Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-019

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Jacqueline Freedman** **Ms Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATES:	**September 17, 18 and 19, 2013**
ISSUE(S):	**1. Entitlement to further psychological treatment benefits;** **2. Entitlement to further Income Replacement Indemnity benefits.**
RELEVANT SECTIONS:	**Sections 110(1)(a) and 136(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and 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

The Appellant was injured in multiple motor vehicle accidents in 1997, including an accident on June 9, 1997. MPIC provided certain benefits, including chiropractic treatment and permanent impairment awards which were dealt with in Internal Review and Automobile Injury Compensation Appeal Commission decisions.

Case Management Decisions:

On February 22, 2005, the Appellant's case manager authorized funding for four transitional psychological sessions, setting a tentative date of September 1, 2005 as a return to work date for the Appellant.

The Appellant filed an Application for Review from this decision, taking the position that he was unable to work due to accident related medical conditions.

The Appellant's case manager wrote to him on February 3, 2006 ending his entitlement to Income Replacement Indemnity ("IRI") benefits. The case manager indicated that the medical information on the Appellant's file indicated that he was psychologically back to his pre-motor vehicle accident baseline status by October of 2004. An evaluation of January 17, 2006 indicated that he was physically able to work safely in the medium/heavy strength category and therefore met the lifting criteria outlined in the Physical Demands Analysis provided for at his job as a [text deleted] (the job he held at the time of the motor vehicle accident).

The case manager concluded that the Appellant was capable of returning to his pre-accident employment and that his IRI benefits would end as per Section 110(1)(a) of the MPIC Act. Temporary continuation of IRI for up to one year was provided for under Section 110(2)(d) of the MPIC Act, until February 2007.

Internal Review:

The Appellant sought an Internal Review of these decisions. The Appellant took the position that he had not been tested on very important aspects of his pre-accident job, such as kneeling,

squatting and lifting, and that he was not psychologically capable of returning to his pre-accident job.

In a decision dated November 9, 2006, an Internal Review Officer for MPIC confirmed the case manager's decisions. He concluded that there was a body of evidence to support the findings and conclusions of the case manager. He noted that the Appellant would have been receiving benefits from MPIC for almost 10 years, but that the much hoped for result of psychological improvement had never materialized. The claimant was considered able to hold his employment, as he was entirely or substantially able to perform the essential duties of that employment. While there may have been some minor duties which the Appellant would have difficulty with, his functional capabilities when last tested met or exceeded almost all of those required per his pre-accident job description. Therefore the case manager's decisions were confirmed.

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

Appeal:

At the appeal hearing, counsel for the Appellant advised the panel that the Appellant's appeal involved a significant interplay between physical and psychological factors. The Appellant was not capable, on a physical basis, of returning to his pre-motor vehicle accident job and the many assessments which MPIC has conducted to arrive at the conclusion that he was able were flawed. The Appellant also suffered from a psychological, chronic pain condition resulting from the motor vehicle accidents.

Counsel for MPIC took the position that psychologically, the Appellant had returned to the position he was in prior to the motor vehicle accident, and that whatever psychological

symptoms he had stemming from the motor vehicle accident had dissipated. Counsel for the Appellant acknowledged the Appellant's pre-morbid psychological fragility, but emphasized that the Appellant could not cope with the additional stressors arising from the motor vehicle accidents, resulting in his current medical condition.

The Commission was provided with evidence (on the Appellant's indexed file) in the form of numerous reports from chiropractors, [Appellant's Chiropractor] and [Independent Chiropractor]; radiologists; psychiatrists, [Appellant's Psychiatrist #1], [Appellant's Psychiatrist #2], [Appellant's Psychiatrist #3], and [Appellant's Psychiatrist #4]; psychologists, [Appellant's Psychologist #1], [Appellant's Psychologist #2]; and [MPIC's Psychologist]; physiotherapists; physiatrists, [Appellant's Physiatrist #1], [Independent Physiatrist], and [Appellant's Physiatrist #2]; occupational therapists; and [Appellant's Doctor #1].

Evidence and Submission for the Appellant:

At the appeal hearing, the panel heard evidence from the Appellant, his brother and his sister.

The Appellant:

The Appellant's testimony described his life prior to the motor vehicle accident. He had a house in [text deleted] which he maintained. He had been working at construction jobs, but because he found these to be of short duration and weather dependent, he returned to high school as a mature student. He completed high school and went to work as a [text deleted] at [text deleted] on a full-time basis, with some overtime work. He did not have any significant physical problems, in spite of regular work at physically demanding jobs.

He took physical fitness seriously, exercising and participating in body building and weight lifting. He lived with his wife and their two daughters, as well as his oldest daughter from a prior relationship. He was active with his family and extended family.

The Appellant described the job demands of his position as a [text deleted]. The job involved kneeling, crouching and crawling, and working on the floor on his hands and knees, spreading glue. It also involved carrying the rolls of [text deleted] along the length of a bus. These rolls weighed from 50 to 75 pounds, and five rolls per bus were required. Installing work was done on three buses per shift.

The Appellant was able to do this job, with very little physical difficulty, aside from some stiffness, perhaps in his back, neck or shoulders. He had no ongoing problems with medical conditions and had not been diagnosed with any type of chronic pain condition.

The Appellant described some difficulties he had in August of 1996. He was encountering problems with stress, alcohol and depression, as well as financial and marital problems. The Appellant provided his reflections upon his marital difficulties. This relationship ended and the Appellant explained that his wife had been having an affair. He went to see a doctor at a walk-in clinic, who referred him to see a psychiatrist, [Appellant's Psychiatrist #1].

The Appellant explained that he had never seen a psychologist or psychiatrist before, except for [Appellant's Psychologist #3], who had performed an evaluation funded by [text deleted] to see where he was at academically, and in what areas he should be training when he went back to school.

The Appellant described his psychological condition when he saw [Appellant's Psychiatrist #1]. He was prescribed antidepressants, but not any other type of medication. He had no symptoms of psychosis, paranoia, delusions or hallucinations at that time.

The Appellant continued to experience some difficulties, due to marital stress and conflict over the custody of his oldest daughter. This resulted in some depression and alcohol abuse on his part, but he continued to work and be active in taking care of his house and children. He continued with his recreational activities such as bike riding, going to the park with his children, fishing and walking.

The Appellant described some struggles with alcohol both prior to and after the motor vehicle accident and his attempts to stop drinking.

The Appellant then described the physical difficulties he began suffering as a result of the motor vehicle accidents. He attended for chiropractic treatment, and with subsequent motor vehicle accidents, his pain continued to get worse. He described the June 1997 motor vehicle accident as being particularly traumatic. He suffered a fracture in his neck, resulting in a lot of pain and stiffness. He was taken to the hospital by ambulance and described an incident where he believed he died, recalling talking to his "higher power", crying and begging before he was saved and found himself back in the emergency room.

The Appellant described his care following that accident and his lengthy recovery. He also described the psychological symptoms which followed. He was hospitalized following some hallucinations he experienced. Various psychological issues such as paranoia, hallucinations, depression and mania presented and the Appellant was prescribed a variety of medications.

The Appellant described treatment with various psychiatrists and psychologists. Although he was treated with various medications, he still experienced depression, paranoia, and panic attacks. These panic attacks would occur out of the blue, for no reason, and were something he had not experienced prior to the motor vehicle accident. Nor had he suffered from paranoid delusions or hallucinations prior to the accidents.

Difficulties with suspicion and social discomfort continue to this day. He no longer was able to be active with his children, family or friends. He lost his house and now lives with his mother. The fast pace of [text deleted] is too stressful, triggering panic attacks. The Appellant also described his attempts at volunteer placements, working in other jobs, such as a [text deleted] job. However, he was unable to maintain this position.

He also described his attempts to return to work at [text deleted] following the motor vehicle accident. Difficulties arose as a result of his inability to physically keep up with the work and the Appellant was upset and concerned with the resentment he felt from his work team as a result of him not carrying his weight and letting them down.

The Appellant explained that his life is completely different than it had been prior to the motor vehicle accidents. He has relied on support from a Community Health Worker as well as his mother, brothers and sisters. He still has difficulty leaving the house and experiences episodes where he believes that people, such as the government or MPIC, are watching him. He covered the windows of his room in tin foil so that no one could see inside, as he believed they were trying to watch him. At times, he screwed the windows shut and had tried to lock the fridge door with a padlock. He described feeling that he just wanted to be left alone. He described his quality of life as poor.

The Appellant's Siblings:

The panel also heard evidence from the Appellant's brother and sister. They also described the Appellant's life before the motor vehicle accident as active. The Appellant worked, kept up his house and family, and had close and active relationships with his extended family. He was in good physical condition and returned to school, eventually finding a well paying job. Although he had some problems with his marriage, and concerns about his wife having an affair, he was financially stable. He was a moderate drinker. He did not act in a paranoid manner or express any concerns about people trying to hurt him.

Both siblings described the great difference they found in their brother after the motor vehicle accident. He complained of pain. He was paranoid and described hallucinations and illusions. He was depressed and had lost all his joy. He had not been anxious prior to the motor vehicle accident, but was anxious afterwards, on edge and restless. His general demeanour totally changed.

Both siblings also described the Appellant's move to his mother's house and his continuing difficulties with paranoia. They described the odd behaviour they had observed, such as nailing all his windows shut, barring the doors and covering the windows with tin foil. He no longer had an active life and complained of pain along with difficulties in functioning.

Submission for the Appellant:

Counsel for the Appellant submitted that the Appellant had few significant problems for many years prior to the motor vehicle accidents. He worked at [text deleted] and then took a job at [text deleted]. Both involved significant physical labour. He worked many overtime hours and

also acted as shop steward. At the same time, he was in good physical shape, active in physical fitness and with his family in recreational activities, participating in biking, body building, fishing, house and yard work. He had a history of Scheuermann's disease, which was established by [Appellant's Physiatrist #1] to be irrelevant. He did not suffer from chronic neck or back problems, with only some occasional treatment for his mid-back, while continuing to work at his physically demanding full-time job.

The Appellant was having some back problems following the first motor vehicle accident in March of 1997. These were still bothering him when he was in a second motor vehicle accident in June of 1997. The main problems were his right neck and shoulder girdle and with his left lumbar and hip. He sought treatment such as chiropractic, physiotherapy and acupuncture.

The June 9, 1997 accident involved both a C5-6 fracture, as well as a significant aggravation of the problems the Appellant was already experiencing subsequent to the accident in March 1997 (from which he had never fully recovered).

Physical Condition:

In regard to the physical aspect of the Appellant's injuries, counsel reviewed various physiatrist reports as well as a Functional Capacity Evaluation ("FCE"), and [Independent Chiropractor's] independent examination. Although [Appellant's Doctor #1] had recommended another FCE, this was declined and MPIC instead performed a baseline functional assessment, resulting in a report dated January 22, 2006. That report noted that the Appellant's carrying capacity was restricted to 40 pounds, below the criteria of the Physical Demands Analysis for the Appellant's job. As well, crouching, kneeling and crawling, which were clearly constant (67% to 100% of a

shift) requirements of the job according to the Physical Demands Analysis report, were not even evaluated.

Counsel also emphasized that both the physical and the psychological aspects of the Appellant's condition play an important role in his appeal.

<u>Psychological Condition:</u>

Counsel reviewed substantial evidence from a variety of psychologists and psychiatrists including [Appellant's Psychiatrist #1], [Appellant's Psychiatrist #2], [Appellant's Psychologist #2], [Appellant's Psychiatrist #3], [MPIC's Psychologist], [Appellant's Psychologist #1] and [Appellant's Psychiatrist #4]. He emphasized that a key error occurred in [Appellant's Psychiatrist #2's] report of April 11, 2000 when he indicated that the Appellant had been taking anti-psychotic medication prior to the accident. The evidence clearly established that at that time, the Appellant was taking only antidepressant medication and was not taking and had not been prescribed anti-psychotic medication.

[Appellant's Psychiatrist #2] also indicated that the Appellant had demonstrated significant psycho-pathology in regards to a paranoid delusional disorder prior to the accident. However, the balance of the medical evidence showed that this was not the case. The Appellant had some difficulties with suspicions of his wife having an affair, prior to the accident, but in fact, the evidence established that his wife had had such an affair and no paranoia was involved.

Further, counsel submitted that the doctor who was actually treating the Appellant prior to the accident was [Appellant's Psychiatrist #1]. [Appellant's Psychiatrist #1's] reports established

that serious symptoms only arose after the motor vehicle accident and anti-psychotic medication was not prescribed until after the accident.

Thus, opinions from [Appellant's Psychiatrist #2] and [Appellant's Psychiatrist #3] that the accident played only a minor role in the Appellant's condition or that the Appellant's psychiatric condition had improved over time to the point where he reached pre-accident levels, were incorrect. Although [Appellant's Psychologist #2] later recommended that [Appellant's Psychiatrist #2] be provided with the correct information for reconsideration, this was never done. [Appellant's Psychologist #2] also noted that given the length of time that had elapsed, and the progress obtained to date, it would be reasonable to consider a psychological permanent impairment award for the Appellant.

MPIC's psychological consultant, [MPIC's Psychologist], also showed significant misunderstanding in interpretation of earlier reports when he noted that the Appellant had a significant pre-accident history and commented on the Appellant's paranoid symptoms of thinking that [Appellant's Psychiatrist #1] might have been trying to kill him. Again, this was based upon a misunderstanding of the facts, as it had been clearly stated by [Appellant's Psychiatrist #1] that this paranoid belief and condition arose and was expressed only <u>after</u> the accident.

Counsel noted however that [MPIC's Psychologist] acknowledged that there was a clear diagnosis of a chronic pain disorder, questioning the attribution of causation of this disorder by the Appellant's treating psychologist, [Appellant's Psychologist #1]. [MPIC's Psychologist] questioned whether the Appellant had a prior pain condition, failing to take into account that

although the Appellant had some prior problems with pain, he was treated for them and had been at work full-time for two years prior to the motor vehicle accident.

Counsel submitted that the medical evidence did not support the conclusions made by [MPIC's Psychologist] and did not support the conclusion that there was a chronic pain disorder problem ongoing prior to the first accident. However, counsel did indicate that the evidence demonstrated quite clearly that the Appellant was in a fragile condition at the time of the motor vehicle accident, which would have made him susceptible to the emergence of a chronic pain condition.

Counsel for the Appellant relied upon reports from [Appellant's Psychiatrist #1], who was very clear that his records indicated no apparent history of psychotic symptoms prior to the motor vehicle accident. He set forward a diagnosis of schizoaffective disorder and clearly indicated that this condition did not arise until after the accident. He also indicated that the Appellant was unable to return to his pre-accident employment.

Counsel noted that [Appellant's Psychiatrist #4] had made a diagnosis of schizophrenia, schizoaffective disorder and alcohol abuse, without any diagnosis of a personality disorder.

Counsel for the Appellant spent a great deal of time reviewing numerous reports provided by the Appellant's treating psychologist, [Appellant's Psychologist #1]. [Appellant's Psychologist #1] referred to the Appellant's pre-morbid fragility, outlined developments which have taken place since May 2004 and also reviewed many of the other psychiatric and psychological reports on the Appellant's file. [Appellant's Psychologist #1] clearly indicated that the Appellant meets all the criteria for chronic pain disorder and that his pre-morbid condition, combined with the motor vehicle accident of June 9, 1997 was sufficient to precipitate a subsequent psychotic reaction.

He explained that an individual with borderline personality traits can experience transient psychotic symptoms when faced with acute stressors, but that those symptoms are usually brief and reversible. However, the traumatic nature of the accident, coupled with his acute stress reaction, pre-morbid fragility, borderline and paranoid personality features, along with the additional stress associated with the consequences of the accident, exacerbated the Appellant's stressors and exceeded his ability to cope. While most of the Appellant's difficulties could not be attributed to his accident, it remained [Appellant's Psychologist #1's] opinion that the motor vehicle accidents and the immediate and subsequent consequences provided the additional stress and resulted in his initial response and subsequent difficulties.

Counsel noted that this reference by [Appellant's Psychologist #1] to the Appellant's pre-morbid fragility was similar to the legal concept of the "thin skull rule", in recognizing that the Appellant was vulnerable to increments and stress resulting from the motor vehicle accident.

In this regard, counsel referred to the Supreme Court of Canada decision in *Athie vs Leonati* [1996] 3 SCR 458 as authority for his position that although the pre-existing disposition may have aggravated the Appellant's injuries, the defendant must take the plaintiff as he finds him, and the defendant is still fully liable.

Counsel emphasized that [Appellant's Psychologist #1] noted the considerable experience that he had in treating the Appellant, outlining the various recommendations he had made in the past to try and help the Appellant with his ongoing problems and to improve his level of function and possible return to work. [Appellant's Psychologist #1] concluded by indicating that it remains his opinion that the Appellant continues to suffer significant physical and psychological difficulties arising from the accident of June 9, 1997 and has experienced a dramatic reduction in

the overall quality of his life. He has been unable to be gainfully employed or restore his pre-morbid level of function, continuing to experience ongoing chronic pain disorder, significant psychiatric and psychological problems, suspiciousness, socialization withdrawal, paranoid ideation, anxiety and depressive symptomatology. He indicated that at this point in time the prognosis for return to work is poor.

Following a thorough review of the evidence regarding the tasks of the Appellant's job, his physical abilities (or lack thereof) and the psychological evidence, counsel submitted that the Appellant had clearly established that as a result of physical and psychological conditions arising from the motor vehicle accident, he was unable to perform the essential duties of his pre-accident employment and that the decision of the Internal Review Officer should be overturned and the Appellant's appeal upheld.

Evidence and Submission for MPIC:

Counsel for MPIC submitted reports from [Independent Chiropractor] (chiropractor), [Independent Physiatrist], [Appellant's Physiatrist #2] and [Appellant's Physiatrist #1] (physiatrists), [Appellant's Psychologist #2] and [MPIC's Psychologist] (psychologists), and [Appellant's Psychiatrist #2] and [Appellant's Psychiatrist #3] (psychiatrists) and [Appellant's Doctor #1].

Counsel for MPIC framed the primary issue as whether the Appellant was able to go back to work at his previous job in 2006. In this regard, he approached both the physical and the psychological aspects of the Appellant's condition.

Physical Condition:

Counsel relied upon reports from [Appellant's Doctor #1], [Independent Physiatrist], [MPIC's Doctor] and [Appellant's Physiatrist #2], as well as [Rehabilitation (Rehab) Clinic #1], [Rehab Clinic #2] and [Rehab Clinic #3] regarding the Appellant's ability to go back to work at his job from a physical perspective.

An assessment at [Rehab Clinic #2] showed that the Appellant suffered from neck pain and soreness and nothing more serious. Even by November of 1997, this supported the Appellant's ability to undertake a graduated return to work program.

Reports from [Rehab Clinic #3] showed only mild physical impairment, mostly in lifting, and with some postures. [Rehab Clinic #3] reports confirmed that by May 12, 2000, the Appellant's functional positional tolerance (presumably regarding crouching and kneeling) had increased.

A physical reassessment (Functional Capacity Assessment) performed by [Rehab Clinic #1] and dated July 28, 2000 indicated that although the Appellant would not try crawling and kneeling (because he said it made his knees sore), the Appellant's knees had not been damaged in the motor vehicle accident. The Appellant had indicated that this activity was not required for his job.

[MPIC's Doctor] found that there was no motor vehicle accident related condition which objectively precluded the Appellant from going back to his job.

[Independent Physiatrist's] independent assessment found that the Appellant was able to stoop, crouch and kneel. The few objective findings consisted of mild neck stiffness and tight

hamstrings. The Appellant's pre-existing neck condition which might have interfered with his ability to work, but in [Independent Physiatrist's] view this was not connected to the motor vehicle accident.

[Appellant's Physiatrist #2] indicated that he could find nothing significant, in the physical sense, which would prevent the Appellant from doing his old job.

[Appellant's Doctor #1] found the Appellant's range of motion and strength levels were normal in his cervical and lumbar spine, as well as in his left upper and lower extremities.

Although the Appellant argued that he could not meet the lifting and carrying requirements for carrying rolls of flooring, counsel for MPIC noted that the Appellant could lift 40 pounds and it would be unusual for him to have to lift more than 40 pounds at his job, on his own. Even the noted lift requirement of 23 kilograms, amounted to approximately 50 pounds, which was pretty close to 40.

Counsel submitted that at the end of the day, MPIC reviewed overwhelming evidence from all the medical reports that supported the capacity of the Appellant to do the substantial duties of his old job. There was little objective medical evidence to the contrary, and the panel was urged not to simply rely upon the Appellant's evidence that he couldn't do the job. There was no mention in the reports of doctors, such as [Appellant's Doctor #1] and [Independent Physiatrist], that the Appellant suffered from hip or low back pain. It was unlikely that the Appellant still suffers from soft tissue injuries that have kept him from working from a motor vehicle accident in 1997. The only doctor who identified an inability to work at his job was [Appellant's Chiropractor]. It would be better to focus on objective evidence from [Independent Physiatrist] that there was not

a whole lot physically and objectively wrong with the Appellant. Accordingly, the panel should prefer the preponderance of objective evidence over the subjective testimony of the Appellant and conclude that there was no serious objective reason, from a physical sense, that the Appellant could not do his old job.

Psychological Condition:

In regard to the Appellant's psychological condition, counsel submitted that the Appellant's condition is no longer, and was not in 2006, related to the motor vehicle accident, so IRI benefits and treatment were properly ended, at that time.

[Appellant's Psychiatrist #1] started seeing the Appellant in 1996, prior to the motor vehicle accident. Although [Appellant's Psychiatrist #1] noted that the Appellant's paranoid and psychotic symptoms began after the motor vehicle accident, it wasn't obvious to him that the motor vehicle accident was connected to these symptoms.

In August of 1999, [Appellant's Psychiatrist #1] discussed the Appellant's pre-motor vehicle accident condition, indicating that he suffered from depression and anxiety. He has continued to suffer significant depression and anxiety symptoms from prior to the motor vehicle accident and continuing through to the present time. However, there did not appear to be any direct connection between the motor vehicle accident and his symptoms. His mental state was acknowledged to be fragile even before the motor vehicle accident. Although [Appellant's Psychiatrist #1] noted that the motor vehicle accident <u>may</u> have been a trigger for the onset of psychotic symptoms, he could not really say that there was a cause and effect relationship between the motor vehicle accident and those symptoms.

Counsel also noted that [Appellant's Psychiatrist #2's] report of April 11, 2000 played only a minor role in the disposition of the Appellant's case. It should be noted that [Appellant's Psychiatrist #2] found that the Appellant would have had the same presentation of symptoms even without the motor vehicle accident. He concluded that the Appellant's drug use would continue his paranoid symptoms and that instead of finding a pain syndrome, the Appellant's psychotic episodes were more likely related to his substance abuse.

Counsel also noted that while anti-psychotics may not have been prescribed prior to the motor vehicle accident, it was worth noting that Lithium had been prescribed as a mood stabilizer. As such, there was no need to ignore everything in [Appellant's Psychiatrist #2's] report, as the anti-psychotics he noted may have referred to a Lithium prescription.

Counsel for MPIC also reviewed the opinion of [Appellant's Psychiatrist #3], [text deleted], who met with the Appellant and agreed with [Appellant's Psychiatrist #2]. He did not view the Appellant as a reliable historian. His main diagnosis was one of substance abuse and personality disorder. He believed it was unlikely that the Appellant was suffering from any psychosis as a result of the motor vehicle accident. His symptoms were not found to be significantly different than what he had experienced before the motor vehicle accident. [Appellant's Psychiatrist #3] did not agree with the diagnosis of the Appellant as suffering from a schizoaffective disorder or a chronic pain syndrome. He pointed to the prescription of Lithium before the motor vehicle accident as evidence that the Appellant's psychological condition had been deteriorating even then.

[Appellant's Psychiatrist #3's] comments regarding the Appellant not being a reliable historian show that there was some confusion and that he may not have been clear regarding what the

Appellant was telling him about certain events and dates. This does not mean that everything [Appellant's Psychiatrist #3] says should be ignored.

[MPIC's Psychologist] undertook an extensive and thorough review of the Appellant's file. He found no diagnosis of a chronic pain syndrome. He concluded that there was no cause and effect relationship between the Appellant's current psychological condition and the motor vehicle accident. He referred to a significant pre-motor vehicle accident history of psychiatric problems including a personality disorder with paranoid, avoidant, borderline, narcissistic, antisocial and schizotypal traits, polysubstance abuse, depression, anxiety symptoms, a possible Paranoid Delusional Disorder and possible Bipolar II Disorder.

Counsel submitted that the fact that the Appellant's siblings did not see these things before the motor vehicle accident was not of great weight, as they are not in the mental health field. Counsel maintains that the post motor vehicle accident diagnosis of the Appellant was virtually the same as the information we have about his pre-motor vehicle accident mental status, with only a few exceptions. Counsel submitted that the Appellant suffered from a pre-existing pain condition prior to the motor vehicle accident and that this was not connected to the accident. The accident may have exacerbated his condition temporarily, but this has not persisted. His clinical psychological condition is not any worse than it was before the motor vehicle accident and there was no relationship between that condition and the motor vehicle accident. Therefore, there was no need for MPIC to provide treatment benefits in this regard as there is no probable causal relationship.

Counsel for MPIC dealt with the numerous reports provided by [Appellant's Psychologist #1]. He noted that some of the conversations that [Appellant's Psychologist #1] had with the

Appellant had been held over the telephone, and so the contact between them was not as significant as one might think. He also noted that [Appellant's Psychologist #1's] report's (sic) only established that the motor vehicle accident <u>may</u> have precipitated a psychotic reaction. He was not fully informed as to what medications the Appellant was taking. Counsel submitted that on a balance of probabilities, his evidence did not establish that the Appellant's psychotic difficulties were caused by the motor vehicle accident.

As well, counsel submitted that it was beyond question that the Appellant's psychotic episodes really ended in approximately 1999. While he may have continued to experience depression, panic attacks, substance abuse and depression, these existed before the motor vehicle accident.

Counsel also noted that all of the psychological, psychiatric and counsellor reports cited substance abuse as the most likely reason for the Appellant's ongoing psychiatric difficulties. This, he submitted is more likely the reason the Appellant presents the way he does today. If he hadn't continued drinking, who knows where he would be, and this is supported by the evidence of [Appellant's Psychiatrist #3], [Appellant's Psychiatrist #2] and [MPIC's Psychologist].

It was submitted that the Appellant's pre-existing mental health conditions of depression and anxiety, coupled with his chronic substance abuse has had a negative effect on his mental and physical health. The case manager and Internal Review Officer did not err in preferring this evidence over the evidence of some other experts.

Counsel submitted that there was no connection between the Appellant's psychological condition in 2006 and the motor vehicle accident, and no reason that he could not work since that time for any motor vehicle accident related reason.

Counsel submitted that the decision of the Internal Review Officer should be confirmed and the Appellant's appeal dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that he was unable to return to his pre-accident employment as a result of the motor vehicle accidents and that he should be entitled to further IRI benefits beyond February 3, 2006 (extended until February 3, 2007). The onus is also upon the Appellant to establish, on a balance of probabilities, that he suffered from a psychological condition as a result of the motor vehicle accident and that he should be entitled to further treatment benefits.

The MPIC Act and Regulations provide as follows:

> **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;
>
> Regulation 37/94:
>
> **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.
>
> **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;

Regulation 40/94

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 panel has carefully reviewed the documentary evidence on the Appellant's indexed file, as well as the testimony at the appeal hearing and the submissions of counsel.

Physical Condition:

The evidence established that prior to the motor vehicle accidents, the Appellant sometimes suffered from stiffness in his neck for which he did some stretching and sought some chiropractic treatment. He had been previously diagnosed with the condition of healed Scheuermann's disease in his mid-back. However, [Appellant's Physiatrist #1], in a report dated September 30, 1999 stated:

"[The Appellant's] Scheuermann's disease would have a minimal contribution, if any, to his ongoing back complaints. This diagnosis would not satisfactorily explain his headache pain, his shoulder pain, his low back pain, or his hip pain. At this stage, the Scheuermann's disease would not be considered a progressive problem. However, it may result in chronic "mechanical" back pain. In most instances Scheuermann's disease symptomatology is self-limited, meaning it resolves spontaneously."

The evidence also established that at the time of the motor vehicle accident the Appellant was basically active and in good physical condition. He worked at heavy construction and physical labour employment on a full-time basis, plus overtime. He also participated in body building, biking, activities with his children, fishing, house and yard work.

Following the two motor vehicle accidents in 1997, the Appellant began to complain of left hip and back pain, which persisted from the March 1997 motor vehicle accident. He also suffered from right shoulder pain and was awarded a permanent impairment for reduced range of motion.

He again complained of low back pain, as well as persistent neck stiffness, following the neck fracture he suffered in the motor vehicle accident of June 1997.

The panel considered these injuries in light of the requirements of his job as a [text deleted].

The Physical Demands Analysis completed on August 27, 1997 showed that the constant (67% to 100%) demands of a shift involved:

Kneeling, crouching, crawling
Eye-Hand Coordination
Arms forward movement
Manual dexterity (dominant)
Firm grasp (dominant)
Use of feet

The Appellant's testimony confirmed that these kneeling, crouching and crawling positions were involved in the installation of five rolls of [text deleted] per bus and that he worked on three buses per work shift. The panel considers this to be a consistent and constant activity.

The Functional Capacity Evaluation conducted on January 2, 2000 noted that the Appellant could sustain a crouch for 1.5 minutes. This was used to determine the Appellant's ability to perform occasional (up to 33% of the work day) crouching/squatting activities with functional reaching, on a sustained basis. His score of 0% correlated to a rating of "below competitive".

The panel also noted that the evaluation classified the Appellant's job at a medium industrial level which included exerting up to 50 pounds of force occasionally and up to 25 pounds of force frequently. It was noted:

> "At this time, it would appear that [the Appellant] does not completely meet the physical demands of his current position due to: decreased positional tolerances in stooping, squatting crouching, axial rotation and general overall de-conditioning..."

Much later, on January 22, 2006, a reconditioning discharge report provided a Baseline Functional Assessment. It was noted by counsel for the Appellant that this assessment did not test for kneeling tolerance. It found that the Appellant had full upper and lower extremity range of motion and could occasionally lift 50 pounds with frequent lifting to 30 pounds. Yet an occasional carry of 40 pounds noted the claimant reporting pain of the left hip and low back and reports of dizziness, fatigue, shortness of breath and pain at the neck.

The report did recognize that:

> "[The Appellant] meets the lifting criteria outlined in the physical demands analysis provided. Carrying capacity was restricted to 40 pounds due to pain complaints which is below the criteria of the physical demands analysis. Crouching, kneeling and crawling were not evaluated."

The Appellant, in his testimony, described the demands of his job in some detail and based upon his experience. The job entailed scraping floors and using a blower to clean them out. Then the rolls of [text deleted] would be prepared and walking ramps installed. While carrying glue

solvents, the [text deleted] roll would be carried and spread out along the length of the bus. The rolls weighed between 50 and 75 pounds and would be rolled with a roller. Most of the job involved kneeling, crouching and crawling on the floor in a hands and knees position, spreading glue, cutting the [text deleted] and wiping it down. It required manual dexterity in a neck forward, bent over position.

The panel found that the Appellant was a straightforward and credible witness and found his detailing of his job description to be particularly credible. We find that the job required him to lift and carry, on a regular and not occasional basis, 50 pound rolls of [text deleted].

Counsel for MPIC submitted that the Appellant had the functional positional tolerance to crouch and kneel and that the only reason that this aspect was not tested on the baseline assessment was that the Appellant said that crawling and kneeling made his knees sore (even though his knees had not been damaged by the motor vehicle accident). Counsel also argued that the assessment showed the Appellant was able to lift and carry a 40 pound weight, which is pretty close to the 50 pounds noted in the assessments and by the Appellant.

However, the panel finds that carrying five 50 pound [text deleted] rolls the length of a bus and doing this for three buses per shift constitutes a regular and not occasional carrying/lifting requirement of over 50 pounds, which was above the Appellant's lifting and carrying tolerance.

Further, the panel finds that a substantial amount of the activities of the job involve kneeling, crouching and crawling, which were not properly assessed on the most recent baseline assessment.

All of these activities put significant weight and pressure on the Appellant's impaired right shoulder, while he used his dominant left hand to complete his tasks. This posture also put strain on his low back and neck, and [Appellant's Chiropractor] recorded back spasms as a result.

The activities described by the Appellant were carried out on a production line, with the requirement that the Appellant meet certain standards. The Appellant testified that during his graduated return to work program his difficulty in meeting these standards caused problems for him with his coworkers. He clearly expressed his dismay at being unable to meet these expectations and a reluctance to negatively affect the production levels of the team he worked with in doing his job.

The Appellant explained that during the failed return to work trial and graduated return to work program, he felt he was letting his coworkers down, which he did not want to do. The Appellant also gave evidence that although his doctors had recommended that he participate in the graduated return to work plan on a supernumerary basis, he was not actually afforded this opportunity. The Appellant was scheduled for full duties, at a slower pace. However, he was not capable of full duties. The Appellant testified that his work mates complained that he was "picking and choosing what he wanted to do". This added to the Appellant's psychological stress. The panel finds that it is not surprising, in the end, that the graduated return to work program was not successful.

[Appellant's Physiatrist #1] recognized the barriers to the Appellant returning to his pre-existing capacity at his employment in his report of September 30, 1999. One barrier related to his psychological status. He added:

> "...The second relates to his physical status wherein he would have some difficulty with prolonged posturing, and the heavier aspects of lifting and other heavy physical exertion. This would relate to his myofascial trigger point problems in the areas mentioned above..."

[Independent Physiatrist] commented upon the Appellant's ability to return to his occupation.

He stated:

> "Return to occupation: I suspect that he would likely not be able to be successful in a return to his pre-accident occupation as a [text deleted]. This is primarily related to his pre-existing neck difficulties and the additional stiffness that appears to have occurred as a result of the fracture. I would point out that he described having difficulties with neck stiffness pre-dating the initial MVAs. The current examination suggested segmental stiffness with minor restriction on range of movement... I would suspect that the job duties as a [text deleted] would potentially result in aggravation of the mechanical neck symptoms, since this job involves prolonged positioning on all four extremities, using neck muscle stabilizers, and requiring maintaining prolonged positions of neck extension. I would be optimistic that the other demands of his job duties, including lifting, he should be able to progress back to doing. A more reasonable option for him would be a return to work process back to his prior employer in an alternate job duty that did not require the stressed, continuous posturing of the neck..."

As a result of the evidence reviewed, the panel finds, on a balance of probabilities, that the Appellant was not physically capable of performing the essential duties of the position of [text deleted] on February 3, 2006, as a result of physical injuries arising out of the motor vehicle accident.

<u>Psychological Condition:</u>

The panel notes that many of the experts charged with assessing the Appellant's physical condition also noted the effect and interplay of psychological factors affecting the Appellant.

On January 5, 1999, [Appellant's Physiatrist #1] noted the difficulties the Appellant was having with pain, stress, sleep and anxiety.

> "...With all of this, his somatic complaints are going to be increased and the increased symptoms are not a reflection of increased injury. He has also been having difficulties with attending to his work responsibilities...
>
> ...There were multiple twitch responses associated with needle insertions, and this is typical of myofascial pain syndrome..."

[Appellant's Physiatrist #1] also noted, in August of 1998, that the Appellant suffered from a myofascial pain syndrome. He noted it would be imperative for the Appellant to continue with his medications and psychological counselling during his physical treatment and return to work period.

The Appellant's treating psychologist, [Appellant's Psychologist #1], reported on February 21, 1999 and clearly set out a diagnosis of a chronic pain syndrome:

> "Diagnostically, [the Appellant] continues to present with a major depressive disorder in an individual with mixed avoidant, borderline, paranoid and schizotypical personality features. In addition, it is presently my opinion that he also meets the diagnostic criteria of a chronic pain syndrome (i.e. Chronic Pain Disorder Associated with Both Psychological Factors and a General Medical Condition). Accordingly, he has experienced incapacitating pain (persisting beyond typical healing times), marked reinjury concerns, adoption of a sedentary lifestyle, high self report of disability, increased alcohol use, diffuse anger and frustration, feelings of victimization, relationship tension and irritability, anxiety and depression, insomnia, decreased libido, increased pain behavior, somatic hypervigilance, catastrophic thinking, feelings of hopelessness and helplessness and, to date, several failed attempts to return to work. Clearly, the resultant psychological adjustment and impairments have served to maintain his disability, dependence on others, deconditioning inactivity, decreased physical capacity and increased pain perception, especially under stress. It is apparent that his chronic pain syndrome, involving the complex interplay of physical and psychosocial variables, has served to increase his fears of pain, further injury, loss of job, loss of relationships, financial ruin and loss of joy of life."

This finding was repeated in [Independent Chiropractor's] report of April 12, 2000 where he noted:

> "[The Appellant] was involved in a single vehicle collision on June 9, 1997, and has since suffered with a chronic pain and disability syndrome...

> There was sufficient evidence that [the Appellant] possesses maladapted beliefs, attitudes, and expectations regarding his pain and disability, and that such beliefs would undermine any opportunity for arriving at a favourable outcome...
>
> With the foregoing in mind, I would believe that [the Appellant] would most benefit by psychotherapeutic management employing chronic pain protocols that would address his maladapted beliefs and somatization disorder. Beyond the efforts of his present mental health professionals, [Appellant's Psychiatrist #1] and [Appellant's Psychologist #1], there may be a requirement for consultation with a therapist who specializes in chronic pain cases..."

The panel heard evidence that prior to the motor vehicle accident, the Appellant had some history of substance use or abuse as a teenager and young adult. However, the evidence established that this did not interfere with his ability to work at seasonal or contract dependent construction work.

He then underwent aptitude testing in 1991, because he wanted to upgrade his education. As a result, a Minnesota Multiphasic Personality Inventory ("MMPI") assessment performed by [Appellant's Psychologist #3] was conducted in October 1991, when the Appellant was [text deleted] years old. This aptitude testing was reported and described by [Appellant's Psychologist #1] in his report dated May 7, 2004. A history of alcohol and substance abuse was noted. There was a finding of some learning disabilities, but no evidence of perceptual, constructional, neuropsychological impairment, psychotic symptomalogy or a gross motor condition. The MMPI suggested impulsivity, poor social judgement and low frustration tolerance, a lack of self-confidence and a sensitivity to criticism. There was no evidence of depression, anxiety, paranoia, disorder thinking or mania at that time.

The panel heard evidence from the Appellant as to how he then went back to school to obtain his Grade 12 standing and obtained employment at [text deleted]. He described an active lifestyle in addition to his full-time work. There was no evidence of paranoia, psychotic behaviour or panic

attacks. The evidence of the Appellant's siblings confirmed this. He did experience some stressors, including a common-law marriage breakdown, but he was awarded custody of his daughter, evidencing the Appellant's stability at that time. He continued to work at his full-time job, and fulfill his duties in regard to overtime and union steward work.

The Appellant described some difficulties with his marriage, which included allegations of his wife's infidelity. MPIC interpreted this behaviour as paranoia, and the panel has reviewed issues of the Appellant's paranoia. The Appellant also expressed financial concerns at that time, in keeping with his status as a father and primary income earner for a family of five.

The Appellant sought some treatment from [Appellant's Psychiatrist #1] which included anti-depressant medication. He indicated that he tried Lithium for three days. Throughout this period he continued to work.

A report from his treating psychiatrist, [Appellant's Psychiatrist #1], dated August 23, 2000 makes it clear that the Appellant did not suffer from psychotic symptoms during this pre-motor vehicle accident period:

> "...As I mentioned to you in our meeting, my records indicate no apparent history of psychotic symptoms prior to the MVA. Your letter also states that "the psychotic episodes became more severe and he developed new symptoms shortly after the motor vehicle accident." This statement also implies that the psychotic symptoms were present prior to the MVA. As mentioned in our meeting, and above, there was no apparent history of psychotic symptoms prior to the MVA."

The panel notes that all of the evidence in the pre-motor vehicle period shows that the Appellant had been at a much higher level of functioning, as was evidenced by his full-time work and extensive activities and responsibilities at home and within his family circle.

A different picture emerges in our review of the evidence from the period following the motor vehicle accident of June 9, 1997. Physical trauma endured by the Appellant included a fractured neck which necessitated three days in hospital with immobilization of the neck, in addition to the hip and back pain which had begun after the first motor vehicle accident, as well as shoulder pain.

The Appellant also described the psychological trauma that he suffered in this motor vehicle accident. It included the belief that he had died and had an after-life experience. The Appellant described this experience in his oral evidence. It was also summarized by [Appellant's Psychologist #1] in a report dated June 2, 1998:

> "On the occasion of our first interview [the Appellant] informed me that he had been involved in a single motor vehicle accident on June 9, 1997, at which time he indicated he had incurred a "broken neck", as well as right shoulder, lower disk, muscle and tissue damage. I learned later that he had incurred a fracture of the C5 and C6 vertebrae. He indicated that he was admitted to [Hospital #1] and transferred to [Hospital #2], where he remained hospitalized for a few days. He appeared most concerned about his stay at [Hospital #2], noting that something happened to him in the emergency room. He reported having talked to a psychiatrist and relating his life history. He also informed me that he was aggressive, had been placed in restraints, received needles, and experienced a cardiac arrest requiring electrocardiac revival. He also outlined an afterlife experience of being led to an incredibly bright light , seeing his deceased father and grandfather and talking to God, and pleading for another chance at life as he had three daughters to raise. He informed me that after this he woke up in the hospital."

The motor vehicle accident of June 9, 1997 was followed by a lengthy period of treatment and recovery. The Appellant sought chiropractic care and physiotherapy as well as trigger point injections, psychiatric and psychological care.

The Appellant described his attempt to return to work with his former employer. He described both physical difficulty, particularly the pain in his hip and from holding his body weight on his damaged right arm which suffered from muscle spasms. He also experienced the stress of being

unable to keep up with his former pace and worried that his coworkers were getting upset with him because of this.

The Appellant also explained that he stopped drinking for about a year at one point. However, new psychotic symptoms began to manifest. Particularly troubling were symptoms of paranoia as well as anxiety or panic attacks, which would appear out of the blue. [Appellant's Psychologist #1] described this as follows:

> "It has now been over four years since [the Appellant's] motor vehicle accident of June 9, 1997, and his premorbid and post accident history remain indicative of a chronic course of difficulties that will continue to require considerable psychosocial rehabilitation efforts. As has been noted presently and in previous reports, despite considerable efforts by his rehabilitation team and caregivers, he has continued to experience ongoing pain, significant psychiatric and psychological problems, paranoia, anxiety and depressive symptomatology, all of which have confounded the rehabilitation process, his functional restoration program and his return to work.
>
> Over the period of time since the last report (July 3, 2000), [the Appellant] has exhibited continued fluctuations in the course of his recovery, and particularly at times of stress, has continued to exhibit ongoing exacerbations of pain and discomfort, increased substance use, increased anxiety, social anxiety and depressive symptomatology, increased anger, suicidal ideation, increased panic attacks, increased isolation and feelings of alienation, periodic exacerbations in his paranoid ideation, and occasional psychotic symptomatology including auditory hallucinations (e.g. hearing his name being called, hearing voices in the next room, etc.), visual hallucinations (e.g. seeing stationary objects move, seeing spiders that are not there, etc.), derealization (sic) and depersonalization experiences, as well as some fleeting evidence of hypomanic mood (Irritable mood, rage, inflated self esteem, feelings of invincibility, decreased need for sleep, distractibility, racing thoughts, and psychomotor agitation, and decreased need for sleep)..."

[Appellant's Psychologist #1] concluded that the Appellant's global assessment of functioning was estimated in the 40 to 50 range, consistent with serious impairment in mood, social, occupational, and personal functioning.

The Appellant's description of his symptoms during this period of time was also confirmed by the evidence of his siblings. It was clear to the panel that he suffered from impairment in mood, societal and occupational functioning.

Counsel for MPIC argued that the Appellant was exhibiting paranoid symptoms prior to the motor vehicle accident. He pointed to the Appellant's suspicions during this time that his wife was having an affair and his behaviour surrounding these suspicions. It was the position of the Appellant that his wife actually was having an affair, which was admitted, and that his behaviour and actions at the time were simply a response to that situation. The panel accepts [Appellant's Psychologist #1's] comments in this regard:

> "...Accordingly, I indicated that while it is possible that prior to his motor vehicle accident, that he was also experiencing considerable suspicions and jealousy which may have been sufficient to warrant a premorbid diagnosis of paranoid personality, there was no empirical evidence to substantiate that he had experienced psychotic symptoms, delusions of persecution, disorders of thinking, a chronic pain or disability syndrome or even panic attacks. Rather, despite his many difficulties and fragility, I suggested that his history indicated that he appeared able to maintain his occupation and level of functioning, albeit at a marginal level and possibly with the assistance of alcohol to cope. While I indicated that it was still not possible to determine with absolute certainty (given his marginal level of functioning at the time of his motor vehicle accident), it remained motor (sic) my professional opinion that the vehicle accident, with its additional concomitant stressors, may have been sufficient to precipitate his subsequent significant psychological/psychiatric difficulties..."

The Internal Review Officer recognized that the Appellant did not have a paranoid relationship with [Appellant's Psychiatrist #1] prior to the motor vehicle accident when he stated, in the Internal Review Decision:

> "...the erroneous conclusion that [the Appellant] had <u>prior to the accident</u> come to believe that [Appellant's Psychiatrist #1] was "trying to kill him". As you pointed out at the hearing, this conclusion was relied upon by several subsequent reviewers of the file even though it was diametrically opposed to what [Appellant's Psychiatrist #1] himself reported on the point."

The Internal Review Officer then acknowledged that [Appellant's Psychiatrist #3] had also considered this erroneous conclusion, although without actually placing "any reliance" on it.

[Appellant's Psychologist #1] noted that the Appellant's paranoid delusions:

> "...although not firmly fixed or systematized, have consistently incorporated his suspicions of MPI, initial physiotherapist, his foreman at [text deleted], [Appellant's Psychiatrist #1], [Hospital #2], [Hospital #1], [Appellant's Doctor #2], his wife, and at points, myself..."

The panel compared this substantial and extensive paranoia noted by [Appellant's Psychologist #1] with the Appellant's specific reaction to his wife's suspected infidelity many years before. As [Appellant's Psychologist #1] notes:

> "...Clearly, I noted a significant increase in paranoid ideation, anxiety and panic attacks. He claimed to never have experienced such panic attacks or paranoid thinking prior to his motor vehicle accident. In addition, he also reported some posttraumatic stress reactions immediately following his accident (e.g. nightmare, dissociative phenomena, avoidance of reminders of the accident, increased arousal and some reliving of the traumatic event)."

The panel reviewed further evidence from the Appellant and his siblings regarding continued demonstrations of paranoid and delusional behaviour following the motor vehicle accident, such as covering his windows with tin foil and/or nailing them shut.

The panel also contrasts the evidence regarding the Appellant's anxiety, which presented with his depression prior to the motor vehicle accident, with the assessment of a panic disorder with agoraphobia which the Appellant and his siblings described as a disabling experience after the accidents, leaving him isolated at home and unable to carry out even the activities of daily living.

These contrasts between the Appellant's condition and level of functioning prior to the motor vehicle accidents and afterwards, were also confirmed by the second MMPI completed by the

Appellant and noted in [Appellant's Psychologist #1's] report of June 2, 1998. [Appellant's Psychologist #1] stated:

> "Clearly, [the Appellant's] present MMPI profile represents a marked departure from his MMPI profile of 1991. At (sic) noted, his present results are indicative of significant depression, anxiety, and psychotic symptomatology (e.g. paranoid delusions, disturbances of thinking) that were not evident at the time of his 1991 assessment..."

In reviewing the MMPI results in a later report dated October 7, 2011, [Appellant's Psychologist #1] believed that the Internal Review Officer failed to consider these pre and post accident comparisons:

> "...In addition, the Review Officer completely ignored evidence of pre-accident objective psychological testing (October 1991) on the Minnesota Multiphasic Personality Inventory (MMPI) and the comparison to post accident functioning on the same instrument. Clearly, as was noted at the time of my May 7, 2004 report (pages 2 – 3, and 6 – 7) [the Appellant's] (sic) post accident MMPI profile (1998) represented a marked departure from his MMPI profile in 1991 and was indicative of significant depression, anxiety, and psychotic symptomatology (e.g. paranoid delusions, disturbances of thinking) that were not evident at the time of his 1991 assessment. As was noted at the time of my May 7, 2004 report, based on his assessment in 1991, [Appellant's Psychologist #3] described [the Appellant] as an individual of average intelligence with specific learning disabilities of reading and written expression (i.e. phonetic reading and spelling) and intact attention and concentration. There was no evidence or perceptual, constructional, neuropsychological impairments, psychotic symptomatology or gross motor coordination problems..."

The panel heard substantial evidence and submissions from both parties regarding the impact and effect of errors made by [Appellant's Psychiatrist #2] and [Appellant's Psychiatrist #3] (subsequently relied upon by [MPIC's Psychologist]), regarding the timing and the onset of the Appellant's psychotic symptoms.

On April 11, 2000, [Appellant's Psychiatrist #2] reported:

> "There is ample information to suggest that [the Appellant] had moderate to severe psychiatric difficulties prior to his motor vehicle accident. He had seen [Appellant's Psychiatrist #1] (sic) prior to the accident for approximately six to eight weeks and was prescribed anti-psychotic medication. History obtained through the exam and through the extensive notes which you have from [Appellant's Psychologist #1] suggest that he was

> very stressed out, had suicidal thoughts, had financial difficulties and was experiencing marital difficulties. It should be noted that he demonstrated significant psychopathology in regards to a paranoid delusional disorder prior to the motor vehicle accident. He felt his wife was cheating on him and he would spend an inordinate time and mental energy tracking her behaviour..."

For example, [Appellant's Psychiatrist #3] opined as follows:

> "It is my opinion that [the Appellant's] present ongoing psychiatric conditions are not, in all probability, a result of the motor vehicle accident.
>
> This is based on several factors. Most notably, if one looks at [the Appellant's] psychiatric condition immediately prior to the motor vehicle accident, one will note that he was experiencing significant depression, ongoing suicidality, possible intermittent paranoia, significant substance abuse, impulsive and dangerous behaviour, and possible suicidal ideation. Most recently, [the Appellant] is experiencing intermittent Major Depression, impulsive, agitated and angry behaviour, suicidal ideation, and perhaps some psychotic symptoms. In summary, the symptoms that he has been experiencing recently are not significantly different from what he experienced prior to the motor vehicle accident of 1997.
>
> It can be argued that [the Appellant] did have a period of time when he had more evident psychotic symptoms. This may or may not be the case, as discussed above. However, even if it is the case, with time and treatment, [the Appellant's] condition seems to have improved to the point that it is now similar to his baseline state prior to the motor vehicle accident."

[Appellant's Psychiatrist #1] provided several opinions. On January 6, 1998 he stated:

> "My original meeting with this gentleman preceded the MVA of June 9, 1997. He is adamant that the paranoid symptoms began very shortly after the MVA and I have no reason to believe otherwise. There is no clear connection obvious to me between the accident and the onset of his paranoid psychosis. However, serious mental symptoms can appear and persist after what would appear to be even mild physical or mental trauma. From my experience with these cases, I do not believe that the symptoms are due to malingering."

On August 23, 2000, he noted:

> "I would like to clarify two points. In the first paragraph of the second page of your letter, you state that "the motor vehicle accident was a precipitant in identifying and exacerbating psychotic symptoms." This implies that psychotic symptoms had been present prior to the MVA. As I mentioned to you in our meeting, my records indicate no apparent history of psychotic symptoms prior to the MVA. Your letter also states that "the psychotic episodes became more severe and he developed new symptoms shortly after the motor vehicle accident." This statement also implies that the psychotic

> symptoms were present prior to the MVA. As mentioned in our meeting, and above, there was no apparent history of psychotic symptoms prior to the MVA."

[Appellant's Psychiatrist #1] went on to indicate that one "could not prove that [the Appellant's] psychotic symptoms were a direct result of the MVA. On the other hand, given the strong chronological correlation between the MVA and the symptoms, one cannot say definitively that the MVA was not a trigger for these symptoms."

On January 23, 2001, [Appellant's Psychiatrist #1] noted that although he could not state that there was a cause and effect relationship, the Appellant's psychotic symptoms appeared to have presented only after the accident of June 9, 1997.

Finally, on April 4, 2002, [Appellant's Psychiatrist #1] updated his observations as follows:

> "[The Appellant's] paranoid symptoms are present but considerably milder than they have been at their worst. These symptoms generally have a chemical basis and may not be related to contributing factors. In [the Appellant's] case I believe that the most significant contributing factor is his belief that MPI does not consider him to be seriously disabled and that MPI may go to great length, to prove this to be the case."

The panel notes that the evidence established that the Appellant was far more functional prior to the motor vehicle accident than the reports of [Appellant's Psychiatrist #3] and [Appellant's Psychiatrist #2] may imply. Further, these reports are from assessors who saw the Appellant only once or twice, if at all.

The panel prefers and gives greater weight to the evidence of the Appellant's caregivers, [Appellant's Psychiatrist #1] and [Appellant's Psychologist #1], who saw the Appellant on numerous occasions, and provided him with treatment on an ongoing basis. [Appellant's Psychologist #1's] most recent report of October 7, 2011 contained a comprehensive review of

the Appellant's history and condition. Dealing with the conflicting views regarding the Appellant's pre-motor vehicle accident condition he stated:

> "As was indicated, he had previously been treated for depression and had been referred to an alcohol counselor and financial planner. Indeed, I also reported that while it was possible, even prior to his motor vehicle accident, that he was also experiencing considerable suspicions and jealousy which may have been sufficient to warrant a premorbid diagnosis of paranoid personality, there was no empirical evidence to substantiate that he was experiencing psychotic symptoms, delusions of persecution, disorders of thinking or even panic attacks. Rather, as noted, despite his many difficulties and fragility his history indicated that he appeared to have been able to maintain his occupation and level of functioning, albeit at a marginal level and with the assistance of alcohol to cope. In addition, I would note that there is no empirical evidence of hospitalization for psychiatric issues and no suicide attempts prior to his motor vehicle accident. While I have previously noted that it is not possible to determine with absolute certainty (given his marginal level of functioning at the time of his motor vehicle accident), it remains my professional opinion that the motor vehicle accident, with its additional significant concomitant stressors, may have been sufficient to precipitate his subsequent psychotic reaction. Clearly, the traumatic nature of his accident, coupled with his acute stress reaction, premorbid fragility, borderline and paranoid personality features, along with the additional stress associated with the consequences of his accident (e.g. physical injuries, loss of license, legal charges, financial costs and adversarial relationship with the MPI) exacerbated his stressors and exceeded his ability to cope...As has been noted previously, while most of his difficulties could not be attributed to his accident, it remains my opinion that his motor vehicle accident provided the additional stress resulting in his initial response. Subsequently, I opinioned that his post-accident difficulties had also been compounded by his physical injuries and pain..."

Further, he concluded,

> "Clearly, it remains my opinion that [the Appellant] continues to experience significant physical and psychological difficulties arising from his motor vehicle accident of June 9, 1997. Clearly, he has experienced a dramatic reduction in his overall quality of life and has been unable to be gainfully employed or restore his premorbid level of functioning. Clearly, over the course of this period of time, he has continued to experience on ongoing chronic pain disorder, significant psychiatric and psychological problems, suspiciousness, social isolation and withdrawal, paranoid ideation, anxiety and depressive symptomatology. It is apparent at this time that his prognosis for a return to work is poor."

<u>Alcohol and Substance Abuse:</u>

The panel finds that the Appellant has had a lengthy fluctuant history of use and sometimes abuse of substances, including alcohol and marijuana. Counsel for the appellant acknowledged

that while this did not help the Appellant's condition, even during periods of lengthy sobriety (lasting up to one year) the Appellant continued to experience psychotic symptoms and functional impairment. Counsel for MPIC argued that the alcohol and substance abuse was a main contributing factor to the Appellant's symptoms and impairment.

The panel finds that while alcohol and substance abuse may have played a role in the Appellant's condition, this does not require or demand that the panel must overlook the impact of the motor vehicle accident upon his condition. We find that, on the evidence, on a balance of probabilities, it was the motor vehicle accident which played the major role in the development of the Appellant's current psychological condition.

Counsel for the Appellant relied upon the "thin skull rule" to submit that MPIC and the Commission must take the victim as he is found. Counsel acknowledged, and the panel agrees, that the Appellant presented with a history of pre-morbid fragility. He suffered at times from depression and anxiety with some history of substance use or abuse prior to the motor vehicle accidents. However, as [Appellant's Psychologist #1] has opined, the subsequent trauma inflicted by the motor vehicle accidents and their consequences caused, or materially contributed, to the Appellant's deterioration into his current psychological condition.

According to [Appellant's Psychologist #1], the trauma, pain and consequences of the accidents coupled with his acute stress reaction and pre-morbid fragility and personality features "exacerbated his stressors and exceeded his ability to cope".

Summary:

Therefore, the panel finds, on a balance of probabilities, that the evidence has established that the Appellant was unable to return to his previous employment as a result, not just of physical injuries sustained in the motor vehicle accidents, as described above, but also as a result of psychological injuries sustained in those accidents.

As a result, the Commission finds that the Appellant is entitled to psychological counselling and treatment benefits as a result of injuries sustained in the motor vehicle accidents. The panel will refer this question back to the Appellant's case manager for determination. MPIC will be responsible to fund assessment and counselling by a clinical psychologist, as well as any further assessments and/or treatments which the psychologist prescribes or recommends.

The Commission also finds that the Appellant shall be entitled to further IRI benefits beyond February 3, 2006 (extended to February 3, 2007).

Accordingly, the Appellant's appeal is allowed and the decision of the Internal Review Officer dated November 9, 2006 is varied.

Dated at Winnipeg this 14th day of November, 2013.

LAURA DIAMOND

JACQUELINE FREEDMAN

LINDA NEWTON