Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-204

PANEL:	**Ms. Karin Linnebach, Chairperson** **Ms. Janet Frohlich** **Dr. Arnold Kapitz**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Ken Kalturnyk of the Claimant Advisers Office;** **Manitoba Public Insurance Corporation (MPIC) was represented by Mr. Steve Scarfone.**
HEARING DATEs:	**May 22, 23, June 25 and September 13, 2018**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity (IRI) benefits beyond May 23, 2014.**
RELEVANT SECTIONS:	**Sections 110(1)(c), 106 and 150 of The Manitoba Public Insurance Corporation Act (the Act) and section 8 of Manitoba Regulation 37/94.**

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

Reasons for Decision

Background and Procedural Matters:

The Appellant, [text deleted], was injured in a motor vehicle accident (MVA) on August 23, 2013. Following the MVA, she received Personal Injury Protection Plan (PIPP) benefits, including physiotherapy benefits, chiropractic treatments and IRI benefits. As the Appellant was unemployed at the time of the MVA, she was found to be a non-earner. Pursuant to subsection 86(1) of the Act, MPIC was required to determine an employment for the

Appellant after the first 180 days after the MVA (the 180 day determination). The 180 day determination for the Appellant was administrative clerk.

On May 9, 2014 the Appellant's case manager issued a decision regarding the Appellant's entitlement to IRI benefits. The case manager found that the Appellant's injuries were no longer preventing her from performing her determined work duties as an administrative clerk on a full time basis. The Appellant's IRI benefits ended May 23, 2014.

The Appellant filed an Application for Review of the case manager's decision. On November 3, 2014, the Internal Review Officer upheld the case manager's decision, concluding that the Appellant regained the functional capacity to hold the determined employment of administrative clerk as of May 23, 2014. The Appellant appealed this decision to the Commission. Accordingly, the issue on appeal is whether the Appellant is entitled to IRI benefits beyond May 23, 2014.

Subsequent to the June 25, 2018 hearing date, the panel discovered that the case manager's decision regarding 180 day determination was inadvertently not included in the documents before the panel. On June 26, 2018, the Commission contacted the parties to advise that the document would be added to the list of documents and gave the parties the opportunity to provide written submissions or to reconvene the hearing.

In written correspondence to the Commission dated July 3, 2018, counsel for MPIC took the position that the February 25, 2014 180 day determination letter was not relevant to the appeal because:

1. The case manager's decision was neither reviewed nor appealed.
2. The decision itself is not referenced in the Internal Review Decision of November 3, 2014. Only the fact that the claimant was determined in accordance with section 106 of the Act is referenced.
3. A determination from the 181st day after the accident does not include an examination into whether or not the employment is available in the region in which the claimant resides. That factor only applies to the two-year determination under section 107.

Counsel for MPIC requested that a case conference be scheduled as MPIC was objecting to the inclusion of this document.

At the commencement of the case conference, the parties were advised that in addition to the 180 day determination decision letter dated February 25, 2014, a subsequent letter entitled Income Replacement Indemnity Benefits dated March 3, 2014 was also inadvertently not included in the binder of documents before the panel. The March 3, 2014 decision letter confirmed the Appellant's entitlement to IRI benefits and the 180 day determination of employment and corrected errors in the February 25, 2014 decision letter. It expressly stated that it replaced the February 25, 2014 decision letter.

Counsel for MPIC took the position that these letters were irrelevant to the issues in dispute and objected to their admissibility on the basis of relevance. Counsel submitted that because these documents are irrelevant, there was no need to provide any further submissions or to reconvene the hearing. Counsel for the Appellant submitted that these documents are clearly relevant to the issue of whether the Appellant was able to return to work in her determined employment. Counsel advised he would like to provide the panel a further written submission.

The Commission found that the February 25, 2014 and March 3, 2014 case manager decision letters were relevant and admissible for the reasons outlined below. The Commission then invited the parties to provide further written submissions. Dates for the receipt of the written submissions were agreed upon after which the panel reconvened on September 13, 2018 to consider these submissions.

Decision:

For the reasons set out below, the panel finds the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to IRI benefits beyond May 23, 2014.

Evidence for the Appellant:

The Appellant described the circumstances of the MVA and her injuries. She suffered a T10 compression fracture, whiplash, pain in her lower back and neck and a bruise on the right side of her abdomen. As part of her rehabilitation, she attended for physiotherapy as well as a work hardening program. She was provided exercises to strengthen her core as well as a home-based program.

In May 2014, she attended a rehabilitation program at the [Rehabilitation Centre]. She indicated that as part of the program, she did a typing exercise which required her to sit in a chair at a small desk with a keyboard and monitor and type. Within seconds to minutes of typing she started to feel pain in the T10 area.

Ever since the MVA, she gets extreme fatigue which turns to pain within minutes if she sits or stands without any support to her mid back area. She advised the staff at [Rehabilitation Centre] at the beginning and throughout the program that she was still having problems sitting. She

wasn't able to sit at a desk and work properly and asked [Rehabilitation Centre] for assistance. The Appellant asserted that [Rehabilitation Centre] only had her do exercises to prepare her for return to work in an industrial setting. Despite her requests, she was never provided with tests which timed her in sitting and working at a desk, which is what she would be required to do as an administrative clerk. Following discharge from [Rehabilitation Centre], she advised [Appellant's Rehabilitation Specialist] that she was still having problems sitting and was not adequately tested on her ability to sit. She wrote a rebuttal to [Appellant's Rehabilitation Specialist]'s discharge report.

The Appellant acknowledged that she showed a marked improvement in her overall strength levels after attending the [Rehabilitation Centre] program. While she initially stated she did not remember being told by [Appellant's Rehabilitation Specialist] that it was important for her to maintain proper posture and to relieve her discomfort by shifting positions and moving from sitting to standing, she acknowledged on cross-examination that [Appellant's Rehabilitation Specialist] may have told her this.

At the time of the MVA, the Appellant was living in a small community approximately 144 kilometers from [text deleted]. After termination of her IRI benefits, she had looked for administration clerk positions in her community and the surrounding communities. She described the availability of administrative clerk jobs in these areas as "next to nothing" and that the available jobs often are given to the "local people". She is fairly new to her community and most people's families have lived there for "hundreds of years". She indicated that this doesn't stop her from looking and applying for employment.

She stated that MPIC never conducted a physical demands analysis of an administrative clerk and she is unaware of whether MPIC investigated the availability of administrative clerk jobs in her area. MPIC has never offered to relocate her to an area where she can find work. She maintains that the administrative positions she held prior to the MVA were managerial or supervisory. She acknowledged that she performed office duties for most of her career.

Following the termination of IRI benefits, she decided to take a course in medical transcriptions so that she could work from home. Because of her difficulties with sitting, the course took her longer to complete. She required ergonomic aids for sitting tolerance and requested these from MPIC. However, it took a year for these supports to be in place and she felt she was not provided adequate ergonomic support in any event. She acknowledged that MPIC had an occupational therapist attend to her home to determine what ergonomic equipment would assist her.

After completion of the transcription course, she attempted to obtain work in this field by applying to three different major companies. She was not hired and assumed it was because she was too slow with transcribing. She acknowledged that she was never provided reasons from the prospective employers about why she was not hired. She stated that she gave up on trying to increase her speed to be able to work in this field.

She then obtained term employment working for the [text deleted] where she was a supervisor of a team of 10 people. Her job duties were varied and included ordering materials, delivering materials, doing site visits and mapping the sites. While there was an administrative component to the position, she asserted she was only able to do the work because she could work from

home. She also indicated that she had a full time assistant who would do a lot of the computer work.

After the [text deleted] work was completed, she had difficulties finding employment. She and her spouse used to be on-site managers for a storage facility in [province] so they decided to look for similar work. They accepted a position with a storage company and relocated to [text deleted]. Her husband did the "physical part" of the work and she took care of the office work. She brought an ergonomic chair and a foot pedal with her.

She and her husband were terminated from their position after seven weeks. She believes they were terminated because she required ergonomic equipment to perform her duties. She stated that her supervisor did a site visit after seven weeks and saw that she was using her own desk and not sitting in normal positions. She explained her disability to the supervisor and indicated that she was managing ok because she could get up and walk around. She acknowledged that she wasn't provided reasons for the termination and that she was just speculating they were terminated due to her use of ergonomic equipment.

After their termination of employment, she and her spouse moved back to their community and she began looking for work. She applied at the post office but didn't get a response. She spoke to an employment agency and they found a job opening for her. However, this position required her to go from workplace to workplace and she felt she wouldn't be able to get her ergonomic equipment in place to be able to do the job.

She and her husband applied and received a contract to do lawn maintenance at [text deleted] in her municipality. This started in May 2018 so they haven't done much work yet. She anticipates her husband doing 80% of the work while she'll do 20%.

She is still having problems sitting and working at a computer. She cannot "sit static or stand static slightly bent forward" as her back "will not take that". She claimed her back gets fatigued after 10-12 minutes of sitting "like that". The Appellant acknowledged on cross-examination that she has learned the importance of proper posture and that it is important for one to sit in an upright position.

The Appellant maintains that in order to function she needs variation in how she works; she needs to be able to walk around, change positions and stand up. She was adamant that only when she is working from home is she free to change to the "right" position.

The Appellant was questioned about her use of a prescription medicine, Tramacet, to relieve her back pain. She acknowledged that Tramacet helped her to function better when she was taking it, but asserted it doesn't work on a daily basis. She continues to use Tramacet occasionally and stated that it works well when she uses it.

The Appellant retained the services of [text deleted], an occupational therapist with [Rehabilitation Centre #2], to obtain her opinion on the functional assessments that were completed and her recommendations for further ergonomic equipment. MPIC did not accept the recommendations of this therapist and continued to maintain that the Appellant was able to return to work in her determined employment.

The Appellant was asked to describe her difficulties with sitting at a desk and doing computer work. She asserted that due to the T10 fracture and difficulties with her lower back, there is "nothing holding the weight of her upper body". If she leans forward, she can feel strain in her upper back. If she develops pain, she is then required to lie down for 10 minutes to a few hours. She acknowledged that her chair arm rests can be adjusted and that the arm rests are designed to relieve some of the burden on her arms when typing. She asserted that she is only able to sit in her chair and type "for a short while" after which she develops "extreme fatigue" and then pain in her mid back. She also has low back pain on and off. In response to whether she can shift positions or stand up to make the discomfort go away, she asserted that she could not because "once the pain starts happening it doesn't go away". She asserted that the only way she can prevent getting to this state is to not do anything. She can manage the pain by doing "something else" around the house. She maintained that there is nothing she can figure out to do that would enable her to sit at a desk for long periods of time to manage working full time. She acknowledged that standing up and walking prolongs the time period before she feels pain. The Appellant asserted that employers will not let her get up and move about the office, but acknowledged that she has not been specifically told by any employers that she can't get up from her chair and move about while working.

Evidence for MPIC:

[Appellant's Rehabilitation Specialist]

[Appellant's Rehabilitation Specialist] has been a physical medicine and rehabilitation specialist since 1996. He was been working at [Rehabilitation Centre] since 2000 and is now the sole proprietor of the facility. He has treated all manner of MVA and work related injuries, including paralysis, amputations and fractures. He has specific experience with the spinal cord rehabilitation unit, having run this clinic for two years.

The Appellant was referred to [Rehabilitation Centre] for assessment and work hardening. [Appellant's Rehabilitation Specialist] described the purpose of the [Rehabilitation Centre] assessment, what information was provided to his team prior to the assessment, and the process used to conduct the assessment. An initial assessment was conducted and the rehabilitation started the same day.

At the time of the initial assessment, [Appellant's Rehabilitation Specialist] was aware that the Appellant was reporting she was having difficulties with sustained prolonged sitting. [Appellant's Rehabilitation Specialist] was questioned about what assessment took place to corroborate the Appellant's subjective complaints regarding her inability to sit. [Appellant's Rehabilitation Specialist] indicated there is no specific test for sitting tolerance. Rather, they get an interpretation watching the Appellant function and watching her sit and walk through the interview and assessment process.

[Appellant's Rehabilitation Specialist] described the functional testing that was conducted to get a benchmark in order to measure whether there was improvement during rehabilitation. After assessment, the Appellant was found to have at least a "light" strength work capacity.

[Appellant's Rehabilitation Specialist] explained the Appellant's T10 fracture and described it as stable, meaning her vertebrae were not likely to collapse and break more. In her case, it was determined that she was not required to wear a brace during healing and a brace, in her circumstances, would have been optional. [Appellant's Rehabilitation Specialist] explained that, as a result of the compression fracture, the Appellant's bone would permanently be in a state of compression. However, as new bone is built, her back becomes strong again at the compressed

height and it stays like that forever. Recovery time for a fracture such as this depends on a lot of things and the healing of the bone could take a year.

With respect to return to work, [Appellant's Rehabilitation Specialist] relied on the orthopaedic surgeon's report and the MDGuidelines which outlines return to work guidelines for medical conditions based on expert consensus. For this kind of injury and a return to the sedentary job of administrative clerk, the range of disability before returning to work varies between 7 and 28 days. An individual returning to a heavy job such as construction may require much longer and may not even be able to return to their job. They may have to return to a lighter strength job. However, [Appellant's Rehabilitation Specialist] has seen construction workers with this type of injury return to their pre-injury jobs. [Appellant's Rehabilitation Specialist] indicated that it is not a situation in which the Appellant is at risk of re-injury, but rather how uncomfortable it is to return to work.

The Appellant was provided with a number of activities in a sitting position during her rehabilitation. She was asked to sit at a computer for testing, she sat and watched educational videos on several days, she did a number exercises in a seated position and was required to do puzzles while sitting. [Appellant's Rehabilitation Specialist] explained that the participants are required to take breaks from sitting. This is because standing up and moving around relieves pressure on the buttocks and legs. It is normal for people to shift their weight to relieve pressure and they remind people in rehab that they are allowed to do that. Our bodies cannot tolerate prolonged sitting because it becomes uncomfortable due to lack of blood flow and joint stiffness. We naturally need to shift our weight.

The activities in rehab are done in a proper office chair with arm rests and at a desk at proper ergonomic height. With respect to leaning forward, there is nothing that prevents the individual from doing that but they are expected to type while sitting in an upright position.

[Appellant's Rehabilitation Specialist] discussed his findings on his discharge report and his conclusion that the Appellant had a demonstrated strength level of medium at the end of the program and was fit for immediate unmodified return to pre-injury employment. He explained that the Appellant's spine was capable of supporting light and medium output. The Appellant showed improvement in many physical performance parameters, in function, and strength ability. [Appellant's Rehabilitation Specialist] commented that the Appellant's improvement was rapid and while this was not usual, this rate of improvement occasionally happens. With respect to the Appellant's sitting tolerance, [Appellant's Rehabilitation Specialist] had no concerns with the Appellant's ability to sit and sit safely from a medical and return to work point of view.

[Appellant's Rehabilitation Specialist] was asked to comment on the Appellant's letter to him dated June 9, 2014 in which she states that she still has challenges when it comes to any sustained activity but is able to perform a combination of sustained activity as long as she is able to shift activities. In [Appellant's Rehabilitation Specialist]'s view, there is nothing unusual in this. Shifting weight and shifting activities is something we all do normally and naturally. It is part of coping with discomfort as well as being rehabilitated.

In a letter to the Appellant dated July 2, 2014, [Appellant's Rehabilitation Specialist] advised her that, when she sits, she should sit upright at a workstation and computer that is ergonomically appropriate. [Appellant's Rehabilitation Specialist] explained that the medical literature shows

that poor posture leads to back ache. Sitting upright reduces the strain on the back by allowing the muscles to relax and is recommended to people generally.

[Appellant's Rehabilitation Specialist] was also asked to comment on [Appellant's Occupational Therapist]'s criticism of his discharge summary, specifically her comments regarding the results of the static back endurance testing. In [Appellant's Occupational Therapist]'s view, the test results showed the Appellant did not meet competitive levels with respect to static back endurance and this activity is the one that most closely relates to sitting tolerance. [Appellant's Rehabilitation Specialist] indicated that there are no medical papers that establish a static back test is the best predictor of ability to return to work in a position where duties are performed sitting. The static back endurance test shows overall fitness and strength and is not a benchmark to return to work. In any event, the Appellant had "pretty good results" on the static back endurance testing given her back injury and age.

[Appellant's Rehabilitation Specialist] also addressed [Appellant's Occupational Therapist]'s contention that the strength testing performed was not valid with respect to the Appellant's ability to perform her determined employment. This is because, in [Appellant's Occupational Therapist]'s view, the strength testing assessed the strength to do material handling in an industrial setting and that an ability to lift a certain amount of weight does not translate into the ability to sit for a given amount of time. [Appellant's Rehabilitation Specialist] disagreed, stating that the connection to make when considering the strength testing results is that the Appellant's spine is strong. With respect to the suggestion that the Appellant should have been told to sit and be timed, [Appellant's Rehabilitation Specialist] was adamant that this is not a recognized test and it would be impossible to get any objective measure. Therefore, they had to do indirect measures. The Appellant's spinal strength and tolerance showed that her spine was strong and

from that strength rating they can extrapolate that she is able to do physical work and sitting with good posture.

[Appellant's Rehabilitation Specialist] agreed with the physiotherapist's recommendations to the Appellant outlined in her letter to MPIC dated August 7, 2014. The physiotherapist expressed the need for the Appellant to change positions for the health of her back and to use adaptive equipment when writing to keep her back fully supported when sitting instead of sitting forward to write on the desk surface. He agreed that, while not necessary, the ergonomic equipment would be helpful for the Appellant and without this equipment, the Appellant may experience backache, discomfort and fatigue.

[Appellant's Rehabilitation Specialist] acknowledged that he did not note any concerns with motivation when he conducted the testing of the Appellant. [Appellant's Rehabilitation Specialist] also acknowledged that the testing undergone at [Rehabilitation Centre] showed the Appellant doing general sitting and that she was able to chose the manner in which she sat. He acknowledged that the Appellant's complaints have been that she cannot sit leaning or bending forward at a computer desk. However, [Appellant's Rehabilitation Specialist] reiterated that this is not a proper ergonomic sitting position for the Appellant.

[Appellant's Rehabilitation Specialist] acknowledged the Appellant documented discomforts she was feeling in her rehab diary. However, he noted that when describing her problems with her back she references fatigue and burning but not pain. [Appellant's Rehabilitation Specialist] indicated that they are trying to incite fatigue and even muscle burning as part of rehab. Fatigue and burning in the rehab context are not concerning to [Appellant's Rehabilitation Specialist].

With respect to the diagnosis, [Appellant's Rehabilitation Specialist] acknowledged that the Appellant has a 9 degree kyphosis which means that her spine is bent forward. While he acknowledged that this is a permanent impairment, he indicated it was small and may have no functional impact. He acknowledged that this objective diagnosis correlates with the symptoms she describes and that the symptoms of the Appellant's condition generally would be backache, fatigue and strain on her muscles. He reiterated that there is no medical fear of re-injury for the Appellant and that she can do her normal activities. However, he is not saying she won't ever have any pain due to her condition.

[MPIC's Medical Consultant]

[Text deleted] is a physician with a special interest in sports medicine and rehabilitation. He runs a sports injury clinic where they see all types of injuries such as joint injuries, neck injuries, fractures and sprains and provide guidance on rehabilitation. He has seen and treated patients with compression fractures. In addition to his sports medicine practice, he also is a medical consultant for MPIC doing forensic file reviews and providing opinions regarding causation, medically required treatments, impairments, and return to work issues. He was asked to review the Appellant's file and provide his opinion on the Appellant's ability to return to work.

The Appellant's determined employment is considered a sedentary position where the majority of the work is computer based desk work as compared to moving things and being active on one's feet. This would require the Appellant to be sitting for a good chunk of the work day. [MPIC's Medical Consultant] is familiar with the MDGuidelines, which outline recovery times based on the condition presented. There are two main factors when considering ability to return to work: the normal healing process for a particular injury and the type of work that will be performed.

[MPIC's Medical Consultant] agreed with [Appellant's Rehabilitation Specialist] that the timeline for recovery for the Appellant to be able return to work was between 7 and 28 days.

[MPIC's Medical Consultant] described the Appellant's compression fracture and agreed with [Appellant's Rehabilitation Specialist]'s conclusion that the Appellant's fracture was stable, fully healed with no real risk of being reinjured. The Appellant may experience some symptoms but her condition isn't one that would limit what she does unless what she was doing was extreme. She is encouraged to remain active.

[MPIC's Medical Consultant] was asked to comment on the progress reports from the physiotherapist that were provided before the Appellant participated in the [Rehabilitation Centre] program as well as the discharge report from [Rehabilitation Centre]. The physiotherapy reports show that the therapy was beneficial and the Appellant was improving with shorter and less frequent rest periods. The [Rehabilitation Centre] discharge report shows that the program was providing benefit as the Appellant demonstrated objective improvement. She was getting stronger and more functional.

[MPIC's Medical Consultant] noted that the physical demands of a sedentary occupation are not significant and there would be no risk of re-injury when returning to a sedentary job.

[MPIC's Medical Consultant] was asked to explain whether one can be tested for sitting tolerance by simply sitting. [MPIC's Medical Consultant] explained that it is impossible for anyone to sit still and not to move. No rehabilitation facility would have someone sit for six hours. People would think it is foolish and possibly leave. In addition, no one would tolerate

sitting in one spot for extended hours. It is natural and instinctive for us to change our posture to reduce stress and strain. We modify and adjust and this cannot be measured. What is done in rehab is improving overall physical fitness and, in the Appellant's case, improving her postural muscles to make them function better.

When returning to a sedentary work environment, individuals are told to move and get up from their chair. Sitting is detrimental to health. The longer we sit the less healthy we get. People should move, stretch, and get out of their chair to minimize the detrimental effects of sitting. In his view, these are things that anyone can do at any office setting.

With respect to ergonomic equipment, [MPIC's Medical Consultant] acknowledged that particular ergonomic equipment may be helpful to the Appellant, but asserted it would not be medically required. It is most important to maintain good posture. It is not helpful to work in a static position. If a particular chair doesn't feel good, one should make adjustments. The goal is to assist the person doing activities with stress or strain or postural difficulties.

[MPIC's Medical Consultant] agrees with the medical consultant who provided an opinion dated April 13, 2017 that intolerance for prolonged sitting is not expected with a thoracic compression fracture. This is because the T10 is not a high stress area and one wouldn't stress that area while sitting in a proper position. If one was to sit static leaning forward and slouching, this would increase stress and strain and cause fatigue. This is because it is a nonconforming position to hold. If the Appellant sits properly, she will not expose herself to harm if sitting for periods of time. The situation would not be helped if the Appellant has poor posture, but posture can be improved and the ill effects of poor posture can be minimized.

[MPIC's Medical Consultant] agreed with the medical consultant's conclusion that the assessments at [Rehabilitation Centre] were more than adequate. While ergonomic aids may assist the claimant with sitting tolerance, she could have returned to work without them. It would be reasonable to use these aids but they are not medically required for her to be able to return to her sedentary employment.

It is [MPIC's Medical Consultant]'s opinion that there is nothing in the Appellant's medical file that shows she was medically unable to return to work when her IRI benefits were terminated. He acknowledged that she may have symptoms given her diagnosis. However, there is nothing from a functional standpoint that says she couldn't return to work if she wanted to. He explained that the goal of rehabilitation is to provide the physical ability to do tasks safely and minimize harm. It does not necessarily mean that the participant will never have pain again.

[MPIC's Medical Consultant] explained the relationship between pain and functional ability. Most people have pain and symptoms as they get older. This doesn't mean they cannot function. One needs to determine whether the Appellant can function. The evidence was that she can do normal things even though she has symptoms. Because they are subjective, it can't be objectively determined to what extent she has symptoms. If it was only based on how people feel and perceive their ability to do things, a lot of people wouldn't do very much. Therefore he encourages patients to have physical abilities and provide the tools to have quality of life. While they may continue to have symptoms, they need to adapt to the situation and maintain their function. They learn to do stretches and exercises to increase function without making the symptoms worse. Even though a person has an impairment, they manage the impairment by learning the tools to function.

With respect to the Appellant's suggestion that she couldn't return to work in May 2014 because she didn't have proper ergonomic equipment, [MPIC's Medical Consultant] indicated that the Appellant needed to go to work and see how it was going. If she had returned to work and there was evidence of physical deterioration, she would have had a stronger argument that specific ergonomic equipment was medically required.

Submission for the Appellant:

The Appellant suffered a T10 compression fracture which resulted in a 30% loss of height of the vertebra. Contrary to the suggestion made by counsel for MPIC, this was hardly a mild unremarkable fracture. Six months after the MVA, the orthopaedic surgeon stated that the fracture was serious and that there were still fragments of the vertebra that had not healed. [Appellant's Rehabilitation Specialist] testified that a complete healing could take a year or more. While the orthopaedic surgeon stated that the fracture was stable, [Appellant's Rehabilitation Specialist] explained this meant that there was no danger of impingement on the spinal cord. However, stable does not mean completely healed.

[Appellant's Rehabilitation Specialist]'s conclusion that the normal recovery period for compression fractures is 7 to 28 days seems to be based on the initial CT scan which reported that it was a mild stable compression fracture. However, the January 2014 scan showed that the fracture had progressed and described a vertical fracture component that was not identified on the initial CT scan. The January 2014 scan no longer described the fracture as mild. The orthopaedic surgeon described the fracture as serious in his February 2014 correspondence, and noted there were remnants of bone fragments. Counsel submitted the orthopaedic surgeon's reports clearly show there were complications which delayed the Appellant's recovery time.

Counsel reviewed the history of the Appellant's recovery and rehabilitation. The Appellant began rehabilitation in March 2014 which appeared to focus on core strength improvement. The rehab report noted that the Appellant's T10 area was still irritated with bending forward. There were no concerns raised about the Appellant's motivation. By April 3, 2014, the Appellant was still reporting burning in the T10 area and surrounding muscles with forward bending and some exercise positions.

A report from her family physician dated April 8, 2014 stated that the Appellant was fit for modified duties at a sedentary level such as educational training or working on a computer from home where she could take breaks to rest and change positions. Counsel submitted that this does not equate to returning to fulltime work as an administrative clerk.

A physiotherapy report from April 10, 2014 stated that full time sedentary work as an administrative clerk may not yet be possible due to sitting intolerance and an April 22, 2014 physiotherapy report stated that the Appellant required an extension of the rehabilitation program. The Appellant was therefore referred to [Rehabilitation Centre] for two more weeks of rehabilitation.

The [Rehabilitation Centre] multidisciplinary assessment report stated that the Appellant's greatest pain complaints occurred in the regions of T10 and that the Appellant's subjective complaints were consistent with the objective findings. There is no indication that the Appellant's sitting tolerance was tested at [Rehabilitation Centre] and sitting tolerance isn't even one of the goals and objectives outlined in the report. There is no evidence that there were any concerns with the Appellant's motivation. The Appellant completed the [Rehabilitation Centre] program and the May 12, 2014 discharge report concluded the Appellant was fit for an

immediate unmodified return to pre-injury employment. While ability to sit in front of a keyboard would clearly be a major part of the job demands of an administrative clerk, there is no indication that the Appellant was ever tested for sitting tolerance in front of a keyboard. The Appellant's IRI benefits were terminated as of May 23, 2014 solely based on the discharge report from the [Rehabilitation Centre] program.

In his discharge report, [Appellant's Rehabilitation Specialist] dismisses the Appellant's problem with sitting, concluding that the Appellant was able to sit repeatedly for sustained periods of time while in rehab and that sitting was no longer an issue. Counsel submitted that [Appellant's Rehabilitation Specialist] did not provide any objective evidence to support the conclusion. He did not define "sustained period of time" nor explain the kinds of sitting that was observed. [Appellant's Rehabilitation Specialist] acknowledged in cross-examination that his observations were subjective in nature.

At the conclusion of the rehab at [Rehabilitation Centre], the Appellant advised her case manager that she was having difficulties bending forward for any length of time, including at her computer. She also mentioned the need for some ergonomic aids. Counsel referred to correspondence between the Appellant and her case manager dated June 9, 2014 where the Appellant outlined the problems she was experiencing and the differences between the actual demands required of an administrative clerk and the activities she did at [Rehabilitation Centre].

The Appellant wrote to [Appellant's Rehabilitation Specialist] and challenged his opinion that she was fit to return to full time work. The Appellant again pointed out that her problem was not just sitting but sitting in a position where she had to bend forward slightly shifting her upper body weight onto the T10 areas of her spine. Counsel referred to [Appellant's Rehabilitation

Specialist]'s written response to the Appellant and suggested that [Appellant's Rehabilitation Specialist]'s observations of the Appellant sitting in rehab did not constitute objective evidence of testing under real life circumstances.

Counsel submitted that [Appellant's Rehabilitation Specialist] failed to appropriately take into account the Appellant's concerns as outlined on her rehab diary. Counsel referred to the evidence in the discharge report that the Appellant reported pain, burning and fatigue and submitted that this evidence raises questions about the objectivity and conclusions drawn by [Appellant's Rehabilitation Specialist] regarding the Appellant's ability to perform the determined employment. Counsel also submitted that [Appellant's Rehabilitation Specialist]'s recommendation of ergonomic equipment is a *de facto* admission that the Appellant was not fit for an immediate, unmodified return to work. The fact that MPIC accepted this recommendation and eventually acted on it also represents a *de facto* admission on the part of MPIC that the Appellant required some modifications in order to successfully return to work as an administrative clerk.

Counsel raised concerns that while [Appellant's Rehabilitation Specialist] never stated he thought the Appellant was malingering or misrepresenting the degree of her disability, he suggested in his testimony that there may be concerns about her motivation based on her significant improvement during her two weeks at [Rehabilitation Centre]. [Appellant's Rehabilitation Specialist] did not raise any concerns in his initial report or the discharge report about the motivation of the Appellant. Counsel submitted that the Commission should rely on [Appellant's Rehabilitation Specialist]'s reports with respect to motivation rather than his testimony four years after the fact.

Counsel referred to the efforts the Appellant made to return to work and submitted that this history demonstrates that the Appellant has been motivated to obtain work.

Counsel submitted that the July 3, 2014 MPIC Health Care Services review glosses over the problems in the [Rehabilitation Centre] assessment and presumes a number of things for which there is no objective evidence. Counsel referred the panel to the Appellant's July 9, 2014 email to MPIC which provides a detailed analysis why the various tasks she performed at [Rehabilitation Centre] did not properly test her ability to perform computer work for extended periods of time.

Counsel referred to the physiotherapist's chart notes between May and August 2014. These show continuing low back problems and the mid-low back getting sore when bending slightly. In her report to MPIC of August 7, 2014, the physiotherapist again referenced the Appellant's continuing mid and low back problems when sitting with a slight bend forward.

Counsel addressed the report of [Appellant's Occupational Therapist] and her conclusion that the [Rehabilitation Centre] assessment did not adequately assess the Appellant's ability to perform the sedentary work as an administrative clerk given the prolonged sitting. [Appellant's Occupational Therapist] opined that the minimal data in the assessment actually indicates that the Appellant would likely not have the sitting tolerance required to perform the job. She recommended ergonomic aids that specifically address the Appellant's problem with typing and similar tasks.

Counsel addressed the issue of the Appellant's need to maintain the correct posture while typing and submitted it is reasonable to conclude that it would be more difficult for the Appellant to

maintain the correct posture while sitting and typing in front of a monitor given her kyphosis due to the MVA. It is easy for someone to suggest that the solution to incorrect posture is to simply have correct posture, but the fact is that an entire ergonomics industry has been developed to assist people with healthy backs to maintain a correct posture. [Appellant's Occupational Therapist] recommended ergonomics to address this, but MPIC has done nothing to ensure that the Appellant receive this kind of support.

Counsel addressed [MPIC's Medical Consultant]'s testimony and his suggestion that the T10 compression fracture cannot be the source of any ongoing problems because it healed in a stable and acceptable good position. Rather, the Appellant's physiotherapist's reports constitute supportive documentation that the Appellant couldn't not perform the job of administrative clerk on a full-time basis.

[MPIC's Medical Consultant] also glossed over the difference between being able to lift at a medium strength level and the specific activities which aggravate the Appellant's back pain at the T10 level, which is bending forward slightly for sustained periods of time. Counsel submitted this activity can be assumed to be part of the job of an administrative clerk especially in the absence of proper ergonomic equipment.

[MPIC's Medical Consultant] made assumptions about what activities were done at [Rehabilitation Centre] but there is no evidence that they were in fact done.

Counsel for the Appellant argued at length about the failure of case management to meet its obligations under s. 150 of the Act. While counsel acknowledged that the Commission does not have jurisdiction to remedy many of these issues, he submitted that these issues have relevance

to how the panel interprets the evidence before it. The letter and spirit of s. 150 of the Act is that MPIC will be proactive in advising claimants of their entitlements. It is not the spirit of s. 150 to ignore a claimant's rights and then advise them to appeal if they don't like it.

Counsel submitted that the Appellant's employment had been improperly determined as most of her pre-MVA jobs had been management. This was ignored by the case manager, who determined the Appellant into an administrative clerk job, thereby reducing her IRI benefits considerably. The case manager also failed to have a proper transferrable skills analysis performed, which would have provided an objective basis for the job determination. Despite the Appellant's concerns about sitting tolerance, the case manager also failed to perform a physical demands analysis of the administrative clerk position. This further exacerbated the error in the determination of employment. No survey was conducted to determine whether or not administrative clerk positions actually existed within a reasonable distance of the Appellant's residence. She testified that she attempted to find employment, but there were very few opportunities for an administrative clerk in rural [province] where she lived. She enrolled in a medical transcription course in the fall of 2014 because she was trying to create a job for herself. The determination of employment was made on a completely arbitrary basis in such a way as to reduce the Appellant's IRI entitlement.

Whether or not ergonomic equipment is medically required is also not an issue on appeal. However, the issue of ergonomic equipment has significant implications for the issue of entitlement to IRI benefits beyond May 23, 2014. Several health care professionals, including [Appellant's Rehabilitation Specialist], recommended ergonomic equipment. While MPIC did order an ergonomic assessment, this assessment only took place several months after the Appellant's IRI benefits had been terminated. The equipment was not fully provided and set up

until 14 months after termination of IRI. MPIC did not reinstate her IRI benefits during this time. The equipment recommended by [Appellant's Occupational Therapist] to address the Appellant's specific problems was never provided.

Counsel submitted that the very fact MPIC accepted the necessity for the provision of ergonomic equipment represents *de facto* acceptance by MPIC that the Appellant was not capable of performing the determined job without those modifications. Therefore, there is no question that the Appellant is entitled to IRI benefits at least to the date that those ergonomic aids were in place and properly adjusted, which was either just before or after the Appellant completed the medical transcription course.

Counsel also addressed difficulties the Appellant had with her right shoulder and alleged that case management with respect to her shoulder difficulties did not comply with s. 150.

The evidence demonstrates that the Appellant's specific disability relating to the T10 area of her back was never adequately addressed until [Appellant's Occupational Therapist] recommended various further ergonomic equipment to solve her specific problems.

With respect to the errors and irregularities in case management, counsel submitted that if the Commission agrees that these errors and irregularities constitute, separately or together, a violation of MPIC's obligations under s. 150 of the Act, then the appropriate remedy is to provide the Appellant greater latitude in establishing her entitlement to IRI benefits, while raising the bar higher for MPIC's case.

Submission for MPIC:

Counsel for MPIC reminded the panel that the determination of employment and her request for specific ergonomic aids are not at issue, but rather the issue on appeal is whether the Appellant was able to return to work in her determined employment when her IRI benefits were terminated.

MPIC's opinion that the Appellant was fit to return to her determined employment is based on the Appellant's medical diagnosis, her stage of healing and recovery and her physical performance in a structured rehabilitation setting.

The medical diagnosis shows that the Appellant had an unremarkable stable fracture that had healed fully and completely.

With respect to stage of healing and recovery, the Appellant participated in 42 physiotherapy sessions and a number of chiropractic sessions. Before attending at [Rehabilitation Centre], she attended the [Rehabilitation Centre #3] for an assessment where it was concluded that she was ready to return to work. It was only if her future job demands exceeded the sedentary strength category that some work hardening would be required.

Counsel submitted that the documents show that the Appellant was able to sit for significant periods of time. On April 17, 2014 the Appellant reported that she was able to sit at a desk with feet on the floor for 45 minutes to an hour before her back starts to hurt. On June 7, 2014, she reported tolerating four hours of sustained activity.

The evidence before the Commission is that her physiotherapist, her chiropractor, and [Appellant's Rehabilitation Specialist] were all telling the Appellant that in order to sit

comfortably and work in her determined employment, she had to maintain proper posture. The Appellant's complaint is that it hurts when she leans forward and that she can't maintain that position very long. However, everybody has told her that she shouldn't sit like that, but rather should maintain proper posture, sit upright, and do exercises to strengthen her core.

On August 7, 2014, her physiotherapist indicated the need for the Appellant to change positions for the health of the back and that most administrative positions include walking to and from machines or file cabinets throughout the day which allows position changes. The Appellant also needs to have proper sitting posture. This is again addressed by her chiropractor who states that the Appellant needs to maintain proper positioning while she works. Counsel submitted that the Appellant is not listening to all the people who are saying that she needs to maintain proper posture to return to work and type at computer.

Counsel submitted that the issue is not whether the Appellant continued to have symptoms in May of 2014, but rather whether she was able to return to work as an administrative clerk. Counsel submitted that the Appellant could return to work if she wanted to and there is nothing that can be done to motivate a person other than teach them the proper techniques. The Appellant does not want to return to work.

Counsel noted that the Appellant wrote lengthy typewritten letters throughout the case management process and "to everyone that disagreed with her". While the Appellant responded on cross-examination that it took her days to write due to her condition, counsel submitted this was not believable and pointed out two lengthy letters that were written within a few days of each other. The Appellant was able to type letters to everybody in charge of her care and was

regularly advocating on her behalf. Counsel submitted this is good objective evidence that the Appellant can perform the duties of an administrative clerk.

MPIC took the position that the ergonomic equipment she was requesting was provided to help her to facilitate her return to work but was not medically required. In any event, whether or not ergonomic equipment was necessary in order to return to work is not the issue on appeal.

The only evidence that the Appellant cannot return to work is from the Appellant herself. She says she can't do it. The Appellant was in receipt of IRI benefits for nine months notwithstanding the evidence of [Appellant's Rehabilitation Specialist], which was corroborated by [MPIC's Medical Consultant], that the guidelines are 7 days to a maximum of 28 days off work. This evidence was not refuted.

In February 2014, the orthopaedic surgeon stated that the Appellant's fracture had healed up in a good position, was stable and that the Appellant was at no risk of further harm. This was not disputed. A few days prior, the [Rehabilitation Centre #3] report concluded that the Appellant, at that time, was functioning within the sedentary strength demand category. In April 2014, a case management file note documented that the Appellant's physiotherapist couldn't guarantee the Appellant would be cleared for sedentary work at that time. Counsel submitted it was difficult to reconcile these two opinions other than to say that the conclusions must be based on the Appellant's subjective reporting. The Appellant didn't like the [Rehabilitation Centre #3] report and wanted to prolong her IRI. She then attended to her physiotherapist reporting that she couldn't return to work. A letter from [Appellant's Rehabilitation Specialist] to MPIC dated May 2, 2014 indicated that the Appellant would be able to return to work at the sedentary level

administrative clerk type of work by May 7, 2014 at the earliest and would be cleared to do light to medium physical demand work at discharge from the program.

Counsel pointed out that when the Appellant was notified that her IRI would end, she claimed that her sitting and typing tolerance was only at 15 minutes, yet a month prior had advised her case manager that she could sit at a desk for 45 minutes to an hour. On June 7, 2014, the Appellant emailed her case manger that her back becomes fatigued after four hours of sustained activity. On June 9, 2014 she advised [Appellant's Rehabilitation Specialist] that she was able to perform a combination of sustained activity for about four hours yet she also states that she can only sustain a half to one hour sitting forward at a computer desk. Counsel submitted that the position that she complains she cannot do, sitting bent forward, is the position she has been told not to do.

Both [Appellant's Rehabilitation Specialist] and [MPIC's Medical Consultant] explained there is no specific test for prolonged sitting tolerance. However, they are able to form an opinion based on the diagnosis, stage of healing and recovery, and the physical performance in the rehab setting. She participated in lifting, squatting and bending in order to prepare her to return to work in the sedentary capacity. By the time of discharge in May 2014, the Appellant was able to return to work.

The Appellant complained that she needed special equipment to sit at a desk. This was provided by MPIC. The Appellant made the choice to attend a course and work at home. Equipment was provided for her to do that.

The only report that suggests the Appellant was not appropriately tested for sitting tolerance is from [Appellant's Occupational Therapist], who did not attend the hearing to be cross-examined on her report. In contrast, both [Appellant's Rehabilitation Specialist] and [MPIC's Medical Consultant] responded to [Appellant's Occupational Therapist]'s report. Counsel submitted [Appellant's Occupational Therapist]'s report is undermined and should be concerning to the panel as she failed to provide *viva voce* evidence to support the position she maintains in her report.

Counsel reminded the panel of the issue before it and submitted that whether or not there is employment in the Appellant's area is not a factor to consider in this case. A 180 day determination is made under section 106 of the Act and does not include an examination into whether the employment is available in the region in which the claimant resides. That factor only applies to the two-year determination under section 107 of Act which has no application to the Appellant's appeal. In addition, there is no obligation for MPIC to conduct a transferable skills analysis and therefore no basis to suggest non-compliance with section 150 of the Act.

Counsel reiterated that the Appellant did not appeal her determined employment and could have done so rather than suggesting non-compliance with s. 150 on this appeal. In any event, the case manager fully complied with section 106 in determining the Appellant into an administrative clerk position, which are positions the Commission can agree are non-specialized positions available in virtually all businesses.

The Appellant's Reply Submission:

There is no evidence to support MPIC's contention that the Appellant was not motivated to return to work. Rather, the Appellant took a course to be able to find work. She relocated to [text deleted] for work. This is not the behaviour of someone who doesn't want to work.

With respect to the assertion that she wasn't working at the time of the MVA, the evidence was that she had a job offer at the time of the MVA and was expected to start after the MVA. MPIC accepted this and paid her IRI starting in September 2013.

Counsel submitted there is no evidence that the Appellant was told she should not lean forward.

The sole evidence that the Appellant could return to work was from [Rehabilitation Centre] and the Appellant has objected to [Rehabilitation Centre]'s conclusion. Counsel stated it was inaccurate to suggest that the only evidence of the Appellant's inability to return to work fulltime is from the Appellant and referred to the reports of the Appellant's physiotherapist.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that she is entitled to IRI benefits beyond May 23, 2014. The relevant provisions of the MPIC Act are as follows:

> **Events that end entitlement to I.R.I.**
> 110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (c) the victim is able to hold an employment determined for the victim under section 106;
>
> **Factors for determining an employment**
>
> 106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

> **Type of employment**
>
> 106(2) An employment determined by the corporation must be an employment that the victim could have held on a regular and full-time basis or, where that would not have been possible, on a part-time basis immediately before the accident.

Manitoba Regulation 37/94 addresses the meaning of "unable to hold employment" and states:

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

As the Appellant was found to be a non-earner at the time of the MVA, MPIC completed the 180 day determination. Section 106 of the Act addresses the factors for determining an employment and states that MPIC shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident. The panel agrees with counsel for MPIC that whether or not the type of employment is normally available in the region where the claimant resides is not a factor to be considered under section 106 of the Act.

Due to an administrative error, the case manager's 180 day determination decision letter dated February 25, 2014 and the subsequent March 3, 2014 decision letter replacing it were not included in the binder of documents before the panel. Counsel for MPIC objected to these documents being included after the conclusion of the June 25, 2018 hearing date on the basis of relevance.

In determining whether the Appellant is entitled to IRI benefits beyond May 23, 2014, s. 110(1)(c) requires the panel to consider whether the Appellant was able to return to work in

her determined employment. It is therefore obvious that the panel needs to know in what employment the Appellant was determined. Counsel for MPIC seems to suggest that, given there is no dispute as what the determined employment was, there is no need to have the document outlining this decision as part of the record in this matter. The panel disagrees. It has been the Commission's practice to include all documents expressly referenced in the Internal Review Decision that has been appealed as well as all documents that support the findings of fact made by the Internal Review Officer. The Appellant's classification of employment at the time of the MVA, the determination of employment, and the basis for the determination of employment are expressly referenced at paragraphs 2 and 3 of the "facts" outlined in the Internal Review Decision on appeal.

In addition, counsel for the Appellant argued at length on the failure of MPIC to meet its obligations under s. 150 of the Act in the case management of the Appellant's personal injury claim and, in particular, regarding the decision on the determination of employment. The documents outlining when and how the decision was made are clearly relevant to this issue.

As noted in Sopinka, Lederman & Bryant: *The Law of Evidence in Canada, 5th ed.*, the question of relevance and admissibility generally is for the trier of fact and is an exercise in the application of experience and common sense. In this case, IRI benefits were terminated because it was found that the Appellant had the functional capacity to return to work in her determined employment. The documents outlining this determination of employment are therefore relevant and admissible.

The case manager's February 25, 2014 decision letter found that "administrative clerk" was the employment the Appellant held for the majority of her work history prior to the MVA and

therefore that was her determined employment. The case manager advised the Appellant that should she disagree with the decision, she could request a review under subsection 172(1) of the Act. The Appellant did not request a review of the 180 day determination. On March 3, 2014, the Appellant's case manager issued another decision explaining the Appellant's entitlement to IRI benefits, including the finding that the Appellant was a non-earner at the time of the MVA and the 180 day determination of an "administrative clerk". The March 3, 2014 decision letter also advised the Appellant that if she was not satisfied with the decision, she could request a review of the decision under subsection 172(1) of the Act. The Appellant also did not request a review of this decision. Accordingly, the Appellant's determined employment is "administrative clerk" and the panel must determine whether the Appellant is able to hold this determined employment.

The duties of an administrative clerk as described by the National Occupational Classification (NOC) were admitted into evidence by agreement. The Appellant did not take issue with the list of main duties of an administrative clerk in the NOC and the physical demands category of sedentary.

It is clear that the Appellant's complaint related to performing fulltime duties as an administrative clerk concerns sitting and, in particular, sitting still or static where she is slightly bent forward. After the termination of her benefits, the Appellant wrote to her case manager on June 7, 2014 about why she could not return to fulltime work in her determined employment. She described the type of activity that "challenges" her mid back as "sustained, still or almost still positions where I am bent forward slightly, where my mid-back (the area of my injury) has to take on much of the weight of my upper body, without the full structure it used to have in order to be able to do this". In a letter to [Appellant's Rehabilitation Specialist] two days later,

she indicated that any activity which requires her to sustain a bent-over position such as sitting forward at a computer/desk creates mid-back fatigue unless her back is supported or she can rest her arms on the desk.

It was submitted that bending forward slightly for sustained periods of time can be assumed to be part of the job of an administrative clerk especially in the absence of proper ergonomic equipment. The panel does accept that the functions of an administrative clerk can only be performed if one bends forward slightly. We accept the evidence of [Appellant's Rehabilitation Specialist and MPIC's Medical Consultant] that this is not proper posture for the Appellant and that sitting upright would reduce the strain on her back. As well, changing and shifting positions is recommended to prevent the Appellant's fatigue. We do not accept the Appellant's evidence that most employers will not let employees get up and move about the office.

We accept the conclusion of [Appellant's Rehabilitation Specialist] that, after completion of the [Rehabilitation Centre] rehabilitation program, the Appellant was able to return to work in her determined employment without restrictions.

[Appellant's Rehabilitation Specialist] made this conclusion based on the Appellant's medical diagnosis, the stage of healing and recovery and the assessment of her functional ability. We do not accept the assertion that the testing at [Rehabilitation Centre] did not properly assess the Appellant's functional ability to work in her determined employment. [Appellant's Rehabilitation Specialist] explained the testing that was conducted and that the results showed the Appellant's spine was strong enough to perform the duties of an administrative clerk without restrictions.

We acknowledge that the report from [Appellant's Occupational Therapist] stated the [Rehabilitation Centre] assessment did not adequately assess the Appellant's abilities. [Appellant's Occupational Therapist] also concluded that it appears the Appellant does not have the ability to perform the duties of an administrative clerk. However, [Appellant's Occupational Therapist] chose not to participate in the hearing and provide clarification on her report, specifically on her comments regarding the static back endurance testing, the strength testing, and testing for sitting tolerance. In contrast, both [Appellant's Rehabilitation Specialist and MPIC's Medical Consultant] addressed the issue of testing for sitting tolerance and [Appellant's Rehabilitation Specialist] explained the results of the static back endurance and strength testing. We accept the evidence of [Appellant's Rehabilitation Specialist and MPIC's Medical Consultant] in that regard. Further, there is no indication that [Appellant's Occupational Therapist] conducted any functional testing of the Appellant, despite being an occupational therapist who provides rehabilitation services.

The panel recognizes that the Appellant reports pain in her mid-back due to the MVA. MPIC has acknowledged that the Appellant may continue to feel pain. However, the existence of symptoms does not automatically mean that the Appellant is not functionally able to safely work. We accept the evidence of [MPIC's Medical Consultant] that it is about symptom management or "learning the tools to function". In the Appellant's case, the evidence is clear that maintaining her core strength, sitting with proper posture and shifting and changing positions are tools she can use to manage her symptoms.

The panel was able to observe the Appellant in the hearing and notes that she was able to participate in the hearing, including sitting for a lengthy period of time leaning forward on the

table while being cross-examined. The Appellant indicated that she did not take any pain medication on the day of her testimony and only uses pain medication on occasion.

It was submitted that the Appellant could not have returned to work without ergonomic equipment. However, the Appellant did not have a position to which she could return and therefore needed to find employment before she could return to work and identify what equipment was required for her workplace. Had she found employment and expressed difficulty in performing her duties with the equipment available in that workplace, the Appellant may have required specific ergonomic equipment to have been able to perform her duties. The Appellant did not return to work, but rather chose to take a course to be able to work from home doing medical transcription. The evidence was that MPIC did engage an occupational therapist to assist with identifying ergonomic equipment to work at home. In any event, whether ergonomic equipment was medically required and the particular kinds of ergonomic equipment provided by MPIC are not issues to be addressed on this appeal.

The Appellant made lengthy submissions on MPIC's failure to fulfill its obligations under s. 150 of the Act. Section 150 states:

> **Corporation to advise and assist claimants**
>
> 150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

The Commission has previously held that it can consider whether MPIC's failure to comply with s. 150 impacted the determination of entitlement to benefits. In other words, MPIC's actions while making a decision to deny a benefit may be relevant to the review and assessment of the

determination of entitlement. In this case, the panel must consider whether MPIC's actions in case management impacted the determination of entitlement to IRI benefits beyond May 23, 2014.

The Appellant's criticisms and allegations of improper case management concern issues not under appeal. The evidence is clear that entitlement to IRI benefits was based on the medical opinions of [Appellant's Rehabilitation Specialist] and the medical consultants who reviewed the Appellant's file. The panel is therefore unable to find the necessary nexus between the criticisms and allegations and the decision regarding entitlement to IRI benefits. It is therefore not necessary for the panel to consider whether the Appellant's allegations amounted to a failure on the part of MPIC to meet its obligations under s. 150 of the Act.

Considering the evidence as a whole, the panel does not accept that the Appellant was entirely or substantially unable to perform the essential duties of an administrative clerk at the time of the termination of her IRI benefits. We therefore find that the Appellant has failed to meet the onus on her of establishing, on a balance of probabilities, that she was entitled to IRI benefits beyond May 23, 2014.

Disposition:

Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated November 3, 2014 is upheld.

Dated at Winnipeg this 5th day of December, 2018.

KARIN LINNEBACH

JANET FROHLICH

DR. ARNOLD KAPITZ