cognitive function in that regard, and found that there was no motor vehicle accident related cause preventing him from working. [Appellant's Neurologist] also opined, in a report dated July 19, 2006 that it was important for the Appellant to get back to work, even on a part-time basis.

Given all of this evidence, counsel submitted that the case manager and the Internal Review Officer made the correct decision and that the Appellant was not disabled from working due to the motor vehicle accident injuries.

Counsel also noted that, as it was agreed that the Appellant was not employed at the time of the classification of the Appellant as a non-earner in November of 2005, that decision was made correctly. Should the Commission overturn the Internal Review Officer's decision regarding the Appellant's entitlement to IRI benefits, then, the question of the Appellant's non-earner status in November of 2005, might need to be revisited in terms of his classification as of October 2005. However, if he would have been entitled to receive IRI benefits, it was submitted, then he would still have remained a non-earner.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in the decision set out above.

1. Reasonable excuse for the late filing of the Application for Review – Internal Review Decision of March 21, 2006.

> **Application for review of claim by corporation**
>
> 172(1) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.
>
> **Corporation may extend time**
>
> 172(2) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.
>
> **Response within 30 days**
>
> 172(3) The corporation shall respond to the claimant within 30 days after receiving an application for review.

The panel finds that the Appellant has provided a reasonable excuse for his failure to file the Application for Review within the time limits set out by the MPIC Act.

The Appellant, in his oral testimony, described the difficulties in his living situation at the time of the case manager's decision of March 30, 2005. He explained that prior to that time, he had been having difficulty with his reading skills, and was relying upon assistance from his girlfriend to help with the review of MPIC documents. Difficulties then developed in their relationship and he moved out of their shared home for a period of time. During that time, the Appellant had limited or no access to his mail. He testified that he finally received a box of mail from his

girlfriend from the home. He went through the box and then found the case manager's decision and filed an Application for Review.

The panel also notes that the delay only extended for five months.

Accordingly, given the difficulties that the Appellant was facing with his health, as well as the instability of his personal circumstances and living situation, the panel does not find this to be an unreasonable delay. Nor do we find that the delay has presented undue prejudice to MPIC.

We find that the Appellant has provided a reasonable excuse for his failure to comply with Section 172 of the MPIC Act.

Accordingly, the Commission will exercise its discretion to allow for the late filing of the Application for Review from the case manager's decision of March 30, 2005.

2. Entitlement to Reimbursement of Chiropractic Treatments beyond May 28, 2004 – Internal Review Decision of September 1, 2004:

The MPIC Act provides:

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;

Manitoba Regulation 40/94 provides:

> **Medical or paramedical care**
> **5** Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:
>
> (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;
>
> (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

The question before the panel was whether there was or is a medical necessity for the Appellant to receive further chiropractic care as a result of injuries arising out of the motor vehicle accident. The panel has considered both whether the care is medically required on the basis that it is advancing the Appellant towards recovery, or whether it is medically required on a supportive care basis.

The panel finds that despite regular and frequent treatments, including some 470 treatments unpaid by MPIC in addition to those that MPIC already funded, the Appellant has experienced little to no advancement in his condition. His symptoms still remain. Although [Appellant's Chiropractor], the chiropractor, testified that the Appellant has experienced slow improvement, he admitted that this improvement was not clinically significant on a standard scale and was relying upon a "value-added" scale to support the care, without providing adequate explanation as to the relevance or meaning of that concept.

The panel finds that the Appellant's symptoms as listed in the chart notes and medical reports have remained largely unchanged over the years and did not improve over the period of almost

10 years that the Appellant received chiropractic treatment from [Appellant's Chiropractor]. He has, on the whole, received the same treatment at the same frequency over this 10 year period without any substantial change in his condition.

[Independent Chiropractor], [MPIC's Chiropractor] and [Appellant's Physiatrist] were all of the view that the Appellant did not require and/or would not necessarily benefit from further chiropractic care of this nature.

The panel considered the criteria recognized by the Commission for supportive care. Generally, supportive care includes the following elements:

1. Patients who have received maximum therapeutic benefit but fail to maintain it and, in fact progressively deteriorate when treatment is periodically withdrawn.
2. Patients who have undergone a trial of active and passive modalities of treatment.
3. Patients who have considered or attempted alternative care options.
4. Patients whose other primary care is not interfered with and who do not risk dependence that might outweigh expected benefits.

The panel carefully considered the withdrawal trials of care which were dealt with in the evidence before us.

The first trial withdrawal of care referred to was during the month of July. The panel has reviewed the evidence in regard to this period and found that the evidence of [Appellant's Chiropractor] was contradictory and unreliable regarding this period of withdrawal. It was not clear, due to contradictions between the oral testimony of the Appellant and [Appellant's

Chiropractor] and that found on the documentary chart records, as to how long the Appellant actually went without chiropractic treatment at that time.

The second period covered in the evidence lasted approximately between September and October. [Appellant's Chiropractor's] evidence indicated that it took six months for the Appellant to recover from the absence of care during that time period. However, as counsel for MPIC pointed out, there was no increase or change in the frequency of treatments the Appellant received once he returned to care. Nor was there any demonstrable difference in the symptoms listed – they appeared to be consistent before and after the withdrawal of care.

[Appellant's Chiropractor] testified that some measurements of range of motion, specifically in the pelvis, showed deterioration. However, the panel agrees with counsel for MPIC that, given the wholesale deterioration over various areas of his body that both the Appellant and [Appellant's Chiropractor] were reporting, there should have been more objective measurements and signs that such deterioration had occurred as the result of the trial withdrawal of care.

In addition, the panel notes counsel for MPIC's submission that the Appellant was at risk for "provider dependence" in this situation.

[MPIC's Chiropractor], in a report dated August 28, 2013 summarized the situation as follows:

> "The chart notes when specifically examined for the hiatus in care in 2012, do not demonstrate convincingly that without chiropractic care the claimant's condition deteriorates to any significant level. Chart notes do describe a one month hiatus in care as previously discussed. They do not however describe a significant difference in the claimant's subjective or objective findings pre and post *"trial separation"*. Indeed, very shortly following the claimant's resumption of care, the chart notes again become essentially indistinguishable from those notes that occurred in the months and years prior. The evidence of a significant regression in the claimant's symptoms appears to be primarily based on the claimant's self report of deterioration.

> Further evidence against the efficacy of ongoing care in this case is that according to [Appellant's Chiropractor's] report it has taken nearly 6 months of care (October 2012-April 2013) to 'stabilize' the claimant following the September to October hiatus in care (page 10 second paragraph). As previously mentioned however, the chart notes do not support this contention as they are essentially indistinguishable before and after the 'trial separation'. [Appellant's Chiropractor] is intimating that after 4 weeks of no care it takes the claimant 6 months to return to his baseline status. This, in my opinion, argues against the effectiveness of the care."

The panel finds that the Appellant has failed to meet the onus upon him of showing that the requisite criteria necessary to show a need for and benefit from supportive care have been met. The Commission finds that supportive care or active chiropractic treatments beyond May 28, 2004 were not medically required. We find that the Appellant has had ample chiropractic care with very limited positive results and agree with the comments of [Appellant's Physiatrist], in his report dated January 12, 2013 when he indicated:

> "...With respect to 2006, he continued to have many non-specific musculoskeletal and cognitive complaints...At that time, my feeling was this gentleman was suffering predominantly psychological symptoms with chronic regional myofascial symptoms in addition. He was receiving some symptomatic improvement with a chiropractor and I suggested that there was no reason to not continue this at that point. In retrospect, it is doubtful that the chiropractic care materially changed his outcome...
>
> To be frank, my medical opinion is that I am not in agreement of the value of supportive chiropractic care in chronic unchanging musculoskeletal conditions..."

Accordingly, the Commission will uphold the Internal Review decision of September 1, 2004 regarding reimbursement of chiropractic treatments for the Appellant beyond May 28, 2004, and the Appellant's appeal is dismissed on this issue.

3. (a) **Whether the Appellant is Entitled to IRI benefits (Internal Review Decision of March 21, 2006) and whether the Appellant was properly classified as a Non-Earner (Internal Review Decision of July 6, 2006) and**,

(b)whether the Appellant is entitled to PIPP benefits as a result of the November 28, 2005 motor vehicle accident or the cumulative effects of the Appellant's prior motor vehicle accidents (Internal Review Decision of April 18, 2008):

The MPIC Act provides:

Entitlement to I.R.I. for first 180 days

85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

(a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;

(b) he or she 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;

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.

Manitoba Regulation 37/94 provides:

Meaning of unable to hold employment
8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Manitoba Regulation 40/94 provides:

Medical or paramedical care
5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

(c) 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;
(d) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

In considering the Appellant's ability to work, his non-earner status, and the cause of his symptoms, the panel has addressed the question of whether the Appellant suffered from a traumatic brain injury, a chronic pain syndrome, or a physical inability to perform the duties of his occupation.

A. <u>Minor Traumatic Brain Injury:</u>

In reviewing the evidence before us, the panel notes that [Appellant's Chiropractor] was of the opinion that the Appellant had suffered from a minor traumatic brain injury while [Independent Chiropractor], who performed an independent assessment, believed he had not.

The panel notes that both of these experts are chiropractors. The panel prefers the evidence of the neurologist, psychologist and neuropsychologists who addressed this question in the evidence.

The neurologist, [Appellant's Neurologist], reviewed a CT scan of the brain on August 21, 2002, which he stated had no abnormality.

On December 3, 2003, [Appellant's Neurologist] noted:

> "He has a normal neurological exam. I told him that his hardwiring was fine but that he had some problems with softer wiring. It is not unusual for people to have these kinds of cognitive defects following trauma, especially multiple trauma. However, any dysfunction at work will increase the negative feedback, in turn aggravating stress, in turn affecting his concentration. I think he is in a vicious cycle to some extent."

On June 12, 2004, [Appellant's Neurologist] stated:

> "I therefore, thought he had a normal neurological examination on this occasion. I again indicated to him that I thought that his complaints were posttraumatic in nature and that it was not unusual for people to have some degree of cognitive impairment following trauma, especially multiple trauma."

On July 19, 2006, [Appellant's Neurologist] stated:

> "Finally, I am not convinced that he actually had a concussion. He had a whiplash and he did not lose consciousness. He has a host of symptoms which could, in isolation, be post-concussive in etiology but, taking into account the entire pattern of this man's history, I believe that his underlying Achilles heel is a personality profile that tends to magnify bodily sensations and also to oversomatize."

In a report dated June 20, 2005 the psychologist, [Appellant's Psychologist], did not believe the Appellant suffered a concussion:

> "...I would regard the most debilitating conditions which [the Appellant] is experiencing as being his borderline hypothyroidism, mild spinal degeneration, an adjustment disorder associated with his four motor vehicle accidents, his pain disorder (with associated somatization and mild depression), and his mild cognitive impairment. Although it is doubtful that [the Appellant] experienced an actual concussion in relation to his four

> M.V.A.'s, the psychological presentation of his symptoms is like that of a mild post-concussive disorder and of a mild posttraumatic stress disorder. Given his history of hypothyroidism and depression, it is possible that the mild cognitive deterioration which appears evident in his various assessment results is related to several different factors, not necessarily just to whatever effect his repeated motor vehicle accidents may have had on his neuropsychological functioning."

[MPIC's Neuropsychologist] reported on November 20, 2006. He disagreed with many of [Appellant's Psychologist's] conclusions. It was his view that a diagnosis of post-concussive disorder was not possible in the absence of an actual concussion and he found no evidence to support that the Appellant was suffering from psychological or cognitive conditions that could be contributed to the motor vehicle accident.

[Appellant's Neuropsychologist] examined the Appellant. He reported on May 11, 2012. He stated:

> "...my opinion is that [the Appellant] has a permanent impairment in his psychological functioning related to his Pain Disorder, but that there is no measurable cognitive impairment despite his symptom report, outside of mild processing speed weakness that would relate to the combination of his somatic focus, ease of being stressed, sleep disturbance, and energy problems. There is no available evidence that I have reviewed that he had sustained, at any time, through the 5 accidents that he has been involved in, a clinically significant brain injury or, a concussive injury that would lead to long-term effects on his cognitive functioning."

Our review of the evidence from the neurologist, psychologist and neuropsychologists, leads the panel to conclude that the evidence has failed to establish, on a balance of probabilities, that the Appellant suffered a traumatic brain injury or concussive head injury in the motor vehicle accidents.

B. <u>Chronic Pain (Somatization):</u>

The panel's review of the evidence has revealed many references to the Appellant's tendency to somaticize and to the development of a possible chronic pain syndrome. [Independent Chiropractor] made note of a possible chronic pain syndrome on April 28, 2006:

> "Chronic pain syndrome with associated maladaptive behaviours. In [the Appellant's] circumstance this is marked by non-organic signs, high self rated pain intensities, magnified self-rated functional limitations, prolonged course of therapy with no apparent benefits, and possibly secondary gain issues. Iatrogenic elements include speculative diagnoses concerning a concussive injury, illness convictions, and pursuit of diagnostic tests."

[Appellant's Neurologist] saw the Appellant as early of June of 2002. Over the course of his care of the Appellant, he documented headaches, photophobia and other symptoms which he eventually concluded arose from the motor vehicle accidents. Although his neurological exams were normal, [Appellant's Neurologist] began to note pain focused behaviour. On July 19, 2006, he noted that he thinks that "the issue is psychological...":

> "He has a host of symptoms which apparently are very real for him. He seems extremely motivated to try and find a way out of his morass of pain and dysfunction. I think that, if there is any way out of this, it lies with protracted counseling and psychological support rather than more scans..."

The Appellant's family doctor [Appellant's Doctor #1], also flagged:

> "Possible adult adjustment disorder from numerous M.V.A.'s.
>
> Vague difficulty concentrating for which there were soft signs present..."

[Appellant's Psychologist], although doubtful that the Appellant had suffered from a concussion, was of the opinion that the Appellant was not capable of being substantially employed due to the combination of physical medical problems and psychological factors, including his chronic pain and deficits in cognitive functioning. He diagnosed an adjustment disorder associated with the four motor vehicle accidents as a debilitating condition along with his pain disorder with an associated somatization and mild depression:

> "I concur with [Appellant's Doctor #1's] diagnosis of an Adjustment Disorder associated with [the Appellant's] multiple motor vehicle accidents. The psychological symptoms of depression and anxiety associated with this probably contributed to his problems with attention, concentration, organization and problem-solving, as it is well-accepted that psychological disturbances cause changes in cognitive functioning. The changes in cognitive functioning tend to resolve with the psychological condition, if the condition is mild."

[MPIC's Doctor #2], medical consultant with MPIC's Health Care Services team, reviewed the Appellant's file on September 25, 2006, referring to [Appellant's Neurologist's] note of the Appellant's "tendency to magnify bodily sensations and also to over somatize". She referred the matter on to MPIC's psychological consultant to clarify further, including addressing the issue of a cause and effect relationship between the collision and the Appellant's current presentation.

[MPIC's Neuropsychologist], a neuropsychological consultant with MPIC's Health Care Services then provided two reports. However, he did not find that the Appellant was suffering from a psychological or cognitive condition that could be attributed to the motor vehicle accidents and did not recommend any psychological treatment.

However, [Appellant's Neuropsychologist] provided an extensive report on May 11, 2012, following lengthy assessment of the Appellant. [Appellant's Neuropsychologist] was asked to assess regarding potential ongoing psychological and cognitive problems and on whether or not they could be causally related to the series of five motor vehicle accidents the Appellant was involved in. He concluded:

> "Given the reports from the psychologist based on the June 2005 report, from the chiropractor from the April 2006 examination, from the neurologist, based on the July 2006 report, in the context of normal neurologic functioning and a poly-symptomatic report, and from what I heard from [Appellant's Physiatrist], with [the Appellant] seen to be very symptom and pain-focused, with the influences here being mostly "supertentorial" as in related to psychological factors, and my own examination findings, [the Appellant] has a primary diagnosis of a Pain Disorder with psychological factors primarily, and a general medical condition, related to his muscular skeletal condition, this

> would subsume his poly-region and system symptom report, including cognitive symptoms, and this is associated, most likely, with a chronic Adjustment Disorder with depressed mood/Depressive Disorder..."

[Appellant's Neuropsychologist] recommended:

> "Having said this, however, he does require medical review regarding his metabolic functioning, to determine whether or not he needs to be on thyroid replacement, and as he has not had psychological treatment at any time in regards to the clear identification of somaticization and, a Pain Disorder, he does require a course of treatment that would be cognitive behavioral symptom management-based and activating in terms of developing a more healthy, adaptive, and prosocial lifestyle, and in reviewing him in regards to the possible use of medication to treat his somatic symptom focus and, depressive symptoms."

On the basis of the evidence from [Independent Chiropractor], [Appellant's Neurologist], [Appellant's Doctor #1], [Appellant's Psychologist] and [Appellant's Neuropsychologist], the panel finds that, as a result of the motor vehicle accidents, the Appellant suffered from a chronic pain disorder with psychological factors, also referred to in reports as associated chronic adjustment disorder with depressed mood/depressive disorder.

Psychological Treatment:

We find that [Appellant's Psychologist], [Appellant's Neurologist] and [Appellant's Neuropsychologist] all recommended psychological treatment for this condition as a result of the motor vehicle accidents and that to date, MPIC has failed to provide the Appellant with such treatment. Accordingly, the Commission finds that the Appellant shall be entitled to psychological treatment benefits to address this psychological condition which arose as a result of the motor vehicle accidents. Accordingly, the Internal Review decision of April 18, 2008 regarding the issue of the Appellant's entitlement to PIPP benefits as a result of the cumulative effect of the motor vehicle accidents, is overturned in this regard, and the Appellant's appeal on

this issue, is allowed, in part, to provide for psychological treatment benefits for the psychological condition which arose as a result of the motor vehicle accidents.

IRI Benefits and the Ability to Work:

In Initial Healthcare Reports dated July 25, 2003 and August 20, 2003, [Appellant's Chiropractor] did not indicate that the Appellant was not able to work. However, his testimony at the hearing did indicate that he was of the view the Appellant was unable to work due to injuries resulting from the motor vehicle accident.

The panel heard evidence that the Appellant worked after the accidents in 2003, but that he had difficulty working after August and was terminated, in December of 2003 for absenteeism and issues regarding compliance with the absenteeism rules of his employer.

[Appellant's Doctor #1] diagnosed the Appellant as suffering from an adjustment disorder. Her report made some reference to loss of time from working in connection with various motor vehicle accidents. She provided some sick certificates for work. However, her opinion as to whether there was a connection between the time loss of work and the motor vehicle accidents was not completely clear. Rather, she indicated that:

> "A portion of his time off work could be from his May crash. It could also be due to his March 2003 crash. He more recently was in a crash in Oct. and the latter portion of his time away from work could be due to that crash."

[Appellant's Doctor #1] does not clearly state that the Appellant could not work due to injuries sustained in his motor vehicle accidents.

[Appellant's Psychologist] was clear in his opinion. In his report of June 20, 2005, he stated:

> "I would regard the significant number of different physical medicine and psychological disorders and symptoms which he is experiencing now, and which he experienced in 2003, as causing him to be disabled for regular competitive employment. I view him as being disabled in terms of his capacity for regular competitive employment, in part due the (sic) deficits in his capacity to function, and in part due to his inability to sustain the regular, consistent employment attendance and performance an employer would require."

Although [Appellant's Doctor #1] failed to make a clear finding as to the Appellant's employability in 2003, [Appellant's Psychologist's] review of her testing results and reports indicates that the Appellant had been experiencing an even greater cognitive impairment in 2003 than [Appellant's Psychologist] was finding in 2005, when he concluded the Appellant was disabled from working:

> "In my professional opinion, the additive and interactive effect of [the Appellant's] multiple physical medicine disorders is likely to have made him disabled in terms of regular, consistent competitive employment, especially in the 2003 time period. The effects of each of his disorders would likely interact with each other, adding to their total effect. [The Appellant's] capacity to return to sustainable competitive employment, in my view, has been diminished by the fact that he has been off work for about two years. When the effect of being off work for two years is added to his other risk factors, [the Appellant's] chances of returning to sustained regular employment are guarded, in my professional opinion."

The panel has also given weight to the observations of [Appellant's Neurologist], who provided thorough and comprehensive assessments of the Appellant, having seen him over the course of several years. In a report dated July 19, 2006, [Appellant's Neurologist] recommended psychological help, noting that he was too focused on his pain, but, from a physical point of view recommended that he should be as active as possible and try and work through the pain:

> "The most important thing is for this man to get back working, even in a relatively low level job, even part-time. Even volunteer work would be preferable to the kind of lifestyle that he is living currently."

The only evidence after this date in July 2006 to support the notion that the Appellant could not work after this time, was provided by [Appellant's Chiropractor]. However, the panel has given greater weight to the evidence of [Appellant's Neurologist], [Appellant's Neuropsychologist]

and [Appellant's Psychologist]. [Appellant's Neuropsychologist's] report of May 11, 2012 did not find any reason that the Appellant could not work at that time:

> "In terms of his prognosis, as has proven to be the case, particularly, in the 7 months preceding my review with him, February 9, 2012, he has been working full-time albeit for minor time loss, and my expectation for him is that this would continue as there is no basis to consider that, due to accident-related causation, he could not continue working as is the case. His prognosis, however, would be very guarded in terms of making gains in his pain perception and the impact that this has on his every day functioning."

The Commission finds that the evidence establishes the Appellant was unable to work, due to the chronic pain impairment resulting from the motor vehicle accidents for the period between December 2003 and July 2006, and that he should be entitled to IRI benefits during this period.

The panel has noted that there was evidence that the Appellant did work some periods at some jobs. However, the Appellant could not recall when, and his counsel came to the appeal hearing without the relevant information and summary of his work history between 2003 and 2013. Therefore, although the Commission finds that the Appellant should be entitled to some IRI benefits between December 2003 and July 2006, we will refer the question as to how much IRI the Appellant was entitled to, having regard to the periods when he may have worked, back to his case manager for investigation. The decision of the Internal Review Officer dated March 21, 2006 will be overturned in regard to the issue of IRI benefits between December 2003 and July 2006. The Appellant's appeal in this regard will be allowed and the issue referred back to the Appellant's case manager for investigation and calculation of IRI benefits.

Non-Earner Status:

Counsel for MPIC agreed that if the Commission found that the Appellant was unable to work as a result of previous motor vehicle accidents and thus, should have been in receipt of IRI benefits in November 2005, this would impact upon the Appellant's status as a non-earner. If the

Appellant had been in receipt of IRI benefits during the relevant period, this could have affected his determination as a non-earner. Counsel conceded that this could have been relevant information to the determination.

Accordingly, given the Commission's determination above, that the Appellant should be entitled to IRI benefits between December 2003 and July 2006, the Commission will also allow the Appellant's appeal in regard to the question of his non-earner status and will refer the question of that status back to the case manager for reconsideration in light of the Commission's findings above.

Dated at Winnipeg this 24th day of October, 2013.

LAURA DIAMOND

NEIL COHEN

JANET FROHLICH