Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-16-105

PANEL:	**Ms Karin Linnebach, Chairperson** **Ms Janet Frohlich** **Ms Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], was not present at the appeal hearing;** **Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Steve Scarfone.**
HEARING DATE:	**March 8 and 9, 2018**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity ("IRI") benefits beyond June 15, 2016.**
RELEVANT SECTIONS:	**Subsection of 110(1)(c) 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:

The Appellant, [text deleted], was injured in a motor vehicle accident ("MVA") on December 26, 2014. Following the MVA, she received Personal Injury Protection Plan ("PIPP") benefits, including physiotherapy, athletic therapy, psychological therapy and IRI benefits.

In a decision letter dated June 16, 2016, the Appellant's case manager held that the evidence on the Appellant's claim file, including surveillance evidence, shows that there is no impairment of function preventing the Appellant from returning to her full-time pre-accident employment. The Appellant filed an Application for Review of this decision. In a decision dated August 19, 2016, the Internal Review Officer upheld the case manager's decision, finding that there is no physical or psychological impairment that precludes the Appellant from returning to work as an Early Childhood Educator ("ECE"). The Appellant filed a Notice of Appeal to the Commission on October 12, 2016. The issue on appeal was whether the Appellant is entitled to IRI benefits beyond June 15, 2016.

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 June 15, 2016.

Preliminary and Procedural Matters:

Three Case Conferences were scheduled regarding this appeal. The purpose of the Case Conferences was to discuss pre-hearing matters and to schedule a hearing date for the appeal. Notices of Case Conference were sent to and received by the Appellant, but the Appellant failed to attend any of the Case Conferences.

The Appeal was set for hearing for March 8 and 9, 2018 at 9:30 a.m. The Notice of Hearing was sent to the Appellant by Xpresspost and regular mail. The Xpresspost was accepted by the Appellant on December 19, 2017.

On March 8, 2018, the hearing was convened at 9:30 a.m. with counsel for MPIC present. The Appellant did not attend. The Commission's Notice of Hearing provided that the time and date of the hearing are firm and that postponements will only be granted under extraordinary circumstances. The Notice also provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and may issue its final decision either granting or dismissing the appeal in whole or in part.

Accordingly, the appeal hearing proceeded. At the commencement of the hearing, the panel advised counsel for MPIC that it required information regarding the Appellant's determined employment and the functional requirements for this employment. The hearing adjourned for MPIC to locate this information.

The hearing reconvened on March 9, 2018. The Appellant again did not attend. Six exhibits were provided as a result of the panel's request for information on the functional requirements of the determined employment and the panel heard MPIC's submission on the appeal. The panel then advised counsel for MPIC that the panel would, as is the normal course, adjourn to deliberate and advise the parties of its decision in due course by providing a written decision. The hearing then adjourned.

Submission for the Appellant:

As indicated, the Appellant did not attend the hearing and therefore was not available to provide any clarification on any points in dispute or to be cross-examined by counsel for MPIC.

In her Notice of Appeal to the Commission dated October 12, 2016, the Appellant stated she wished to appeal the August 19, 2016 Internal Review Decision for the reasons she had "already

sent in". On September 23, 2016, the Commission had received a copy of a handwritten letter addressed to the Claimant Adviser Office that stated:

> I am writing to appeal MPI's decision to stop my IRI payments on July 17, 2016. When my accident occurred I was employed and due to my injuries and depression and anxiety I was unable to return to work which means I was eligible to receive IRI benefits paid. While I was off work from my car accident my employer terminated my employment. I was told I would still receive my IRI benefits till I was able to return to work. I have never been cleared for work by any of the therapist or doctors I was seeing. An argument occurred between my MPI worker and myself my MPI worker closed my file. I filed an appeal and was told that her decision stands. I was told that I am not able to receive IRI benefits because I didn't lose my job from the car accident. When my accident occurred I was employed full time my employment was terminated because I was not able to return or provide a return date so I was let go months after my accident. I continued to receive IRI benefits up until the argument occurred with my MPI worker. I told her that there was nothing but issues since she took over my file. She was forcing me to get treatment in [text deleted] even after she was told by my doctor that I needed local treatment in my area. I have a home athletic therapist that came to me from [text deleted] and my MPI worker would not take her calls or return messages. I feel that MPI was deliberately finding ways to close my file because I was on for over a year. Everytime I spoke to her she would threaten to close my file if I didn't do what she wanted me to. She cancelled an appointment I had with a Psychologist and said I would be responsible for the cost. I am entitled to all these benefits through the insurance I pay for and I feel I have been wrongfully denied these benefits. I am unable to work to support my family and I need my benefits till I can return to work.

The Appellant's Application for Review dated July 7, 2016, filed in response to the case manager's decision, included a letter outlining her reasons for the appeal. The Appellant complained about her interactions with her case manager. She indicated that she had driving anxiety which prevented her from attending appointments, that she lives with pain and depression, that the surveillance video doesn't show the pain she experiences, and that washing her car was good therapy for her to move her muscles and strengthen her body. She stated that the surveillance report didn't see her running and jumping and playing outside with her children. She stated that if she was seen doing those things it could ensure that she could return to regular job duties. She reiterated that she could not go for treatment in [text deleted] until she conquered her fear of driving in [text deleted]. She requested that MPIC give her a worker in [text deleted].

Documentary Evidence

As the Appellant did not attend the hearing and provide any testimony on the MVA and her injuries, the panel relied on the documentary evidence from the Appellant's claim file and the exhibits filed at the hearing.

Following the MVA, the Appellant was unable to return to work due to her MVA related injuries. At the time of the MVA, the Appellant was employed as an ECE at a day nursery. Based on information provided by the Appellant's pre-MVA employer, the Appellant was classified as a temporary earner by MPIC and received IRI benefits due to her inability to return to work. The Appellant's pre-MVA employer advised her in February 25, 2015 that her employment was terminated because the Appellant had been absent from work and failed to keep in contact with the centre.

Because the Appellant was classified as a temporary earner and did not have employment to which she could return, MPIC completed the "180 Day Determination", a process of determining the Appellant's employment from the 181st day of the MVA. The determination of employment identified ECE as the Appellant's determined employment, the same position that she held pre-MVA. The Appellant was advised that her entitlement to IRI as of the 181st day after the MVA is based on her ability to hold this determined employment.

The Appellant completed level of function ("LOF") forms throughout her claim. These LOF forms identified the Appellant's functional restrictions based on her reporting. In the LOF form dated May 20, 2015, the Appellant reported shoulder, back and neck pain as well as severe driving anxiety. Due to the physical and psychological difficulties the Appellant was reporting, she was referred to a psychologist for an assessment and treatment and sought the services of an

athletic therapist ("AT"). A September 1, 2015 AT's report indicated a diagnosis of whiplash associated disorder with myofascial neck and shoulder pain. The AT indicated that the Appellant could not yet return to work and indicated the Appellant should be reassessed in 4 weeks time.

In her October 19, 2015 LOF form, the Appellant reported restrictions in walking, standing, sitting, bending, squatting, and lifting. She indicated that her youngest child is 20 lbs and she is unable to lift her. However, in a report from October 2015, the AT indicated that the Appellant had full physical ability and was fit for regular duties. The AT stated that she had observed the Appellant caring for her children and completing household tasks such as cleaning and mopping with no visible and verbally reported signs of pain or discomfort. A March 18, 2016 case manager file note documenting a conversation with the AT confirmed that the AT report was provided in October 2015 and that, in the AT's view, the Appellant was fit to return to regular work duties.

The Appellant completed an LOF form on January 7, 2016. She reported that she was limited in walking for 15-30 minutes, limited in standing for 15-30 minutes, had limited bending, limited in sitting for 0-15 minutes, limited in driving for 0-30 minutes, limited to 0-30 minutes of repetitive motion, could not twist her body to the left, limited lifting of 5-10 pounds, limited overhead lifting of 5-10 pounds, limited pushing and pulling of 10-20 pounds and difficulties with moving her neck. She reported often having fear of being in an automobile and that she had driving anxiety.

The Appellant attended for another psychological assessment in February 2016. She was diagnosed with Posttraumatic Stress Disorder, in partial remission and an Adjustment Disorder

with depressed mood. It was recommended that the Appellant participate in further individual psychotherapy to assist her in becoming more comfortable in driving a motor vehicle.

The Appellant was also referred for a Facilitated Collaborative Rehabilitation Assessment which took place on February 22, 2016. The Appellant reported the following symptoms at the assessment: neck and mid back pain constantly but with varied intensity, frequent migraines, pain in the upper shoulders and a numbness and tingling into her right hand. Regarding function, the Appellant reported having difficulty with some of her self care such as washing her hair due to shoulder and neck pain. She reported having difficulty with sweeping, washing floors, laundry and standing for long periods of time. She could not do any yard work due to the pain in her neck and back and was unable to lift more than thirty-five pounds.

The assessment report concluded, based on functional testing, that the Appellant demonstrated lifting and carrying up to 15 pounds. The Appellant struggled with gripping as well as kneeling due to pain complaints so objective signs in these areas could not be observed. The report concluded that the Appellant placed within the sedentary to light categories of physical demands and therefore would not meet the medium strength job requirements of her determined employment of an ECE. It was noted in the report that a review of the original accident mechanism suggested that there would be little, if any, trauma experienced in the MVA. Further, there was minimal physical examination findings on the assessment examination with no definite physical or pathoanatomical diagnoses as related to the original accident. Some areas of muscular tightness and slight muscle irritability at the top of the shoulder and lateral neck were noted. The report recommends that the Appellant commence a 6-8 week reconditioning program. It was anticipated that the Appellant would be capable of returning to the workplace performing her regular hours and duties at the end of the reconditioning program. The report was signed by a

physical medicine and rehabilitation consultant, a physiotherapist, an occupational therapist and an athletic therapist.

The Appellant was scheduled to attend the rehabilitation program as recommended. However, her family physician wrote to MPIC, indicating that the Appellant could not commute to [text deleted] to attend the rehabilitation program due to her driving anxiety. The physician requested that the Appellant be accommodated by participating in rehabilitation in [text deleted], where she lives.

MPIC had arranged for the Appellant to receive psychological services from a female psychologist in [text deleted]. An appointment was scheduled with the psychologist and the Appellant was asked to make arrangements so that she could attend. The Appellant indicated that she was unable to drive to [text deleted] herself, that her spouse was unable to drive due to a suspended licence, and that she did not have childcare arrangements.

On April 14, 2016, the Appellant was advised that her PIPP benefits were suspended due to her failure to follow through and actively participate in her rehabilitation program. MPIC scheduled another appointment with the female psychologist in [text deleted]. The Appellant cancelled the appointment and rescheduled it for later in the month, but failed to attend as scheduled. After MPIC requested and received a final Health Care Services (HCS) review of the Appellant's file from both a psychological consultant and a medical consultant, the Appellant's case manager issued the decision terminating the Appellant's IRI benefits.

Video Surveillance Reports

MPIC retained [investigation service] to conduct surveillance of the Appellant to monitor her abilities and physical capabilities in a non-clinical setting and to videotape these activities where possible. Surveillance was conducted on 15 days between September 2015 and May 2016. Five investigative reports were submitted into evidence along with 12 surveillance DVDs. The surveillance video was thoroughly addressed by both HCS consultants in their final reviews.

Final HCS Reviews

An HCS psychological consultant was asked to review the Appellant's medical file as well as the surveillance information and provide an opinion on whether the Appellant had provided accurate information to MPIC and on whether the Appellant has a driving phobia that precludes her from returning to her employment as an ECE. In a report dated June 2, 2016, the psychological consultant concluded that the Appellant had not been providing accurate information to MPIC regarding her driving abilities. The psychological consultant found that, despite reporting she could drive no more than 30 minutes at a time and that she had many fears of driving, the Appellant was observed driving with her children in excess of 30 minutes with no apparent difficulty being observed. Despite reporting to a psychologist that she could only drive to the edge of [text deleted] and that she could not drive any great distance, the Appellant was observed driving in downtown [text deleted] as well as on the highway to [text deleted]. The psychological consultant concluded that, based on the file and video surveillance information, the Appellant does not have a driving phobia or PTSD in partial remission that is manifesting as driving anxiety that would preclude her from returning to employment as an ECE.

An HCS medical consultant was asked to review the Appellant's medical file as well as surveillance information and provide an opinion on whether the Appellant's functional abilities

on the surveillance was consistent with her presentation to health care providers and her reported physical abilities. The consultant was also asked to provide an opinion as to whether the Appellant was capable of returning to her full time position as an ECE.

In a report dated June 14, 2016, the medical consultant concluded that the Appellant's demonstrated functional abilities as shown on the surveillance footage was not consistent with her presentation to health care providers and her self-reported physical abilities and provided several examples thereof. The medical consultant provided thorough summaries and commentary on 14 days of surveillance video and concluded that the Appellant was capable of returning to her full time position as an ECE.

Submission for MPIC:

MPIC submitted that the onus is on the Appellant to refute, on a balance of probabilities, the position of the Internal Review Officer that the Appellant was capable of returning to work as an ECE. The Appellant failed to appear at the hearing and therefore failed to provide any evidence to rebut the finding of the Internal Review Officer.

Counsel submitted that there are two issues to be addressed: the psychological issue and the physical issue, both of which the Appellant alleges have rendered her unable to return to work as an ECE.

The Appellant's Psychological Injury

Counsel acknowledged that the Appellant was diagnosed with a psychological injury. However, he referred the panel to a report from the Appellant's treating psychologist dated September 24, 2015 that indicates there was nothing psychologically preventing the Appellant from working.

Rather, the Appellant had a psychological condition that prevented her from driving to work. In her October 19, 2015 LOF form, the Appellant reported that she could drive in low traffic areas and was limited to 16-30 minutes of driving. The Appellant identified "driving anxieties" as a difficulty she was experiencing.

Counsel referred the panel to the surveillance conducted on September 30, 2015 and the HCS psychological consultant's review of this surveillance as compared to the Appellant's reporting of symptoms. Despite the limitations in driving that she described, the Appellant was observed to be out between 9:30 am and 4:00 pm with her children, driving on the highway and in [text deleted] in high traffic areas with no observable difficulties. She took her five children to the mall and other stores for shopping, to a restaurant, and to the car wash.

Counsel referred to the Appellant's January 7, 2016 LOF form where she again reported that she suffers anxiety when driving and is limited to 0-30 minutes of driving. This is confirmed in the Appellant's report to the psychologist who conducted an assessment of the Appellant in February 2016. The Appellant reported that she continues to experience anxiety when driving but has progressed to the point where she can drive to the edge of [text deleted] as well as to [text deleted]. She reported needing her partner to do any driving of great distance. Counsel submitted this reporting of the Appellant is inconsistent with the surveillance video conducted on February 10, and 22, 2016 where she is seen to have driven to [text deleted] with her partner as a passenger. The Appellant is observed driving to [text deleted], [text deleted], in downtown [text deleted] in heavy traffic areas, and to [text deleted].

Counsel referred to the HCS psychological consultant's review of the surveillance video where the consultant concludes that the surveillance information shows that the Appellant is able to

drive a vehicle to [text deleted] with her family and there is no apparent driving anxiety noted in her behaviour. The consultant noted that the Appellant drove to [text deleted] with no apparent difficulty twice in a two week period. The consultant concluded that the Appellant did not have a driving phobia and was therefore able to drive herself to work, which is what she had been claiming she could not do.

The Appellant's Physical Injuries

Counsel described the Appellant's MVA injuries as neck pain, upper back pain and headaches. An LOF form was completed by the Appellant's case manager after a telephone interview with the Appellant on September 18, 2015. Counsel submitted that the limitations reported by the Appellant in her October 19, 2015 LOF form are greater than what is reported in September 2015 and that the Appellant appeared to be getting worse over time rather than getting better.

On October 19, 2015, the Appellant reported that she could only lift 6-10 pounds and could not lift her youngest child, who weighs 30 pounds. However, surveillance video starting September 30, 2015 shows the Appellant regularly lifting her two smallest children out of their car seats in their van when taking them to daycare. Counsel submitted the Appellant's regular routine required her to drop her children off at daycare which required daily lifting to place them and remove them from their car seats. Counsel referred the panel to the December 30, 2015 surveillance and submitted that it is clear that the Appellant could easily lift her child into her car seat without any difficulties. The Appellant is observed accompanied by her partner and her young daughter and is observed lifting her daughter in and out of her van a few times throughout the afternoon.

Despite reporting she was limited to walking 16-30 minutes, the Appellant is observed doing a lot of walking on September 30, 2015. Counsel submitted that there is no indication from observing the Appellant that she is in any pain and there doesn't appear to be anything holding her back from walking.

In her October 19, 2015 LOF form, the Appellant reported that she was restricted to lifting 1-5 pounds overhead because she experiences back and neck pain. She also reported limited ability to bend due to increased back and neck pain and limited ability to twist to the right. However, three weeks prior on September 30, 2015, the Appellant was observed hand washing her van in a car wash. She used the spray wand to wash, then the foam brush and then the spray wand to rinse her van. Counsel submitted she didn't display any difficulty with bending, or lifting, including overhead.

On October 14, 2015, the Appellant was observed lifting for a sustained period of time. The Appellant picked up a boy who appeared to be [text deleted] years old and carried him down the street for approximately a block. Counsel submitted that this is entirely inconsistent with the LOF form completed of October 19, 2015.

The Appellant again hand washed her van on November 6, 2015 and was observed vacuuming the interior and using the spray wand and foam brush to rinse and wash her vehicle. She spent over 28 minutes cleaning her van without displaying any discomfort in doing so.

On her January 7, 2016 LOF form, the Appellant again reported that she experienced back and neck pain when driving too long, that bending and twisting is hard to do, that she cannot lift her

[text deleted] year old, and that she cannot reach too high. This is reported 2 months after she was observed spending 28 minutes hand washing her van.

With respect to functional ability to perform the duties of the Appellant's determined employment, counsel for MPIC acknowledged that, while the HCS medical consultant considered the Appellant's functional ability as displayed on the surveillance video, there is no information in the report that shows the medical consultant considered the demonstrated functional abilities compared to the physical requirements of an ECE. However, counsel provided the panel with email correspondence from the Appellant's previous employer regarding the requirements of the ECE position, an ECE job description, the description of the ECE position from the National Occupational Classification (NOC), the description and physical requirements from the Dictionary of Occupational Titles (DOT), and descriptions of the strength requirements as outlined in the NOC and DOT. Counsel compared the physical requirements as outlined in these documents to the Appellant's ability as demonstrated on the surveillance video and reports and submitted that the Appellant was clearly functionally able to perform the medium strength requirements of an ECE.

With respect to the Appellant's suggestion in her Application for Review that before she could return to work she would have had to be seen running, jumping and playing outside with her children, counsel submitted that level of physical activity is not a required part of the Appellant's determined employment. Counsel referred to correspondence from the Appellant's former employer that it is up to the ECE to decide how much physical activity they will undertake while interacting with the children.

Counsel referred the panel to the September 30, 2015 surveillance that shows the Appellant out all day with her children doing activities as well as washing her car and performing many of the activities that are outlined in the DOT. Washing her car shows that the Appellant was able to make considerable use of her arms and hands and handle equipment such as the brush, wand, and vacuum.

Counsel acknowledged that there is no evidence that the Appellant is able to climb, but submitted that there is no evidence that she is required to climb as part of her ECE job duties. Counsel submitted that it is clear that the Appellant can lift and balance and referred the panel to the surveillance which showed the Appellant carrying her [text deleted] year old child down the street for over a minute.

Counsel acknowledged that the rehabilitation assessment report concluded that the Appellant did not meet the medium strength requirements of an ECE. However, the surveillance shows that the Appellant was clearly underreporting her functional abilities when she participated in this assessment. The Appellant had fooled the practitioners who signed the assessment report. She was capable of doing the job, but didn't want to participate in rehabilitation and didn't want to return to work. Further, she has chosen not to appear at this hearing. She knows she can do the job, but doesn't want to do it. Counsel submitted that there was ample evidence before the panel to conclude that the Appellant was able to return to work without any conditions or rehabilitation and there was no evidence deduced that the decision of the Internal Review Office was arrived at incorrectly.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that she is entitled to IRI benefits beyond June 15, 2016.

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:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident;
>
> (c) the victim is able to hold an employment determined for the victim under section 106;

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.

The Appellant held the position of an ECE at the time of the MVA. However, based on the information provided by the Appellant's employer, the Appellant was classified as a temporary earner. The Appellant took no issue with this classification. On November 23, 2015, the Appellant's case manager advised her that in accordance with the Act, the process to determine her employment was completed and the determined employment was found to be an ECE, the same position the Appellant held prior to the MVA.

It is noted that MPIC, despite conducting surveillance of the Appellant and asserting that the Appellant misled MPIC, did not terminate the Appellant's IRI benefits under s. 160 of the Act, the provision that addresses termination of benefits for providing false or inaccurate information. Rather, MPIC took the position that the totality of the information in the Appellant's claim file, including surveillance video and reports, supported the termination of benefits under s. 110(1)(a) of the Act.

Counsel acknowledged that, because the Appellant's employment was determined under s. 106, the relevant provision of the Act is s. 110(1)(c) not 110(1)(a) as referenced by both the case manager and the Internal Review Officer. However, because the position the Appellant held at the time of the MVA and the determined employment are the same, there is no practical difference. In considering whether the Appellant is entitled to IRI benefits beyond June 15, 2016, the panel must determine whether the Appellant is able to hold the employment of an ECE. This determination requires a consideration of the functional abilities of the Appellant as compared to the functional requirements of the essential duties of an ECE.

The Appellant was found to have physical and psychological injuries as a result of the MVA. However, the Appellant's treating psychologist opined that the Appellant's psychological condition did not prevent her from being at work, but rather prevented her from driving to work. It was recommended that the Appellant continue to expose herself to more driving until she was able to drive to her workplace in [text deleted] . Despite treatment and being exposed to driving, the Appellant continued to assert that she had a driving anxiety that limited her ability to drive more than 30 minutes and greater distances.

The panel accepts the conclusion of the HCS psychological consultant that the Appellant does not have a driving phobia that would preclude her from returning to her employment as an ECE. The consultant thoroughly reviewed the surveillance video and file information and found that the Appellant was able to drive on the highway, in the city of [text deleted] and to [text deleted] with her family without displaying any driving anxiety or any observable difficulties. The psychologist who provided an assessment of the Appellant in February 2016 based his opinion on the reports of the Appellant and did not have the benefit of observing the surveillance video. The onus is on the Appellant to prove, on a balance of probabilities, that she has a psychological condition that prevents her from performing the essential duties of an ECE. The Appellant did not attend the hearing and provide evidence addressing the HCS psychological consultant's conclusions based on the surveillance video. The panel therefore finds that the Appellant has not met her onus to prove that she has a psychological condition that prevents her from working as an ECE.

With respect to her physical injuries, the panel agrees with counsel for MPIC that the Appellant underreported her functional abilities on her LOF forms and when she participated in the rehabilitation assessment. Had the panel been asked to do so, we would have had no difficulty in upholding a decision to terminate the Appellant's IRI benefits, on the basis that she provided false or inaccurate information to MPIC. However, MPIC ended entitlement to IRI benefits because it was concluded the Appellant was able to work as an ECE.

The panel notes that while MPIC considered the Appellant's functional ability as demonstrated on the surveillance video, MPIC paid little attention to the functional requirements of the essential duties of an ECE when making the decision to terminate IRI benefits. However, this was addressed at the hearing. In response to questions from the panel, counsel for MPIC

provided a thorough submission, demonstrating that the Appellant's functional abilities as shown on the surveillance video revealed that she was functionally able to perform the essential duties of an ECE as described in the Appellant's job description, the NOC and the DOT.

Given that the Appellant did not appear at the hearing and provide testimony to rebut the documentary evidence which she was provided, the panel deemed it unnecessary to view the surveillance video. Rather, the panel relied on the surveillance reports and the detailed summaries and commentaries on the surveillance video by the HCS consultants. The panel finds that the Appellant was observed to have been walking in a mall and from her van to various stores and restaurants; pushing a shopping cart with two children inside; lifting her children in and out of her van; cleaning the interior and exterior of her van using a vacuum, hand wand and foam brush which included bending and lifting; carrying her child while walking down the street for over a minute; and carrying bags, backpacks, trays of food, groceries, and jugs of washer fluid. The panel accepts the HCS medical consultant's conclusion that the Appellant was able to perform her activities of daily living without difficulty. The panel also accepts the submission of counsel for MPIC that a comparison of the Appellant's functional abilities as shown in the surveillance evidence with the functional requirements of an ECE demonstrate that the Appellant is physically able to perform the essential duties of an ECE.

The panel notes that the Appellant's treating athletic therapist provided a report to MPIC in October 2015 which states that the Appellant demonstrated full physical abilities and was fit for regular duties. The panel also notes the conclusion in the rehabilitation assessment report that there was minimal physical examination findings on the examination with no definite physical or pathoanatomical diagnoses as related to the MVA and that a review of the MVA suggested there would have been little, if any, trauma experienced in the MVA.

The onus is on the Appellant to prove, on a balance of probabilities, that she was physically unable to perform the essential duties of an ECE. She failed to attend the hearing and address the inconsistencies between her reporting of symptoms and functional abilities and the surveillance evidence of her functional abilities. The panel therefore finds that the Appellant has not met her onus to prove that she has a physical condition that prevents her from working as an ECE.

Considering the documentary evidence, the Appellant's reasons for appeal, and the submission of counsel for MPIC, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that she is entitled to IRI benefits beyond June 15, 2016.

Disposition:

The decision of the Internal Review Officer dated August 19, 2016 is varied only in so far as entitlement to IRI benefits should have ended pursuant to s. 110(1)(c) of the MPIC Act rather than pursuant to s. 110(1)(a) as stated in the Internal Review Decision. In all other respects, the Appellant's appeal is dismissed.

Dated at Winnipeg this 4th day of June, 2018.

KARIN LINNEBACH

JANET FROHLICH

SANDRA OAKLEY