Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-034

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Mr. Neil Margolis** **Dr. Chandulal Shah**
APPEARANCES:	**The Appellant,[text deleted], was represented by Ms Darlene Hnatyshyn of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**September 8, 2015 and September 24, 2015**
ISSUE(S):	**1. Whether the Appellant has a reasonable excuse for the late filing of her Application for Review;** **2. Whether the Appellant is entitled to further Income Replacement Indemnity benefits.**
RELEVANT SECTIONS:	**Section 117(1)(a) and 171(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

[The Appellant] was involved in a motor vehicle accident on February 28, 2005 suffering an L5-S1 disc herniation, spinal stenosis and radiculopathy. These injuries were aggravated by subsequent motor vehicle accidents as follows:

1. March 6, 2006 suffering aggravation of previous injuries.
2. January 11, 2008 suffering aggravation of previous injuries.

3. March 18, 2008 suffering aggravation of previous injuries, including right knee patellar dislocation, plus new injuries to neck (whiplash), left shoulder (strain) and wrist (sprain).
4. September 18, 2009 suffering aggravation of previous injuries, cervical, thoracic and lumbar spine injuries, right-sided sciatica, right leg, left shoulder injuries, sensory/motor/reflex changes.

At the time of the February 28, 2005 motor vehicle accident, the Appellant was a student and received Income Replacement Indemnity ("IRI") benefits in accordance with the classification to July 2, 2006. At that time it was determined that the Appellant had regained the capacity to hold employment.

At the request of MPIC, the Appellant was referred to the [rehabilitation clinic #1] for the purpose of having a mini-functional capacity evaluation ("FCE"). [Appellant's occupational therapist #1], an occupational therapist, performed the assessment on June 20, 2008. In summary, [Appellant's occupational therapist #1] reported:

> "Based on the results of this mini FCE, [the Appellant] does not demonstrate the ability to perform the majority of the physical demands in her job description of an Administrative Assistant. She does not meet the job requirements for sitting on a constant basis. A physical demand analysis of the position was note (sic) completed however based on [the Appellant's] subjective reports, the position requires constant sitting for about 7.25 hours a day.
>
> [The Appellant]demonstrated the capacity to meet the Sedentary to Light Physical Demand Strength Rating as per the DOT. This means [the Appellant] can lift up to 13 pounds safely and dependably. However, given the high pain rating she provided (5/10) at end of testing, she would benefit from sedentary work as per the DOT meaning handling of weights no more than 10 pounds.
>
> [The Appellant] was <u>limited to sedentary to light level work</u> by left upper limb pain and lower back pain which prevented her from reaching her biomechanical limits for lifting, carrying. She self limited in these activities prior to reaching her strength limitations."

On February 29, 2008 the Appellant contacted MPIC to report that she sustained an aggravation of her back injury in her most recent motor vehicle accident. At the time of the aggravation she was employed full-time at [text deleted] as an administrative assistant.

As of March 4, 2008 the Appellant was employed as an administrative assistant at [text deleted]. The Appellant contacted MPIC to advise that she had suffered a relapse.

The Appellant was referred to the [rehabilitation clinic #2] where a multi-disciplinary assessment was conducted on November 6 and 7, 2008.

The Appellant completed a pain diagram during her [rehabilitation clinic #2] assessment which indicated the following:

1. Back pain (low back) – the Appellant reported that the usual episode of pain lasts continuously and she said her usual pain lasts 7 days a week and almost 24 hours per day (day and night). She rated her pain at the time of the assessment as 7 out of 10 on the numerical pain scale and rated her worst pain over the previous two weeks as 9 out of 10, the least pain was rated as 4 out of 10, and the average pain rated as 8 out of 10. She further indicated that since the pain first started, the pain progression was somewhat improved.
2. Leg pain (right)
3. Arm pain (left)
4. Neck pain – from whiplash

The Appellant indicated her sleep was usually bad, but good once in a while. She stated that she gets three hours of good sleep each night.

[Rehabilitation clinic #2] summarized their recommendations as follows:

> "**Therapeutic**
>
> 1. [The Appellant] is presently capable of Sedentary to Light level physical activities, including sedentary office work. She may find it helpful to use a sit/stand apparatus such as a stool or elevated work surface to allow her to change position as required for comfort of her low back and her knee. Kneeling and squatting may be problematic due to her knee, so lower level equipment such as low file cabinets and shelves could be accommodated by making them higher."

On November 12, 2008, [Appellant's neurosurgeon], neurologist, indicated that he had seen the Appellant in November 2008 and the Appellant's clinical presentation suggested some mechanical low back pain that accounted for the proximal discomfort.

Case Manager's Decision – November 26, 2008:

The case manager's decision of November 26, 2008 indicated the Appellant had attended a Multi-Disciplinary Assessment at [rehabilitation clinic #2] which confirmed the Appellant's ability to perform the duties of Sedentary to Light level employment, including sedentary office work. Based on the information provided by [rehabilitation clinic #2], the case manager determined that the Appellant's entitlement to IRI would end effective December 14, 2008. The case manager further stated that at the time of her relapse the Appellant was employed in a sedentary position on a full-time basis. The medical information supported the Appellant's ability to return to this employment if the Appellant chose to do so.

The case manager further informed the Appellant that in an effort to facilitate a safe return to employment at [text deleted], MPIC has asked [Appellant's occupational therapist #2], an occupational therapist, to complete a worksite/ergonomic assessment. On December 1, 2008 the occupational therapist, [Appellant's occupational therapist #2], completed a Physical Demands Analysis on-site at [text deleted]. [Appellant's occupational therapist #2's] opinion was that

sitting and/or standing tolerance were the primary issues for the Appellant and he felt that it was plausible to modify the work station to allow the Appellant to alternate between sitting and standing easily and frequently.

The Appellant returned to work at [text deleted] as an administrative assistant on January 19, 2009.

On March 26, 2009, [Appellant's doctor #1] clinically diagnosed the Appellant with chronic right lumbar nerve root irritation. In his opinion, the Appellant's clinical condition did not preclude travelling to and from the workplace, did not result in an inability to perform required tasks, did not pose a safety/health risk to the Appellant or to her co-workers, and a return to work would not adversely affect the natural history of her condition.

About two weeks later, on April 15, 2009, [Appellant's doctor #1] found that the Appellant's condition did result in an inability to perform required tasks, and he recommended that the Appellant be excused from work indefinitely. It was noted that a return to the workplace would adversely affect the natural history of the Appellant's condition and further, that the Appellant had poor results exacerbated by work related activities.

On April 15, 2009, [Appellant's doctor #1] wrote to MPIC and indicated:

> "This letter is to inform you of my opinion that [the Appellant] be excused from her current employment indefinitely due to chronic recurrent lumbar nerve root irritation. A full report is to follow."

[Appellant's doctor #1] also wrote to MPIC's case manager on April 15, 2009 and stated:

> "[The Appellant] is a [text deleted] year-old patient currently under my care for recurrent low back pain with radicular symptoms.
>
> You are likely familiar with her case as she has had multiple motor vehicle accidents in the past resulting in her chronic back symptoms. She has been followed by [Appellant's neurologist], neurologist as well as [Appellant's neurosurgeon], neurosurgery. She carries a diagnosis of L5 and S1 nerve root irritation with possible permanent scarring.
>
> She has attempted a return to work with frequent position changes. However, despite workplace modifications as well as her current management with physiotherapy and chiropractics her symptoms continue to escalate.
>
> [The Appellant] experiences right sided low back pain radiating posteriorly down to the right lower extremity to the level of the sole of the foot. She has reduced patellar reflexes as well as reduced sensation to the sole of the foot. She had a follow-up appointment with [Appellant's neurosurgeon] on April 8th who is recommending an indefinite excuse from work. Based on her current symptoms as well as the fact that they have progressed despite workplace modifications I would recommend that she be excused from her current employment indefinitely." (Underlining added)

An Initial Therapy Report from physiotherapist [Appellant's physiotherapist] dated May 5, 2009 clinically diagnosed the Appellant with lumbar radiculopathy. It also noted the Appellant's clinical condition resulted in an inability to perform required tasks and posed a safety/health risk to the Appellant and her co-workers. The physiotherapist explained that the Appellant's condition would be aggravated because the Appellant was unable to sit or stand for long periods of time.

On June 11, 2009 [Appellant's neurosurgeon] spoke to the Appellant's case manager about her ability to perform her tasks as an administrative assistant at [text deleted]. According to [Appellant's neurosurgeon], the Appellant's restrictions had been previously outlined and indicated that:

1. She was capable of walking around and had the use of a sit/stand station and it would be up to her to choose to return to work or not.
2. The only restriction noted was protracted sitting or standing for more than 30-40 minutes at a time.

Case Manager's Decision – June 15, 2009:

The case manager then wrote a decision dated June 15, 2009 denying the Appellant further entitlement to IRI.

MPIC's Health Care Consultant, [MPIC's doctor], reviewed the Appellant's file on August 5, 2009 regarding her ability to work as an administrative assistant. In doing so, [MPIC's doctor] considered the injuries the Appellant suffered in all her motor vehicle accidents. Based upon the information on the file, it was noted that the Appellant should avoid strenuous physical activities involving repetitive bending or heavy lifting. Restrictions were also placed on protracted sitting or standing more than 30-40 minutes. Because the Appellant's position as an administrative assistant could accommodate these restrictions, [MPIC's doctor] opined that it did not appear the Appellant was specifically precluded from performing the job duties.

Internal Review Officer's Decision – December 21, 2010:

On December 21, 2010 the Internal Review Officer issued a decision rejecting the Appellant's Application for Review on the following grounds:

1. The Appellant did not file a timely Application for Review under Section 172(1) of the MPIC Act.
2. The Appellant was capable of working as an administrative assistant at [text deleted].

In arriving at this conclusion, the Internal Review Officer stated that MPIC had requested a Physical Demands Analysis be conducted to assess the Appellant's ability to perform her duties as an administrative assistant. The Internal Review Officer placed greater weight on the reports of [Appellant's occupational therapist #2] conducted in December 2008, closer in time to when the Appellant reported experiencing a relapse ([occupational therapist #1's] report was written in June 2008, almost 1 year before the reported relapse of April 2009).

The Internal Review Officer further stated:

> "Through the Physical Demands Analysis, the only applicable restrictions identified are prolonged standing and sitting. Although your health care providers have opined that you are unable to work, the stated reason is the prolonged standing and sitting. I also note that [MPIC's doctor] has considered each and every one of your motor vehicle accidents when coming to the conclusion that you are functionally capable of employment as an administrative assistant.
>
> Because an accommodation has been made with the sit/stand station, I cannot find any objective medical evidence that supports an accident-related inability to hold employment as an administrative assistant.
>
> Therefore, if I had not dismissed your Application for delay, I would have dismissed it on the merits. Your case manager's decision of June 15, 2009 is confirmed."

Notice of Appeal:

The Appellant filed a Notice of Appeal on March 11, 2011.

The relevant provision pertaining to this appeal is:

> **Entitlement to I.R.I. after relapse**
>
> 117(1) If a victim suffers a relapse of the bodily injury within two years
>
> (a) after the end of the last period for which the victim received an income replacement indemnity, other than an income replacement indemnity under section 115 or 116; or
>
> (b) if he or she was not entitled to an income replacement indemnity before the relapse, after the day of the accident;

> the victim is entitled to an income replacement indemnity from the day of the relapse as though the victim had been entitled to an income replacement indemnity from the day of the accident to the day of the relapse.

MPIC received a report from the [text deleted] dated June 19, 2012 which outlined the Appellant's current condition and the report stated:

> "[The Appellant] is a [text deleted] year old woman under our care for ongoing low back pain and radicular symptoms. This letter was requested by [the Appellant] to outline her current condition and therapies that are currently found to be helpful. [the Appellant] has had multiple motor vehicle accidents in the past resulting in her chronic back symptoms. She has been assessed by [Appellant's neurologist], neurologist, and [Appellant's neurosurgeon], neurosurgeon for the diagnosis of L5 S1 nerve root compression.
>
> She continues to experience great difficulty with back and right leg pain. She also has right sided leg weakness with sensory loss. She has an ongoing issue with symptoms worsening when sitting, in fact she has had episodes of bladder and bowel incontinence due to the loss of sensation she gets from sitting for prolonged periods. This last occurred February 2012.
>
> The inability to sit for long periods has affected her career path. When the injury occurred she was working on a [text deleted] degree, she was unable to complete this due (sic) the inability to sit in class. She recently discontinued her work as an administrative assistant for the same reason. She has been training to enter the field of [text deleted] with the hope that it will be more suited to her limitations.
>
> ...
>
> On exam [the Appellant] has an antalgic gait. In the lumbar region her vertebrae are tender on palpation. She has limited lumbar flexion and pain with extension and rotation. Her sensation is impaired to light tough (sic) and sharp/dull on the right side of her low back. Her right lower extremity has 3/5 strength with hip flexion, knee extension, dorsiflexion, and great toe extension. Her reflexes are diminished on the right."

At MPIC's request [independent sports medicine specialist], a sports medicine doctor, provided a report dated October 3, 2012 and stated:

> "At this examination, the writer is unable to establish a pathoanatomical diagnosis to explain [the Appellant's] persisting subjective complaints. Without an established pathoanatomical diagnosis, the writer is unable to comment on impairment. On a pathoanatomical basis, the writer would not recommend any impairments or restrictions.

> There isn't any medical contraindication at this time to attempt a return to work in order to promote functional recovery.
>
> At this musculoskeletal examination, given the normal sensation, reflexes, strength, and imaging studies, the writer is unable to explain [the Appellant's] symptoms of bladder or bowel incontinence in regards to a musculoskeletal lesion. The writer was unable to establish a causal relationship to a musculoskeletal lesion and as such was not able to relate the reported symptoms to injuries related to a motor vehicle collision."

In a letter dated December 21, 2012 [Appellant's doctor #1] wrote to MPIC and stated:

> "In my opinion, [the Appellant] was unable to carry out her duties as an administrative assistant as a result of her motor vehicle related injuries. Her duties required prolonged sitting and standing in one location which exacerbated her symptoms. I recommended that [the Appellant] be excused from her employment on April 15, 2009. This recommendation was made on the basis of an attempted return to work with frequent position changes. However, despite workplace modifications her symptoms continued to worsen."

[Appellant's orthopedic specialist] wrote to the Claimant Adviser Office on December 31, 2012 and indicated that he met with the Appellant on June 28, 2011 and he stated that his primary area of practice was knee and shoulder reconstruction. He had known the Appellant since his 2011 consultation and stated:

> "In reviewing the documents, she should be able to work in a position as an administrative assistant with modifications. However, I would note that a prolonged sitting or standing in one location was part of the position then she may have difficulties. However, it is difficult to support this based on anatomical ongoing problems.
>
> On balance of probabilities, I do not think that there is enough evidence on residual effects from the car accident to prevent her from performing her duties as administrative assistant.
>
> However, if you consider the patient as a whole and pre-existing degenerative change in her patellofemoral articulation as well as the chronic low back mechanical problems, on the balance of probabilities the motor vehicle accidents each played a significant role in enhancing her low back and knee symptoms."

On January 23, 2013 [Appellant's physiotherapist], a physiotherapist who treated the Appellant since January 2008 for injuries suffered as a result of her motor vehicle accidents, indicated that

her last visit with the Appellant was on June 13, 2012. She had seen the Appellant throughout the last four years and stated:

> "Throughout the last four years, [the Appellant] had complaints of ongoing low back pain and weakness into her right leg which was aggravated by sitting, standing and static positions. As well, she presented with intermittent neck pain, left shoulder pain that was worse when leaning on the arm, typing, reaching, looking down and lifting. In addition, she experienced knee pain following multiple patellar dislocations. [The Appellant] had a CT scan in April 2005 and MRI's in April 2006 and March 2008 that confirmed a large central disc herniation at L5-S1 with moderate to severe central stenosis that compresses the right, greater than the left S1 nerve root. This was deemed to be treated conservatively and not through surgical intervention.
>
> On the June 13, 2012 examination, throughout the history, she changed positions frequently and spent some time lying on a ball to do self traction because of her back pain. Objectively she presented with myotomal weakness on the right at L4, L5 and S1. [The Appellant] had a decrease (1) DTR on right for both L3 and S1. She also presented with sensory deficits in her right leg. Her quadriceps diameter was measured to be 3 cm less on the right leg, and her calf diameter was 1 inch less on the right,. In addition to that, she presented with loss of neck and shoulder range of motion with positive impingement findings. Please note for a complete list of my objective findings on June 13, 2012 see the attached chart note documents.
>
> In my opinion, on a balance of probabilities, [the Appellant] was unable to continue working in her position as an administrative assistant due (sic) her injuries. The motor vehicle related injuries have impacted [the Appellant] tremendously over the period of time she was under my care. She has been unable to work as an administrative assistant because of the nature of her injuries and how they are aggravated by that type of sedentary work. Due to the weakness that she presents with because of her back and patellar dislocations, she is unable to stand, sit or be in static positions for long periods of time. This time frame varied over the course of treatment depending on what activities she had done in the day or days prior as well as her condition. It was as little as 2 minus (sic) (March 3, 2008 see initial MI report), and was often 30 minutes in length. This limitation makes it very challenging to do sedentary work.
>
> In January 2009, she tried to carry out those duties and reported experiencing more numbness and tingling into her legs, low back pain and sometimes experienced bowel and bladder changes. [The Appellant] had to change her career plans on several occasions as she could not tolerate sitting when she returned to school.
>
> In my opinion, [the Appellant] requires a job where she is not in a static position or any length of time. A sit/stand work station is not sufficient to accommodate her due to her injuries, as it does not comply with the above restrictions I have outlined." (Underlining added)

On July 11, 2013, [Appellant's doctor #2] wrote to the Claimant Adviser Office and indicated he had the opportunity to meet with and assess the Appellant on July 10, 2013. [Appellant's doctor #2], after this assessment, advised:

> "In my professional opinion [the Appellant] suffers a number of permanent musculoskeletal pathologies which impinge on her employability, and which in particular do indeed warrant the kind of flexibility in work schedule which [the Appellant] seeks and which would permit her to avoid prolonged sitting, and allow her the freedom to change her posture and to walk around at numerous junctures throuhout (sic) the day."

Testimony of the Appellant:

The Appellant testified that the motor vehicle accidents adversely affected her personal life and her employment as an administrative assistant. She described her difficulty in walking, sleeping, sitting, severe pain to her lower back, hip, neck, left shoulder and left wrist. She testified that as a result of the motor vehicle accidents she lost her independence and her life changed dramatically. She further testified that due to the motor vehicle accidents, she was no longer physically active and no longer able to hold two part-time jobs and no longer able to attend university and she was now on social assistance.

She further testified that in her position as an administrative assistant at [text deleted] that she had to remain at her work station and could no longer get up and move around. She returned to work on January 9, 2009 with restrictions, with accommodations which permitted her to sit and stand and there were changes made to her chair and work station. Within three months of doing this work, her symptoms of back pain and leg pain worsened and she stopped working on April 8, 2009. She also had an embarrassing incident of bladder/bowel incontinence.

[Independent physiatrist], physiatrist, was requested by the Commission to assess the Appellant. The assessment took place on March 27, 2014, over a period of 2½ hours. The Appellant

reported to [independent physiatrist] that she was involved in several motor vehicle accidents resulting in injuries as follows:

> "February 28th, 2005 – L5-S1 disc herniation, spinal stenosis, radiculopathy.
> March 6, 2006 - aggravation of previous injuries.
> January 11, 2008 - aggravation of previous injuries.
> March 18, 2008 - aggravation of previous injuries, including right knee patellar dislocation, plus new injuries to neck (whiplash), left shoulder (strain) and wrist (sprain).
> September 18, 2009 - aggravation of previous injuries, cervical, thoracic and lumbar spine injuries, right-sided sciatica, right leg, left shoulder injuries, sensory/motor/reflex changes."

[Independent physiatrist] reported that some of the Appellant's injuries began following three motor vehicle accidents in 2003 and were enhanced by subsequent motor vehicle accidents. The Appellant claimed she was unable to perform her duties as a full-time administrative assistant, a stationary role, due to low back, knee, left shoulder, left wrist and neck symptoms related injuries from multiple accidents over several years. Her primary complaints were pain to her low back, knee, neck, left shoulder and wrist that occur while sitting or standing for extended periods of time without the ability to leave the work station. The Appellant reported her current symptoms as:

1. Low Back Pain – The Appellant started having low back pain following her first motor vehicle accident in 1987. As a result of exercises, she had reduced her pain from 7 to 10 to 3 to 4/10 on the visual analogue scale. The Appellant indicated she was involved in three motor vehicle accidents in 2003 and these accidents aggravated the pain from 2 to 3/10 to 8/10 on the visual analogue scale and the pain started radiating to her right leg to the calf and numbness. Her low back pain is worse than the right leg pain, with the right leg pain having improved within the last 1½ years but it has not resolved.
2. Right Knee Pain – The Appellant stated that this pain started in 1987 when she was a passenger in a truck driven by her husband. She suffered a fracture of her right patella

and the pain being 10/10 on the visual analogue scale. She was treated with a cast for six weeks followed by physiotherapy treatments and her symptoms improved 80% and she was able to resume most of her normal activities. The Appellant stated that in the 2003 motor vehicle accident she hit her right knee again on the dash, causing further aggravation with right knee pain and low back pain with a 10/10 on the visual analogue scale. She was involved in further motor vehicle accidents in 2004, 2005, 2006, 2008, 2009, 2010 and April 2013. She received chiropractic treatments and the pain was reduced to 3 to 4/10 on the visual analogue scale. She reported the pain was not constant, but prolonged activities of more than one hour or so increases the pain to 710 on the visual analogue scale. When she stands up within 2 to 3 minutes she feels better.

3. Left Shoulder Pain – The Appellant reported that following the 2003 motor vehicle accident her pain was 7/10 which gradually improved and reduced to 4/10 on the visual analogue scale. The 2008 motor vehicle accident further aggravated her pain from 4 to 8/10 on the visual analogue scale. The nature of the pain she described is it hurts and is stabbing in nature and on the date of the assessment the pain was 7/10 on the visual analogue scale. She further reported that since then typing and out-stretching and hand activities increase the pain from 3 to 7/10 on the visual analogue scale.
4. Left Scapular Pain – The Appellant noted this pain commenced after the motor vehicle accident of March 2008. She injured her left should and her left wrist. Initially the pain was 8/10 and as of the date of the assessment the pain was 6/10 on the visual analogue scale.
5. Stiffness and Feels Tired – When the Appellant wakes up in the morning it feels like she did not have a good sleep because of the pain and her energy level is reduced to 60% of her normal 100% before the motor vehicle accidents.

6. Sleep Disturbances – Due to the pain she cannot fall asleep and wakes up during the night. In the morning she wakes up un-refreshed and tired. The Appellant feels that her strength is reduced to 40% of normal prior to the motor vehicle accidents. The whole left leg feels weak and her right leg numbness is constant, her right leg pain is non-burning in nature. The Appellant takes Tylenol Extra Strength which helps to control the pain so she can fall asleep.

[Independent physiatrist] reported that:

1. On physical examination of the Appellant he noted a gait antalgic right leg.
2. She could not stand on her right leg for more than a minute and she could not walk on her toes and the heel on her right side.
3. She informed [independent physiatrist] that she had to use a cane in her right hand to walk for more than one hour.
4. On examination of her spine, [independent physiatrist] reported:

   "**Spine examination,** cervical spine reduced lordosis, mild forward stooped posture of her neck, mild elevation of the right shoulder in comparison to the left side. Range of motion of cervical spines left lateral flexion and rotation 25% restricted of normal range and caused pain in the right cervical scapular region. Motor strength of the neck muscles graded 4+/5. Spurling's test negative for foraminal nerve root encroachment."

5. On examination of the Appellant's right knee joint he noted a patellar deformity with asymmetry and migration of the patella laterally.
6. A CT Scan performed in April 9, 2005 indicated that at the Appellant's L5-S1 there was a large central disc herniation associated with marked compression on the adjacent dural sac.
7. An MRI of the lumbar spine on April 2006 indicated a central L5-S1 disc protrusion with S1 root compression, L5-S1 central spinal canal stenosis.

8. A comparison of the MRI of March 31, 2008 and the MRI of April 11, 2006 indicated there had been some progression of annular tear and disc herniation in that period of time.

[Independent physiatrist] reviewed [Appellant's neurosurgeon's] reports and reported that:

1. [Appellant's neurosurgeon] had determined that the Appellant's medical condition was essentially suggestive of mechanical low back pain and probably some radicular irritation (sciatica).
2. Based on the submitted medical reports and his clinical assessment of March 27, 2014, the Appellant suffered an L5-S1 disc protrusion causing right S1 radiculopathy in the motor vehicle accident of February 28, 2005.
3. The Appellant was suffering from myofascial pain and mechanical low back pain with trigger points of the paraspinal muscles.

After reviewing the reports of [Appellant's orthopedic surgeon], [Appellant's doctor #1] and [independent sports medicine specialist], [independent physiatrist] reported that:

1. The Appellant had suffered a right knee injury with possible fracture of the patella. Although there was no X-ray or any reports of injury in 1987, this information was given at the medical assessment where the Appellant said she fractured of the right patella and was treated with a cast.
2. The motor vehicle accidents of May 15, 2003 and August 2007 aggravated her pre-existing injuries from 1987, particular suffering right patella dislocation injury in August 2007.
3. Based on his review of the medical reports the motor vehicle accidents of March 18, 2008 and September 18, 2009 resulted in a whiplash related disorder.

4. In respect of her whiplash injuries, she saw a physiotherapist and chiropractor as a result of the motor vehicle accidents of March 8, 2008 and September 18, 2009.
5. The Appellant was experiencing sleep disturbances because of the pain which interferes with her falling asleep and wakes her up at night. This further contributes towards her reduced energy level and delay in recovery.
6. The Appellant indicated that her energy level was reduced to 60% of normal and this contributed to her chronic pain (mechanical neck pain, shoulder, back and discogenic pain and up to some extent right leg radiculitis.
7. After reviewing the reports of the occupational therapist, [Appellant's occupational therapist #1], and the report of [Appellant's doctor #1], the Appellant's personal physician and after considering the reports of [Appellant's neurosurgeon], [Appellant's doctor #3], and [MPIC's doctor], [independent physiatrist] concluded in his opinion based on these reports that the Appellant had discogenic low back pain and right leg radiculitis which was significant.
8. An examination of the MRI of March 31, 2008 showed an L5-S1 disc protrusion compared with the MRI of April 11, 2006 which indicated a slight worsening of the annular tear and prominence which increased the L5-S1 disc on the right side.

[Independent physiatrist] stated:

> "The sitting position does aggravate the interdiscal pressures and this may have further aggravated the discogenic and radicular pain. [Text deleted] found that at L3-L4 level upright pressure was more than 10 times greater than recumbent disc pressure. Indeed, the pressure exerted on the upright L3-L4 disc in the seated partially flexed position is also 11 times the pressure the recumbent L3-L4 disc experiences when recumbent and is the same pressure multiple that Wilke et al measures. She did receive long term physiotherapy and chiropractic treatments with limited improvement."

In summary [independent physiatrist] stated:

> "... She was not able to perform her employment as an administrative assistant because of her discogenic low back pain, right leg radiculopathy and mechanical low back pain with reduced endurance for sitting, standing and working tolerance as administrative assistant. She tried to return to work in January 2009 with the restrictions but within three months or (sic) doing this work, her symptoms of back pain and right leg radiculitis got worse and she stopped working from April 8th, 2009."

[Independent physiatrist] noted that the Appellant did not exaggerate her symptoms.

Testimony of [Independent physiatrist]:

[Independent physiatrist] testified that prior to providing his written report to the Commission dated May 11, 2015, he had reviewed all the relevant medical and documentary reports provided to him by the Commission. He testified that he spent a period of 2½ hours assessing the Appellant, which included taking her history relating to all the motor vehicle accidents and the injuries she sustained as a result. [Independent physiatrist] testified that:

1. The Appellant did not exaggerate the injuries she sustained in the motor vehicle accidents and the adverse effect these injuries had on her ability to work.
2. Because of the Appellant's low back pain, right leg radiculopathy, and mechanical low back pain, her endurance for sitting, standing and working as an administrative assistant was reduced.
3. She attempted to return to work in January 2009 with restrictions but within three months of doing her work, her back pain and right leg radiculitis was worse and she stopped working on April 8, 2009.

[Independent physiatrist] was cross-examined by MPIC's counsel and testified that:

1. The Appellant had undergone many examinations in respect of functional capacity.
2. He was not a functional capacity expert, nor an occupational expert, and although he is not trained to conduct these assessments, in respect of the assessment he did conduct, he

indicated he conducted a physical assessment, testing power and strength, observing the patient and conducted a general overview of the Appellant's motor strength.

3. Acknowledged that during the clinical assessments there were no signs of radiculopathy.
4. The Appellant had ongoing signs of inflammation; she had leg pain, back pain and an annular tear.
5. The Appellant was advised by her employer there would be no flexibility in her work and as a result she was unable to continue working in April 2009.
6. The employer initially granted her the opportunity to sit or stand while working and then withdrew this accommodation.

MPIC's Submission:

MPIC's legal counsel submitted that the Internal Review Officer's decision of December 21, 2010 was correct in rejecting the Appellant's Application for Review on the following grounds:

1. The Appellant did not file a timely Application for Review under Section 172(1) of the MPIC Act.
2. The Appellant was capable of working as an administrative assistant at [text deleted]. In arriving at this conclusion the Internal Review Officer relied on the Physical Demands Analysis provided by [Appellant's occupational therapist #2] over the FCE provided by [Appellant's occupational therapist #1]. As well, the Internal Review Officer relied on the report of [MPIC's doctor] who concluded the Appellant was functionally capable of employment as an administrative assistant. The Internal Review Officer concluded that since an accommodation had been made for the Appellant in respect of a sit/stand station, she found there was no objective medical evidence to support the Appellant's accident-related inability to hold employment as an administrative assistant. As a result the Appellant's Application for Review was dismissed by the Internal Review Officer.

In support of the Internal Review Officer's decision, MPIC's legal counsel referred to the following reports:

1. [Rehabilitation clinic #2] conducted a multi-disciplinary assessment on November 6 and 7, 2008. The [rehabilitation clinic #2's] recommendation stated the Appellant was capable of sedentary to light level physical activity including sedentary office work.
2. On December 23, 2008, the occupational therapist, [Appellant's occupational therapist #2] completed a Physical Demands Analysis at the workplace at [text deleted] and he concluded that a sitting and/or standing tolerance were primary issues for the Appellant. He felt it was possible to modify the workstation to allow the Appellant to alternate between sitting and standing easily and frequently.

MPIC's legal counsel also referred:

1. To a discussion that the case manager had with [Appellant's neurosurgeon] in June 2009, who had seen the Appellant and indicated that she was capable of walking around and had the use of a sit/stand station and therefore it was up to her to choose to return to work or not.
2. The report of [MPIC's doctor], MPIC's medical consultant who had reviewed the Appellant's file and it did not appear to her that the Appellant was specifically precluded from carrying out her job duties.
3. The report from [independent sports medicine specialist], a sports medicine doctor, who conducted a musculoskeletal examination and was unable to establish a causal relationship to a musculoskeletal lesion and as such was unable to relate the Appellant's reported symptoms to injuries related to the motor vehicle accident.

4. The report from [Appellant's orthopedic surgeon], whose primary practice was knee and shoulder reconstruction and who concluded after reviewing the documents that the Appellant should be able to work as an administrative assistant with modifications.
5. The report of [independent physiatrist] and submitted that the Commission should give greater weight to the reports of [Appellant's occupational therapist #2], [Appellant's neurosurgeon], [MPIC's doctor], [independent sports medicine specialist] and [Appellant's orthopedic specialist] who all concluded that the Appellant would be able to carry out the duties of an administrative assistant with modifications.

MPIC's legal counsel submitted the Appellant had not established on a balance of probabilities there was a causal relationship between the injuries the Appellant sustained in the motor vehicle accident and her inability to do the duties of an administrative assistant with modifications.

Discussion:

Delay**:**

The Internal Review Officer had dismissed the Appellant's appeal on the grounds that contrary to Section 172(1) the Appellant had not filed an Application for Review of the case manager's decision of June 15, 2009 within 60 days of receiving the Notice of that decision.

The Internal Review Officer, in her decision of December 21, 2010, stated:

> "In your November 30, 2009 letter, you explained that you delayed in submitting your Application for Review because of broken sleep and a delay in receiving [Appellant's occupational therapist #1] June 2008 report. You told me that you received the June 2008 report in November 2008, along with the [rehabilitation clinic #2] report.
>
> I note that your case manager's decision was dated June 15, 2009. Therefore, I do not find it relevant that you did not receive [occupational therapist #1's] report until November 2008. This report was apparently received approximately 7 months before your case manager's decision, so you would have had sufficient time to review it.

> The case manager's (sic) June 15, 2009 specifically mentioned your ability to appeal the decision under section 172(1) of *The Act*. The time limit of 60 days was clearly stated.
>
> Based on all of the above, I am dismissing your Application for Review because there was no reasonable excuse for a delay in filing it."

The Commission notes the Appellant filed an Application for Review sometime in October 2009 (undated), approximately 7 weeks after expiry of the 90 day time limit. On reviewing the Appellant's letter dated November 30, 2009 regarding her delay in filing a timely Application for Review, the Appellant stated:

> "... Unfortunately the damaged nerves in my back affected my ability to perform at a desk job the symptoms returned and worsened which resulted in right leg and back pain also my shoulder and neck pain were aggravated too. All the pain I have been in for many years has been very difficult. I have broken sleep because of the pain and this is affecting me. ..."

This letter also stated that:

1. The Appellant was upset as the injuries caused from the multiple accidents for the most part were not her fault.
2. She had previously received IRI and now she did not know why her IRI was being terminated which did not make sense to her and she wanted to know how she was supposed to live.
3. The Appellant was extremely frustrated by the termination of her IRI.
4. She attempted to obtain assistance from the [text deleted] and was unsuccessful.
5. She was emotionally exhausted and could not deal with the extra stress and pain she was in, in addition to having to find another job.
6. She was without pay and not sure how she could manage financially and stated:

   > "My emotional state was not good and in order for me to keep moving forward I needed to step back for a while and gather my emotions. This was so very hard and I didn't have money to hire a lawyer to help with this situation and was discouraged by all the events."

Section 172(2) of the MPIC Act provides:

> **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.

The Commission finds that the Internal Review Officer erred in failing to take into account the psychological condition of the Appellant who had sleep problems, was emotionally exhausted and was frustrated in dealing with MPIC, was unable to find employment and was without funds to retain legal counsel to represent her. The Commission finds that the Appellant has provided a reasonable excuse for failing to file an Application for Review within the 60 day time period and extends the time for which the Appellant has for making a timely Application for Review of the case manager's decision.

Relapse:

The Commission rejects the submission of MPIC's legal counsel and submits that the Appellant has established, on a balance of probabilities that the injuries sustained in the motor vehicle accidents prevented the Appellant from returning to work as an administrative assistant.

The Commission notes that [Appellant's occupational therapist #1], the occupational therapist who assessed the Appellant on June 20, 2008 concluded that:

1. The Appellant did not demonstrate the ability to perform the majority of her physical demands of her job description as an administrative assistant.
2. The Appellant was limited to sedentary and light level work due to left upper limb pain and lower back pain which affected her ability to lift and carry.

The Commission notes that the Appellant's personal physician, [Appellant's doctor #1], who the Appellant had seen since September 13, 2009, provided two reports which clearly indicated the Appellant was unable to continue her employment as an administrative assistant due to the injuries she sustained in the motor vehicle accident. [Appellant's physiotherapist], in her report of January 23, 2013, clinically diagnosed the Appellant with lumbar radiculopathy and concluded that this clinical condition resulted in an inability to perform the required tasks and posed a safety/health risk to her and her co-workers. [Appellant's [physiotherapist] stated:

> "In my opinion, on a balance of probabilities, [The Appellant] was unable to continue working in her position as an administrative assistant due (sic) her injuries. The motor vehicle related injuries have impacted [the Appellant] tremendously over the period of time she was under my care. She has been unable to work as an administrative assistant because of the nature of her injuries and how they are aggravated by that type of sedentary work. Due to the weakness that she presents with because of her back and patellar dislocations, she is unable to stand, sit or be in static positions for long periods of time.
>
> In January 2009, she tried to carry out those duties and reported experiencing more numbness and tingling into her legs, low back pain and sometimes experienced bowel and bladder changes. [The Appellant] had to change her career plans on several occasions as she could not tolerate sitting when she returned to school.
>
> In my opinion, [the Appellant] requires a job where she is not in a static position for any length of time. A sit/stand work station is not sufficient to accommodate her due to her injuries, as it does not comply with the above restrictions I have outlined." (Underlining added)

The Commission also notes that [Appellant's doctor #2] assessed the Appellant on July 11, 2013 and concluded:

> "In my professional opinion [the Appellant] suffers a number of permanent musculoskeletal pathologies which impinge on her employability, and which in particular do indeed warrant the kind of flexibility in work schedule which [the Appellant] seeks and which would permit her to avoid prolonged sitting, and allow her the freedom to change her posture and to walk around at numerous junctures throuhout (sic) the day."

[Independent physiatrist] examined the Appellant over a period of 2½ hours and examined all of the relevant documentary evidence on file. He noted that:

1. The Appellant was involved in five motor vehicle accidents and that the first accident of February 28, 2005 indicated that the Appellant sustained an L5-S1 disc herniation, spinal stenosis, and radiculopathy.
2. Each of the subsequent motor vehicle accidents aggravated her previous injuries.
3. Her primary complaints were pain to her low back, knee, neck, left shoulder and wrist that occurred while sitting or standing for extended periods of time without the ability to leave the work station.
4. Upon a physical examination the Appellant had a gait antalgic right leg.
5. She could not stand on her right leg for more than a minute and she could not walk on her toes and the heel on her right side.
6. The Appellant informed [independent physiatrist] that she used a cane in her right hand to walk for more than one hour.

In his testimony, [independent physiatrist] confirmed the opinions he set out in his medical reports which included the following:

> "The sitting position does aggravate the interdiscal pressures and this may have further aggravated he discogenic and radicular pain. [Text deleted] found that at L3-L4 level upright pressure was more than 10 times greater than recumbent disc pressure. Indeed, the pressure exerted on the upright L3-L4 disc in the seated partially flexed position is also 11 times the pressure the recumbent L3-L4 disc experiences when recumbent and is the same pressure multiple that Wilke et al measures. She did receive long term physiotherapy and chiropractic treatments with limited improvement.
>
> ... She was not able to perform her employment as an administrative assistant because of her discogenic low back pain, right leg radiculopathy and mechanical low back pain with reduced endurance for sitting, standing and working tolerance as administrative assistant. She tried to return to work in January 2009 with the restrictions but within three months or (sic) doing this work, her symptoms of back pain and right leg radiculitis got worse and she stopped working from April 8th, 2009."

[Independent physiatrist], in his report, set out the employment history of the Appellant, and which supports the Commission's view that the Appellant was a hardworking person who was not a malingerer who did not attempt to avoid returning to work as an administrative assistant. [Independent physiatrist] stated:

> "In 1988 before the motor vehicle accident, she was working 2 jobs, one part-time at [text deleted] 15 hours a week and second job was full time at [text deleted] (sewing work). She stopped this job due to injuries sustained in the summer 1987 motor vehicle accident. Then she worked from early 1989 until 1990 as a caretaker of [text deleted] which according to her was not heavy work. She worked [text deleted] in office administration and sales from 1991 for one year then the company was sold and she received unemployment benefits. From 1992 she worked 1 ½ years with the [text deleted] in administration. From 1993 until 1995 she worked [text deleted] as a sales assistant.
>
> From 1993 she worked evenings and weekends as a [text deleted] for three years then she had two more kids and did not work. From 1988 until 2002 she worked as an Office Manager [text deleted]. In 2002 she returned to [text deleted] and graduated. In 2003 she worked for one year for [text deleted] as an administrative secretary. In 2004 to 2005 for [text deleted]. In 2005 she worked for [text deleted] and part-time sales at [text deleted]. In 2005-2006 she attended the [text deleted] and took [text deleted] and [text deleted] courses. Since 2003 she has been trying to continue to earn money to support family, gradually symptoms got worse with numbness in the right leg and increased pain in 2007 in the back, she kept on trying; even was given flexibility at work to sit/stand. In 2008 November/December, she was advised that she will not be given flexibility and has to sit at the desk as a receptionist and she stopped working in April 2009. December 2010 she took a job with the Province of Manitoba, administrative assistant to [text deleted] for 20 hours a week. January 2012 she went to college [text deleted] and completed a course in November 2012. In April 2012 she stopped working because her courses required more commitment. November 2012 she went to [text deleted] to do practicum with [text deleted] for two months, then returned [text deleted] in January 2013 because her dad became very sick [text deleted] and now he is stable. She worked from May 2013 to September 2013 for [text deleted]. She let the job go because she started having problem with the back because her job required sitting."

The Commission rejects the medical opinion of [Appellant's neurosurgeon] who initially concluded that the Appellant was capable of returning to work if she was capable of walking around. This statement conflicts with the report from [Appellant's doctor #1] who indicated on April 15, 2009 that [Appellant's neurosurgeon] had, in respect of the Appellant, recommended

an indefinite excuse from work on April 8, 2009. In view of the conflicting opinions from [Appellant's neurosurgeon], the Commission cannot give any weight to his medical opinions.

The Commission rejects the reports of [rehabilitation clinic #2] and [Appellant's occupational therapist #2], who did not have the opportunity of examining the reports of physiotherapist, [Appellant's physiotherapist], [Appellant's doctor #1], [Appellant's doctor #2], and [independent physiatrist] in arriving at their conclusion that the Appellant did have the capacity to return to work as an administrative assistant.

The Commission further notes that [independent sports medicine specialist], a sports medicine doctor, and [Appellant's orthopedic specialist], whose primary practice is knee and shoulder reconstruction, were of the view that the Appellant could perform the tasks of an administrative assistant. The Commission notes that [independent sports medicine specialist's] report primarily deals with a musculoskeletal examination and that [Appellant's orthopedic specialist] acknowledged:

> "However, if you consider the patient as a whole and pre-existing degenerative change in her patellofemoral articulation as well as the chronic low back mechanical problems, on the balance of probabilities the motor vehicle accidents each played a significant role in enhancing her low back and knee symptoms."

The Commission notes that neither [independent sports medicine specialist] nor [Appellant's orthopedic specialist] had the opportunity of examining all the medical reports and documentary evidence that [independent physiatrist] had in arriving at his opinion.

The Commission notes that [MPIC's doctor] did have the opportunity of examining the relevant medical reports in order to conclude the Appellant had the ability to return to her position as an administrative assistant. Unfortunately [MPIC's doctor], unlike [independent physiatrist], did

not have the opportunity to personally examine and assess the Appellant over a period of 2½ hours and in particular to determine whether the Appellant was credible.

The Commission also finds that [independent physiatrist] concluded the Appellant could not perform the duties of an administrative assistant, not only because she suffered from mechanical low back pain, but also because of discogenic low back pain and right leg radiculopathy. The Commission finds that [MPIC's doctor] and [Appellant's neurosurgeon] did not address these two issues. As well, MPIC did not provide any expert medical opinion to contradict the findings of [independent physiatrist].

The Commission finds that the Appellant testified in a direct and unequivocal fashion, and the Commission accepts her testimony that due to the injuries she sustained in the motor vehicle accident she was unable to return to her position as an administrative assistant.

The Commission accepts the opinions of the occupational therapist, [Appellant's occupational therapist #1], physiotherapist, [Appellant's physiotherapist], [Appellant's doctor #1], [Appellant's doctor #2] and [independent physiatrist], who all corroborate the Appellant's testimony of her incapacity to return to employment as an administrative assistant due to the injuries she sustained in the motor vehicle accident.

Decision:

For these reasons, the Commission finds the Appellant has established on a balance of probabilities that she was unable to return to work as an administrative assistant and suffered a relapse pursuant to Section 117(1) of the MPIC Act. The Commission rescinds the decision of

the Internal Review Officer dated December 21, 2010 and finds that the Appellant is entitled to IRI benefits from the date of the IRI termination, together with interest.

Dated at Winnipeg this 16th day of November, 2015.

MEL MYERS, Q.C.

NEIL MARGOLIS

DR. CHANDULAL SHAH