Automobile Injury Compensation
Appeal Commission

Annual Report
2019-2020

Manitoba

Automobile Injury Compensation Appeal Commission
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MINISTER OF FINANCE

Legislative Building
Winnipeg, Manitoba, CANADA
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Her Honour The Honourable Janice C. Filmon, C.M., O.M.
Lieutenant Governor of Manitoba
Room 235 Legislative Building
Winnipeg MB R3C OV8

May it Please Your Honour:

I have the privilege of presenting, for the information of Your Honour, the Annual Report of the Automobile Injury Compensation Appeal Commission for the year ended March 31, 2020.

Respectfully submitted,

Honourable Scott Fielding
Minister of Finance

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Honourable Scott Fielding
Minister of Finance
Room 103 Legislative Building
Winnipeg, Manitoba R3C 0V8

Dear Minister:

Section 180(1) of the Manitoba Public Insurance Corporation Act states that within six months after the end of each fiscal year, the Chief Commissioner shall submit an annual report to the Minister respecting the exercise of powers and the performance of duties by the Commission, including the significant decisions of the Commission and the reasons for the decisions.

I am pleased to enclose herewith the Annual Report of this Commission for the fiscal year ending March 31, 2020, which includes a summary of significant decisions.

Yours truly,

LAURA DIAMOND
CHIEF COMMISSIONER

ANNUAL REPORT OF THE
AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION
FOR FISCAL YEAR 2019/20

General

The Automobile Injury Compensation Appeal Commission (the "Commission") is an independent, specialist administrative tribunal established under The Manitoba Public Insurance Corporation Act (The MPIC Act) to hear appeals of Internal Review Decisions concerning benefits under the Personal Injury Protection Plan (PIPP) of Manitoba Public Insurance Corporation (MPIC).

Fiscal year 2019/20, which is April 1, 2019 to March 31, 2020, was the 26th full year of operation of the Commission.

The staff complement of the Commission is 10, including a chief commissioner, one deputy chief commissioner, one part-time deputy chief commissioner, a director of appeals, three appeals officers, a secretary to the chief commissioner and two administrative secretaries. For the majority of this fiscal year, the full-time deputy chief commissioner position experienced a vacancy equivalent to a .6 FTE.

In addition, there are 16 part-time commissioners who sit on appeal panels as required.

The Appeal Process

In order to receive PIPP benefits, a claimant must submit an Application for Compensation to MPIC. If a claimant does not agree with their case manager's decision regarding an entitlement to PIPP benefits, the claimant has 60 days to apply for a review of the decision. An Internal Review Officer will review the case manager's decision and issue a written decision with reasons.

If a claimant is not satisfied with the Internal Review Decision, the claimant may appeal the decision to the Commission within 90 days of receipt of the Internal Review Decision. The Commission has the discretion to extend the time by which an appeal must be filed.

In fiscal year 2019/20, 203 appeals were filed at the Commission, compared to 150 in the fiscal year 2018/19.

The Claimant Adviser Office

The Claimant Adviser Office was created in 2004 by an amendment to Part 2 of The MPIC Act. Its role is to assist appellants appearing before the Commission. In the 2019/20 fiscal year, 69% of all appellants were represented by the Claimant Adviser Office, compared to 57% in 2018/19.

Pre-hearing procedures & the mediation pilot project

Since February 2012, the Notice of Appeal has indicated that appellants have the option to participate in the mediation of their appeal. Mediation services are provided by the Automobile Injury Mediation Office (AIM). A mediation information sheet is also provided with the Notice of Appeal. Of the 203 new appeals that were filed during the 2019/20 fiscal year, 136 appellants pursued the option of mediation.

If mediation is requested at the time an appellant files a Notice of Appeal, the Commission is responsible for assembling the package of information containing the significant appeal documents, which will be utilized in the mediation process.

Hearing Procedure

Once the mediation process concludes, unresolved or partially resolved appeals are returned for adjudication at a hearing before the Commission. The Commission's appeals officers prepare indexed files only for those unresolved appeals returned to the Commission from the AIM Office. If mediation is not requested at the time the Notice of Appeal is filed, an indexed file will be prepared. The indexed file is the compilation of documentary evidence considered relevant to the issues under appeal. It is provided to the appellant or the appellant's representative and to MPIC and will be referred to at the hearing of the appeal. Once the parties have reviewed the indexed file and submitted any further relevant evidence, a date is fixed for hearing the appeal.

Case Conferences

Management of appeals by case conference continues to be an important part of the Commission's hearing schedule. Over the last six fiscal years, the Commission's experience has been that many appeals require additional case management by a commissioner. In keeping with past practice, the Commission continued to initiate case conference hearings in 2019/20. The Commission finds that these case conference hearings continue to assist in determining the status of appeals, identifying sources of delay, resolving parties' impediments to scheduling a hearing date, facilitating mediation, and scheduling hearings.

Hearings

For appeals that are not fully resolved at mediation, or where an appellant does not elect the option of mediation, the Commission will adjudicate appeals by hearings.

Hearings are relatively informal in that the Commission is not strictly bound by the rules of evidence followed by the courts. Appellants and MPIC may call witnesses to testify and may also bring forward new evidence at appeal hearings. The Commission's hearing guidelines require each party to disclose documentary and oral evidence in advance of the hearing. The Commission may also issue subpoenas, which require persons to appear at the hearing to give relevant evidence and to bring documents with them.
If required, the Commission will travel outside of Winnipeg to conduct a hearing or, if it is appropriate, a hearing may be conducted by teleconference or videoconference.

The commissioner(s) hearing an appeal weigh the evidence and the submissions of both the appellant and MPIC. Under The MPIC Act, following an appeal hearing the Commission may:

(a) confirm, vary or rescind MPIC's review decision; or
(b) make any decision that MPIC could have made.

The Commission issues written decisions and provides written reasons for the decisions. The decisions and reasons are sent to the appellant and to MPIC. The Commission's decisions and reasons are publicly available for review at the Commission's office and on the Commission's web site, http://www.gov.mb.ca/justice/cp/auto/decisions/index.html. Decisions made available to the public are edited to protect the privacy of the parties, in compliance with privacy legislation in Manitoba. The Commission is committed to providing public access to the evidentiary basis and reasons for its decisions, while ensuring that personal health information and other personal information of the appellants and other individuals are protected and kept private.

In fiscal year 2019/20, appellants were successful in whole or in part in 25% of the appeals heard by the Commission, compared to 55% in 2018/19. In addition, the case management work of the Commission resulted in the resolution of 31 appeals through settlement or withdrawal and a formal hearing or decision was not required.

Resolutions

The case management work of the Commission resulted in the resolution of a number of appeals, through settlement or withdrawal, so that a formal hearing or decision was not required.

- 1 appeal was withdrawn or settled after a case conference and the scheduling of a hearing was not required.
- 7 days of hearings were scheduled but the appeals were withdrawn or settled prior to the commencement of the hearing.

Hearing Activity

The following identifies the number of hearings held in the last six fiscal years.

Fiscal Year	Hearings	Case Conferences	Total Hearings
2019/20	26	91	117
2018/19	30	75	105
2017/18	23	124	147
2016/17	27	117	144
2015/16	37	80	117
2014/15	47	150	197

While there were less hearings overall, there was an increase in complex multi-day hearings held in the 2019/20 fiscal year.

The following identifies the number of days scheduled for hearings and case conferences in the last three fiscal years.

Fiscal Year	Days of Hearings Held	Settled Days	Days of Case Conferences	Adjourned Case Conference Days	Total Hearing Days Scheduled
2019/20	41	7	91	14**	153
2018/19	40	23	75	4	142
2017/18	31	N/R*	124	N/R*	155

*Not Recorded
**3 days adjourned due to COVID-19

Statistics

The Commission hears and decides appeals fairly, accurately and expeditiously. With this in mind, the Commission has established the following service level parameters:

- For those appellants who do not request the option of mediation and request a hearing for the adjudication of the appeal, Commission staff prepares the indexed file of material to be used at the hearing five weeks after receipt of MPIC's file and all other additional material.
- For those appeals that request the option of mediation, Commission staff prepares the indexed file five weeks after the Commission is notified by AIM that mediation is concluded and the appeal will continue to proceed at the Commission to hearing.
- The Commission's expectation is to schedule hearings within six to eight weeks from the time the parties notify the Commission of their readiness to proceed.
- The Commission's expectation for rendering written decisions is six weeks following the hearing and receipt of all required information.

The Commission continues to experience a consistent volume of appeals filed resulting in the following average turnaround times for 2019/20:

- Files were indexed within 1 week of receipt of MPIC's file and additional material compared to 4.57 weeks in 2018/19 and 3.69 weeks in 2017/18.
- Files were indexed within 3.57 weeks of receipt of notification by AIM that mediation was concluded but the unresolved or partially resolved issues will proceed to hearing, compared to 5.43 weeks in 2018/19 and 5.07 weeks in 2017/18.
- Hearing dates were scheduled, on average, within 7.67 weeks from the time the parties were ready to proceed to a hearing. This compares to 3.31 weeks in 2018/19 and 0.92 weeks in 2017/18. During this fiscal year, the vacant Deputy Chief Commissioner position affected timelines to schedule hearings.
- The Commission prepared 20 written decisions in 2019/20, compared to 20 written decisions in 2018/19. The average time from the date a hearing concluded to the date the Commission issued an appeal decision was 13.19 weeks in 2019/20, compared to 8.43 weeks in 2018/19 and compared to 5.94 weeks in 2017/18. The vacant Deputy Chief Commissioner position affected timelines of issuing of decisions during this fiscal year.

- In accordance to Dismissal for Failure to Pursue Appeal provisions passed under a recent amendment to The MPIC Act, the Commission has written 9 decisions in 2019/20. The average time from the date a Failure to Pursue hearing concluded to the date the Commission issued a decision was 6.43 weeks.

The Commission's appeals officers continue to provide substantial administrative support to the case management of appeals. The level of complexity of appeals has continued to increase, with multiple issues under appeal included in one MPIC internal review decision. This has resulted in a reduction of indexes prepared but a significant increase to the case management process and the volume of documentary evidence that come to form the index.

- The Commission completed 102 indexes in 2019/20, compared to 112 indexes in 2018/19 and compared to 51 indexes in 2017/18.
- The average indexed file included 107 tabbed documents for the 2019/20 fiscal year, compared to 190 in 2018/19 and 136 in 2017/18.
- Staff prepared 72 supplemental indexes in 2019/20, compared to 73 supplemental indexes in 2018/19 and 61 in 2017/18. These indexes are for case conference hearings, jurisdictional hearings and additional indexes to supplement existing files where additional information is received.

Including supplemental indexes, appeals officers prepared a total of 174 indexes in 2019/20, as compared to 185 indexes in 2018/19 and 112 indexes in 2017/18.

As of March 31, 2020, there were 396 open appeals at the Commission, compared to 371 open appeals as of March 31, 2019 and 362 open appeals as of March 31, 2018.

Appeals to the Manitoba Court of Appeal

A decision of the Commission is binding, subject only to a right of appeal to the Manitoba Court of Appeal on a point of law or a question of jurisdiction, and then only with leave of the court.

There were two applications for leave to appeal in 2019/20. One case was denied leave to appeal and the other is still before the Courts.

In the Commission's 26 years of operation, as of March 31, 2020, the Court of Appeal has granted leave to appeal in 14 cases from the 1759 decisions made by the Commission.

Sustainable Development

The Commission is committed to the Province of Manitoba's Sustainable Procurement Practices plan. Commission staff is aware of the benefits of Sustainable Development Procurement. The Commission uses environmentally preferable products whenever possible and takes part in a recycling program for non-confidential waste.

The Public Interest Disclosure (Whistleblower Protection) Act

The Public Interest Disclosure (Whistleblower Protection) Act came into effect in April 2007. This law gives employees a clear process for disclosing concerns about significant and serious matters (wrongdoing) in the Manitoba public service, and strengthens protection from reprisal. The Act builds on protections already in place under other statutes, as well as collective bargaining rights, policies, practices and processes in the Manitoba public service.

Wrongdoing under the Act may be: contravention of federal or provincial legislation; an act or omission that endangers public safety, public health or the environment; gross mismanagement; or, knowingly directing or counselling a person to commit a wrongdoing. *The Act* is not intended to deal with routine operational or administrative matters.

A disclosure made by an employee in good faith, in accordance with the Act, and with a reasonable belief that wrongdoing has been or is about to be committed is considered to be a disclosure under the Act, whether or not the subject matter constitutes wrongdoing. All disclosures receive careful and thorough review to determine if action is required under the Act, and must be reported in a department's annual report in accordance with Section 18 of the Act. The Commission has received an exemption from the Ombudsman under Section 7 of the Act. As a result, any disclosures received by the Chief Commissioner or a supervisor are referred to the Ombudsman in accordance with the exemption.

The following is a summary of disclosures received by the Commission for the fiscal year 2019/20.

Information Required Annually (per Section 18 of *The Act)*	Fiscal Year 2019/20
The number of disclosures received, and the number acted on and not acted on. Subsection 18(2)(a)	NIL

Significant Decisions:

The following are summaries of significant decisions of the Commission and the reasons for those decisions that were issued in 2019/20.

1. Failure to Pursue the Appeal

In cases where an appellant does not take active steps to pursue their appeal, the Commission has the power to consider whether to dismiss the appeal. Subsection 182.1(1) of the Manitoba Public Insurance Corporation Act (The MPIC Act) was recently enacted, and provides that "the commission may dismiss all or part of an appeal at any time if the commission is of the opinion that the appellant has failed to diligently pursue the appeal".

There are several circumstances in which an appellant may fail to diligently pursue their appeal. For example, in some cases, the appellant has not taken active steps to communicate with the Commission. In other cases, the appellant has failed to attend case conferences and meet deadlines set by the Commission. There are also rare circumstances where an appellant has passed away, and there is no next of kin who will pursue the appeal on the appellant's behalf.

The following cases illustrate factors the Commission may consider in determining whether to dismiss an appeal due to the appellant's failure to diligently pursue it.

Case #1

In this case, the Appellant advised the Commission that she no longer wished to pursue her appeal.

The Appellant was involved in a motor vehicle accident ("MVA") in December, 2007. She ultimately filed a Notice of Appeal with the Commission in April, 2014, in relation to MPIC's decision to terminate her Income Replacement Indemnity (IRI) benefits. A lengthy case management process then ensued in the Appellant's appeal.

On January 17, 2017, the Commission's secretary contacted the Appellant to schedule a case conference. The Commission's secretary recorded that the Appellant indicated that she no longer wished to pursue her appeal. The Commission's secretary also made note that the Appellant was advised that a Notice of Withdrawal would be forwarded to her, for her to sign and return to the Commission.

Although several attempts were made by the Commission to contact the Appellant subsequent to that telephone conversation, they were unsuccessful. The Commission held a case conference, which the Appellant did not attend, and also scheduled a hearing, which was adjourned when the Appellant did not attend.

The Commission then wrote to the parties on January 15, 2019, advising that the Appellant had not provided any further information to the Commission. Therefore, the Commission determined that it would schedule a hearing to determine whether the Appellant had failed to diligently pursue her appeal, within the meaning of subsection 182.1(1) of The MPIC Act, and, if so, whether the Commission should dismiss her appeal.

The Appellant did not attend the hearing. The Notice of Hearing sent to the Appellant by regular mail to the address on her Notice of Appeal was not returned to the Commission. Although the Appellant was not present at the hearing, the Commission found that she had been given proper notice of the hearing. As well, she had been given the opportunity to make written submissions or otherwise be heard in respect of the dismissal of her appeal.

The Commission determined that section 182.1 of The MPIC Act does not require a consideration of the merits of an appeal. It requires that the Commission be of the opinion that "the appellant has failed to diligently pursue the appeal". If so, the Commission then has the discretion to dismiss all or part of an appeal.

In this case, the Appellant had determined not to proceed with mediation in July, 2015. On January 17, 2017, the Commission's secretary contacted the Appellant to schedule a case conference. At that time, the Appellant advised that she no longer wished to pursue her appeal. Nevertheless, the Commission scheduled a case conference, to afford the Appellant the opportunity to appear and be heard. The Appellant did not attend the 2017 case conference, nor did she attend a 2017 hearing. The Commission made several subsequent attempts to contact the Appellant, both by telephone and by letter, but the Appellant did not respond to any of those attempts. The hearing under section 182.1 of The MPIC Act was then scheduled.

As noted above, the Appellant did not attend the hearing, nor did she provide any written submissions, although she was provided the opportunity to do so. She did not provide any explanation for her failure to appear or for her failure to respond to the Commission's attempts to contact her. On the contrary, the only information that the Commission had from the Appellant was her advice to the Commission's secretary from January, 2017, that she no longer wished to pursue her appeal. Since the Appellant had clearly ceased to pursue her appeal, the Commission saw no compelling reason to proceed with the appeal. The Commission therefore found that the Appellant had failed to diligently pursue her appeal and the Appellant's appeal was dismissed.

Case #2

In this case, the Appellant did not take active steps to communicate with the Commission.

The Appellant was involved in an MVA in June, 2000. He ultimately filed a Notice of Appeal with the Commission in February, 2014, in relation to MPIC's decision to terminate his IRI benefits. A lengthy case management process then ensued in the Appellant's appeal.

On October 18, 2016, a case conference was held. Although the Appellant had signed to accept service of the Notice of the case conference, he did not attend. Several attempts were made by the Commission to contact the Appellant subsequent to that case conference, but they were unsuccessful. The Commission held three further case conferences, which the Appellant did not attend.

The Commission then wrote to the parties on March 12, 2019, advising that the Appellant had not provided any further documentation to the Commission or been in contact with the Commission. Therefore, the Commission would schedule a hearing under section 182.1 of The MPIC Act.

The Appellant did not attend the hearing. The Notice of Hearing sent to the Appellant was accepted and signed for by him. Although the Appellant was not present at the hearing, the Commission found that he had been properly served with the Notice of Hearing by personal service. As well, he had been given the opportunity to make written submissions or otherwise be heard in respect of the dismissal of his appeal.

In this case, the Appellant's last participation in his appeal was on August 9, 2016, when he participated in a case conference by telephone. Since that date, he had taken no steps to pursue his appeal. The Commission held four further case conferences, to afford the Appellant the opportunity to appear and be heard, but the Appellant did not attend any of those case conferences. The Commission had made numerous attempts to contact the Appellant, but the Appellant did not respond to any of those attempts. The Appellant did not even keep the Commission updated as to his current address, although it appeared that he did provide current information to MPIC. The Commission was able to serve the Notice of Hearing personally on the Appellant by obtaining his current address from MPIC.

After the Appellant's failure to attend a fourth case conference, the hearing under section 182.1 of The MPIC Act was scheduled. As noted above, the Appellant did not attend the hearing, nor did he provide any written submissions, although he was provided the opportunity to do so. He did not provide any explanation for his failure to appear or for his failure to respond to the Commission's attempts to contact him. On the contrary, at the same time as the Appellant was not responding to the Commission's attempts to contact him, and failing to attend at case conferences and the hearing, the documentary evidence submitted by MPIC showed that he was communicating with MPIC and/or its agents with respect to other matters. It was apparent that the Appellant was clearly able to communicate with MPIC, but chose not to communicate with the Commission during the same period. The Commission saw no compelling reason to proceed with the appeal. The Commission therefore found that the Appellant had failed to diligently pursue his appeal, and the Appellant's appeal was dismissed.

Case #3

This case is slightly different than the previous cases. The Appellant in this case did actively participate in his appeal initially; however, subsequently, he failed to attend case conferences and meet deadlines set by the Commission. Here, the Appellant attended the hearing.

The Appellant was injured in MVAs in May, 2009 and August, 2010. He ultimately filed a Notice of Appeal with the Commission in March, 2014, in relation to MPIC's decision to deny him Personal Injury Protection Plan (PIPP) benefits, including funding for chiropractic treatment, and also in relation to MPIC's determination of his employment. A lengthy case management process then ensued in the Appellant's appeal.

The first case conference was held on March 2, 2016. The Appellant was present and indicated (as he had previously) that he wished to pursue obtaining legal counsel. Three further case conferences were held which the Appellant attended, having not yet retained legal counsel. A fifth case conference was scheduled for July 5, 2017. The Appellant did not attend. Subsequent to that point in time, the Appellant's contact with the Commission was sporadic.

Two further case conferences were held, which the Appellant did not attend. The Commission wrote to the Appellant and he was given a deadline of November 1, 2017, to submit a medical report from his chiropractor to the Commission. He did not provide any medical reports by the November 1, 2017 deadline. On November 9, 2017, the Appellant telephoned the Commission and advised that he was not sure if he wished to appoint his girlfriend as his representative and he again indicated that he was considering hiring legal counsel. On November 28, 2017, the Appellant advised the Commission that it was still his intention to obtain a report from his chiropractor. By letter dated December 13, 2017, the Appellant was advised that he had until February 1, 2018 to submit the report from his chiropractor.

By letter dated February 7, 2018, the Appellant was advised that as the Commission had not received a response from the Appellant, the Commission assumed the Appellant was no longer seeking a report from his chiropractor. The Commission tried to contact the Appellant five times between September 27, 2018 and October 1, 2018. As the Appellant did not answer those calls and had not contacted the Commission, a case conference was scheduled for January 9, 2019. Documents were also sent to the Appellant. The Appellant did not attend the January 9, 2019 case conference. As a result, the Commission determined it would schedule a hearing to consider whether the Appellant had failed to diligently pursue his appeal and therefore whether the Appellant's appeal should be dismissed.

On February 12, 2019, the Appellant contacted the Commission and indicated that he wished to pursue his appeal. MPIC advised that it was MPIC's position that the Appellant had failed to diligently pursue his appeal. Accordingly, the matter was set for hearing under section 182.1, to determine whether the Appellant had failed to diligently pursue his appeal.

At the hearing, the Appellant submitted that he had been diligent overall. He had tried to get the report from his chiropractor, but he could not force his chiropractor to provide a report. The Appellant said at one point he made the wrong choice to have his girlfriend deal with this. He wanted to have a lawyer represent him, but he could not afford a lawyer right now. He was currently on a fixed income. He had tried to do what he could and it was very hard for him. Now he had no choice but to handle his appeal himself and he would be more than diligent pursuing it. He felt he was not asking for more than he deserved. His life was ripped apart by the MVAs. He wanted to be re-trained, compensated for his medications and reimbursed for the chiropractic treatments he underwent. He submitted he was not asking for anything out of line. He submitted he had gone over and above in his attempts to get what he deserved from MPIC.

Counsel for MPIC reviewed subsection 182.1(1) of The MPIC Act, and noted that the word "diligently" qualifies the word pursue. Counsel submitted that the analysis was not about the Appellant's intention, but rather his actions. Counsel referred to the definitions of diligence and diligent in the 2nd edition of the Oxford Canadian Dictionary. Diligence is defined as careful and persistent application of effort; diligent is defined as careful and steady in application to one's work or duties and showing care and effort. Counsel submitted that the Appellant's actions had either been absent, or quite far from diligent. The Appellant had failed to provide a reasonable explanation for missing the case conferences. Considering his actions to date, there was no assurance that the Appellant would actually pursue his appeal. Counsel submitted that the

Appellant had failed to diligently pursue his appeal and that it was insufficient for him to state that he now intended to pursue his appeal.

The Commission carefully considered the documentary evidence, the testimony of the Appellant and the submissions of the parties, and concluded that the Appellant had failed to diligently pursue his appeal.

He failed to attend three case conferences without a reasonable explanation. Regarding the first case conference, he said he forgot. Regarding the second case conference, his girlfriend called the Commission and said that they had been in an MVA two months earlier and that the Appellant was in pain. However, the Appellant had not notified the Commission that he would not be attending the case conference. Regarding the third case conference, the Appellant stated that he thought his girlfriend was representing him and would attend the case conference on his behalf. However, the notice of hearing was sent to the Appellant and there was no evidence that he didn't receive it. As well, there was no evidence that the Appellant completed an authorization to appoint his girlfriend as his representative, despite having been provided an Authorization for Representation form over a year earlier. Rather, the Appellant advised Commission staff by telephone shortly after receiving that form that he was not sure if he would appoint his girlfriend as his representative and again advised that he was considering hiring a lawyer.

In addition to missing case conferences, the Appellant failed to return the Commission's telephone calls on several occasions and he failed to claim correspondence and documents sent to him. At one point, Commission staff were unable to reach him by telephone because his telephone number was no longer in service. The Appellant did not provide the Commission with an alternate telephone number. Commission staff searched through the documents provided by MPIC to locate an alternate phone number. While the Commission was able to reach the Appellant at this alternate number, he asked to be called back. Despite Commission staff calling him back as requested and making several further attempts to reach him, the Appellant did not answer his phone and did not return the Commission's calls. A reasonable appellant would have tried to reach out to the Commission in these circumstances. The Appellant did not dispute that he was aware the Commission was trying to reach him.

The Appellant had very little contact with the Commission after July 2017 and no contact with the Commission between September 27, 2018 and February 12, 2019. The Appellant waited a month to contact the Commission after he was advised a hearing would be held on whether or not he had failed to diligently pursue his appeal. Between the time that the matter was scheduled for hearing and the first day of the hearing on May 23, 2019, there is no evidence the Appellant made any attempts to further his appeal. Rather, he attended the May 23, 2019, hearing without any documents.

The Appellant stated that his "domestic difficulties" had prevented him from pursuing his appeal. The Commission did not accept this as a reasonable excuse for his lack of contact and participation. The Commission agreed with a case from the Workers Compensation Appeal Tribunal that "important personal activities" such as divorce are not adequate reasons for failing to pursue an appeal.

The Appellant indicated that as a result of his domestic difficulties he was charged criminally and was incarcerated. The Commission would have considered whether the time of incarceration impacted his ability to pursue his appeal. However, the Appellant refused to indicate when he was incarcerated and for how long. Accordingly, the Commission did not find his incarceration to be a reasonable explanation for his lack of contact and participation.

While the Appellant suggested that he would now pursue his appeal as he had no choice, he then stated that he needed to hire a lawyer. The Appellant first advised the Commission in June of 2015 that he was considering hiring legal counsel. Several years later, he still had not done so, even when advised of this hearing in January, 2019. A reasonable appellant, not having the funds to retain legal counsel, would respond to the Commission, follow-up when asked and attend case conferences as scheduled. Most appellants do not have legal counsel representing them at Commission hearings. While many appellants are represented by the Claimant Adviser Office (CAO), there are other appellants who represent themselves at Commission hearings. There was no evidence that the Appellant had a medical condition that impacted his ability to prepare for and complete a hearing. Rather, the Appellant acted on his own behalf in this hearing and was able to give evidence, answer questions and provide submissions.

The Commission agreed with counsel for MPIC that the use of the word "diligently" in subsection 182.1(1) of The MPIC Act requires an appellant to show care and effort in pursuing an appeal. Based on the foregoing, the Commission found that the Appellant had failed to show reasonable care and effort in pursuing in his appeal. The Commission was therefore of the opinion that the Appellant had failed to diligently pursue his appeal, and the Appellant's appeal was dismissed.

<u>Case #4</u>

In this case, the Appellant died intestate while her appeal was pending before the Commission, and her former spouse and adult children did not come forward to seek the ability to represent the estate in the appeal.

The Appellant was involved in an MVA on August 11, 2014. MPIC denied the Appellant's PIPP benefits and she filed a Notice of Appeal dated October 25, 2015. On January 31, 2017 the Commission was advised by the Appellant's former common-law spouse ("the Former Spouse") that the Appellant had died in October 2016 and the date of death was later confirmed by Funeral Director's Statement of Death.

On February 9, 2017 the Former Spouse advised the Commission that he would attend to paperwork which appointed him the Administrator of the Appellant's estate. By September 13, 2017 the Former Spouse had not yet applied to become Administrator, and further advised the Commission that he did not believe such a process would be beneficial.

The Former Spouse and MPIC counsel attended a case conference on May 14, 2019 to discuss the status of the appeal, as well as the steps necessary for the Former Spouse to take, to be appointed Administrator of the Appellant's estate. A written summary of this conference was sent to the Former Spouse with a request that he advise the Commission whether or not he intended to proceed as the Appellant's estate representative.

On May 29, 2019 the Former Spouse advised the Commission by telephone, later confirmed in writing on June 19, 2019, that neither the Former Spouse nor the Appellant's adult children wished to pursue the appeal.

The Commission fixed a hearing date of October 25, 2019 to consider whether or not the Appellant had failed to diligently pursue her appeal. The Notice of Hearing was sent to the Appellant's last address provided by her; sent to the address listed on the Appellant's initial Notice of Appeal; published in the Saturday, September 28, 2019 edition of the Winnipeg Free Press; and published in the Manitoba Gazette on October 2, 2019. No representative for the Appellant appeared at the hearing.

Subsection 182.1 of The MPIC Act provides the Commission with the discretion to dismiss all or part of an appeal "if the commission is of the opinion that the appellant has failed to diligently pursue the appeal" and provided that, the commission has given "the appellant the opportunity to make written submissions or otherwise be heard in respect of the dismissal."

In this case, there was no evidence of a will or named executor, and no evidence that anyone applied to represent the estate. In fact, the Former Spouse advised in writing that neither he nor the Appellant's adult children wished to purse the appeal. The Commission found that appropriate notice had been effected, and no one appeared at the hearing on behalf of the Appellant. Therefore, it was found that the Appellant and her estate failed to diligently pursue the appeal, and as such, the appeal was dismissed.

Case #5

In this case, the Appellant died intestate while his appeal was pending before the Commission, and despite efforts made by his healthcare worker, the CAO and the Commission to find family members, no representative could be found for his estate.

The Appellant was involved in an MVA on August 7, 2000. MPIC denied the Appellant's claim and his counsel filed a Notice of Appeal dated October 27, 2004. The Appellant was next represented by the CAO who advised the Commission that the Appellant died on January 25, 2017.

As there appeared to be no will, inquiries were made by the CAO as to who may be appointed to deal with the Appellant's estate. Over the next year, efforts were made to contact family members, including children from whom the Appellant was estranged. By December 22, 2017, the CAO advised the Commission that no family members had come forward with regard to the Appellant's estate.

A Case Conference was held by the Commission on May 2, 2019 to consider the issue of representation of the estate. A Funeral Director's Certificate of Death was provided and the Commission heard that as of the date of the Case Conference, the Appellant's healthcare worker had been unable to locate any family members willing to represent the Appellant's estate on the appeal.

The Commission fixed a hearing date for July 11, 2019 to consider the issue of whether the Appellant had failed to diligently pursue his appeal. The Commission issued a Notice of Hearing

dated May 9, 2019 with publication in the Saturday, May 18, 2019 edition of the Winnipeg Free Press, as well as publication in the Manitoba Gazette on May 22, 2019.

The hearing was convened on July 11, 2019 attended by counsel for MPIC as well as the CAO Representative (the "Representative") and the Director of the CAO (the "Director"). The Representative set out his efforts in trying to locate relatives of the deceased Appellant and the Director confirmed its inquiries to confirm that no probate applications had been filed. The Representative sought to withdraw his representation based upon his inability to receive instructions.

In considering subsection 182.1(1) of The MPIC Act, the Commission agreed with MPIC's counsel submission that this section was intended to streamline government operations and, as such, the section does not require a consideration of the merits of the appeal. It simply requires that the Commission be of the opinion that the Appellant has failed to diligently pursue the Appeal.

The Commission considered the evidence of the Appellant's death, the efforts of the CAO and healthcare worker to locate relatives, the evidence of the lack of response from the Appellant's relatives and the absence of probate documents being filed. The Commission also considered the evidence of the lack of responses to the Notices of Hearing, and despite all reasonable efforts at notice, no one appeared at the hearing. The Commission concluded that the Appellant and his estate had failed to diligently pursue the appeal and therefore, the appeal was dismissed.

2. Extension of Time Limit to file a Notice of Appeal

The MPIC Act provides a time limit for appealing decisions to the Commission. However, the Commission has the ability to extend this time limit. Subsection 174(1) of The MPIC Act states that a claimant may appeal an Internal Review Decision ("IRD") to the Commission within 90 days after receiving notice of the decision or within such further time as the Commission may allow.

The following cases illustrate factors the Commission may consider in exercising its discretion to extend the time limit.

Case #1

The Appellant was injured in an MVA in July, 2006. The Appellant's Income Replacement Indemnity (IRI) and Personal Care Assistance (PCA) benefits ceased in 2007. In 2009, the Appellant claimed benefits for her recent onset of an epileptic seizure disorder, her reduced range of motion in her left shoulder, and the numbness in her hands and legs, allegedly related to the MVA. This claim for benefits resulted in a March 2010 case manager's decision that the medical evidence did not support a causal relationship between the Appellant's current complaints and the MVA, and further determined that the Appellant's MVA injuries did not prevent her from performing her pre-accident employment.

Later dealings with the Appellant resulted in the Appellant's case manager issuing a decision dated September 16, 2015 which denied IRI and PCA benefits related to the Appellant's recent diagnosis

of "possible bilateral adhesive capsulitis of the shoulders". This decision was upheld in March, 2016 by an Internal Review Decision (the "2016 IRD"). The Appellant filed a Notice of Appeal of the 2016 IRD to the Commission in April, 2016 on the basis that her "medical conditions like arms/shoulder pain and head injury and effects [were] not taken into consideration by MPI and [were] caused by MVA." The Appellant was represented by the CAO, and that Appeal proceeded to mediation on September 7, 2017.

Eventually, on May 17, 2017, the Appellant also filed an Application for Review of MPIC's March 2010 decision on the basis that she had suffered a head injury and loss of consciousness in the MVA. By decision dated June 30, 2017 (the "2017 IRD"), the Internal Review Office denied the Appellant's Application on the basis that the Appellant failed to provide a reasonable excuse for the delay in filing her Application for Review (i.e., almost 7 years since March 2010), and MPIC was not prepared to grant an extension of the time for filing.

On May 28, 2018 (8 months past the 90-day appeal deadline), the Commission received the Appellant's Notice of Appeal of the 2017 IRD. The late filing required that the Appellant provide reasons for the delay. The Appellant stated that the delay was caused by a miscommunication between herself and the CAO, as well as her "confusion, mental fatigue, memory issues and chronic headaches" which allegedly resulted from her injury, and for which she had been "gathering additional evidentiary information to back [her] case and [her] current health status."

The Commission heard arguments and reviewed the case file to determine whether it should allow the Appellant an extension of time to appeal the 2017 IRD. Although not normally admissible into evidence, the assertions in this case about the mediation issues and confusion as to representation by the CAO, combined with the agreement of the parties, warranted a review of the separate mediation file of the 2016 IRD.

Subsection 174(1) of The MPIC Act provides the Commission with discretion to extend time for appealing an IRD. The Commission considered the following factors in exercising its discretion:

1. The actual length of delay compared with the legislated 90-day time period;
2. The reasons for delay;
3. Whether the delay has resulted in prejudice;
4. Whether there has been any waiver respecting the delay; and
5. Any other factors relevant to a just outcome.

The Commission also considered the following factors set out in *R. v. Roberge*, 2005 SCC 48:

1. Whether the applicant formed a *bona fide* intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time;
2. Whether counsel moved diligently;
3. Whether a proper explanation for the delay has been offered;
4. The extent of the delay;
5. Whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and,
6. The merits of the application for leave to appeal.

The Commission considered the actions of the CAO, the Appellant's previous representative, as well as the merits of the Appellant's appeal.

The Appellant testified that she had provided the 2017 IRD to the CAO. However, she was unable to provide any evidence of when she received the 2017 IRD or when she provided it to her CAO. In her Notice of Appeal, she stated that "the major reason for the delay was a miscommunication between me and the claimant adviser office*".* However, the Appellant was unable to provide any details of any communication with respect to the filing of the appeal, repeatedly stating that she could not remember. While the Appellant testified as to experiencing cognitive impairment, she also admitted to having "good days" which allowed her to independently conduct her activities of daily living without assistance. Further, despite the Appellant's testimony of her referral from the Manitoba Brain Injury Association, and numerous references in the CAO file to medical practitioners, including neurologists, there was no such medical documentation on the file, and the Appellant declined the panel's offer to obtain such medical documentation. The panel also noted the inconsistency between the Appellant's statements that she is at risk for grand mal seizure (implying these are not controlled) yet she still held a driver's licence. The panel found the Appellant to be evasive and lacking credibility with respect to her claims of being unable to remember many important details.

The panel considered the mistakes made by the CAO office, and accepted that there should have been notes on file to indicate when the 2017 IRD was received, and what further steps would be taken. The panel noted that the absences of the CAO who handled the file should have resulted in the Appellant's file being reassigned on a timelier basis. Neither the former representative, nor the representative later assigned to the Appellant's file (and who discovered the 2017 IRD) were called as witnesses. There was a notation on the CAO file that the Appellant spoke with the former Director on January 9, 2018. However, the former Director was not called as a witness. Therefore, the panel concluded that there was no evidence upon which it could conclude, on a balance of probabilities, that the Appellant provided the 2017 IRD to the CAO during the 90-day appeal period.

Finally, the panel found that the merits of the appeal were questionable in that the Appellant had failed to provide a reasonable excuse for the seven year delay in requesting a review of the March 2010 decision. The panel further noted that in 2015, when seeking compensation related to loss of mobility in her arms, the Appellant was represented by legal counsel, yet did not raise the issue of the March 2010 decision. Therefore, after considering the above factors, as well as the evidence, the Commission found that the Appellant had not met the test of providing a reasonable excuse for failing to appeal the 2017 IRD within the prescribed time limit. Accordingly, the Commission declined to grant an extension of the time limit.

<u>Case #2</u>

The Appellant was injured in an MVA in June 2004 and sought PCA benefits from MPIC as a result. In October of 2017 her case manager issued a decision advising that following an assessment of her needs using MPIC's PCA tool, the Appellant did not meet the minimum score required and as such, did not qualify for reimbursement of PCA expenses as of October 6, 2017.

This information was followed by a standard paragraph advising the Appellant of the review process and the deadlines for applying for review if she was not satisfied with the decision.

On October 18, 2017, the Appellant filed an Application for Review within the prescribed time frame. An IRD upholding the case manager's decision was issued on October 27, 2017. The IRD set out standard information regarding the appeal process and deadlines as well as information regarding the availability of the CAO.

The Appellant filed a Notice of Appeal from this IRD with the Commission on April 8, 2019, approximately 15 months after the appeal period had expired. The Appellant sought an extension of the 90-day time limit and explained that the reason for her delay and for seeking the extension was due to the impact upon her of her mother's illness and death, which followed her receipt of the IRD. She explained that she was quite preoccupied by her mother's death and associated tasks which fell to her, followed closely by the Christmas holiday. By the time she revisited the IRD following all of that, her 90-day time limit was up.

MPIC took the position that additional time should not be extended for such a late filing (16 months) of the appeal.

A hearing was held to determine whether the Commission should exercise its discretion under subsection 174(1) of The MPIC Act to extend the time allowed for filing the appeal.

The Appellant testified at the hearing that she was her mother's primary caregiver. She explained that her mother went into the hospital on October 17, 2018 and passed away on November 9, 2018. She described the difficulties she encountered in clearing out her mother's apartment and resolving her estate. She felt this was a good reason for her delay in filing her appeal.

Counsel for MPIC asked the Appellant to explain the fact that the IRD was dated October 27, 2017, over a year before her mother passed away on November 9, 2018, even though her original explanation to the Commission indicated that her mother had passed away 3 weeks after the IRD was issued. The Appellant said that she had been dealing with this case and associated frustrations for many years. These frustrations included constantly changing case managers and a legal advisor telling her that her case would never be resolved. However, she confirmed that she had still been able to read and seek timely review of the case manager's decision, and that she had eventually reviewed the IRD in full and had seen the section setting out her appeal rights and the deadlines.

The Appellant noted that she also had an open claim for IRI benefits relating to shoulder surgery and that she had thought that all her appeals were under one claim.

The panel expressed some concern regarding the inconsistencies in the Appellant's account of the delay and her mother's illness and passing, and found that the fact that the Appellant's mother became ill and passed away one year after the IRD was not a reasonable excuse for failing to file the appeal within the required timeline. The Appellant had not presented a persuasive explanation for the discrepancy in dates. Nor was the Appellant's explanation that she was frustrated and confused by the process and changing of case managers found to be a reasonable explanation for missing the deadline. She did not present evidence that she tried to avail herself of the services of the CAO or take other reasonable steps to clarify her confusion, such as contacting the Commission

or previous legal counsel. She had ample opportunity to clarify her confusion in the 15 months which passed after receipt of the IRD, but there was no evidence that she had done so. The Appellant failed to meet the onus upon her of presenting evidence to support her reasons for the delay.

Accordingly, the Commission found that based on the totality of the evidence, both oral and documentary and the valid relevant factors surrounding the delay, the Appellant had not provided a reasonable excuse for failure to appeal the IRD within the 90-day time limit set out in subsection 174(1) of The MPIC Act. The Commission did not extend the time limit within which the Appellant may appeal the IRD to the Commission.

Case #3

The Appellant was injured in an MVA on February 14, 2017 and sought funding from MPIC for physiotherapy treatment for neck pain which she felt resulted from the MVA.

The case manager issued a decision dated March 28, 2018, taking the position that the neck pain was not MVA related and denying funding for physiotherapy treatment. At the end of this letter the case manager set out a provision advising the Appellant of the internal review process and the deadline for applying for review if she was not satisfied with the decision.

On May 27, 2018 the Appellant filed an Application for Review of the case manager's decision and on August 24, 2018 an IRD was issued upholding the case manager's decision and dismissing the Appellant's Application for Review. The IRD also included provisions for appealing that decision to the Commission with time limits and deadlines for doing so and information about the CAO.

The Appellant filed a Notice of Appeal from the IRD with the Commission on May 23, 2019, which was approximately 6 months after the end of the 90-day appeal period set out by The MPIC Act.

The Appellant sought an extension of time to file the appeal and a hearing was held before a panel of the Commission to consider this request.

The Appellant argued that the reason for her delay in filing the appeal was due to her frustration with the case management and review process. When she received the IRD in the mail, she found matters extremely overwhelming, and waited to be examined by a neurologist and collect their medical opinion regarding her condition. She testified that when she received the IRD she felt so nervous, devastated and rejected that she could not even finish reading the letter to the end. She testified that she was unaware of the availability of the CAO to assist with appeals and unaware of the appeal deadlines. Once she did go back and read the letter in full, she was afraid she would not be able to afford the financial cost to her family of appealing the IRD. She admitted that she contacted MPIC several times during those months, seeking relief, but that they gave her the cold shoulder. She was under stress due to chest pain and had to focus on her heart condition. It was not until she saw a pain specialist at the end of May 2019 that she became aware that she could appeal the IRD at no cost to her, and was provided with contact information for the CAO. The

Appellant submitted that 6 months was not a lengthy period of delay and that for all these reasons the 90-day time limit for filing her appeal should be extended.

MPIC submitted that the Appellant had not noted her health concerns in the original letter to the Commission, which initially outlined her reasons for delay. It was submitted that in spite of the Appellant's claims that she was frustrated and overwhelmed, there was no evidence of any cognitive difficulties or that she lacked the capacity to understand the process. Nor was it reasonable, MPIC submitted, to delay filing an appeal until she received medical information, especially when she had been able to file her Application for Review while indicating that she was obtaining medical advice that would be forthcoming.

Counsel referred the panel to several previous decisions of the Commission where it was found that frustration with the process and delay in accumulating medical evidence were not reasonable excuses for failing to meet the time limits.

The panel reviewed the Commission's discretionary power to extend time limits under subsection 174(1) of The MPIC Act and the various relevant factors which the Commission considers in that regard.

The panel found that the Appellant was advised of the 90-day time limit and the availability of services from the CAO in the body of the IRD.

It found that the fact that the Appellant did not read the IRD letter through until the end was not a reasonable excuse for the delay, also noting that it seems unlikely that the Appellant did not read the decision to the end at some point during the 90 days following the IRD, making her aware of the appeal process and the availability of the CAO. In fact, the Appellant stated that eventually she read the letter many times, in spite of her frustration.

The panel also noted the Appellant's competence in filing her Application for Review pending receipt of further medical information. The evidence that she had to concentrate on her heart condition was not found to be a reasonable excuse, as she did not raise this concern in her original letter to the Commission and also admitted that she had continued to attend to doctor, massage and physiotherapy appointments for her neck pain, as well as to contact MPIC several times.

After considering the various factors surrounding the delay and the totality of the documentary and oral evidence, the Commission found that the Appellant had not provided a reasonable excuse for her failure to appeal to the Commission within the 90-day time limit set out in subsection 174(1) of The MPIC Act. The Commission did not extend the time limit within which the Appellant may appeal.

3. Whether there is a Causal Connection between the MVA and the Appellant's Symptoms

In order to be entitled to PIPP benefits under The MPIC Act, an Appellant must establish, on a balance of probabilities that his or her injuries were caused by the MVA. In the following cases, the Commission carefully considered the evidence and the reports of the medical experts to determine whether there was a causal connection between the MVA and the Appellants' injuries and symptoms, in order to determine the Appellants' entitlement to benefits.

Case #1

In this case, the issue was whether the Appellant's left wrist symptoms were causally connected to the MVA, thereby entitling her to PIPP benefits.

The Appellant was driving her vehicle on a gravel road in May, 2010, when she lost control and the vehicle rolled over into a ditch. In late 2011, she contacted MPIC to request PIPP coverage related to her left wrist symptoms, which MPIC denied. At the appeal hearing, there was no dispute that the Appellant was ultimately diagnosed with a left wrist injury in November, 2014, specifically grade III lunotriquetral and scapholunate ligament tears. The dispute was whether this injury was caused by the MVA.

It was the Appellant's position that her left wrist was injured in the MVA. She argued that after the MVA, her left wrist was swollen and sore, and so the next day she went to see her general practitioner, who referred her for an x-ray, which did not show any fracture or dislocation. Her ribs and back were causing her greater pain, and she thought her wrist was sprained and that the sprain would go away, so she concentrated her chiropractic treatment on her ribs and back. She returned to work initially on light duties. When she resumed full duties, her wrist would get sore by the end of the day. Eventually, the wrist pain became greater, and she was referred for a further x-ray, a CT scan, an MRI and eventual surgery and diagnosis.

It was MPIC's position that based on the significance of the eventual diagnosis, if the Appellant had injured her wrist in the MVA, she would have been complaining of pain and restricted range of motion to all of her health care providers. MPIC's Health Care Services ("HCS") consultant opined that there had not been consistent reporting by the Appellant regarding her left wrist pain from the time of the MVA. It was also MPIC's position that the Appellant's left wrist injury could have arisen by virtue of repetitive use over the course of her working life.

The Commission carefully reviewed the documentary evidence, and found that the Appellant had consistently reported problems with her left wrist to her health care providers over the 15-month time period beginning right after the MVA. As well, the Appellant's surgeon, who examined and performed surgery on the Appellant's wrist, was clear in stating that the Appellant's wrist did not objectively demonstrate signs of long-standing advanced scapholunate collapse or arthrosis. The Commission determined that this refuted the HCS consultant's suggestion that the Appellant's left wrist complaints arose due to degenerative causes. The Appellant's surgeon was also consistent in stating that it was likely that the Appellant's ligament tears were caused by the MVA, although he did state that he could not state "for sure" whether or not it was causally related.

The Commission found that, applying the threshold test of a balance of probabilities, rather than a test of scientific certainty, based on the Appellant's evidence, the documented reports of her left wrist complaints and the evidence of the surgeon, the Appellant met the onus upon her to establish a causal connection between the MVA and her left wrist symptoms. Consequently, the Appellant was entitled to PIPP benefits with respect to her left wrist symptoms.

Case #2

This case is similar to the previous one. However, in this case, the Commission found that the Appellant did not meet the onus of establishing, on a balance of probabilities, that her right rotator cuff tear was caused by the MVA.

The Appellant was injured in November, 2012, when she was a passenger in a vehicle that was rear ended by another vehicle. In late 2013, she contacted MPIC to request PIPP coverage related to her right rotator cuff tear, which MPIC denied. At the appeal hearing, it was not disputed that there was evidence that the Appellant had been diagnosed with a right rotator cuff tear, initially by ultrasound in June, 2013, and then by MRI in January, 2014. The dispute was whether the tear was caused by the MVA.

The Appellant argued that the rotator cuff tear was caused by the MVA. She noted that immediately after the MVA, she had pain in her right shoulder. She went to the Emergency Room the following day complaining of acute pain in her right shoulder, difficulty moving her arm and redness around her neck and shoulder area. She said that she had trouble lifting her young children, and that she had to have her two older sons help around the house. She also said that she had to have her sister come and help out around the house due to her difficulty with her right shoulder. As well, although she did apply for and obtain work as a housekeeper at a hotel, she said she had to quit that job due to her shoulder pain.

In January, 2013, her husband began working as a Superintendent, and she assisted him with some of the housekeeping duties associated with that job. As well, she performed some childcare duties and some of the housekeeping duties at home during this time. She had also been working as a housekeeper for 15 years. She eventually went to see a physiotherapist in February, 2013. Although her physiotherapist and her chiropractor reported on her treatment, they did not comment on the cause of her rotator cuff tear. Her family physician supported the Appellant's use of physiotherapy as treatment for her shoulder pain. However, in his reports he did not expressly say that her rotator cuff tear was caused by the MVA.

MPIC argued that that there was no medical evidence supporting that the Appellant suffered a rotator cuff tear at the time of the MVA. MPIC's Health Care Services (HCS) consultant opined in his report that a rotator cuff injury is not a probable sequelae of a rear end collision. He noted that the Appellant did not receive services from a health care professional until February, 2013, two and a half months after the MVA, which pointed to the absence of an acute injury in the MVA. As well, the most common cause of rotator cuff tendinopathy is overuse, and based on the demands of the Superintendent position, it was possible that the symptoms the Appellant reported in February, 2013, stemmed from her work duties combined with caring for her children.

The Commission found that there was no medical evidence supporting the Appellant's position. Rather, the only medical evidence commenting directly on causation was from MPIC's HCS consultant, and he was of the opinion that her right rotator cuff tear was not caused by the MVA.

Further, the Appellant did not seek further medical attention for two and a half months after the MVA, and during that time she looked after her young children at home, did some housekeeping duties at home (assisted by her two older sons and her sister), assisted her husband with his Superintendent duties, and as well sought and obtained a housekeeping job with a hotel. The Commission found that the Appellant did not meet the onus of establishing, on a balance of probabilities, a causal connection between her right rotator cuff tear and the MVA. Consequently, the Appellant was not entitled to PIPP benefits with respect to her right rotator cuff tear.

Case #3

In this case, the evidence of the Appellant's surgeon, who had operated on the Appellant's back both before and after the MVA, led the Commission to conclude that the MVA caused deterioration in the Appellant's back condition.

The Appellant was involved in an MVA in December of 2013. On June 9, 2015 he contacted MPIC to open a bodily injury claim regarding injuries to his back. The Appellant had a history of back pain and back surgery years prior to the MVA. Although he did not have pain in his back immediately following the MVA, approximately 6 weeks later he began to experience pain in his buttock, leg pain and back spasms, which got progressively worse over time. An MRI showed that the screws in his back from his previous back surgery had snapped and he underwent another back surgery, with the same surgeon, to replace the damaged screws.

The Appellant's case manager issued a decision indicating that MPIC did not agree that the damage to the screws and injury to his back were caused by the MVA, denying his entitlement to PIPP benefits. Upon review, the IRO upheld the case manager's decision, and the Appellant appealed this IRD to the Commission.

The Appellant testified regarding his history of back pain and surgery, and described the increase in pain following the MVA and the circumstances under which it arose. He explained that it felt different from his previous back pain, starting in his buttock, more painful and sharper than any previous sciatica. However, he was used to dealing with back pain for many years, and so did not immediately complain of it to his doctors. He tried physiotherapy and medication first, but then the pain became so severe that he sought help from his family physician and then from his surgeon.

The Appellant relied upon reports and testimony from his back surgeon, who performed both back surgeries, provided a history of the Appellant's back condition and treatment, examined the Appellant and reviewed the diagnostic tests that confirmed the broken screws. The surgeon concluded and testified that the Appellant had been doing well with the long fusion of his back and that his current problems stemmed from the MVA and subsequent fracture of screws. The patient had been stable prior to the MVA, and then, after breaking screws in the MVA, had significant instability through flexion and extension.

MPIC's HCS consultant also provided reports and testified at the hearing. In his view, broken hardware is a relatively common finding in post-operative cases. He also maintained that the history of the Appellant's pain post MVA did not support the surgeon's view that the Appellant was pain-free before the MVA and then suffered progressive pain afterwards. The consultant found that a temporal relationship did not exist between the incident and the progressive pain.

The surgeon, upon reviewing this opinion, did not agree. He explained that in his extensive experience with back surgery and research in the area, as well as his familiarity with the patient and his history, he had found that even if the screws had broken prior to the MVA, there had been enough stability in the spine to allow for resolution of back pain. This completely changed after the MVA, which in his view caused progression of the instability at that level, leading to the pain. He confirmed his stated opinion that the Appellant was doing very well up until the MVA, and that the MVA led to the screw breakage. Once the screws were broken, more stress was placed upon the bone graft and a stress fracture resulted. This explained the delay in the presentation of the Appellant's back pain. The stress fracture developed over time and overloaded the bone graft and fusion mass, without the screws there to support it. Without x-rays from the day before and the day after the MVA there was no 100% science to prove this, but the surgeon remained of the view that the MVA led to instability of the bone graft.

The panel noted the onus upon the Appellant to show, on a balance of probabilities, that the back condition which required the second surgery was caused by the MVA, thereby entitling him to PIPP benefits. The panel reviewed the documentary evidence on file, the testimony of the Appellant, his surgeon, the HCS consultant and the submissions of both parties. The panel agreed with MPIC that the Appellant had a lengthy history of back pain and underwent major back surgery in 2007. After recovering from that surgery, he also encountered some sciatic issues. He received treatment to deal with the problem, including Gabapentin for this neuropathic pain. Then, after the MVA, he experienced some buttock pain, leg pain and tingling, followed by full back pain so acute that it led to another back surgery.

While the panel recognized that the Appellant suffered from a lengthy history of back pain, it accepted his testimony that following the MVA, he experienced a different kind of mechanical back pain. This testimony was consistent with and confirmed by his surgeon's testimony and opinion. While MPIC pointed to a temporal lag between the MVA and the reporting of back pain, the surgeon had the advantage of treating the patient for a lengthy period. This included operating on him and making intraoperative observations, and the panel accorded a great deal of weight to his testimony, which it found to be clear, succinct and reasonable. Noting that spinal surgery was his area of expertise, the panel accepted the surgeon's evidence that the screws broke as a result of the MVA, followed by greater flexion of the lower spine and irritation of the nerve. This gave rise to right buttock pain and tingling in the leg approximately one month later, as a result of the increased flexion and spinal instability, and then to a stress fracture in the bone graft, causing severe back pain and leading to the second surgery. Accordingly, the panel accepted the surgeon's evidence that this condition was caused by the MVA and found that the Appellant had met the onus upon him of showing on a balance of probabilities that the back symptoms and condition which led to his second back surgery were caused by the MVA. The appeal was allowed and the matter referred back to the Appellant's case manager for review and determination of his PIPP benefit entitlements.

4. Reimbursement of Expenses

The MPIC Act and regulations contain many provisions dealing with the reimbursement of expenses. Paragraph 136(1)(d) of The MPIC Act provides for the reimbursement of expenses which are prescribed by regulation. Sections 34 and 36 of Manitoba Regulation 40/94 also address the reimbursement of expenses, such as those incurred for medical equipment and appliances.

The following case illustrates some of the issues faced by the Commission when considering claims for reimbursement of expenses.

Case #1

The Appellant was involved in an MVA in August, 2017. At the time of the MVA, the Appellant was travelling out of town. In the trunk of his car, he had his portable CPAP machine. He used the CPAP machine because years earlier, he had been diagnosed with obstructive sleep apnea ("OSA"), and he was required to use the CPAP machine every night to treat the OSA. As a consequence of the MVA, the portable CPAP machine was damaged. After the MVA, the portable CPAP machine did not work, and was not able to be repaired. The Appellant eventually purchased a new portable CPAP machine and sought reimbursement from MPIC for the cost of the new machine, which MPIC denied. The Appellant acknowledged that his OSA was not exacerbated by the MVA and that his need for the CPAP machine was not in any way related to the MVA.

The Appellant argued that he was entitled to be reimbursed for the expense incurred to replace his CPAP machine, pursuant to the provisions of section 36 of the Regulation, and that its interpretation ought not to be limited by all of the requirements of section 34. He also argued that ambiguous provisions of The MPIC Act should be construed against MPIC. In the alternative, the Appellant argued that if reimbursement could not be made under section 36, then reimbursement should nevertheless be made under the Regulation because the CPAP machine was required by the Appellant in order for him to comply with his driver's license requirements.

MPIC argued that the Appellant's proposed interpretation of section 36 could not stand. MPIC argued that section 36 of the Regulation should be interpreted in accordance with its plain and ordinary meaning, and this required looking at the context in which it falls within the Regulation. Section 34 of the Regulation requires that for an expense to be reimbursed under section 36, it must have been incurred for a medical reason related to the accident, which was not the case here. Further, the legislation is not ambiguous.

The Commission considered the evidence, the arguments of the parties, and the applicable case law, and determined that section 34 of the Regulation is the primary section, to be consulted first when assessing whether an expense incurred for the purchase, rental, repair or replacement of clothing, a medical appliance or medical equipment would be reimbursed, subject to any limitations on the reimbursement imposed by section 35, section 36, section 37 or Schedule B. Therefore, as the first step to determine whether reimbursement is available, the expense must first meet the conditions required by section 34 of the Regulation, which are as follows:

1. The expense must be incurred for the purchase, rental, repair, replacement, fitting or adjustment of clothing or a medical appliance or medical equipment; and
2. The expense must be incurred for a medical reason related to the accident; and
3. The expense must be incurred on the prescription of a physician, dentist, optometrist, chiropractor, physiotherapist, registered psychologist, athletic therapist, nurse practitioner, clinical assistant or physician assistant.

The Appellant acknowledged that his OSA was not in any way affected by the MVA and he did not argue that his medical need for the CPAP machine was related to the MVA. Thus, the Appellant's expense incurred to replace his CPAP machine that was damaged in the MVA was not incurred for a medical reason related to the accident. Accordingly, no reimbursement could be made under section 34 of the Regulation, and section 36 of the Regulation was therefore inapplicable. Section 36 provides a limitation on the reimbursement of expenses in circumstances where the victim wore or used an object before the accident, but it only applies in respect of an expense that falls within the provisions of section 34.

The Appellant had testified that his use of the CPAP machine at night was a "requirement of his driver's license". However, counsel for the Appellant could not point to any documentary evidence which confirmed this testimony. In any event, even if the Appellant's use of the CPAP machine was a restriction on his driver's license, the Appellant did not establish how that would entitle him to reimbursement for the expense in question. The Commission was not aware of a provision in The MPIC Act or the Regulation which expressly permits the reimbursement of expenses incurred solely for the purpose of repairing or replacing medical devices required by the victim of an accident in order for the victim to comply with a driver's license restriction (i.e. absent a medical reason related to the accident).

Based on its interpretation of the legislation, as well as on the Appellant's evidence, the Commission found that Appellant had failed to establish, on a balance of probabilities, that he was entitled to be reimbursed for the expense incurred to replace his CPAP machine that was damaged in the MVA.

5. Termination of Benefits

Section 160 of The MPIC Act states that MPIC may terminate benefits where the claimant knowingly provides false or inaccurate information to MPIC. It also allows for a termination of benefits where a claimant refuses or neglects to produce information, or to provide authorization to obtain the information, when requested by MPIC in writing.

In the following case, the Commission carefully considered the testimony of the Appellant, as well as all of the other evidence, to determine whether the Appellant's benefits had been properly terminated by MPIC.

Case #1

The Appellant was injured in an MVA on June 5, 2009, following which he received PIPP benefits including PCA and IRI. Based upon an MPIC investigation, including surveillance, MPIC concluded that the Appellant did not have a physical impairment of function, and further, he had provided false and inaccurate information. The Appellant's PIPP benefits were terminated pursuant to paragraph 160(a) of The MPIC Act on the basis that the Appellant had knowingly provided MPIC with false information. Pursuant to subsection 189(1) of The MPIC Act, MPIC requested that the Appellant reimburse certain PCA benefits he received.

The issues on appeal were whether the Appellant's PIPP benefits were properly terminated, and whether MPIC was entitled to repayment of $26,667.94 in PCA benefit payments already made.

MPIC submitted that the Appellant's subjective reporting of his physical and emotional functioning, which resulted in the Appellant being awarded PCA benefits, was inconsistent with video surveillance images. Further, MPIC referenced an incident in which the Appellant and his wife were not forthright in providing information about the Appellant's condition to hospital staff and to the Appellant's psychologist. Therefore, MPIC submitted that they had knowingly provided false or inaccurate information, which further brought into question the credibility of their testimony.

Over six days of hearing, the panel heard testimony from family members and long-time friends of the Appellant, who had each been involved in the Appellant's post-MVA personal care. Witnesses were excluded from the hearing room to avoid testimony being tainted. The witnesses testified to the Appellant's behaviour before the MVA and how it had significantly deteriorated post-MVA. The panel found all of the witness testimony to be unique, consistent, credible and reliable, and without exaggeration or embellishment. The panel found that the testimony of the Appellant and his wife was corroborated by the other witnesses, as well as medical documentation or MPIC notes.

Shortly after the MVA, the Appellant was diagnosed with a traumatic brain injury (TBI). The panel found, on a balance of probabilities, that the evidence supported a finding that the Appellant's behaviour and emotional functioning was markedly different after the MVA, such that PCA was required to assist with the Appellant's daily personal needs, as well as to supervise him.

In considering the surveillance videos, the panel found that it was never explained to the Appellant why supervision was provided, nor what the meaning, or expectation was of supervision. Further, MPIC does not provide pamphlets or policies that describe supervision requirements. Documentation corroborated the Appellant's and witnesses' testimonies that the approval of 20 hours per day of supervision was not defined, and that the provision of a cell phone to the Appellant implied that he may be left on his own. Medical records corroborated the witnesses' testimony that they followed medical advice, and supervised in a manner that facilitated and encouraged the Appellant's independence. The panel found that it was unrealistic to expect that the Appellant would never be out and about on his own, especially when he did not want to be supervised. The panel also found some flaws in MPIC's system of supervision when the amount paid is capped by

the legislation. Although the Appellant was told he would obtain 20 hours per day of PCA which he must document and claim at minimum wage, he was never reimbursed for that time.

The panel found that the Appellant and his wife had been dishonest in reporting the Appellant's functioning and whereabouts to hospital staff and MPIC, during one of his disappearances. The panel agreed with MPIC that honesty and good faith go to the heart of the relationship between the insurer and the insured, and cautioned the Appellant to remember that obligation. Nonetheless, the panel accepted the explanation of the Appellant and his wife that the dishonest statements had been made in response to one specific incident in order to avoid the Appellant's involuntary hospitalization, which he feared, and which had previously been discussed with, and documented by, the Appellant's psychologist. The Appellant's explanation was supported by the uncontroverted witness evidence which described the Appellant later resisting and being handcuffed by police officers, when they arrived at the Appellant's home to hospitalize him.

The panel found that there was no evidence to support, as credible, MPIC's claim that the Appellant was exaggerating his symptoms for secondary gain. The panel also found that the surveillance video did not support a conclusion that the Appellant provided false information to MPIC regarding his physical and emotional functioning. In fact, the panel found that certain video surveillance corroborated the witness testimony of the Appellant's erratic behaviour, and supported the Appellant's description of the physical loss of function in his injured right hand.

The panel concluded that MPIC had erred in finding that the Appellant knowingly provided false or inaccurate information regarding his physical and emotional functioning. The panel therefore found that the Appellant was not required to repay PCA benefits. The Commission allowed the appeal and ordered reinstatement of the Appellant's PIPP benefits. The matter was referred back to case management for a determination of benefits.

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