Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-13-056, AC-15-209, AC-15-210

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Trevor Anderson** **Ms Karin Linnebach**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Ken Kalturnyk of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**October 13, 14 and 17, 2016**
ISSUE(S):	**1. Entitlement to Income Replacement Indemnity benefits for the period from the 181st day following the motor vehicle accident to May 2008.** **2. Whether the medical information provided by [Appellant's neuro-ophthalmologist] results in the Appellant's entitlement to Income Replacement Indemnity benefits and/or additional permanent impairment award.** **3. Entitlement to cranial sacral or vestibular therapy.**
RELEVANT SECTIONS:	**Section 86(1), 127, 137, and 171(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act'), Section 5 of Manitoba Regulation 40/94 and Division 2, subdivision 1, 1.2(d) of Manitoba Regulation 41/94.**

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

Reasons For Decision

Background:

The Appellant was involved in a motor vehicle accident("MVA") on August 8, 1994, in the Province of Alberta, and sustained the following injuries:

- Comminuted fractured right femur with IM rod implanted
- Frontal contusion and evidence of a subarachnoid bleed
- Multiple contusions/abrasions: right forehead/cheek; left and right elbows/knees; with residual scarring to the left knee; and
- Right eye visual defect – very small inferior right " 'quadrantic homonymous' (harmonious)" field loss.

The Appellant had a history of polio resulting in a deformity of the right foot and an unsteady gait. Prior to the motor vehicle accident she had been employed as a house cleaner in private homes and providing homecare services. As a result of injuries sustained in the motor vehicle accident, she was treated surgically for her right broken femur, with the insertion of screws.

Fifteen years after the motor vehicle accident, in October of 2009, the Appellant sought to reopen her MPIC Personal Injury Protection Plan ("PIPP") file. She sought permanent impairment, treatment and Income Replacement Indemnity ("IRI") benefits as a result of vision problems and pain in her right leg. Case management and Internal Review decisions were issued by MPIC. The Appellant, dissatisfied with these decisions, filed an appeal with this Commission. A hearing was held on October 24, 2012 and the Commission issued a decision dismissing the Appellant's appeal on December 13, 2012 (the earlier AICAC decision). In its Reasons for Decision, the previous panel of this Commission found;

> "... that the Appellant had failed to establish on a balance of probabilities that the Appellant was absent from work between the periods 1995 to 1998 and May 11, 2008 onward due to the injuries she sustained in the motor vehicle accident."

In this regard, the Commission referenced the Appellant's testimony before the Commission as well as evidence provided from her Employment Insurance ("EI") and Canadian Pension Plan

("CPP") files and reports, as well as medical evidence. The Commission found that there was no objective evidence which would indicate that the Appellant's physical impairment would negatively affect her ability to perform gainful employment.

The Commission also found, based upon evidence from the Appellant's physician and MPIC's Health Care Services consultant, that the Appellant had not provided medical information to support her challenge of MPIC's calculation of her permanent impairment award.

The Current Appeal:

Following the filing of her earlier Notice of Appeal with the Commission (on August 26, 2011), the Appellant continued to seek further benefits from MPIC. Following denials of benefits by her case manager for further IRI benefits, additional permanent impairment and therapy benefits, the Appellant submitted further medical information from [Appellant's neuro-ophthalmologist]. MPIC considered whether this new medical evidence could be considered fresh evidence impacting its decisions. Three additional Internal Review decisions, dated February 27, 2013, September 24, 2015 and September 25, 2015 were issued by MPIC denying entitlement to IRI, further permanent impairment and cranial sacral and vestibular therapy. The Appellant filed Notices of Appeal with the Commission in regard to these three decisions.

The Commission held several case conference hearings ("CCH") to review issues regarding the Commission's jurisdiction to hear the appeals. Issues arising from the Commission's previous decision and having regard to questions of re-litigation, res judicata, and finality were reviewed. The impact of [Appellant's neuro-ophthalmologist's] more recent new reports was also considered. The parties made written submissions on these questions and these legal issues were reviewed by the Commission and discussed with the parties.

It was concluded and confirmed with the parties that findings of fact made by the Commission in its earlier decision would be binding on the parties. Further, the parties would not be permitted to give testimony in the current appeal contrary to the testimony which was reflected in the earlier decision. The parties agreed that the only new medical evidence subsequent to the earlier decision were the reports of [Appellant's neuro-ophthalmologist]. The Commission also confirmed that, with respect to the issues under appeal, specifically IRI benefits, the only time period that was not dealt with in the earlier decision was the period from January 1999 to May 10, 2008. This time period would be the focus of the current appeal, although should the panel hearing the appeal find that the reports of [Appellant's neuro-ophthalmologist] were determinative with respect to IRI, this could form the basis of a new decision which would be based on fresh evidence and which could relate to all time periods.

Issues:

At the commencement of the current appeal hearing, the parties agreed that they were bound by the evidence and findings from the previous hearing and earlier AICAC decision. Counsel for the Appellant confirmed that she was seeking IRI benefits for the period between 1998 and 2008, which had not been the subject of the earlier decision. Further, the Appellant took the position that although the earlier decision had found that the Appellant's other problems had not been sufficient to warrant IRI prior to 1999 and after May 2008, now, in combination with the new evidence of [Appellant's neuro-ophthalmologist] identifying visual problems and dizziness, the Commission should find that the Appellant had been and continues to be unable to perform the duties of her employment. Therefore, she should be entitled to IRI benefits from the 181st day following the motor vehicle accident, due to a combination of her other physical ailments and the findings of [Appellant's neuro-ophthalmologist]. The Appellant also sought further permanent

impairments regarding her visual problems and for a sub-arachnoid bleed, as well as treatment benefits for cranial sacral therapy and vestibular therapy.

Counsel for MPIC took the position that the earlier AICAC decision had clearly found that based upon the evidence the Appellant had not established an inability to work due to her motor vehicle accident injuries. The only new evidence on file was the evidence of [Appellant's neuro-ophthalmologist], which MPIC maintained was not persuasive in establishing an inability to work or treatment required due to accident injuries. The Appellant had received all benefits to which she was entitled.

Accordingly, the issues before the panel were whether the Appellant was entitled to IRI benefits for the period from the 181st day after the MVA to May 2008, and whether the medical information from [Appellant's neuro-ophthalmologist] should result in the Appellant's entitlement to IRI benefits for that period and/or for the entire period from the 181st day following the MVA to date. The panel also considered whether the Appellant should be entitled to any additional permanent impairment award and whether the Appellant is entitled to cranial sacral or vestibular therapy benefits as a result of the motor vehicle accident.

The Commission finds that the Appellant is entitled to a further permanent impairment benefit of 5% as a result of a sub-arachnoid bleed suffered in the motor vehicle accident. However, the panel has found that the Appellant is not entitled to further IRI benefits, any additional permanent impairment awards, or to treatment benefits for cranial sacral or vestibular therapy.

Evidence and Submissions for the Appellant:

At the hearing of the current appeal, the panel heard evidence from the Appellant, her husband and [Appellant's neuro-ophthalmologist], a specialist in neuro-ophthalmology and neuro-otology.

The Appellant:

The Appellant described her work experience in housecleaning and elder care, between 1978 and 1993. Although she had some issues with her leg, due to childhood polio, this did not affect her work. Prior to the motor vehicle accident, she did not use a cane, and had no problems with her vision, headaches or dizziness. Following the motor vehicle accident, between 1995 and 1998, she struggled with headaches and dizziness. While she attempted to work part-time at jobs in the fast food and restaurant industry between 1998 and 2002, she had difficulties with slow work and focussing on customer service. She maintained that this was because she had a vision problem and could not see properly.

The Appellant described her job working at a care centre in Alberta between June 2002 and December of 2005. Her duties included dusting the furniture and cleaning bathrooms but some consideration and accommodation was afforded to her by management regarding her inability to do any heavy lifting (including patients). Others were assigned to collect garbage and to help her with lifting when she did general heavier cleaning.

The Appellant described difficulties which she had during this period. She described her heart beating faster and feeling dizzy, even at work. The resulting diagnoses were of high blood pressure and panic attacks. The Appellant acknowledged that when applying for EI she had

indicated that she quit to look after her husband, who had been ill. This was in error and at some point she had indicated that it was due to her heart problems.

The Appellant then described trying to work at other jobs in care facilities in [Manitoba]. She had difficulties lifting heavy things, could not see properly and was afraid that she might fall when the jobs involved a lot of walking. Her leg and hips hurt and she suffered from headaches, dizziness and a fast heart beat. She also described the problems that she was having and had suffered since the motor vehicle accident, with blank spots in her vision and her visits to and treatment by eye specialists in [Alberta] and [Manitoba]. She suffered from pain in her hip where the rod was placed after the motor vehicle accident. She has not had it removed and still has pain there. Her back hurts, she has problems sleeping and so feels fatigued during the day.

On cross-examination, the Appellant was questioned about her failure in the past to attribute her reason for leaving various employments to her vision and dizziness problems. She had not provided this reason to her employers or to authorities at Service Canada when dealing with applications for EI and CPP benefits. The Appellant could not explain why the documentary evidence on her indexed file did not support her contention that she left these jobs due to problems with dizziness or her eyesight.

When asked why medical records failed to note such complaints during her visits with her family physician and other caregivers, she indicated that she had made such complaints when she could, but they were not noted. Sometimes she had to deal with other issues with her doctor and was limited to only dealing with one complaint at a time by the doctor's policies.

The Appellant also asserted that she had failed to mention dizziness in her CPP application, as she had missed that point due to unfamiliarity with and difficulty filling out the forms. She was

unable to explain why the representative who helped her with her EI application also failed to cite dizziness in the application.

Although the Appellant testified that she had fallen a few times, she could not explain why [Appellant's neuro-ophthalmologist] did not note that in her report, in spite of the fact that the Appellant maintained she had told [Appellant's neuro-ophthalmologist] about it.

She admitted that she had fallen in 2006 and cracked or broken some teeth, but that she had not hit her head in doing so.

On cross-examination the Appellant also indicated that [Appellant's neuro-ophthalmologist] had recommended she try cranial sacral therapy and that she had been waiting for [hospital] to contact her regarding this treatment, to no avail. She could not explain why [Appellant's neuro-ophthalmologist] did not, in spite of recommending vestibular physiotherapy in her report, make any written recommendations regarding cranial sacral therapy.

<u>The Appellant's Husband:</u>

The Appellant's husband testified that he had known and been married to the Appellant for over one year prior to the motor vehicle accident and that she had never had any problems with vision, vertigo or dizziness prior to the motor vehicle accident. Following the motor vehicle accident, she had problems with her vision and balance and was hardly able to get up and do anything. Between March 1995 and May 1998, these balance, dizziness and vision problems affected her ability to work and to do chores at home. When she tried to work in the fast food industry, she was not able to fulfill all her duties.

When she was working at a care centre in Alberta between June 2002 and December 2005, she was only able to do light duties such as dusting and pushing a light cart. Even then, the Appellant told him she had fallen a couple of times because of her dizziness. She quit that job in December of 2005 due to problems with a high pulse rate, dizziness and headaches. He also had his own health difficulties around that time, although he was able to drive and go to work, until he resigned from his job in February of 2006.

He described the Appellant's difficulties with a high heart rate and her eventual diagnosis of panic attacks. She had not suffered from panic attacks prior to the motor vehicle accident and it was his view that something about the motor vehicle accident (whether it be headaches, dizziness or hip pain) had brought on the panic attacks.

The Appellant's husband explained that subsequent jobs the Appellant took at care homes in Manitoba involved heavier work than she used to do at the care home in Alberta. She was unable to meet these requirements and continued to have problems with vision and dizziness. However, he testified that they did not contact MPIC about these difficulties because they had reached a previous settlement and since he was still working, he had insurance coverage for her medical expenses. Then, in 2009 he and his wife contacted MPIC to obtain information from their files which could be used to help with the Appellant's application for CPP disability benefits. He testified that they were met with an angry response by the MPIC employee they contacted. This led them to then contact a lawyer. The lawyer assisted them in pursuing permanent impairment benefits from MPIC.

On cross-examination the Appellant's husband could not recall if the Appellant specifically mentioned her vision and dizziness problems to her family physician when they filled out forms

for MPIC in late 1994. The indication to EI that the Appellant had to leave work to look after him was not correct and he attributed that to the Appellant's lack of computer skills. He was not able to explain why the pain in her legs and back was noted as the reason for stopping work and not her dizziness. Several documents on the indexed file were reviewed with the Appellant's husband on cross-examination which did not contain any reference to dizziness or eye problems as impairments preventing her from working but the Appellant's husband could not explain the reason for this.

Evidence of [Appellant's neuro-ophthalmologist]:

[Appellant's neuro-ophthalmologist] testified at the hearing and was qualified as an expert in the field of neurology, specifically neuro-ophthalmology and neuro-otology.

[Appellant's neuro-ophthalmologist] had provided reports, found on the Appellant's indexed file and dated December 13, 2013, June 8, 2014 and March 31, 2015.

On December 13, 2013, [Appellant's neuro-ophthalmologist] reported that she had examined the Appellant and reviewed reports on her file, including a report from [Appellant's ophthalmologist] dated June 14, 2010. Her report indicated that the Appellant suffered from a right inferior homonymous quadrantanopsia, incongruous and worse in the left eye. She noted that this visual field defect had been described by [Appellant's ophthalmologist] in June 2010. In [Appellant's neuro-ophthalmologist's] view this injury was a result of classic coup-contrecoup injury. As she struck the right frontal lobe, one would predict damage to the left posterior cerebral hemisphere, resulting in this visual field defect. It would also account for her symptoms of having to move her eyes in order to see words on a page as one quarter of each word would be missing. This was caused by the motor vehicle accident.

[Appellant's neuro-ophthalmologist] also reported that the Appellant had problems with dizziness. She suspected a possible condition of BPPV (benign paroxysmal positional vertigo), although on testing, there was an absence of characteristic nystagmus. [Appellant's neuro-ophthalmologist] stated that even at that BPPV still could not be definitely ruled out. Alternatively, the condition could be the result of cervical muscle spasm consequent to her abnormal posture from scoliosis. [Appellant's neuro-ophthalmologist] recommended exercises and noted that a vestibular physiotherapist can assist with assessment and provide exercises to assist with balance problems.

[Appellant's neuro-ophthalmologist] reported again on June 8, 2014 indicating that an MRI scan of April 11, 2014 showed no evidence of damage in the lobes. However, she noted that regardless, the visual defect was reproducible and long-standing.

Finally, [Appellant's neuro-ophthalmologist] reported on March 31, 2015, responding to questions posed to her by the Appellant's case manager. She indicated that she had seen the Appellant on one occasion only (in December of 2013) and had no information regarding her current clinical condition. She was not aware of the Appellant's prior employment history and had not conducted a medicolegal or occupational assessment. The Appellant had described difficulty with reading and vertigo and the examination confirmed a diagnosis of inferior right homonymous quadrantanopsia, incongruous with the left eye affected more than the right eye. A definitive diagnosis as to the cause of the Appellant's dizziness could not be made, other than stating she may have BPPV or cervical vertigo. Whether or not these findings prevented her from performing gainful employment would, according to [Appellant's neuro-ophthalmologist], depend on what that employment detailed. Specific visual tasks involving accuracy and numbers

or jobs which entail turning and looking up might prove problematic. [Appellant's neuro-ophthalmologist] confirmed again that the quadrantanopsia was a result of the motor vehicle accident. She was unable to state that the BPPV was a direct result of a motor vehicle accident, but noted that in her practice 60% of cases of BPPV are caused by head trauma. The BPPV should not be a permanent deficit, and vestibular physiotherapy treatment would be worthwhile in that regard.

[Appellant's neuro-ophthalmologist] also confirmed [Appellant's ophthalmologist's] finding regarding the Appellant's visual field deficiencies and confirmed that other visual symptoms which the Appellant described (diplopia, vitreous floaters and flashes of lights) were unlikely to have originated from the motor vehicle accident.

At the appeal hearing, [Appellant's neuro-ophthalmologist] confirmed that the visual defects found were likely present, largely unchanged, following the motor vehicle accident.

She indicated that her diagnosis of the Appellant's vertigo or dizziness problems was based upon the history provided to her at the Appellant's examination and was most consistent with BPPV.

She described the condition and presentation of BPPV for the panel, as well as treatments for it. She indicated that the literature indicates that 30% of cases of BPPV are caused by trauma and 30% are idiopathic. Another possible cause could be cervical vertigo, caused by restrictions on head movement due to sore neck muscles and the discrepancy which this creates.

While [Appellant's neuro-ophthalmologist] indicated that BPPV which developed secondary to a motor vehicle accident would be expected to typically present immediately or within the first few

days following the accident, she does sometimes see patients who suffer from BPPV which is attributed to events many years earlier. In her view a long period post-motor vehicle accident containing no reports of dizziness until 10 or 15 years after the motor vehicle accident would not necessarily make it less likely that the motor vehicle accident was the cause of BPPV. Although literature indicates that in most cases the problem is reported immediately, in the days or weeks after the trauma, it could be based on more remote trauma which is later stimulated by another event.

On cross-examination, [Appellant's neuro-ophthalmologist] was asked about more recent falls which had been documented in the Appellant's indexed file, although her notes did not indicate that the Appellant had reported any such falls to her. She agreed that a fall which broke the teeth could be the kind of trauma which might also cause BPPV.

She indicated that she thought the Appellant was a little too young to attribute the cause of the BPPV to aging.

[Appellant's neuro-ophthalmologist] also explained that she had difficulty reproducing the nystagmus which is common to a diagnosis of BPPV in her manoeuvres with the Appellant, but was of the view that a physiotherapist may be able to perform the manoeuvre to complete this test and also to provide vestibular physiotherapy treatment.

On cross-examination, [Appellant's neuro-ophthalmologist] also agreed that mechanical issues such as the Appellant's scoliosis related leg length discrepancy could possibly lead to the kind of cervical spasms that can cause vertigo. She did not rule this out.

She indicated, however, that she had never recommended cranial sacral therapy for the Appellant, would not recommend it and did not know enough about what cranial sacral therapy was.

In summary, she indicated that the possible primary causes for the Appellant's BPPV were the motor vehicle accident, the recorded fall where she broke her teeth and aging. In her view, the most likely cause was the motor vehicle accident, which was not a trivial event.

Evidence for MPIC:

[MPIC's doctor]:

[MPIC's doctor] testified at the hearing into the Appellant's appeal and was qualified as an expert in physiatry and forensic review.

[MPIC's doctor] provided reports on the Appellant's indexed file and, in particular, conducted file reviews dated April 20, 2015 and June 3, 2015. [MPIC's doctor's] report of June 24, 2015 noted instances where her doctor (in March 1995) reported that the Appellant was fully functional. She was then able to secure various types of employment and continued to work until sometime in May 2008. He reported that the medical evidence did not support a physical or ophthalmological deterioration in her condition to the extent that she could no longer perform gainful employment in May 2008. He noted [Appellant's ophthalmologist's] assessment in June 2010 which found visual system deficits yet opined that she was functionally normal and not identified as having a visual impairment which would prevent her from performing gainful employment. He also reviewed [Appellant's neuro-ophthalmologist's] reports. He concluded that the same observations as had been made by [Appellant's ophthalmologist], were made by [Appellant's neuro-ophthalmologist] and that the Appellant's visual system did not deteriorate to

the extent additional visual impairments developed or that she would not be capable of performing gainful employment if she so desired.

[MPIC's doctor] also reviewed [Appellant's neuro-ophthalmologist's] references to dizziness for which, in his view, the cause could not be determined. [Appellant's neuro-ophthalmologist] listed possibilities for the reported dizziness, including BPPV, which can develop following head trauma or from cervical muscle spasms stemming from abnormal posture from her scoliosis. In his view, although [Appellant's neuro-ophthalmologist] noted that the most common cause for BPPV was a blow to the head (which could have occurred at the time of the accident), [Appellant's neuro-ophthalmologist] could only speculate that the BPPV originated from a head injury. His own forensic review of the claim file showed that the first documentation of dizziness was noted in [text deleted's] (neurologist) report outlining an assessment performed on November 29, 2010. It was reasonable to opine, 16 plus years after the accident, that a temporal relationship could not be established between the incident in question and the reported dizziness. Further, [MPIC's doctor] did not believe that [Appellant's neuro-ophthalmologist] had advised the Appellant against pursuing gainful employment as a result of her reported dizziness.

[MPIC's doctor] did not believe there was sufficient medical evidence reporting an evidence-based beneficial effect of cranial sacral therapy in the management of underlying musculoskeletal conditions.

While [Appellant's neuro-ophthalmologist] had indicated that vestibular therapy might assist in minimizing the Appellant's reports of dizziness, and this form of treatment could be considered medically acceptable, it would not be required in this case for the management of *a motor vehicle accident related* condition. (Emphasis added)

In his testimony before the Commission, [MPIC's doctor] confirmed his view that the evidence on the Appellant's file did not indicate that she was impaired from performing gainful employment as a result of a motor vehicle accident related condition. A review of the medical information on her file, in conjunction with reports from [Appellant's neuro-ophthalmologist] regarding visual concerns, did not present objective evidence of a physical or visual impairment which would prevent the Appellant from working. The visual impairment noted by [Appellant's neuro-ophthalmologist] had been previously identified and the Appellant had been provided with a permanent impairment benefit in that regard, but it did not preclude her from working. The Appellant's dizziness, for which there was no evidence of onset until 2010, when the Appellant was assessed by [Appellant's neurologist], did not bear a temporal relationship to the motor vehicle accident. Further, the various possible causes for such dizziness, including head trauma from the motor vehicle accident, cervical spasm, and a history of a head trauma due to a fall in 2006 (when the Appellant had broken teeth) did not lead him to conclude that the motor vehicle accident was the most likely cause. It was hard to establish a causal connection between the dizziness symptoms and the motor vehicle accident.

Nor did the Appellant's previous statements (documented on the file) to MPIC or through her doctors, or to Service Canada employees, do anything to change his view that the dizziness which presented much later in time was connected to the motor vehicle accident.

Therefore, although [MPIC's doctor] recognized the recommended vestibular therapy as medically acceptable, he did not believe the need for it was required as a result of the motor vehicle accident. Cranial sacral therapy was not recognized or supported by the literature by sound medical and scientific principles.

[MPIC's doctor] also testified that the evidence showed the Appellant had suffered a subarachnoid bleed which could be attributed to the motor vehicle accident and that even without any alteration in tissue, a subarachnoid bleed of this nature would be sufficient to qualify for a permanent impairment award under the MPIC Act and Regulations.

Submission for the Appellant:

Counsel for the Appellant confirmed that the Appellant was no longer seeking entitlement to IRI benefits during the first 180 days following the motor vehicle accident. The Appellant was seeking a further permanent impairment award for a subarachnoid bleed, vestibular therapy treatment benefits and IRI benefits from the 181st day following the motor vehicle accident.

IRI:

Counsel submitted that the vision problem of inferior homonymous quadrantanopsia as diagnosed by [Appellant's neuro-ophthalmologist] had been accepted by MPIC as having been caused by the motor vehicle accident. In addition, [Appellant's neuro-ophthalmologist's] reports and testimony identified dizziness, likely due to BPPV, which counsel submitted was caused by head trauma in the motor vehicle accident. He pointed to [Appellant's neuro-ophthalmologist's] evidence that in her practice 60% of cases of BPPV are caused by head trauma, which was recognized as a major cause of the condition. Even when asked whether the fall which broke her teeth in 2006 could have been a cause of the vertigo problems, [Appellant's neuro-ophthalmologist] testified that in her view the most probable cause was still the motor vehicle accident, which she described as a not trivial event.

The Appellant's vision and vertigo problems could cause issues for any work involving numbers and jobs which entail turning and looking up or down. Yet the Appellant's case manager did not follow-up with [Appellant's neuro-ophthalmologist] by describing the nature of the Appellant's prior employment. Nor did she request a physical demands analysis from an occupational therapist. Neither [Appellant's neuro-ophthalmologist], the case manager or the Health Care Services consultants who reviewed the file had a very clear idea of the specific duties which the Appellant performed either prior to the motor vehicle accident during the period from 1999 to 2002 or from 2002 to 2005.

Counsel also noted that in addition to her vision and dizziness problems, the Appellant had ongoing problems with her right hip and that doctors had recognized she may have trouble with the rod inserted in her femur. This was contributing to her disability. Although the earlier AICAC decision found that the Appellant's problems with her right hip would not have prevented her from working, counsel took the position that this constituted one part of the problem which, when taken in combination with her vision and dizziness problems, could render her incapable of working. He submitted that the vision problems, dizziness problems and documented problems with her right hip in combination rendered her incapable of working at her pre-accident types of employment. Problems with seeing properly, periodic dizzy spells and an unstable gait would create a risk to elderly and disabled patients in a care facility, as well as a risk to the Appellant injuring herself in a fast food environment where she frequently made errors.

Counsel submitted that some of the absence of medical information on the Appellant's file for relevant periods was due to an error which MPIC had made in first adjudicating the Appellant's claim in 1995. Her case manager had treated the claim as a tort case rather than as a no-fault

claim under the MPIC Act, settling the file and leaving the Appellant and her husband to believe that they could not return to MPIC for support or benefit entitlements when the Appellant later experienced difficulties. By the time the Appellant pursued further claims and sought legal advice, many of her medical records had been destroyed, as the doctors were only obligated to keep these records for 10 years. This, counsel submitted resulted in serious prejudice to the Appellant's appeal which he did not believe MPIC should be allowed to benefit from, stemming as it did from a fundamental error on the part of her case manager.

Counsel took the position that the Appellant could not perform the kind of work which she had performed prior to the accident (housecleaning and home care work), as she could no longer lift patients or do any heavy work. He submitted that she should be entitled to full IRI benefits for the period from 180 days after the motor vehicle accident until she obtained part-time work in 1998 and then should receive partial IRI benefits until she was able to return to work full-time in June 2002. Since the Appellant was working full-time between June 2002 and December 2005, she would not likely be entitled to IRI benefits for that period. However, counsel noted that the Appellant was able to work during this time because her employer was accommodating her difficulties and restrictions. Later attempts at employment in 2008 showed, according to the Appellant's testimony, that she was unable to meet the heavy demands of the job. Although the earlier AICAC decision referenced reasoning provided by the Appellant to EI for quitting her job in 2005, counsel noted that the Appellant has English as a second language and no computer skills. He therefore questioned the accuracy of that information, recognizing that the Appellant was admittedly a poor historian.

Permanent Impairment:

Counsel submitted that the Appellant should be entitled to a further permanent impairment award of 5% under Division 2, Subdivision 2, 1.2 post-traumatic alteration of tissue. This falls under Section (d) for a subarachnoid hemorrhage.

Therapy:

Counsel acknowledged that as [Appellant's neuro-ophthalmologist] was not recommending cranial sacral therapy, he would not attempt to argue that point. However, he submitted that [Appellant's neuro-ophthalmologist] had testified that, while she could not provide a definitive diagnosis of BPPV in the Appellant's case, it is more likely than not that this is the correct diagnosis and that it was the result of trauma from the motor vehicle accident. [Appellant's neuro-ophthalmologist] testified that a course of vestibular therapy would conclusively establish the precise diagnosis and she had advocated a course of combined physiotherapy to treat both the BPPV and any possible cervical component to the therapy. Therefore, counsel submitted that the Commission should award the Appellant an assessment and course of vestibular therapy.

Submission for MPIC:

Permanent Impairment:

Counsel for MPIC advised the Commission that based upon the test applied by [MPIC's doctor] during his testimony, MPIC agreed that a permanent award benefit of 5% for a subarachnoid bleed should be payable to the Appellant pursuant to Division 2, subdivision 1, item 1.2(d) of Manitoba Regulation 41/94.

> **Subdivision 1: Skull, Brain And Carotid Vessels**
> **1. Alteration of brain tissue**
> 1.2 Post-traumatic alteration of tissue
> (d) with subarachnoid hemorrhage 5%

Counsel then continued on to submit that the Appellant is not entitled to any further permanent impairment awards as none had been submitted by the Appellant's counsel, or to further IRI or treatment benefits.

IRI:

Counsel submitted that the evidence before the Commission regarding IRI benefits (in particular regarding dizziness and vertigo) must be viewed through the lens of the Appellant's credibility as a witness. Reports of dizziness and vertigo are subjective issues which cannot be measured by relying upon self-reports. In order to accept the Appellant's claims, the Commission must find the Appellant's self-reports and history to be credible. The documents on the Appellant's indexed file as well as the testimony heard by the panel showed significant credibility issues regarding both the Appellant and her husband. The Appellant suggested that she attempted to work but had to leave jobs or was unable to work due to her symptoms of visual disturbance and dizziness/vertigo. However, the reasons reported for these jobs ending, which are documented on the indexed file, are not consistent with that suggestion. Of course, this is also reflected in the earlier reasons for decision of the previous panel in the earlier AICAC decision regarding the Appellant's entitlement to IRI benefits. These findings remain and must be taken into account by this panel.

Counsel proceeded to review several documents in the file where the Appellant provided different and contradictory reasons for not working.

Moving through the documentary evidence, counsel pointed to the Appellant's reports to Service Canada that she did not quit her job at the care centre in [Alberta] for health reasons, but rather

because she was moving back to [Manitoba] and her husband was sick. On cross-examination, the Appellant could not recall writing that and said that it did not mean much if she had done so.

A letter from her representative regarding her EI appeal did not mention dizziness, vertigo or eye problems as reasons for quitting her job, but mentioned only hypertension and stress. Correspondence from employers contradicted the Appellant's testimony that she quit due to health reasons, indicating that she had not successfully completed her probation, with non-medical absence and attendance problems and the unsatisfactory nature of her work cited.

The Appellant's application for CPP disability benefits indicated that she had stopped work due to pain in her legs and back, noting polio, the motor vehicle accident, pain in her leg and arthritis. There was no mention of dizziness or visual issues.

Another employer also failed to indicate that the Appellant was leaving for medical reasons, and did not indicate that the quality of her work was affected by a medical condition.

Counsel pointed out that no reports of dizziness or eye problems preventing her from working came to MPIC until 2009. This conversation with a case manager occurred only a few months after the Appellant filed her CPP disability application where no mention was made of problems with her eyes or dizziness preventing her from working.

Further testimony by the Appellant and her husband regarding the aggressiveness of the case manager when contacted by them and regarding [Appellant's neuro-ophthalmologist's] recommendation of her cranial therapy were also unsubstantiated and shown to be incorrect when the Appellant's testimony was compared with documents on the indexed file.

Therefore, counsel submitted that given all of these contradictory statements and explanations, the Appellant and her husband lacked credibility as witnesses and historians of her condition. Greater reliance should be put upon the documented reasons in the file for the Appellant leaving her jobs, including the reports of the employers themselves.

Counsel also submitted that the Commission should consider, as [MPIC's doctor] had, the lack of medical information and reports regarding the Appellant's dizziness, despite persistent visual field damage since 1994, until her reports to MPIC and [Appellant's neurologist] in 2009 and 2010. A review of the file shows a lack of attention paid to any dizziness issues in reports between 1995 and 2008, even when the Appellant's medical condition was otherwise discussed in detail.

Although [Appellant's neuro-ophthalmologist] did testify that remote events can in some cases trigger pre-existent but dormant BPPV, that is not what the Appellant testified regarding what occurred in her case. She did not testify that some event occurring around 2009 happened to cause her dizziness to appear again. Rather, she testified that it had been occurring steadily since the motor vehicle accident despite her lack of reporting it.

Counsel addressed [Appellant's neuro-ophthalmologist's] evidence that most cases of dizziness appear within a short period of the motor vehicle accident or trauma that gave rise to the BPPV. [MPIC's doctor] agreed with this point. It should also be noted that [Appellant's neuro-ophthalmologist's] testing of the Appellant failed to produce the characteristic nystagmus of BPPV and that she was forced to make a diagnosis using the history provided by the patient. Counsel recommended caution in relying upon any history provided by the Appellant. Nor was

[Appellant's neuro-ophthalmologist] provided the opportunity to review the Appellant's whole file, as [MPIC's doctor] had been able to do in conducting his forensic review.

He further noted the Appellant's own admission on cross-examination that she had suffered from a fall in 2006 which was of sufficient force to break several teeth. [Appellant's neuro-ophthalmologist] admitted on cross-examination that this also could be the type of accident which could cause BPPV. The Appellant's pre-existing scoliosis could also be a cause of a cervical spasm causing dizziness, and [Appellant's neuro-ophthalmologist] testified that this could not be ruled out as a cause.

Overall, therefore, counsel submitted that the panel should accept the opinion advanced by [MPIC's doctor] that the Appellant had failed to show that her dizziness was caused by the motor vehicle accident.

Further, counsel submitted that the Appellant was able to work and had failed to provide any medical evidence suggesting that she could not. [Appellant's neuro-ophthalmologist] did not opine that the Appellant was prevented from performing gainful employment due to her visual problems or dizziness. It was her view that this would depend on what employment was involved and she simply noted that some tasks could be difficult.

In regards to counsel for the Appellant's submission that the Appellant's symptoms of dizziness and vertigo should be considered in combination with her leg and hip pain, and panic attacks, leading to the conclusion that in total the Appellant was rendered unable to work, counsel noted that information regarding symptoms of dizziness and vertigo was before the panel in its earlier AICAC decision. That panel had before it the CPP Disability appeal information as well as

[Appellant's ophthalmologist's] and [Appellant's neurologist's] reports and as such would have taken these factors into account in its decision dismissing the Appellant's previous appeal for IRI benefits.

Therapy:

Counsel noted that the Appellant had not pursued her claim for cranial sacral therapy benefits. Further he noted that although vestibular therapy may be a medical requirement, as the BPPV had not been shown to be causally related to the motor vehicle accident, the Appellant was not entitled to MPIC benefits for such treatment.

Decision:

The MPIC Act and Regulation provide as follows:

> **Entitlement to I.R.I. after first 180 days**
>
> 86(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section 106, and the non-earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident.

> **Corporation may reconsider new information**
>
> 171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

> **Lump sum indemnity for permanent impairment**
>
> 127(1) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum

indemnity of not less than $500. and not more than $100,000. for the permanent impairment.

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

(a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

(b) the purchase of prostheses or orthopedic devices;

(c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;

(d) such other expenses as may be prescribed by regulation.

Medical or paramedical care

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

(a) when care is medically required and is dispensed in the province by a physician, nurse practitioner, clinical assistant, physician assistant, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician, nurse practitioner, clinical assistant, or physician assistant;
(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 onus is on the Appellant to show on a balance of probabilities that the Internal Review decisions are in error and that she should be entitled to the benefits sought.

The Appellant argues that her vision and dizziness problems are a part of the totality of conditions which have prevented the Appellant from working. In this regard, the panel notes that in addition to motor vehicle accident related conditions discussed at the hearing and reviewed

and considered by the panel of the Commission in the earlier AICAC decision, the Appellant suffers from several conditions which are not alleged to be connected to the motor vehicle accident. These include panic attacks, anxiety, hypertension, scoliosis and post-polio condition.

This panel finds that while the Appellant did suffer from visual disturbances, the evidence of [Appellant's neuro-ophthalmologist] and [MPIC's doctor] established that these were not connected to and did not contribute to her reported symptoms of dizziness. Nor was there any evidence provided that these vision problems prevented the Appellant from working. Both [Appellant's ophthalmologist] and [Appellant's neuro-ophthalmologist] recognized this. [Appellant's neuro-ophthalmologist's] evidence confirmed that since detailed reading was not part of the Appellant's occupation, the visual deficiencies described would not prevent her from working at cleaning houses or providing long term care. [Appellant's neuro-ophthalmologist's] evidence did not support a finding that the visual defect would encumber major motor issues involved in the Appellant's day to day activities, such as cleaning and changing bedding.

In regard to the Appellant's symptoms of dizziness, the panel has carefully considered [Appellant's neuro-ophthalmologist's] evidence that the most probable diagnosis accounting for these symptoms is BPPV, and that the most likely cause would be the significant trauma of the motor vehicle accident. [Appellant's neuro-ophthalmologist] recognized that BPPV developing secondary to a motor vehicle accident would usually or typically present itself immediately or within a few days following the event. But, in this regard the specialist noted that she does sometimes see people where the initiating cause of the BPPV dated back several years, possibly even decades.

[Appellant's neuro-ophthalmologist] also recognized that the Appellant's scoliosis or leg length discrepancies could lead to the kind of cervical spasm that causes vertigo. She could not rule this out as a possible cause of the BPPV. She acknowledged that the Appellant's fall in 2006 which broke her teeth could also lead to the development of BPPV. But when asked specifically about these possible primary causes of the dizziness symptoms, [Appellant's neuro-ophthalmologist] testified that it was most likely the motor vehicle accident, as it had not been a trivial event.

In this regard, the panel has considered counsel for MPIC's submission regarding the Appellant's credibility. We do find that, given the large number of contradictory statements and explanations from both the Appellant and her husband which were evident in the documentary evidence and their testimony at the hearing, the Appellant and her husband lacked credibility as witnesses and historians of her condition. In our view, this lack of reliability must also be factored into our consideration of [Appellant's neuro-ophthalmologist's] evidence, given that she had to rely upon the information provided to her by the Appellant during her examination and history taking.

[MPIC's doctor's] review of the file emphasized the lack of reporting of dizziness symptoms until more than 15 years after the motor vehicle accident. The evidence also highlighted the Appellant's failure to complain or attribute her problems to this dizziness during countless points of contact with employers, caregivers, MPIC employees, and Service Canada employees. When she was asked or given the opportunity to address her health issues and the barriers to employment, she did not report her dizzy symptoms or attribute her inability to work to dizziness.

Given all of the Appellant's other non-motor vehicle related conditions, and the possibility that many of these could also contribute to her dizziness, the Commission finds the Appellant's lack

of reliability as a historian makes it too difficult to attribute her condition to the motor vehicle accident as the primary cause.

Given the length of time between the motor vehicle accident and the first reporting of dizzy symptoms in 2009 and 2010, all of these factors lead us to conclude on the balance of the evidence and on a balance of probabilities that the Appellant has failed in the onus upon her to establish that she was unable to work due to a condition caused by the motor vehicle accident or that she was entitled to vestibular or other therapy based upon a motor vehicle accident related condition. We do not find that [Appellant's neuro-ophthalmologist's] new medical information establishes an entitlement to IRI or treatment benefits for the Appellant, or to further permanent impairment for visual deficits (for which she has already received the appropriate permanent impairment award) or dizziness.

Accordingly, the Appellant's appeal in regard to IRI and treatment benefits is dismissed. She will be awarded a 5% permanent impairment benefit for a subarachnoid hemorrhage.

Dated at [Manitoba] this 15th day of November, 2016.

LAURA DIAMOND

TREVOR ANDERSON

KARIN LINNEBACH