Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-140

PANEL:	**Ms Jacqueline Freedman, Chair** **Ms Linda Newton** **Ms Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], did not attend the hearing; Manitoba Public Insurance Corporation ("MPIC") was represented by Ms Ashley Korsunsky.**
HEARING DATE:	**January 23, 2020**
ISSUE(S):	**Whether the Appellant is entitled to Personal Injury Protection Plan benefits for her left thumb and wrist signs and symptoms and/or her right wrist signs and symptoms.**
RELEVANT SECTIONS:	**Subsection 70(1) and section 184.1 of The Manitoba Public Insurance Corporation Act ("MPIC Act").**

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

Reasons for Decision

Background:

[Text deleted] (the "Appellant") was a driver in a vehicle that was rear-ended by another vehicle on November 21, 2013 (the "MVA"). The Appellant advised MPIC that she suffered various injuries as a result of the MVA and she received certain treatments pursuant to the Personal Injury Protection Plan ("PIPP") provisions of the MPIC Act, including physiotherapy and chiropractic treatment.

In early 2015, the Appellant's claim file was reviewed by MPIC's Health Care Services team, to assess the Appellant's continued entitlement to treatment. Based on that review, the case manager issued a decision dated March 4, 2015, which states, in part, as follows:

> As the medical information indicates that there is insufficient evidence to support a causal relationship between your current signs/symptoms to your left thumb, wrist and right wrist and the motor vehicle accident of November 21, 2013 there is no entitlement to funding of any further treatment or medications to treat these areas under the Personal Injury Protection Plan (PIPP).

The Appellant disagreed with the decision of the case manager and requested that MPIC review the case manager's decision in accordance with subsection 172(1) of the MPIC Act. The Internal Review Officer considered the decision of the case manager, and issued a decision which upheld the decision of the case manager. The Internal Review decision, dated April 23, 2015, provides, in part, as follows:

> In order for you to succeed on this review, I have to be satisfied, on a balance of probabilities, that the medical evidence supports your current signs/symptoms to your left thumb/wrist and right wrist were "*caused by an automobile or the use of an automobile*" as defined by Section 70(1) of the Act. In my opinion, that has not been demonstrated.
>
> Giving consideration to all the information on file, I agree with the case manager's decision of March 4, 2015. The decision is supported by the opinion of MPI's medical consultant. The decision is based on the grounds that the medical evidence does not support your current signs/symptoms to your left thumb/wrist and right wrist were "*caused by an automobile or the use of an automobile*" as defined by the Act.

The Appellant disagreed with the decision of the Internal Review Officer and filed this appeal with the Commission on July 16, 2015.

Issue:

The issue which requires determination on this appeal is whether the Appellant is entitled to PIPP benefits for her left thumb and wrist signs and symptoms and/or her right wrist signs and symptoms.

Decision:

For the reasons set out below, the panel finds that the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to PIPP benefits for her left thumb and wrist signs and symptoms or for her right wrist signs and symptoms.

Preliminary and Procedural Matters:

The Commission's records indicate that subsequent to filing her Notice of Appeal, the Appellant advised that she would like to participate in mediation. The Appellant's appeal was then referred to the Automobile Injury Mediation office. On November 7, 2017, the Commission was advised by the Automobile Injury Mediation office that mediation was complete and that the matter would be returned to the Commission.

An indexed file was prepared with respect to the Appellant's appeal. A copy was sent to MPIC on January 26, 2018, and to the Appellant on February 2, 2018. Thereafter, the Commission attempted to contact the Appellant on several occasions seeking an update with respect to the status of her appeal. Although the Appellant occasionally responded to the Appeals Officer to advise that she intended to submit documents to the Commission, no documents were submitted. Accordingly, on July 26, 2018, the Commission sent a letter to the parties advising that a case conference would be scheduled to discuss the status of the appeal.

Case Conference

The Commission's secretary made several attempts to contact the Appellant, by telephone and by letter, to schedule the case conference, but these were unsuccessful. The Appellant contacted the Commission on August 27, 2018, and advised the Commission's secretary that she is frequently out of the city due to her job; however she would be available for a case conference on November

15, 2018. A case conference was therefore scheduled in this appeal for November 15, 2018, at 9:30 a.m. The purpose of the case conference was to discuss the status of the appeal.

On November 6, 2018, the Appellant contacted the Commission by telephone, requesting that the case conference be rescheduled due to a family emergency. She also sent an email to the Commission on November 6, 2018, indicating that her father had suffered a stroke and she wished to reschedule the case conference for this reason, as she would be in attendance at the hospital to oversee the care of her father.

After receiving comments from counsel for MPIC and reviewing the matter, the Commission wrote to the parties on November 13, 2018. Noting previous delays in setting this matter down for case conference, difficulties which the Commission had experienced to date in making contact with the Appellant and the Appellant's demanding work schedule, the Commission advised that the Appellant's request for an adjournment had been denied. The case conference would proceed as scheduled, but if the Appellant wished to participate by teleconference she could do so.

An Appeals Officer for the Commission wrote to the Appellant (by email) on November 14, 2018, indicating that the chair would be contacting the Appellant by telephone, at 9:30 a.m. (at the phone number on file) to conduct the case conference. This email indicated that if the Appellant did not answer the phone, the case conference would proceed without her.

The Appellant wrote to the Commission (by email) on November 14, 2018, indicating that the number the Commission had on file was her home number, but as she would be travelling for her career she would not be home at that time. She raised numerous objections to the timing of the conference call and indicated that she did not wish to provide any confidential phone numbers to

the Commission or MPIC. She reiterated that she had to "cancel the original meeting" as her father had a stroke. The Appellant also left a voicemail message on November 14, 2018, indicating that she would be travelling on a plane for work at the time of the case conference and so was not available.

The Appeals Officer responded to the Appellant (by email) advising that if she did not wish to provide her phone number, she could phone either the Appeals Officer or the Commission's reception line and request to have her call transferred into the hearing room.

The case conference convened at 9:30 a.m. on November 15, 2018. Counsel for MPIC attended at the Commission. The Appellant did not attend and did not contact the Commission by telephone. The case conference proceeded in her absence.

Medical Authorization Forms

At the case conference, counsel for MPIC indicated that in addition to querying whether the Appellant intended to submit any further evidence in regard to her appeal, MPIC was requesting that she execute medical authorization release forms to enable MPIC to review her Manitoba Health Services records and chart notes from her general practitioner, [text deleted], for the two years prior to the MVA. In the absence of the Appellant at the case conference, counsel undertook to make this request to the Commission in writing. She also undertook to provide a history of the requests for this information which had already been made of the Appellant and the release forms which had already been provided to her.

Counsel for MPIC provided a letter to the Commission on January 17, 2019. MPIC's letter set out the history of requests for medical authorizations from the Appellant. It acknowledged MPIC's

receipt of completed authorization forms for [physiotherapy centre], [text deleted] and the [clinic]. The letter then reviewed MPIC's unsuccessful attempts to receive completed authorization forms for [Appellant's general practitioner] and Manitoba Health from June 10, 2014 through June 27, 2014, September 2, 2014, September 22, 2014, October 7, 2014, November 27, 2014, December 22, 2014, January 30, 2015 to February 13, 2015. Included in the attachments to the letter were medical authorizations for [Appellant's general practitioner] and Manitoba Health (record of caregivers), should the Appellant wish to sign them.

MPIC's letter also reviewed the reasons that MPIC requested the authorization of the release of this information: in summary, the Appellant's records from [Appellant's general practitioner] and Manitoba Health would be "extremely relevant" to the issue before the Commission and should be made available for the Commission's consideration. The letter also noted MPIC's intention to proceed with a Health Care Services review upon receipt of these medical records.

The letter set out MPIC's position in the event the Appellant failed to cooperate with the request for signed authorizations:

> […] However, in the event that the appellant does not provide the requested signed authorizations, MPI intends to make submissions at the appeal hearing that an adverse inference should be drawn in the appellant's failure to produce the requested documentation.

MPIC's letter and the attachments were sent to the Appellant on January 18, 2019.

The Appellant provided a letter dated February 18, 2019, in reply to MPIC's letter. She did not provide signed medical authorization release forms for [Appellant's general practitioner] and Manitoba Health. In her letter, the Appellant provided comments regarding the mediation of her case and alleged "mishandling" of her information by MPIC. Her letter alleged that personal

medical information was improperly used in her case, stating that this situation "is a case of the inappropriate conduct of the employees of MPI, and their mishandling of my personal health information and claim." The Commission notes that these issues are not generally within the jurisdiction of the Commission.

In her letter, the Appellant also indicated that MPIC had been provided with medical releases on two separate occasions.

The Commission reviewed the letters from the parties regarding the issue of the medical authorization forms and wrote to the parties by letter dated February 28, 2019. The Commission noted that the Appellant maintained that she had complied with all requests (on two separate occasions). Whether or not this was the case, MPIC's letter stated that "despite multiple requests" MPIC had not received the completed forms for Manitoba Health and [Appellant's general practitioner]. In the February 28, 2019, letter, the Commission highlighted MPIC's position, as follows:

> […]
>
> **The Appellant is hereby advised and put on notice of MPIC's intention to argue that an adverse inference should be drawn by the appeal panel from the Appellant's failure to produce the requested authorizations.** [emphasis in original]

Scheduling the Hearing

The Commission's February 28, 2019, letter to the parties also enclosed a supplemental indexed file, and stated further as follows:

> A copy of the supplemental index is enclosed, along with a Request to set Hearing Form for the Appellant. Please review the supplemental index and advise whether the indexes are now complete.

> The Commission asks the Appellant to also complete the top portion of the Request to Set Hearing Form and return it to the Appeals Officer, [text deleted], by March 21, 2019.

On July 31, 2019, the Commission wrote to the parties and advised that the Commission did not receive the completed Request to Set Hearing Form from the Appellant. Counsel for MPIC had provided additional documents to be included in the indexed file on July 25, 2019, and had advised that MPIC was ready to proceed to setting a date.

The Commission's secretary then proceeded to schedule the appeal for hearing. She made several attempts to contact the Appellant by telephone, but was unable to leave a message because the Appellant's voicemail was full. She also made several attempts to contact the Appellant by email. On October 10, 2019, the Commission's secretary sent an email to the Appellant that provided, in part, as follows:

> The following email is to inquire on your scheduling availability for a 1 day Hearing on the following date:
>
> Thursday January 23, 2020 @ 9:30 a.m.
>
> The Hearing will take place at the Automobile Injury Compensation Appeal Commission located at 301-428 Portage Avenue.
>
> Please advise on your scheduling availability by replying to this email. If the date is not suitable, new dates will be submitted.

The Appellant replied on October 16, 2019, as follows: "I am in receipt of your email. I will get back to you in regard to the next step".

The Commission's secretary wrote to the Appellant by email again on October 21, 2019, again inquiring as to her availability for hearing on January 23, 2020. The Appellant replied on October

23, 2019, as follows: “I don’t have my work travel schedule in place yet, so I cannot commit to any appointments until my schedule is set”.

The Commission’s secretary replied to the Appellant by email on October 23, 2019, stating, in part, as follows:

> The hearing has been scheduled for Thursday January 23, 2020 @ 9:30 a.m.
>
> Once you receive your schedule and if the date is inconvenient, you may request an adjournment (postponement) by providing the reason(s) for your request in written form to your Appeals Officer, [text deleted], at [email address] or by mail at 301-428 Portage Avenue, Winnipeg MB, R3C 0E2.

A Notice of Hearing for the January 23, 2020, Hearing was sent to the Appellant by Canada Post Xpresspost and regular mail, to the address on her Notice of Appeal. An acknowledgement of receipt of the Canada Post Xpresspost was signed by “[the Appellant]” on November 12, 2019. The Commission did not hear from the Appellant after her receipt of the Notice of Hearing, until the evening of January 21, 2020, as set out below.

The Appellant was properly served with the Notice of Hearing by personal service pursuant to section 184.1 of the MPIC Act. The Notice of Hearing provided that the time and date of the hearing were firm. It also provided that adjournment requests must be made in writing, and postponements would only be granted under extraordinary circumstances. The Notice further provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and render its decision. It may dismiss the appeal, adjourn the hearing to a new time and date, or take such other steps as it deemed appropriate.

Appellant's Adjournment Request

In accordance with the Commission's practice, on January 20, 2020, the Commission's secretary left a voicemail message for the Appellant to remind her of the upcoming appeal hearing. She also provided a reminder to the Appellant via email. On January 21, 2020, the Appeals Officer sent an email to the Appellant enclosing information regarding the indexed file for use in the appeal hearing. On January 21, 2020, at 8:46 p.m. the Appellant contacted the Appeals Officer by leaving a voicemail message and by sending an email, which stated, in part, as follows:

> I am currently away on business as mentioned in my original attempt to reschedule this appointment at the time it was scheduled on a date that would not work for me. Again for the third time, I will not be able to attend this meeting on this date.
>
> If this meeting goes on without being rescheduled and without me, I will be in contact with the Minister's office and any other means available to me to apprise said offices of the treatment I have received from your office.

Notwithstanding the short notice provided by the Appellant, on January 22, 2020, the Commission canvassed the parties regarding their availability for dates to hold the appeal hearing in the first or second weeks of February. The Commission also inquired of the Appellant as to her availability to participate in the appeal hearing by teleconference, either on the originally scheduled date or on February 4, 5, 6, or 11, 2020. The Appellant was asked to respond by 2:00 p.m. that day (January 22, 2020), as the appeal was scheduled for the following day.

The Commission, in accordance with its usual practice, also asked counsel for MPIC for her comments on the Appellant's adjournment request. MPIC opposed the adjournment request.

The Appellant did not respond to the Commission's inquiries by 2:00 p.m. Therefore, on January 22, 2020, shortly after 2:00 p.m., the Commission sent a letter to both parties, informing them that the Commission had considered the Appellant's adjournment request and had determined to deny

the request. Accordingly, the appeal hearing would proceed as scheduled the following day, Thursday, January 23, 2020, at 9:30 a.m. The Appellant was advised that she was welcome to participate by teleconference; however, she was advised to confirm this with the Commission in writing and to provide a telephone number where she could be reached for the teleconference no later than that day, January 22, 2020, by 3:00 p.m. The Appellant did not respond to the Commission's letter that day.

Further Request on the Hearing Date

On the day scheduled for the appeal hearing, January 23, 2020, the Appellant sent an email to the Commission at 7:58 a.m., which provided in part as follows:

> Due to your inability and unwillingness to accommodate my family situation with my father's stroke, my case progressed to a hearing. Further to this, I advised your office that I would have to check my work travel schedule to provide a date for the hearing and get back to your office. Instead of waiting for me to check my travel schedule or make arrangements to have a date cleared in my schedule, your office went ahead and scheduled this hearing for January 23, 2020 without my consent. I advised the person I spoke to on the phone this date would not work as I had to arrange for a date within my schedule. I was told your office scheduled hearings three months in advance, and you would schedule it anyways which was directly against my wishes. I was then told I could respond closer to the date to attempt to have it moved to a date that would work for me. I again told this person this date would not work without a confirmation of my schedule. Again, your office scheduled this hearing without my confirmation of the date. I then received a reminder email of the hearing to which I responded that I was not available for that date. [The Appeals Officer] then sent me an email with a less than six hour response deadline in order to reschedule the hearing. I cannot respond to an email in six hours when I am not available to respond to the email.
>
> […]
>
> I will repeat what I told you in my original email to you in response to your reminder of the aforementioned hearing. I am not available to attend this hearing, which means I am also not available to teleconference. I have requested that you reschedule this hearing. I will need to find a few dates that I am available for a hearing, not be provided ultimatum dates and times that work specifically for you.

The Appellant then telephoned the Commission's Director of Appeals at 8:50 a.m. She advised that she was up North for business reasons. She only had 10 minutes available to speak, because she had excused herself from a meeting to make the call and she would be attending another meeting at 9:00 a.m. The Director of Appeals asked if the Appellant had time at 9:30 a.m. to call in, or be called, to speak with the appeal panel, even if briefly. She said there was no possible way, as she was up North and phone service was spotty, although the Director of Appeals noted that the phone connection was very clear.

The Appellant voiced her displeasure at how her adjournment request was denied on January 22, 2020. She advised that she is CEO of a public relations firm and her career requires extensive travel. She felt that the Commission had a duty to accommodate her. The Appellant also said that even if she agreed to a hearing date that initially worked for her, her availability may change on short notice given the travel demands of her career. The Director of Appeals advised the Appellant that the decision on whether the hearing proceeded or not was at the discretion of a Commissioner and that she could not comment on what would happen when the panel convened at 9:30 a.m. that morning for her hearing.

The Appellant subsequently emailed the Commission's Director of Appeals, at 9:10 a.m., as follows:

> As far as I know right now, I would not be available for a hearing until the very end of March or early April. I would have to confirm dates.

Counsel for MPIC attended at the Commission on the hearing date, but the Appellant did not attend and did not telephone the Commission further at 9:30 a.m., the scheduled start time of the hearing, to participate by teleconference. In accordance with the Commission's practice, after allowing a

grace period, in this case 30 minutes, the panel convened the hearing at 10:00 a.m., in the Appellant's absence.

Preliminary Matter

At the outset of the hearing, the panel advised counsel for MPIC of the recent communications received from the Appellant that morning. The panel indicated that the Commission would treat the Appellant's communications as a further adjournment request, noting, however, that the Appellant had also indicated that she is not necessarily able to commit to a hearing date given that the travel demands of her career may always necessitate a change on short notice.

Counsel for MPIC advised that MPIC maintained its objection to an adjournment of the appeal hearing. She pointed out that the Commission had already denied the Appellant's first request for an adjournment.

Counsel reviewed the history of the Appellant's participation in the appeal. She pointed out that the Appellant had often failed to respond to the Commission's attempts to contact her, for example when trying to schedule the case conference, which was ultimately scheduled for November 15, 2018. Counsel noted that the Appellant's initial request for an adjournment of that case conference in order to care for her father was somewhat confusing and inconsistent with her later communication that she would be on a plane travelling for work at the time of the case conference. Subsequent to the case conference, the Appellant was asked to complete the Request to Set Hearing form, which she failed to do. The Appellant signed for the Notice of Hearing on November 12, 2019, but did not request an adjournment of the hearing date until the evening of January 21, 2020. Counsel submitted that all of this reflects an appellant who is not actively pursuing her appeal, and who should not be granted an adjournment. Counsel further noted that if the Appellant was able to

make time to attend the various doctors' appointments as evidenced in the indexed file, she could have made time to attend the appeal hearing or to request an adjournment in a timely manner.

The panel briefly adjourned to consider the submissions made by counsel for MPIC. Upon resumption of the hearing, the panel advised that we had made a decision to deny the Appellant's further request for an adjournment of the appeal hearing. The Commission had already denied the Appellant's request for an adjournment one day earlier, and the only new information provided by the Appellant since then was her inability firmly to commit to a hearing date, which did not militate in favour of granting the adjournment. Further, the Appellant had clearly demonstrated that she was available to telephone the Commission at 8:50 a.m. and then to further contact the Commission by email at 9:10 a.m. on the date of the hearing; it was unclear to the panel why she could not make herself available to participate in the appeal hearing at least by teleconference for a brief period of time.

The onus is on the Appellant to establish her entitlement to PIPP benefits. In order to be able to do so, the Appellant has a responsibility to pursue her appeal. As can be seen from the discussion above, the Commission gave the Appellant numerous opportunities to provide information in respect of her appeal, with which she failed to comply. When the Commission attempted to fulfill its obligation to schedule a hearing date in a timely manner, the Appellant seemed to view this as a personal affront, expressing dismay that she would be expected to be available to attend at "dates and times that work specifically for you [the Commission]". Even in the Appellant's final adjournment request, which came one half-hour before the appeal hearing started, she advised the Commission's Director of Appeals that even if she agreed to a hearing date that initially worked for her, her availability may change on short notice given the travel demands of her career. In the panel's view, these statements, together with the Appellant's earlier failure to attend to her appeal,

reflect an appellant who did not evidence at intention to pursue her appeal. Having said that, we considered the Appellant's appeal on its merits and the hearing proceeded in the Appellant's absence.

Relevant Legislation:

The relevant provisions of the MPIC Act are as follows:

> **Definitions**
>
> 70(1) In this Part,
>
> **"accident"** means any event in which bodily injury is caused by an automobile;
>
> **"bodily injury caused by an automobile"** means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile ...
>
> …
>
> **Application of Part 2**
>
> 71(1) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.
>
> **How notices and orders may be given to appellant**
>
> 184.1(1) Under sections 182, 182.1 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant
>
> (a) personally; or
>
> (b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.
>
> **When mailed notice received**
>
> 184.1(2) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

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. However, the panel has reviewed the documentary evidence to extract any material which could be considered to be a submission on behalf of the Appellant, and set it out below.

In her Notice of Appeal to the Commission dated June 22, 2015, the Appellant stated that she wished to appeal the April 23, 2015, Internal Review decision for "complete and total mismanagement of my claim", and the Appellant provided several examples of this alleged mismanagement, including "mishandling of my personal + health information", "failure to accommodate", and "unfair assessment of health information".

The Appellant's email to MPIC dated March 26, 2015, which was treated by MPIC as an Application for Review, stated, in part, as follows:

> I am not in agreement with the decision made in regard to my claim #1034302842. My experts involved in my care, are not in agreement with your decision. The injuries to both wrists were caused by the car accident on November 21, 2013. […]
>
> […]
>
> I am not in agreement with your statement that you do not have a signed release for [Appellant's general practitioner]. MPI was sent all the requested and necessary releases inclusive of [Appellant's general practitioner]. I have attended an appointment with [Appellant's general practitioner] quite some time ago, in order to discuss the releases that were sent to MPI. This appointment is documented by [Appellant's general practitioner], and proof of said submissions. I have concerns about the handling and whereabouts of my medical information. At no time is it acceptable for my medical releases and information to be misplaced or mishandled. The fact is, you do have the medical releases. If you cannot produce this information, then we have a whole other serious problem that will need to be addressed.
>
> […]
>
> In conclusion, my experts and I, are not in agreement with the conclusions of your Health Care Services Medical Consultants or you. Your findings are ridiculous. The

> morning immediately prior to the car accident on November 21, 2013, I was fully functional in all ways inclusive of my hands. Immediately after the accident on November 21, 2013, I was no longer functional inclusive of my hands. It is very clear what caused the damage to my body and hands. This will be substantiated. It is unfortunate that it is my health and progress with my injuries that has suffered due to the way MPI has chosen to handle my claim. This is also something that will need to be addressed.

Just prior to issuing the decision denying benefits, MPIC's case manager left the Appellant a voicemail advising her that benefits would be terminated, sent her an email to the same effect and also advised her physiotherapist that coverage would be discontinued. The Appellant telephoned the case manager on February 13, 2015, and left a voicemail message, which the case manager transcribed, in part, as follows:

> [Text deleted], this is [the Appellant] calling, returning your call. I received information when I was at physiotherapy today that you were discontinuing care. Then I got home and found your e-mail. I would suggest that you check the files to see what your people have done with the release that was signed for [Appellant's general practitioner] long long ago. I'm getting a little concerned as to what's happening with my personal medical information with you people down there, it keeps disappearing. Now this … I've never had an injury to my wrist prior to this accident, okay? This is absolutely ridiculous. […] This injury was sustained in this car accident. […] I'm at the point where I'm starting to make progress with my hand and now you're again interfering with my care. So I'm gonna suggest you escalate this back to your supervisor and have her call me at [text deleted], so we can fix this situation. Thank you.

As noted above, the Appellant provided a letter to the Commission dated February 18, 2019. That letter stated, in part, as follows:

> I am in complete disagreement with the comments in Ms. Korsunsky's correspondence. Her letter is an attempt to imply that I am not in compliance with their requests for information, go on a fishing expedition with my medical information beyond the two year period and blame the injuries I sustained as a victim of a collision caused by another driver on fabricated previous health issues that did not exist. The root of this letter and conduct is to cover up the many breaches of my personal health information under the Personal Health Information Act. These breaches occurred from the onset of the registration of my claim.
>
> For the record, MPI was provided with medical releases on two separate occasions. […]

As noted above, there is a dispute between the parties regarding the medical authorization form for [Appellant's general practitioner]. As well, it appears that the parties take different positions with respect to whether the Appellant had any pre-existing hand or wrist issues prior to the MVA, and if so, how those issues might have affected her functionality. The panel had questions regarding these matters; however, neither the Appellant nor any of her caregivers, such as [Appellant's general practitioner] or [Appellant's physician], were present at the hearing to address those questions.

Submission for MPIC:

Counsel for MPIC noted that the issue in this appeal is whether the Appellant's signs and symptoms of her left thumb and wrist and right wrist were causally related to the MVA. She pointed out that this is the Appellant's appeal, and therefore the onus is on the Appellant to establish the causal connection. It is MPIC's position that the Appellant has failed to meet that onus, based on the documentary evidence contained in the indexed file, and especially in light of the Appellant's failure to appear at the hearing.

In MPIC's view, it is important to get an understanding of the MVA itself and the mechanism of injury. The Appellant's vehicle was rear-ended by a third-party. As noted in the Internal Review Decision, there were minimal damages to the vehicle's rear bumper, the airbags did not deploy and no ambulance attended the scene. The estimate of damages contained in the documentary evidence is for $575.30. MPIC did not receive an invoice, so the vehicle may not have even been repaired. The photos of the vehicle, which was an extended cargo van, appear to indicate surface damage. It is MPIC's position that the impact of the MVA could not have been significant to the Appellant.

Counsel submitted that the source of the Appellant's hand pain is her carpometacarpal ("CMC") joints bilaterally, as indicated by [text deleted], a plastic surgeon specializing in hand, wrist and peripheral nerve injuries. Prior to the MVA, the Appellant had pre-existing CMC joint osteoarthritis. While the MVA may have caused a temporary worsening of that condition, the change was not permanent. Counsel reviewed the medical reports which supported this position.

It appears that the Appellant did not seek medical treatment until she went to her physiotherapist on January 5, 2014, approximately one and a half months after the MVA. Subsequently, on January 8, 2014, the Appellant saw [Appellant's physician] at the [clinic] and had bilateral wrist x-rays. The imaging report noted that there was no fracture, and stated: "Incidental note is made of osteoarthritic change in the left first CMC joint".

The Appellant had an MRI of her left wrist on February 18, 2014. The report stated, in part, as follows:

> IMPRESSION:
>
> 1. Severe first carpometacarpal joint osteoarthritis. The patient indicated their pain is located in this region.
> 2. The scapholunate ligament appears intact.

As indicated above, it is MPIC's position that the MVA probably caused a temporary worsening of the osteoarthritis in the Appellant's CMC joints, which later resolved. This is consistent with the documentary evidence. For example, in the clinical chart notes from the Appellant's physiotherapist at [physiotherapy centre], notes of her visit from March 14, 2014, indicate that the Appellant "feels she is improving/was able to play piano for = 5 min". Notes of her visit from March 21, 2014, indicate that the Appellant's "thumb improving, played guitar for = 5 min". Notes of the Appellant's visit from April 16, 2014, indicate that the Appellant "feels about 65% better".

Similarly, in the clinical chart notes from the Appellant's physician, [Appellant's physician] at the [clinic], notes of her visit from March 4, 2014, indicate that the Appellant's "L thumb improved, R not bad". Notes of her visit from April 24, 2014, indicate that the Appellant's "L hand improved but still stiff". Counsel noted that although there is limited evidence regarding the Appellant's pre-MVA function, the clinical chart notes from [clinic] do contain notes of a visit from December 18, 2012, when the Appellant was seen by [Appellant's physician]. Those notes indicate "L hand pain for the last one week. Tender 1st CMC ++". Therefore, it is clear that the Appellant was symptomatic within one year prior to the MVA.

The Appellant had MRIs of her left and right wrists on June 29, 2014. The MRI of the left wrist at that point identified a "small partial-thickness tear affecting the dorsal aspect of the scapholunate ligament", which was visible on one image. The report also identified, as with the previous MRI, "severe first carpal metacarpal joint osteoarthritis".

The MRI report for the right wrist stated, in part, as follows:

> IMPRESSION:
>
> 1. Mild partial thickness tearing of the scapholunate ligament.
> 2. Severe first carpal metacarpal joint osteoarthritis.
> 3. Mild focal tendinosis of the extensor carpi ulnaris tendon at the level of the ulnar styloid.

It is MPIC's position that the minor scapholunate ligament tears reflected in the June 29, 2014, MRIs were not caused by the MVA. Counsel submitted that the tear in the Appellant's left scapholunate ligament must have happened some time between February and June, 2014, because it was not reflected in the February 18, 2014, MRI of the Appellant's left wrist. Further, it is MPIC's position that the pain in the Appellant's right hand is coming from her CMC osteoarthritis

and not the scapholunate ligament tear. This position is supported by the opinion of [Appellant's plastic surgeon], who specializes in hand and wrist issues.

The Appellant saw [Appellant's plastic surgeon] on December 30, 2014. She reviewed the MRIs of June 29, 2014, and also examined the Appellant. [Appellant's plastic surgeon] provided a report dated December 30, 2014, which stated, in part, as follows:

> On examination, the patient has full range of motion of her fingers and thumb. She has reduced range of motion of her left wrist compared to her contralateral right wrist. The patient has tenderness over the scaphoid tubercle at the first CMC joint bilaterally as well as along the first dorsal extensor compartment bilaterally. She has a negative Watson's test and minimal-to-no tenderness at the scapholunate interval. There is no tenderness at the lunotriquetral region or any region of TFCC.
>
> Examination of the x-ray does reveal that she does have some osteophytes at the first CMC joint.
>
> My impression is that the majority of her pain is coming from the first CMC joints bilaterally. I have told her to wean out of the braces as I am sure this is contributing to her first dorsal extensor compartment tendinitis and discomfort. I have told her to wear the braces only for nighttime or during strenuous activities. I have told her to use her hand as much as possible. At this time, I have told her that we can start with conservative management of the first CMC joint arthritis such as continued range of motion and topical and oral anti-inflammatories or Tylenol Arthritis. If she continues to have discomfort, we can talk about a steroid injection. Our last resort would be surgical. The patient is in agreement with this. I will see this patient back on an as needed basis.

Counsel pointed out that [Appellant's plastic surgeon] identified that the Appellant's pain was coming from her first CMC joints bilaterally. She recommended conservative management of the Appellant's CMC osteoarthritis. [Appellant's plastic surgeon] did not identify any injury to the Appellant's scapholunate ligaments.

Counsel noted that there was one other specialist whom the Appellant had seen in consultation one and a half years after the MVA, [text deleted], a neurologist, who provided a brief report dated May 6, 2015. In that report, [neurologist] stated that since the MVA, the Appellant "has had

ongoing pain on the flexor aspects of both distal forearms increased with prolonged wrist flexion. This likely represents tendon damage or inflammation of the flexor tendons". Counsel pointed out that there is no evidence of tendon damage, or inflammation in the flexor tendons, in the diagnostic imaging. The MRIs of the Appellant's wrists from June 29, 2014, indicate that her flexor tendons appear normal. There is no indication from [neurologist]'s report whether he reviewed any of the imaging, or whether he was even aware of it; nor does his report reflect that he knew of [Appellant's plastic surgeon]'s opinion or of the Appellant's CMC osteoarthritis. Further, he based his opinion on the Appellant's self-report one and a half years after the MVA, and there were times during that period when she had reported improvements in her condition. Therefore, it is MPIC's position that more weight should be given to the opinion of [Appellant's plastic surgeon], who specializes in hand and wrist surgery, and who had the opportunity to review the diagnostic imaging.

As well, counsel noted that MPIC's Health Care Services ("HCS") medical consultant, [text deleted], who specializes in sports medicine, had an opportunity to conduct a forensic review of all the file material in this appeal on several occasions. His report, dated May 28, 2019, stated as follows with respect to the Appellant's left thumb:

> The evidence in the patient's bodily injury claim file indicates on the balance of probability, with a high degree of medical certainty, the patient had left thumb carpometacarpal arthrosis prior to the event in question. This was documented in a 2012 visit. She had x-ray changes and symptoms at that time.
>
> The evidence on file indicates this is a pre-accident diagnosis. There is insufficient evidence, in close temporal proximity to the crash at hand, to confirm that there was a probable permanent worsening of this condition from the crash. The natural history of carpometacarpal joint arthrosis is a slow progression with time.

The report stated as follows with respect to the Appellant's left wrist:

> The complaints from the patient's left wrist appear to be related to the carpo-metacarpal arthrosis. The left wrist MRI of February 2014 revealed severe left

> carpometacarpal joint arthrosis. There were no other probable abnormalities which would be related to a crash. There has been essentially a complete absence of physical findings which would be consistent with a diagnosis of a specific wrist injury. There has been no evidence of abnormal carpal ligament laxity, or tests to perturb the scapholunate or lunotriquetral ligaments. The carpometacarpal joint of the thumb is within a cm. of the scapholunate ligament, and [Appellant's plastic surgeon] did not opine that there was probable injury to the wrist. There was no probable diagnosis to account for the patient's wrist difficulties. Therefore, there would be no probable cause/effect relationship to any episode of trauma.

The report stated as follows with respect to the Appellant's right wrist:

> The reasoning is essentially the same. There is a lack of high quality medical evidence which indicate a probable right wrist diagnosis. The specialists in question does not identify any wrist findings on the right side which would indicate a probable diagnosis of ligament disruption. Stability tests are negative. There is no consistent tenderness over that region.
>
> The patient has been identified as having a probable right carpometacarpal arthrosis. The very mild findings on MRI, were described as being possible "manifestations of a ligament tear, not probable manifestations". The very small region of an abnormal signal on only one sequence probably prevents a diagnosis of being attributed to that area. Therefore, on the balance of all probability, the patient's right wrist is not related to the motor vehicle collision in question.

Counsel submitted that given [MPIC's medical consultant]'s area of specialty and forensic review, his report should carry significant weight.

Counsel acknowledged that there is very limited information regarding the Appellant's pre-existing osteoarthritis in her left first CMC joint. She noted that the Appellant had been given notice of MPIC's intention to argue that an adverse inference should be drawn from the Appellant's failure to provide medical authorization forms for [Appellant's general practitioner] and for Manitoba Health in order that MPIC could obtain a two-year history of the health care providers that she had seen. Counsel referred to a 1997 case, *Stelman v. McCarthy* (119, Man. R. (2d) 229 Man. Q.B.), in which the court quoted an earlier case, as follows, at paragraph 9:

> … The production of medical records is … fundamental to a Court's determination of the nature, extent and effect of the injuries which may have been suffered and the appropriate measure of damages flowing from them.
> …
>
> No doubt medical records are private and confidential in nature. Nevertheless, when damages are sought for personal injuries, the medical condition of the plaintiff both before and after the accident is relevant. In this case, it is the very issue in question. The plaintiff himself has raised the issue and placed it before the Court. In these circumstances there can no longer be any privacy or confidentiality attaching to the plaintiff's medical records.

The Appellant was symptomatic prior to the MVA with respect to CMC osteoarthritis. In some of the material submitted to the Commission, the Appellant alleged that she didn't have any loss of function prior to the MVA, but counsel argued that there is no way to confirm this. It appears that the Appellant is some type of business consultant and does office work in addition to her work as a musician, but MPIC submitted that there is no real way of knowing her functionality prior to the MVA and that is why MPIC wanted to see her pre-MVA medical records. Therefore, it is MPIC's position that an adverse inference should be drawn by the Commission against the Appellant for her failure to produce those medical records. The Appellant could have clarified what her pre-existing condition was, but she didn't, so counsel argued that justified an inference that the evidence would have been unfavourable to her. Counsel referred to a 2005 decision of the Ontario Labour Relations Board, *International Union of Bricklayers and Allied Craft Workers v. Durson Holdings Ltd.*, 2005 CanLII 5209, in which the Board stated as follows at paragraph 20:

> […] This approach is consistent with the well-established principle that the failure of a party to adduce evidence which was in its power to give and by which facts may have been elucidated, justifies an inference that the evidence would have been unfavourable to that party. [citations omitted]

Counsel therefore submitted that the Appellant had failed to establish a causal connection between her left thumb and wrist signs and symptoms or her right wrist signs and symptoms and the MVA, and she submitted that the Appellant's appeal should be dismissed.

Discussion:

The Appellant is seeking PIPP benefits under the MPIC Act for her left thumb and wrist signs and symptoms and for her right wrist signs and symptoms. In order to be entitled to those benefits, she must establish, on a balance of probabilities, that she suffered a "bodily injury caused by an automobile", within the meaning of subsection 70(1) of the MPIC Act, with respect to each of those areas.

In making our decision, as set out below, we have thoroughly reviewed all of the reports and documentary evidence filed in connection with this appeal. We have given careful consideration to the submissions of counsel for MPIC. As indicated above, we have also reviewed the documentary evidence to extract any material which could be considered to be a submission on behalf of the Appellant, and we have given careful consideration to those submissions. As well, we have taken into account the provisions of the relevant legislation.

The Appellant's position seems to be best summarized in her email to MPIC dated March 26, 2015, which stated, in part, as follows:

> In conclusion, my experts and I, are not in agreement with the conclusions of your Health Care Services Medical Consultants or you. Your findings are ridiculous. The morning immediately prior to the car accident on November 21, 2013, I was fully functional in all ways inclusive of my hands. Immediately after the accident on November 21, 2013, I was no longer functional inclusive of my hands. It is very clear what caused the damage to my body and hands. This will be substantiated. […]

The panel has given consideration to the Appellant's submissions. We have also taken into consideration the following (all of which are noted above):

1. The Appellant did not attend the hearing, and so was not present to provide testimony regarding the MVA or her pre-MVA functioning, nor to be subject to cross-examination by counsel for MPIC;

2. The Commission provided the Request to Set Hearing form to the Appellant on February 28, 2019, eleven months prior to the appeal hearing. In that form, the Appellant was asked to advise the Commission as to the witnesses that would testify on her behalf. She failed to complete the form and return it to the Commission. Consequently, none of her health care providers were present at the hearing to provide testimony; and
3. As indicated by counsel for MPIC, MPIC did not receive from the Appellant the signed medical authorization forms for [Appellant's general practitioner] or for Manitoba Health, and thus MPIC was unable to obtain information from those sources regarding her pre-MVA condition.

As noted by the Board in *Durson Holdings Ltd.*, cited above, information regarding the Appellant's pre-MVA condition was in her power to give. In addition, arranging for her health care providers to appear as witnesses, as well as her own attendance, was well within the Appellant's control. The panel is left to conclude that the reason for the failure to submit any missing information and the failure to appear, or have any witnesses appear, was because such information, or testimony, would not have been favourable to the Appellant.

There is evidence that the Appellant had pre-existing left first CMC osteoarthritis, as reflected in the clinical chart note of [Appellant's physician] from December 18, 2012. It is MPIC's position that the Appellant's CMC osteoarthritis is the source of her hand pain, as indicated by [text deleted], a plastic surgeon specializing in hand, wrist and peripheral nerve injuries. As indicated above, [Appellant's plastic surgeon]'s report, dated December 30, 2014, stated that: "My impression is that the majority of her pain is coming from the first CMC joints bilaterally."

[Text deleted], MPIC's HCS medical consultant, in his report of February 9, 2015, stated as follows:

> The current problem appears to be related to the left thumb carpo-metacarpal joint. The plastic surgeon has recommended to stop using the splints, and begin a return to all activity. This is a pre-existing condition, based on the information on file.
>
> The patient probably sustained a perturbation of pre-existing left thumb carp-metacarpal (sic) joint arthrosis with the event in question. Her scapho-lunate ligament appears normal on the first MRI from February of 2014, and therefore, was not probably injured in the event in question.
>
> The right wrist injury also probably involved a sprain. There were no consistent signs of injury in relationship to the right wrist documented in her file at the [clinic]. Therefore, the relationship of the identified abnormalities on the recent MRI of the right wrist with the event in question is unknown. There is not a probable cause effect relationship between the current MRI findings in both wrists and the event in question.

[MPIC's medical consultant], in his report of May 28, 2019 (referred to by counsel for MPIC), again reviewed all of the medical documentation on the file, and reiterated his conclusions.

The only medical evidence which appears to support the Appellant's position, that her hands were injured in the MVA, is the report from [neurologist] dated May 6, 2015. In that report, as noted above, [neurologist] states that the Appellant likely suffered "tendon damage or inflammation of the flexor tendons". However, it would not appear that [neurologist] had the benefit of reviewing the diagnostic imaging performed on the Appellant. The MRI of her left wrist dated June 29, 2014, states "the flexor and extensor tendons appear normal". The MRI of her right wrist dated June 29, 2014, identifies damage to one of the extensor tendons, and then states "the remaining flexor extensor tendons appear normal". From [neurologist]'s brief report, it is not clear whether he knew that diagnostic imaging had even been done.

The panel finds that [MPIC's medical consultant], in the preparation of his reports dated February 9, 2015, and May 28, 2019, had the opportunity to review all of the medical reports, assessments

and reports of interventions on the Appellant's file and was thorough and comprehensive in his analysis. The panel preferred the evidence provided by [MPIC's medical consultant] to that of [neurologist], who did not have an opportunity to conduct a review of all of the file material. The panel also finds that the evidence of the Appellant's treating physician, [Appellant's plastic surgeon], a specialist in hand and wrist issues, was persuasive, as she had the benefit of reviewing the most recent imaging conducted on the Appellant and as well personally examining her.

Based on the evidence of [Appellant's plastic surgeon] and [MPIC's medical consultant], we find that the Appellant has not established a causal connection between her left thumb and wrist signs and symptoms, or her right wrist signs and symptoms, and the MVA. As a result, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to PIPP benefits for her left thumb and wrist signs and symptoms or for her right wrist signs and symptoms.

Disposition:

Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer of April 23, 2015, is upheld.

Dated at Winnipeg this 25th day of March, 2020.

JACQUELINE FREEDMAN

LINDA NEWTON

SANDRA OAKLEY