Automobile Injury Compensation
Appeal Commission

# Annual Report
# 2020-2021

Manitoba

**Automobile Injury Compensation Appeal Commission**
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**MINISTER OF FINANCE**

Legislative Building
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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 0V8

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, 2021.

Respectfully submitted,

Honourable Scott Fielding
Minister of Finance

Manitoba

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

Dear Minister:

Subsection 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, 2021 which includes a summary of significant decisions.

Yours truly,

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LAURA DIAMOND
CHIEF COMMISSIONER

# ANNUAL REPORT OF THE AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION FOR FISCAL YEAR 2020/21

## 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 2020/21, which is April 1, 2020 to March 31, 2021, was the 27th 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 part of this fiscal year, there was an administrative secretary vacancy equivalent to 1.0 FTE.

In addition, there are 10 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 2020/21, 204 appeals were filed at the Commission, compared to 203 in the fiscal year 2019/20.

## 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 2020/21 fiscal year, 51% of all appellants were represented by the Claimant Adviser Office, compared to 69% in 2019/20.

## 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 204 new appeals that were filed during the 2020/21 fiscal year, 129 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.

## Changes to Service Delivery Due to COVID-19

Service delivery at the Commission was altered in fiscal year 2020/2021 due to the COVID-19 pandemic. The office remained open to serve the public and Commission staff worked remotely on a rotating schedule to minimize the number of individuals in the office at any given time. Many scheduled in-person hearings were adjourned, where the parties did not feel comfortable attending at the Commission offices. During this time, case conference hearings were generally held via teleconference. Most hearings did proceed using a variety of formats, which included minimal in-person attendance. Many virtual (remote) hearings were conducted, or a hybrid model was used, where some parties, witnesses or Commissioners attended in person but others participated remotely. The Commission made every effort to accommodate individuals who lacked the technological capacity to access virtual hearings by providing access to the technology required to allow virtual participation from a separate room at the Commission's offices. As a result, the Commission is now in the process of establishing a separate space in its office as a Public Access Workstation in order to increase such opportunities for access. Throughout the fiscal year, all in-person participants of a hearing adhered to public health protocols, such as wearing face masks in the Commission's office and maintaining a minimum six feet of space between parties in the hearing room. Plexiglas screens were used in the hearing room to provide additional protection against the spread of COVID-19.

## 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 seven 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 2020/21. 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 and of benefit to an appellant who lives or works elsewhere, 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 2020/21, appellants were successful in whole or in part in 9% of the appeals heard by the Commission, compared to 25% in 2019/20. In addition, the work of the Commission resulted in the resolution of 3 appeals through settlement or withdrawal and a formal hearing or decision was not required.

## Resolutions

The 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.

- 6 days of hearings were scheduled but the appeals were withdrawn or settled prior to the commencement of the hearing.
- 2 appeals were withdrawn or settled prior to the conclusion of the hearing or issuing of a decision.

## Hearing Activity

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

| Fiscal Year | Hearings | Case Conferences | Total Hearings |
|---|---|---|---|
| 2020/21 | 15 | 52 | 67 |
| 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 |

While there were less hearings overall, there was an increase in complex multi-day hearings held in the 2020/21 fiscal year. In addition, some hearings and case conferences were postponed as they could not be accommodated while adhering to public health orders during the COVID-19 pandemic and technology for remote hearings was not available.

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 |
|---|---|---|---|---|---|
| 2020/21 | 35 | 6 | 52 | 4 | 97 |
| 2019/20 | 41 | 7 | 91 | 14 | 153 |
| 2018/19 | 40 | 23 | 75 | 4 | 142 |

## 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 2020/21:

- Files were indexed within 2.25 weeks of receipt of MPIC's file and additional material compared to 1 week in 2019/20 and 4.57 weeks in 2018/19.
- Files were indexed within 3.4 weeks of receipt of notification by AIM that mediation was concluded but the unresolved or partially resolved issues will proceed to hearing, compared to 1.8 weeks in 2019/20 and 5.43 weeks in 2018/19.
- Hearing dates were scheduled, on average, within 15 weeks from the time the parties were ready to proceed to a hearing. This compares to 7 weeks in 2019/20 and 3.31 weeks in 2018/19.
- The Commission prepared 12 written decisions in 2020/21, compared to 20 written decisions in 2019/20. The average time from the date a hearing concluded to the date the Commission issued an appeal decision was 10 weeks in 2020/21, compared to 13.19 weeks in 2019/20 and 8.43 weeks in 2018/19.
- In accordance with the Commission's discretion under the provisions passed in Bill 12 for Dismissal for Failure to Pursue an Appeal or Appeals, the Commission has written 1 decision in 2020/21. The time from the date the hearing concluded to the date the Commission issued the decision was 6 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 significant increase to the case management process and the volume of documentary evidence that come to form the index.

- The Commission completed 130 indexes in 2020/21, compared to 102 indexes in 2019/20. and compared to 112 indexes in 2018/19.
- The average indexed file included 121 tabbed documents for the 2020/21 fiscal year, compared to 107 tabbed documents in 2019/20 and 190 in 2018/19.
- Staff prepared 70 supplemental indexes in 2020/21, compared to 72 supplemental indexes in 2019/20 and 73 in 2018/19. 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 200 indexes in 2020/21, as compared to 174 indexes in 2019/20 and 185 indexes in 2018/19.

As of March 31, 2021, there were 368 open appeals at the Commission, compared to 396 open appeals as of March 31, 2020 and 371 open appeals as of March 31, 2019.

## 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 2020/21. Leave to appeal was denied in both cases.

In the Commission's 27 years of operation, as of March 31, 2021, the Court of Appeal has granted leave to appeal in 14 cases from 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. Staff have implemented practices to reduce the amount of paper used by the Commission.

## 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 2020/21.

| Information Required Annually (per Section 18 of The Act) | Fiscal Year 2020/21 |
|---|---|
| The number of disclosures received, and the number acted on and not acted on. Paragraph 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 2020/21.

### 1. Extension of Time Limit to file a Notice of Appeal

The MPIC Act provides a time limit for seeking appeal of decisions of MPIC 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 that the Commission may consider in exercising its discretion to extend a time limit.

Case #1

The Appellant was injured in a motor vehicle accident (MVA) in 2016. Following a case manager's decision and application for review, an IRD was issued.

The Appellant then filed a Notice of Appeal (NOA) with the Commission, almost 13 months after the expiry of the 90-day period to appeal set out in section 174 of the MPIC Act. The Appellant was asked to provide her reasons for the late filing, and a hearing was held in order to determine whether the Appellant had a reasonable excuse for her failure to appeal within the 90-day time limit.

The Appellant gave evidence at the hearing and relied upon letters and photographs to support her position. She argued that she had been struggling with her pain and personal care needs, which had been denied by MPIC. Her partner suffered from his own pain, and both struggled to care for their family. They had moved into a larger home and this required more work, while MPIC had continued to deny her assistance. They had not been responsive to her questions and communications and she did not understand the appeal process. She said that the Claimant Adviser Office (CAO) and the Commission had also failed to respond to her inquiries.

She acknowledged that she was well educated, had computer skills and was capable of keeping up with other matters such as travelling to doctor's appointments and keeping track of, calculating and submitting mileage claims. Counsel for MPIC noted that her evidence of failed attempts to contact MPIC and the Commission was inconsistent and did not ring true. It was suggested that the Appellant may have been confused about where and when she sent things or attempted to make contact, but the onus is on the Appellant to take reasonable steps to clarify her confusion and the Appellant had not done so. Moving house is not considered a reasonable excuse for failing to take any action on her appeal.

The Commission reviewed previous decisions of the Commission that established the factors to consider in cases of filing delay, such as:

1) The actual length of the delay compared to the 90-day time period set out in section 174 of the MPIC Act;

2) The reasons for the delay;

3) Whether there has been any prejudice resulting from the delay;

4) Whether there has been any waiver respecting the delay; and

5) Any other factors which argue to the justice of the proceedings.

The Appellant did not submit medical or other evidence to establish that she suffered from a condition which would prevent her from attending to her appeal. The evidence showed that she was eventually able to competently file her NOA and to continue to efficiently file travel expense claims seeking reimbursement from MPIC. The evidence also showed that she had the education and ability, including familiarity with computers, email and the internet, to attend to important matters such as her appeal.

The Commission's process for filing appeals is not complex and the options and resources offered to assist her were set out in clear language in the IRD. The Appellant's explanation that she was confused and unable to follow through was not a reasonable explanation for missing the appeal deadline. She did not meet the onus of proof upon her or present clear evidence of reasonable steps taken to clarify any confusion she may have had or obtain assistance. The panel found her assertions that calls made to the CAO or Commission went unanswered to be vague, inconsistent with the general practice of these organizations and not substantiated by clear or convincing evidence.

The Commission found that the Appellant failed to establish that the factors cited by her prevented her from filing her appeal in a timely fashion. It found that she had not provided a reasonable excuse for failing to appeal the IRD within the time limits. Accordingly, the Commission declined to allow the Appellant an extension of time to file her appeal.

Case #2

The Appellant was injured in an MVA. MPIC issued a decision that discontinued the Appellant's PIPP benefits, and notified him of the 60-day filing deadline for an appeal. The Appellant filed his Application for Review within the 60-day deadline. The Appellant did not attend the scheduled in-person hearing. MPIC issued an IRD, which upheld the Case Manager's decision. The IRD concluded with a prominent notice advising the Appellant that any appeal must be filed within 90 days of receiving the IRD.

211 days after the date of the IRD, the Appellant requested that the Commission provide him with information concerning filing his NOA. The Commission provided information and advised that he must also include reasons for the late filing. Nearly three months later, the Commission received the Appellant's NOA, which included his handwritten letter giving reasons why he had missed his

Internal Review hearing (his mother died that day). The letter did not explain why he had filed his NOA later than the 90-day time limit.

The Appellant represented himself at the appeal hearing. The Commission heard his testimony and submissions about whether the Commission should allow the late filing pursuant to subsection 174(1) of the MPIC Act. In determining whether to exercise its discretion to allow further time to file an appeal, the Commission considered the five factors established in these cases, as listed in the above example.

The Appellant advised that while English was not his first language he nonetheless understood the hearing process and the questions from both the Commission and MPIC counsel. The Commission explained that this was the Appellant's opportunity to give his reasons for filing his NOA more than 90 days after the date he received the IRD. The Appellant did not have his tabbed binder, and so the hearing was momentarily adjourned to make a copy of the IRD for the Appellant's reference.

The Appellant confirmed his mailing address and date of birth. He said he obtained a Master of Science degree from the Philippines and worked in the Foreign Service. He acknowledged that he took prescription medication, but the medication did not affect his memory or concentration. He confirmed he was 67 years old and said, "My mind is sharp."

The Commission asked the Appellant to describe his actions after receipt of the IRD. He said that he received the IRD "a few days" or "a week later" (meaning a few days or a week after the date on the IRD). He confirmed that he read the IRD upon receipt. He did not explain why he delayed responding, but rather discussed his prior MVAs and previous dealings with various lawyers, case managers, and Commissioners. The Commission explained that this was a new hearing to specifically hear his reasons for not filing his NOA within 90 days. He replied that his mother had died on the date of his Internal Review hearing.

The Commission asked the Appellant to clarify his prior statement that he missed his Internal Review hearing because his mother died that day (the Commission also pointed out that published obituaries stated that his mother died a month earlier than the Internal Review hearing date, which the Appellant said were wrong). The Commission pointed out that the Appellant's statement explained why he missed the Internal Review hearing, but not why he was late filing his NOA, and again asked the Appellant to explain why it took him over six months to file his NOA. The Appellant replied by reviewing the history of his prior accidents and various hearings, which did not answer the question.

The Appellant admitted that he received the IRD a week after its date. He admitted that he had read the IRD and that he had a copy at his house. The Appellant admitted that he had filed previous applications for review and appeals on time. In particular, the Appellant admitted that he filed a prior appeal within four days of receipt of a decision because he knew that he should file an appeal "as soon as possible." MPIC counsel asked "why it took so long" for the Appellant to file this NOA to which he replied, "I was all alone." When asked whether "being alone" prevented him from filing his NOA, the Appellant said he went back to his old chiropractor because MPIC had approved payment of one more treatment.

The Commission found that the Appellant received, read and had notice of the IRD a week after it was issued. The Commission found that the Appellant understood the proceedings and the requirement to explain the delay. The Appellant's testimony was that he understood that he should file an appeal as soon as possible. The Appellant had in fact met this deadline for prior appeals. The Appellant filed his NOA 121 days (four months) past the 90-day deadline. Four months is a significant delay, which required a cogent and reasonable explanation. Despite offering the Appellant numerous opportunities to explain the delay, he did not provide a cogent and reasonable explanation for failing to file within the 90-day deadline. Accordingly, the Commission declined to allow an extension of time to file his appeal.

## 2. Whether there is a Causal Connection between the MVA and the Appellant's Injury

In order to be entitled to benefits under the MPIC Act, an Appellant must establish, on a balance of probabilities that their injury was 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 current medical condition was causally related to the injuries sustained in the MVA, thereby entitling him to Personal Injury Protection Plan (PIPP) benefits.*

The Appellant was injured in an MVA and suffered low back pain radiating down his left leg, with swelling. He had been employed as a car salesman and was unable to work as a result of his MVA injuries. He received Income Replacement Indemnity (IRI) benefits from MPIC.

The Appellant had a pre-MVA medical history of gout in his lower extremities and often experienced acute flare-ups. He had also been diagnosed with osteoarthritis of the left knee. An x-ray taken after the MVA showed mild disc narrowing at L4-5 with mild osteophyte formation in the lumbar spine but no significant facet joint abnormality.

After the MVA, the Appellant was treated with physiotherapy, chiropractic care and medication. He saw an orthopedic surgeon. He was also treated for his gout. He attempted a gradual return to work program, which caused him some pain, but he returned to work with symptoms and was advised regarding postural modifications

After experiencing an increase in symptoms later that year, his work hours were decreased to half-time. Further relapses of symptoms continued in the following years and interfered with his ability to work. His lower back and leg problems were exacerbated following another MVA, and there were more periods where he was unable to work.

MPIC conducted investigations into his work capacity and determined that he was able to work on a sedentary basis. Based upon his experience and abilities, an alternate employment of mortgage broker was determined for him, but he never worked at this employment and continued to try to work selling cars. He continued to struggle with lower back pain, radicular symptoms and multi-joint gout.

After some years MPIC concluded that the MVA was no longer preventing the Appellant from working and that any ongoing disability was not related to the MVA. The Appellant had been determined into a sedentary job which his MVA injuries did not prevent him from doing. Any ongoing disability in the past number of years was a result of his unrelated chronic painful disease condition and not related to the MVA.

At the appeal hearing, the Appellant relied upon his own testimony and that of his daughter. He also submitted reports from his family doctor, orthopedic surgeon and chiropractor. MPIC provided reports from a physiotherapist, independent physiatrists, a third party chiropractic assessor and its Health Care Services (HCS) medical and chiropractic consultants and director. MPIC also relied upon reports from the Appellant's rheumatologists describing his history of gout with increasing episodes of joint involvement, inconsistent compliance with his medications and resultant elevated levels of uric acid.

This documentary evidence led the panel to conclude that the weight of the medical evidence supported MPIC's position that the Appellant's MVA injuries were no longer preventing him from working, particularly in the sedentary employment which had been determined for him. The physiotherapist and physiatrists who examined him did not find a pathoanatomical basis for his symptoms (beyond soft tissue injuries), or any specific neurological defects. There was a lack of assessment findings to support his reported level of pain. A significant past history of sacroiliac and sciatic pain were noted.

Moreover the panel, while recognizing that the Appellant had suffered injuries in the MVA and that exacerbations had followed, concluded that the issue from which the Appellant primarily suffered did not stem from the MVAs but rather was primarily related to his gout. It was this condition which prevented him from full time employment and his condition was exacerbated by his lack of compliance with his prescribed medical regime.

The Commission found that the Appellant had failed to establish a causal relationship between his medical condition and the injuries sustained in the MVAs. The appeal was dismissed.

Case #2

*In this case, the issue was whether the Appellant's neck condition was causally connected to the MVA.*

The Appellant was a physiotherapist with 27 years experience who owned her own clinic. The Appellant was involved in three motor vehicle accidents ("the MVAs") dated January 2005, ("2005 MVA"); June and September 2009 ("the 2009 MVAs"). In the 2005 MVA, the Appellant's

vehicle was broadsided with enough speed to spin her vehicle across the oncoming traffic lanes and into the opposite ditch. The 2009 MVAs involved the Appellant's vehicle being rear-ended. The Appellant underwent cervical spine surgery in February 2016. The Appellant sought PIPP benefits for her neck condition.

Pursuant to subsection 70(1) of the MPIC Act, the Commission had to determine whether the Appellant's cervical spine surgery was medically required, for management of a condition causally connected to the Appellant's MVAs.

The panel found that the Appellant and both expert witnesses were credible, reliable, fair and impartial. The expert doctors ("the experts") agreed that they could not categorically state that the MVAs caused the degenerative changes in the Appellant's cervical spine. However, the Appellant's burden of proof is not categorical proof, but proof on a balance of probabilities.

The experts agreed that the Appellant's imaging reports, which showed a change in normal cervical lordosis, represented a structural change to her cervical spine. They agreed that multiple traumas can speed up degenerative changes. However, MPIC's expert qualified his position by stating that the level of trauma is a key factor when considering progressive changes over time. Finally, the experts agreed that surgery does not totally alleviate symptoms and therefore the Appellant's returning symptoms post-surgery could be remnants of her prior condition.

The experts disagreed on the temporal and therefore causal relationship between the 2005 MVA and the Appellant's cervical degeneration and radiculopathy, which culminated in her cervical spine surgery. MPIC's expert concluded that there was no causal relationship based upon the following: 1) the Appellant had a pre-existing neck condition; 2) the Appellant did not seek treatment for her neck; 3) the Appellant had fully recovered her normal functioning at work; and 4) there was no real documentation of persistent deterioration. As such, the degenerative structural changes discovered in her 2008 MRI, after her initial recovery, could not be the result of the 2005 MVA.

The panel accepted the Appellant's testimony that during her pregnancy she experienced a 'locking' sensation in her neck when waking in the morning, which only occurred during a two year period while the Appellant nursed her daughter. The panel accepted that the Appellant never experienced this locking or stiffness after she stopped nursing, at least three years prior to her 2005 MVA. The Appellant received treatment for her sore neck and was told that her C3-C4 vertebrae were involved. There was no evidence that the Appellant missed any time off work for neck issues between 1996 and the 2005 MVA. The Appellant's Manitoba Health billing records did not show any attendances for neck issues. The panel accepted the Appellant's testimony that the locking sensation was nothing like the pain and muscle spasm that she experienced in her neck after the 2005 MVA. The muscle spasm was severe enough that it structurally altered her normal lordotic neck curvature. She had nosebleeds. Her head felt like it no longer sat properly on her shoulders.

At the time he provided his written opinion, the Appellant's expert was unaware of her neuro-ophthalmologist's report referencing a past history of C3-C4 subluxation. However, he addressed this during cross-examination, stating that a 'subluxation' is severe and this condition would have shown up on imaging. Since it did not, he did not find this information reliable and maintained his opinion that there was a temporal and causal relationship between the 2005 MVA

and the Appellant's ultimate cervical spine condition that required surgery. The panel found that the Appellant's expert adequately explained this previously unknown fact, which did not undermine his opinion.

The panel accepted the conclusion of the Appellant's expert that the Appellant's prior neck issue was unrelated to the 2005 MVA cervical strain diagnosis. The panel also found that the Appellant's prior neck issue was qualitatively different from the neck pain and spasm she experienced after her 2005 MVA, and it had resolved at least three years prior to her 2005 MVA. The panel therefore found that the Appellant did not have a pre-existing neck condition.

The panel accepted the Appellant's testimony and found that her neck muscle tightness and sensation of lopsided head balance never resolved from the time of her 2005 MVA, until her cervical spine surgery in 2016. Although the Appellant had increased her work hours since the MVAs, her expert testified that 'number of work hours' did not indicate a person's level of functioning. The panel found that the Appellant had modified her practice to accommodate her neck pain, and treatment by colleagues in her clinic explained the lack of documented medical treatment. The panel found that the Appellant did not return to full functioning at work after the 2005 MVA.

The panel also accepted the Appellant's testimony of her gradual increase in radicular symptoms such as neck referral pain, arm pain and arm tingling sensation. The panel found that these symptoms, together with the 2008 and later cervical spine images, constituted probable evidence of the Appellant's persistent deteriorating condition. The Appellant's 2012 and 2013 loss of function reports also documented her ongoing restricted neck range of motion, neck pain and stiffness, which continued to require work accommodation for her neck injury.

These findings undermined the MPIC expert's conclusion that the MVAs were not causally connected to the Appellant's cervical spine surgery. This was not a criticism of MPIC's expert but simply an acknowledgement that MPIC's expert did not have the complete factual foundation for his conclusion. MPIC's expert also did not have the advantage of examining the Appellant.

The panel also noted the Mayo Clinic documentation that queried whether the Appellant had suffered a prior hyperflexion cervical sprain, despite not knowing about the Appellant's MVA history. Finally, the panel noted the MPIC expert's testimony that there was a "very, very low probability" that the 2009 MVAs led to the Appellant's cervical changes and radiculopathy. The panel found that a 'very, very low probability' is nonetheless, a probability.

The panel considered the Appellant's expert's years of experience in the specific practice of spinal pathology and spinal surgical management, which also led the panel to prefer the opinion of the Appellant's expert. The panel found that there was a temporal and therefore a causal relationship between the 2005 MVA and the Appellant's deteriorating cervical condition and radiculopathy. The panel also found that the 2009 MVAs exacerbated the Appellant's cervical spine condition and radiculopathy caused by the 2005 MVA.

Therefore, the panel found that the Appellant's cervical spine surgery was medically required in the management of her cervical condition because her MVAs caused her cervical spine condition

and radiculopathy. The panel rescinded the Internal Review Decision and referred this matter back to MPIC to determine any benefits that may flow from our finding of causation.

Case #3

*In this case, a central issue was whether the Appellant's right knee condition was causally connected to the MVA, thereby entitling him to PIPP benefits.*

The Appellant slipped and fell while exiting a vehicle in April 2004. He injured his left knee as a consequence of this MVA, and as a result he was entitled to benefits under the PIPP provisions of the MPIC Act, including a permanent impairment benefit for a total knee replacement (arthroplasty) which was required for his left knee in 2009. Over several years, he suffered ongoing problems to his left knee, and required further surgeries to his left knee to deal with these problems. (Although not detailed here, the Appellant sought a further permanent impairment benefit regarding a second left knee arthroplasty, which MPIC denied. He appealed that decision, and the Commission upheld MPIC's decision.)

In addition to his left knee problems, the Appellant contacted MPIC to advise that, although he did not injure his right knee in the MVA, he would require arthroplasty of his right knee, which was deteriorating due to the continual limping and other effects of surgery on his left knee. He underwent right knee arthroplasty in 2018 and sought PIPP benefits in respect of that surgery.

The Appellant's case manager issued a decision indicating that MPIC did not agree that the Appellant's right knee condition was caused by the MVA, denying his entitlement to PIPP benefits. This decision was upheld review, and the Appellant appealed to the Commission.

There was no dispute that the Appellant's right knee was not directly injured in the MVA. It was the Appellant's position that the damage to his right knee occurred as a consequence of the MVA, resulting from a slow erosion over time, due to the damage caused by the MVA to his left knee. He testified that his right knee started hurting a few years after the 2004 MVA. Two of his treating medical practitioners noted complaints of right knee pain in their charts in 2009. The Appellant testified that because his left knee was a bigger issue than his right knee, more attention was paid to the left knee, and that explained the lack of mention of his right knee in subsequent medical documentation until 2015, when the right knee became a more pressing concern. He acknowledged that he did not have medical opinions from his health care providers supporting his position, but he argued that sometimes you just have to listen to the claimant.

MPIC argued that there was no medical evidence supporting the Appellant's position that the right knee condition was caused by the MVA. MPIC's HCS consultant opined in his report that it was not medically probable that the claimant's right knee osteoarthritis and arthroplasty were directly related to the 2004 slip and fall, because the right knee became symptomatic many years later, and a temporal relationship to the MVA was not present. Further, the medical literature does not support the theory that an injury to one lower extremity would have any significant impact on the opposite, uninjured limb, unless the injury resulted in major muscle or nerve damage causing partial or complete paralysis of the damaged leg and/or shortening of the injured lower extremity resulting in a limb length discrepancy, which was not the case here.

The Commission considered the lack of medical documentation noting any right knee complaints between 2009 and 2015. 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 the Appellant's right knee condition was not caused by the MVA. The Commission found that the Appellant did not meet the onus of establishing, on a balance of probabilities, a causal connection between his right knee condition and the MVA. Consequently, the Appellant was not entitled to PIPP benefits with respect to his right knee condition.

## 3. Evidentiary Onus

In an appeal at the Commission, the onus (responsibility) is on the Appellant to establish their case. To be successful, Appellants need to show that they are entitled to the benefits that they seek under the MPIC Act. The burden of proof is a balance of probabilities, meaning more likely than not.

The following cases illustrate some issues faced by Appellants in meeting the burden of proof.

Case #1

*In this case, the issues were whether the Appellant should be classified as a non-earner and whether he had recuperated after 181 days. The Appellant refused to provide MPIC with necessary documentation and failed to attend his hearing.*

The Appellant was involved in an MVA in 2018. At the time of the accident, the Appellant was a self-employed freelance composer and music teacher working 20-40 hours per week. He stated his occupation as "Administrator/consultant". The Appellant sought IRI benefits for lost income.

Pursuant to the MPIC Act, MPIC requested the Appellant provide his 2015, 2016 and 2017 tax returns and Notices of Assessment to confirm self-employment at the time of the MVA and thereby determine his average gross yearly income. The Appellant had previously submitted tax information for the years 2014, 2015 and 2016 in respect of a 2016 MVA. He insisted that MPIC use the prior documentation to determine his employment status and income for his 2018 MVA.

MPIC issued an IRD in October of 2018, denying IRI benefits to the Appellant. Based upon the documentation provided by the Appellant, MPIC concluded that the Appellant was a non-earner at the time of his MVA. As a non-earner, the Appellant was not entitled to IRI benefits in the first 180 days of the MVA. Further, MPIC concluded that the Appellant was not entitled to IRI as of the 181$^{st}$ day following the MVA because the Appellant was capable of working during this time period.

Notwithstanding its IRD of October 2018, MPIC realized that it had mistakenly overlooked the Appellant's request for an Internal Review hearing and therefore scheduled a meeting with the Appellant to allow him the opportunity to submit further income documentation and present his position. At this meeting, the Appellant spoke about his circumstances but did not provide

additional documentation. The Internal Review Officer affirmed the October 2018, decision in his follow-up IRD, issued in November 2018.

The Appellant sent the Commission an email stating that he was "appealing the decision". Two months later, the Appellant delivered 67 pages of documents to the Commission, which included a three-page cover letter, the October 2018, IRD, and some 57 untitled pages of material. These untitled pages mostly duplicated the documents previously provided to MPIC. They included partial emails with redacted information, unidentified and partially redacted bank statements, revenue/expense statements dated 2012 to 2017, a 2015 vehicle lease sub-contractor agreement, vehicle lease company invoices partially redacted, as well as Canada Revenue Agency website views of returns, Notices of Assessment, and Reassessment from 2011 to 2017, mostly redacted. The Appellant later forwarded a statement of revenue received via email from the Society of Composers, Authors and Music Publishers of Canada (SOCAN), an organization that distributes royalty payments to its members when, for example, radio stations play their music. The Appellant requested that the Commission determine his employment income as a Level 3 Composer and calculate IRI benefits accordingly.

The Appellant did not attend his Commission hearing. (As a preliminary matter, the panel considered whether the Appellant had received proper notice of the hearing pursuant to MPIC Act subsection 182(2) and section 184.1. Finding proper notice, the panel considered the substantive issue of whether the Appellant has proven his appeal, on a balance of probabilities.)

Absent the Appellant's testimony, the panel considered and relied upon his submitted documents and emails. The Appellant consistently stated that he was aware of the facts, and submitted that he wished to be classified as, and paid in accordance with, the National Occupational Classification (NOC) schedule of income for a Level 3 composer.

The panel considered the Appellant's reasons for appeal as set out in his Notice of Appeal, which stated as follows:

> I do not agree with MPIC's decision for the following reasons:
>
> a) Grossly inaccurate summary of the fact [sic] with respect to 'NON EARNER' STATUS where by ongoing remunerative occupation is confirmed by SOCAN (SOCIETY OF AUTHORS COMPOSER AND MUSIC PUBLISHERS) INCOME VERIFICATION DECLARATION
>
> b) Sub contract services (disrupted as a result of the accident) to the owner of the vehicle in the accident
>
> c) Artist development agreement/gueerra [sic] (disrupted as a result of the accident)
>
> d) Items a-c make it clear and apparent that non earner status is a GROSS ATTEMPT TO "RAIL ROAD" THE CLAIM INTO A POSITION OF UNDUE DELAY. [All emphasis in original]

The Appellant's cover letter reiterated the above reasons and expanded his argument to include criticism of MPIC, argued that his three types of occupation had been "substantiated, documented, & proven at NAUSIEM [sic]", argued that his bank statements substantiated his income related to his three occupations and that his contracts were examples of ongoing (as opposed to past) income. The Appellant submitted that he had proven his occupation as a Level 3 Composer and requested payment of IRI benefits based upon an income for that occupation. The panel accepted these statements as the Appellant's submission on appeal.

By email, the Appellant stated, among other things, that he would not require the indexed file as "there was simply a disruption of [his] earnings" because of his MVA related injury. He stated, "Substantial documentation has been submitted," and then accused MPIC of "negligence & malicious incompetence." The Appellant attached a physiotherapy note to this email and commented, "Do with them what you will…"

A further email from the Appellant stated, in part, that the constant emails were unnecessary, he should be classified as a composer registered with SOCAN, a hearing and witnesses were unnecessary, the Commission should deliberate as it saw fit and leave him alone.

An additional email from the Appellant reiterated (among other things) his 30 years as a composer with SOCAN; he produced recordings as well as gave music lessons; and he subcontracted to a vehicle leasing company. He expressly stated that he did not care about the indexed file provided to him.

The panel considered subsections 70(1), 85(1), 85(3) and 86(1) of the MPIC Act. Subsection 70(1) of the MPIC Act defines "employment" as any remunerative occupation and defines a "non-earner" as someone who, at the time of the accident, is not employed but is able to work.

Subsection 85(1) of the MPIC Act generally states that a non-earner is entitled to IRI during the 180 days following the MVA if he is unable to hold employment that he could have held during that period but for the accident. Subsection 85(3) of the MPIC Act generally states that MPIC shall determine the IRI benefits based upon the gross income that the non-earner would have earned from employment.

The onus of proof for any Appellant is proof on a balance of probabilities. The panel found that the Appellant did not provide sufficient evidence that he held a remunerative occupation at the time of the MVA. The income tax information for the relevant time did not show any income. The panel found that the Appellant appeared to have created the "financial statements", "Development Proposal" and "schedule of time commitment", and these were insufficient to verify, on a balance of probabilities that the Appellant had a remunerative occupation or income at the time of the MVA.

The documents provided by the Appellant contained redacted income and dollar amounts, were mostly untitled, unsigned, unverified and difficult to decipher. The Appellant did not attend the hearing to testify and explain to the panel the purpose or meaning of the documents. Therefore, there was no basis upon which to determine the income and corresponding IRI benefit for the Appellant.

The panel found that the SOCAN statement apparently showed passive income from the Appellant's past work and therefore did not prove, on a balance of probabilities, employment at the time of the MVA. The panel concluded on a balance of probabilities that the Appellant was a non-earner at the time of the MVA.

Subsection 86(1) of the MPIC Act refers to entitlement to IRI benefits after the first 180 days. If the Appellant is still unable to work because of the MVA, MPIC must determine an employment and income for the Appellant. The panel found that the medical evidence did not prove, on a balance of probabilities that after the first 180 days, the Appellant was unable to work because of his MVA injury. The Therapy Discharge Report from the Appellant's physiotherapist stated that the Appellant's symptoms were improving. The physiotherapist further stated that the Appellant "should have been back at regular duties" within the 180-day period, and he was "under the impression that [the Appellant] has improved since [he] has not come in for further treatment." This evidence was un-contradicted. The panel therefore found, on a balance of probabilities that the Appellant had recuperated within the first 180 days after the MVA.

Accordingly, the panel found that the Appellant had not proven, on a balance of probabilities that he was an income earner at the time of the MVA, or that he was incapable of working after 180 days because of his MVA injury. The panel dismissed the appeal.

Case #2

*In this case, the main issue was whether the Appellant was entitled to IRI benefits. Here, the Appellant did not have supporting medical evidence.*

The Appellant was injured in an MVA in 2011 and she sought IRI benefits. MPIC denied IRI benefits to her, on the basis that her MVA-related injuries, neck and back sprain would not have prevented her from doing a reasonable range of employment. The main issue on appeal was entitlement to IRI benefits. (Although not detailed here, a preliminary issue on appeal was whether the Appellant had a reasonable excuse for the late-filing of her Application for Review with MPIC. The Commission found that she did.)

In order to show that she was unable to hold employment because of the MVA, the onus was on the Appellant to establish, on a balance of probabilities that she suffered an injury that was caused by the MVA, which rendered her entirely or substantially unable to perform the essential employment duties.

The Appellant was not employed at the time of the MVA. She had taken courses in computer technology and accounting prior to the MVA and said that her plan was to be a computer technician after the MVA, but she was unable to work in that job due to her injuries. She was able to work in accounting for a brief period after the MVA. Irrespective of whether the Appellant's potential post-MVA employment might have been as a computer technician or in accounting, the Appellant provided no documentary evidence with respect to the essential duties of either occupation. Therefore, the panel had to rely on the Appellant's testimony, the documentary evidence regarding her injuries and her ability to work generally.

The Appellant testified regarding the injuries that she attributed to the MVA, including pain in her knees, hips, neck and back. She also attributed numerous other ailments to the MVA, including vision problems, osteoarthritis, chronic pain, nightmares and PTSD. With respect to her ability to work, the Appellant said that she did not have the strength to deal with the computer equipment on which she was trained to work, and she would never last in a full-time job.

The Appellant's chiropractor diagnosed her with spinal sprains/strains and multiple subluxations. The Appellant's treating physicians did not provide any diagnoses of her MVA injuries. MPIC's HCS consultants opined that her MVA injuries were neck and back strains, and that this would not have prevented her from doing a reasonable range of employment.

Based on the documentary medical evidence, the panel found that the Appellant's MVA injuries were neck and back strain. The panel acknowledged the Appellant's testimony that she was suffering from other symptoms as she described. However, there was no evidence from a medical practitioner indicating that those other symptoms were connected to or caused by the MVA. Although it was the Appellant's conviction that that was the case, there was no medical evidence supporting her position.

Furthermore, none of the Appellant's health care providers provided an evaluation or opinion that any of the Appellant's symptoms, including her neck and back strain, resulted in an inability to work. However, the HCS consultants both opined that the Appellant's MVA injuries would not have prevented her from doing a reasonable range of employment, and the panel accepted that evidence.

Therefore, the Commission found that the Appellant did not meet the onus of establishing, on a balance of probabilities that she suffered an MVA injury which rendered her entirely or substantially unable to hold employment. As a result, she did not establish, on a balance of probabilities that she was entitled to IRI benefits as a result of the MVA.

Case #3

*In this case, the principal issue was also whether the Appellant was entitled to IRI benefits. Here, the Appellant did not submit evidence on a timely basis. He did not have evidence supporting his absence from work.*

The Appellant was injured in an MVA in 2016. He continued to work following the MVA, although he modified his duties for the duration of a project. When that project was completed, around November 2017, he resumed working at his pre-MVA duties. He told MPIC that he was having difficulty at work due to the MVA and he sought IRI benefits for time missed. MPIC considered his claim and denied IRI benefits, noting that he had not submitted a list of his time missed from work. The Appellant appealed that decision to the Commission.

Prior to the hearing of the appeal, a Case Conference was held to discuss preliminary matters. At that Case Conference, counsel for the Appellant noted that the Appellant returned to work

following the MVA (as indicated above). Counsel advised that the Appellant was seeking IRI benefits in respect of days that he missed work from time to time, when his injuries were exacerbated, and that the Appellant would testify with respect to the days that he missed from work. At the Case Conference, it was confirmed that neither party would be submitting any further documentary evidence. The appeal hearing date was also set, to be held approximately three months later (subsequently rescheduled by approximately four months due to the pandemic).

The Commission's procedural rules provide that all new documentary evidence must normally be filed with the Commission at least 30 days prior to the appeal hearing. In this case, the Appellant sought to abridge that deadline, by late-filing two different sets of documents. The Commission ruled on the admission of these documents into evidence at the outset of the appeal hearing.

Twelve days prior to the hearing, counsel for the Appellant had submitted additional documentary evidence to the Commission, which consisted of various log sheets, pay stubs and T4 statements issued by the Appellant's employer and appearing to be relevant to the issue under appeal ("the Supplemental Documents"). At the outset of the hearing, the Appellant's counsel argued that the Supplemental Documents should be admitted as they were relevant to the issue under appeal. That is, the Supplemental Documents showed the Appellant's missed work hours, and compared the difference in his employment income from before and after the MVA. Counsel for the Appellant explained that the late filing arose due to COVID-19 and major disruptions in accessing documents remotely.

Counsel for MPIC advised the Commission that the Appellant's counsel had provided the Supplemental Documents to MPIC four months earlier, and therefore MPIC had prepared for the appeal hearing on the basis that these documents reflected the Appellant's claim for missed time from work. As such, MPIC did not require additional time for review, and did not object to the Supplemental Documents being admitted now to the indexed file.

Also at the outset of the hearing, the Appellant himself advised that he would like to submit an additional document ("the Appellant's New Document") as evidence of his missed time from work between 2016 and 2018. When questioned by the panel, he advised that he had asked his employer three times to prepare a list of all the days from 2016 to 2018 that he missed work or worked half days. Approximately six months prior to the hearing, his employer started on the list. The Appellant received the Appellant's New Document approximately two months prior to the hearing, but he did not provide it to his counsel. Although the Appellant's counsel had not seen the Appellant's New Document, and could not confirm its contents, counsel anticipated that its contents (the days and half days missed from work) would be the days for which the Appellant was seeking IRI benefits.

Counsel for MPIC objected to the admission of the Appellant's New Document. He said that he had prepared for the appeal hearing on the basis of the Supplemental Documents previously provided to him by the Appellant's counsel. Those documents relate to specific calendar days, and MPIC reasonably considered that those were the days to which the Appellant's claim related. If the Appellant's New Document now reflected different days, this would essentially constitute a trial by ambush. Counsel for MPIC would require an adjournment of the hearing, in order to review

the Appellant's New Document, reassess the evidence in light of the new information and revisit previously prepared questions and argument.

Counsel for the Appellant agreed with counsel for MPIC that the Appellant's New Document could be material, although he had not seen it. He noted that he could not comment on whether reviewing the Appellant's New Document and incorporating its contents into an analysis of the other evidence would take a long time, or whether it would require an adjournment. He submitted that because the Appellant's New Document would appear to be material, it should be admitted into evidence.

The panel noted that the Commission's policy on the submission of documents for use at a hearing is reflected in its Guidelines for Hearings. That is, documents should be submitted no later than 30 days prior to the hearing date. That deadline was not observed by either the Appellant or his counsel.

As noted above, counsel for MPIC did not object to the admission of the Supplemental Documents; MPIC had received the Supplemental Documents several months earlier. Counsel for the Appellant identified work disruptions as the reason that the Supplemental Documents were submitted to the Commission twelve days prior to the hearing, rather than at the same time that they were sent to MPIC. Counsel for MPIC did object to the admission of the Appellant's New Document, on the basis that its admission would constitute unfair surprise, as set out above.

The onus in an appeal is on the Appellant to establish his case. Here, the Appellant said that he asked his employer several times to provide him with information regarding his days missed from work. However, when he did finally receive the Appellant's New Document, he did not pass it on to his counsel. He acknowledged that he held on to the document for approximately two months. There was no explanation given for his failure to provide this document to his counsel or to submit this document to the Commission on a timely basis.

Counsel for the Appellant was advised by the Commission at the Case Conference, held seven months prior to the hearing that the issue of the Appellant's missed time from work needed to be addressed. The panel was of the view that there was ample time for this to be done, and for evidence on this issue to be submitted on a timely basis, particularly since the originally scheduled hearing date was postponed.

Taking all of the above into consideration, and bearing in mind the rules of procedural fairness that apply, the panel determined that to admit the Appellant's New Document into evidence at the outset of the hearing, would in fact constitute an unfair surprise to MPIC, and would likely result in an undue delay of the proceedings. In contrast, although the Supplemental Documents had not been filed with the Commission on a timely basis, they had been provided to counsel for MPIC several months in advance of the hearing date, and counsel had adequate time to review them and prepare for the hearing, so their admission would not contravene any fairness principles.

Accordingly, the objection of counsel for MPIC regarding the admission of the Appellant's New Document was sustained, and the Appellant's New Document was not admitted into evidence.

The Supplemental Documents were admitted into evidence. The appeal hearing then proceeded.

The panel noted that counsel for the Appellant spent a fair bit of time at the hearing, both in direct examination of the Appellant, and in argument, addressing the question of whether the actions of MPIC impacted the Appellant's entitlement to IRI benefits. In particular, counsel emphasized that MPIC did not inquire as to the particular duties of the Appellant's employment, nor did MPIC seek out certain medical information. Appellant counsel argued that MPIC had failed to conduct various investigations into the Appellant's condition, and MPIC's decision to deny IRI benefits was made without full information. Therefore, the decision should be overturned on that basis.

It is not the responsibility of MPIC to produce evidence at the case management stage of the file, with a view to ensuring that certain evidence will be before the Commission on appeal. Even if the information gathered by MPIC was deficient, and further formed the basis of the Internal Review Decision, it would not be significant because on an appeal, the Commission is tasked with making a fresh decision, and is not simply reviewing the prior decision made by the Internal Review Officer. The Commission is empowered to make any decision in granting benefits to the Appellant that MPIC could have made.

When pursuing an appeal at the Commission, the onus is on the Appellant to establish the entitlement to benefits under the MPIC Act, and the burden of proof is a balance of probabilities. Therefore, regardless of whatever actions were or were not taken during the case management phase by MPIC prior to the termination of benefits, the Appellant is not only free but is encouraged to take further actions to gather and submit additional evidence to the Commission, in order to establish the entitlement to whatever further benefits are sought under the MPIC Act.

Here, the issue of the ability of the parties on this appeal to submit additional evidence was raised with the parties at the Case Conference held seven months prior to the appeal hearing. Although, at that time, the parties indicated that they did not intend to submit further evidence, the panel was of the view that the Appellant had ample time to do so, had he been of the view that there was missing evidence which he felt should be in front of the Commission in his appeal. Again, the onus is on the Appellant to establish his case.

The Appellant cannot meet his onus of showing that he is entitled to certain benefits merely by arguing that the Internal Review Decision was deficient of potentially discoverable information; rather, there is a positive onus on the Appellant to establish, on a balance of probabilities that he is entitled to the benefits that he seeks under the MPIC Act. This positive onus can be met through oral testimony and/or his own investigations and documentary evidence.

The panel noted that although the Appellant did testify that he missed hours and days from work during the period in question, there was no documentary evidence in front of the panel to support which hours and days during the period in question the Appellant may have missed. As indicated above, the Appellant had ample time and opportunity to submit evidence to the Commission to establish the particulars of his missed time from work. The panel reviewed the Appellant's testimony regarding his missed time from work, as well as the documentary evidence, and found that the Appellant's testimony was inconsistent with the documentary evidence in several respects.

The panel also reviewed the medical evidence regarding the ability of the Appellant to perform the duties of his employment during the time period in question. The panel preferred the evidence of the HCS consultant, who 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, to that of the Appellant's health care providers, none of whom had an opportunity to conduct a review of all of the file material.

The Commission found that the Appellant did not establish, on a balance of probabilities that he was absent from work during the time period in question; nor did he establish, on a balance of probabilities that even if he were absent, that the reason for any absence was his MVA injuries. Further, the Commission found that the Appellant did not establish, on a balance of probabilities that he was substantially unable to perform the essential duties of his employment during the time period in question. Therefore, the Appellant was not entitled to IRI benefits for the time period in question.

(Although not detailed here, another issue on appeal was whether the Appellant was entitled to additional chiropractic treatment. The Commission ultimately determined that he did not establish, on a balance of probabilities that he was entitled to such treatment.)

## 4. Reimbursement of Expenses that are Medically Required

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. Section 38 of Manitoba Regulation 40/94 provides for the reimbursement of medication that was required for a medical reason resulting from the accident.

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

### Case #1

The Appellant was involved in a motor vehicle accident in 2011 ("the MVA"). The Appellant sustained, among other injuries, rib fractures, transverse process fractures, a fracture of the left scapula and several areas of scarring. He required surgery for a chest tube insertion and was hospitalized, during which time he received pain (and other) medications. After discharge from hospital, the Appellant continued to see his family doctor for treatment, including medication for pain relief. Causation was not in issue for these injuries.

As a result of the Commission's pre-hearing case management process, MPIC's additional investigations resulted in a Case Management decision which denied reimbursement for the Appellant's pain medication, Endocet. MPIC maintained that the Appellant took Endocet to manage his back pain, which was not causally related to the MVA. Further, MPIC's HCS consultant's opinions determined that Endocet was not a safe and effective long term treatment for

pain management of the MVA related shoulder injury, and therefore was not medically required. The parties agreed that the Commission would consider the Case Management decision of whether Endocet medication was "medically required".

(The Appellant had appealed his 40% permanent impairment award, and sought benefits for other injuries. Although not detailed here, the Commission ultimately determined that the Appellant's MVA did not cause his lower back, left hip, and left knee complaints, and that his permanent impairment benefits for his left shoulder had been properly calculated.)

Chart notes dated in the months immediately following the 2011 MVA showed that the Appellant's doctor had monitored and treated the Appellant's MVA related pain with medication such as Percocet, Tylenol #3 and Endocet. In early 2012, the chart notes described the Appellant's continued intermittent chest wall pain, his inability to tolerate work activities, his need for continued physiotherapy and his regular use of pain medication. Attempts to increase his range of motion had exacerbated his shoulder pain and muscle spasm and the Appellant's recovery was guarded while awaiting a surgical consult. In April 2012, the Appellant was taking one to two Endocet tablets, with one to two Tylenol tablets, to a maximum of eight tablets per day. He intermittently used anti-inflammatories and other medications.

In March 2015, chart notes indicated that the Appellant continued to experience pain in his injured left shoulder (among other areas) and was taking Endocet daily to manage his pain. In September 2016, his doctor reported that the Appellant continued to suffer ongoing left shoulder blade pain (among other pain) since his 2011 MVA, which required daily doses of Percocet and Naprosyn, and opined that the Appellant would require long term pain medication. A chart note from April 2018, indicated that the Appellant was taking up to seven Oxycocet per day and that the doctor and Appellant had discussed opioid guidelines.

The Appellant testified that the undiagnosed scapula fracture had gotten worse since the MVA. His scapula continued to cause sharp pain, which he was learning to live with. The Appellant testified that before the MVA he took four Tylenol #3 per day for sciatica. Following the MVA, he initially took eight Endocet per day. However, in 2016 and in response to the opioid crisis, he and his doctor discusses reducing his prescription. He agreed to a dose of four Endocet per day, but determined that six Endocet per day managed his pain better without making him feel like a 'zombie'. The Appellant admitted that as of November 2011, he was down to four pills a day because his shoulder had improved. However, after physical activity caused his pain to a flare up, he increased his dose to eight pills per day. He recognized that eight pills per day detrimentally affected his mental functioning, but four or six pills per day managed his pain and without affecting his mental function.

MPIC's HCS medical consultant reviewed the file and determined that (among other medications) the prescribed Endocet was not medically required to manage the Appellant's MVA related pain. The consultant concluded that the Appellant had not developed a medical condition that would likely deteriorate if he did not take Endocet. The consultant assumed the Appellant's symptoms would wax and wane dependent upon his activities, and therefore considered it reasonable for the Appellant to utilize over-the-counter analgesic medication to minimize any pain symptoms. The consultant acknowledged that although the shoulder pain was probably caused by the MVA, opioid

analgesics were not indicated for long term pain management (eight years in this case) and can cause more harm than benefit. The consultant concluded that Endocet (a short acting opioid analgesic) had not been established as a safe and effective long term treatment. Tolerance, dependence, opioid induced hyperalgesia and significant side effects exist, which limit its effectiveness.

The panel considered subsection 136(1) and sections 5 of Regulation 40/94, and section 38 of the MPIC Act to determine entitlements. Although sometimes troubled by pre-existing lower back pain, the Appellant's testimony established that he was healthy and active before the MVA. He worked hard as a healthcare aide and participated in a variety of sports. He then experienced a serious MVA and, as a result, suffered with residual pain. He described significant pain from his hip and knee, as well as his and shoulder, and how this negatively affected his activities of daily living.

The Appellant testified that he had worked with his doctor since the MVA to arrive at a dosage level of Endocet which allowed him to control his pain and manage his activities of daily living, without interfering with his cognitive function. He attempted a lower dosage and consequently settled on his current dosage of six tablets per day. His testimony was supported by the various reports and chart notes of his doctor.

The Appellant described trying other medications for pain control, such as anti-inflammatories, which caused him side effects. He also displayed an awareness of the possible side effects which can result from the extended use of opioids. His work as a healthcare aide had exposed him to the deleterious effects of opioid over-use, and he had discussed this with his doctor.

The panel appreciated the HCS consultant's comments regarding the general safety and effectiveness of opioids as well as the potential side effects, and did not minimize these genuine, well-recognized concerns. However, the evidence showed that the Appellant's doctor had closely followed and managed his opioid use. The Appellant's awareness of the potential side effects reflected this consultation, which was documented in the clinical notes. His doctor had the advantage of assessing and treating the Appellant over time, evaluating the effect of medication at various levels and had continued to prescribe Endocet for him at the current dosage. While the HCS consultant's evidence addressed general concerns with opioid medication, the evidence showed that the Appellant's doctor had addressed the general concerns with him, and continued to prescribe the medication at levels determined appropriate for his ongoing treatment.

Accordingly, the Commission found that the Appellant had met his onus of showing, on a balance of probabilities that Endocet medication, as prescribed for him by his doctor for management of his shoulder pain, was medically required as a result of injuries sustained in the MVA. He was therefore entitled to reimbursement for those past and ongoing, medication expenses. The matter was referred back to his case manager for a determination of the amount of reimbursement owed.

## 5. Permanent Impairment Benefits

Section 127 of the MPIC Act provides that a victim who suffers permanent disability or mental impairment because of an accident is entitled to a lump sum indemnity, which is calculated in accordance with Manitoba Regulation 41/94. The following cases provide examples of issues faced by the Commission when adjudicating these types of matters and illustrate the importance of expert evidence to establish the extent of the impairment or that the impairment was caused by the MVA.

Case #1

*In this case, the issue was whether the Appellant was entitled to Permanent Impairment (PI) benefits for 23 further impairments.*

The Appellant was the driver of a vehicle when she was involved in accidents on four separate occasions (the MVAs). MPIC reviewed the Appellant's injuries, in order to review her entitlement to PI benefits. The case manager issued a decision letter which provided a total PI benefit to the Appellant of 6%, in respect of alteration of two intervertebral discs (3% each) arising from one of the MVAs.

The Appellant disagreed with the decision of the case manager, being of the view that she was entitled to further PI benefits, and filed an Application for Review. This decision was upheld on review, and the Appellant appealed to the Commission. In her appeal, the Appellant sought 23 further PI benefits.

In order to be entitled to further PI benefits, the Appellant had to establish, on a balance of probabilities that there were additional PI benefits to which she was entitled, as a result of one or more, of the MVAs. For each of these PI benefits, the onus was on the Appellant to establish, on a balance of probabilities that:

a) She suffered the identified impairment; and

b) The impairment was caused by an MVA; and

c) The impairment was permanent; and

d) There is a PI benefit available for the impairment.

The Appellant had to establish all four components in respect of each PI benefit sought; failure to establish even one component of a particular claim was fatal to that claim.

The Appellant was the only witness to testify at the appeal hearing. In considering the Appellant's claim for each of the 23 further PI benefits, the panel carefully considered the testimony of the Appellant and the arguments of counsel. The panel also carefully reviewed all of the reports and documentary evidence filed in connection with the appeal, and took into account the provisions of the relevant legislation.

With respect to eight of the PI benefits sought, the panel found that the Appellant had not met the onus to establish, on a balance of probabilities that she suffered from the identified impairment. With respect to six of the PI benefits sought, the panel found that the Appellant had not established, on a balance of probabilities that the impairment was caused by an MVA. Six of the Appellant's other claims failed on the basis that the Appellant had not established, on a balance of probabilities that the identified impairment was permanent. With respect to two of the Appellant's claims, the panel found that the Appellant failed to establish, on a balance of probabilities that a PI benefit was available for the impairment. However, the panel found that the Appellant did establish, on a balance of probabilities that she was entitled to a PI benefit in respect of one particular impairment, having established all four necessary components.

In summary, the panel found as follows:

1. that the Appellant had met the onus to establish, on a balance of probabilities that she was entitled to a permanent impairment benefit in respect of her osteitis pubis.

2. that the Appellant had not met the onus to establish, on a balance of probabilities that she was entitled to any other additional permanent impairment benefits (other than in respect of her osteitis pubis), and that the Appellant's PI benefits were otherwise correctly assessed and calculated.

Case #2

*In this case, the issue was whether the Appellant was entitled to PI benefits for two further impairments.*

The Appellant sustained multiple injuries in an MVA. Following hospitalization and treatment, MPIC assessed a number of PI awards to which the Appellant was entitled. These included awards for impairments related to cerebral concussion or contusion, post–traumatic alteration of tissue, facial alteration in form and symmetry, facial nerve, ptosis, functional alteration of brain, alteration of consciousness and a communication disorder.

Two issues remained in dispute. The Appellant sought an additional PI award for a disc herniation in his back and for a psychiatric condition, syndrome or phenomenon.

MPIC took the position that although the Appellant had neck and back difficulties and there was evidence of a disc herniation, these were not caused by the MVA. They were not noted while he was under the care of a neurosurgeon while in hospital, and the disc herniation was degenerative in nature.

The Appellant argued that while hospitalized he had been given morphine, for other more severe injuries he had suffered. This masked the pain of his back condition, while other priority medical issues were investigated. Once he tried to return to work, he shouldered through the pain, but this did not mean he was not experiencing pain throughout.

The Commission noted that the evidence did support that the Appellant suffered from a disc herniation. However, the burden of proof is on the Appellant to show, on a balance of probabilities that the herniation was casually related to the MVA. The Appellant was able to provide evidence of back pain, disc herniation and degeneration, but evidence to support a link between the disc herniation and degeneration and the MVA was limited. The evidence that the Appellant was pain-free prior to the MVA was not sufficient to conclude that the pain he experienced after the MVA resulted from the disc herniation. The intervening five and a half years between the date of the MVA and the diagnosis of disc herniation, made the Appellant's position that this was caused by the MVA untenable. The Appellant was not entitled to a further PI award in this regard.

In regard to the second issue in dispute, MPIC agreed that the Appellant suffered from a psychiatric condition as a result of trauma from the MVA, but had awarded him a benefit under the MPIC Act and Regulations that corresponded to an injury or impairment of cognitive function, Class 5, requiring "medication, psychiatric intervention or both on an occasional basis", being an award of 5% of the total eligible amount. The Appellant was of the view that he was entitled to a 10%, or closer to a 15%, award for Class 4, which required "psychiatric follow-up on a monthly basis".

The Appellant's treating neuropsychologist acknowledged that a rating of 5% was, in a precise fashion, accurate. However, he was of the view that the rating for the Appellant should likely fall midway between 5% and 15%. His evidence was that the Appellant did not attend for treatment only occasionally, but that he attended six times per year, although this was not on a monthly basis either.

The Commission noted that the neuropsychologist was trying to account for the fact that it is difficult to classify psychological conditions precisely within the definitions provided in the legislation, referring to the fact that such conditions may be more "episodic". The panel acknowledged the doctor's view that the Appellant's rating should be between Class 4 and Class 5, but noted that the evidence did not support that finding.

In assessing whether the Appellant's PI award was correctly classified, both parties had emphasized the frequency of attendance for psychological counselling, and other symptoms or conditions were not addressed. The evidence was undisputed that the Appellant attended for psychological counselling less than once a month and this fell accurately within the Class 5 classification. The Commission found that the Appellant was not entitled to a further permanent impairment award in this regard.

Accordingly, the Appellant's appeals were dismissed and the IRD was upheld by the Commission.

## 6. Calculation of Income Replacement Indemnity benefits

Under the MPIC Act, an Appellant may be entitled to IRI benefits if they are unable to work for a period of time. The MPIC Act and regulations contain many provisions dealing with the entitlement to and calculation of IRI benefits.

The following case illustrates the issues faced by the Commission when considering the calculation of IRI benefits.

Case #1

The Appellant suffered injuries from an MVA which rendered him unable to continue working. He was therefore eligible for IRI benefits. MPIC classified the Appellant as a full-time, self-employed earner at the time of the MVA and, pursuant to the MPIC Act, determined an occupation classification and gross yearly employment income (GYEI) for him. Based upon his MVA injuries, the Appellant also applied for and received federal Canada Pension Plan (CPP) disability benefits (income).

In calculating the Appellant's IRI, MPIC reduced his gross yearly employment income by an amount equal to his CPP disability income. MPIC also calculated and deducted income tax and employer/employee CPP contributions from his GYEI. The Appellant argued that because he was in receipt of CPP disability income (which federal tax law stated was not subject to a CPP calculation and contribution) then MPIC was wrong in calculating and deducting a CPP contribution from his determined GYEI.

The Appellant's MVA injuries also resulted in his eligibility for a federal Disability Tax Credit (DTC). MPIC did not apply this tax credit when calculating his IRI. The Appellant argued that, paragraph 10(3)(c) of Regulation 39/94, allowed the same tax credits as would be allowed under The Income Tax Act of Manitoba (which included the DTC). Therefore, MPIC should allow and apply his DTC to increase his net income and corresponding bi-weekly IRI. The Appellant appealed MPIC's treatment of both the CPP contribution and the DTC income to the Commission.

(The Appellant also appealed the occupation classification determined by MPIC. This issue is not dealt with here.)

The Commission found that MPIC's treatment of the Appellant's CPP contributions and CPP DTC was appropriate in the calculation of his IRI benefit.

MPIC's treatment of self-employed gross income, CPP contributions and DTC is governed by subparagraph 81(2)(a)(ii) of the MPIC Act, and paragraphs 3(2)(d), 10(1)(a) and subparagraphs 10(3), 10(4) and 10(6) of Regulation 39/94. Regulation 39/94 defines "gross yearly employment income" (GYEI) as having the same meaning as "gross income" has in Part 2 of the MPIC Act, which covers "Universal Bodily Injury Compensation".

The panel accepted MPIC's evidence that one purpose of the MPIC Act is to financially compensate Manitobans for income loss resulting from injury suffered because of a MVA. This compensation is a tax-free benefit calculated within a context meant to simulate the Appellant's losses as of the time of the MVA and going forward. The panel found that the applicable sections should be interpreted within the purpose and context of the Act as a whole.

Subsection 3(2) of Regulation 39/94, confirms that a self-employed victim's occupation and GYEI is derived from the self-employment established at the time of the accident. Therefore, the calculation of IRI benefits arises from the circumstances present at the date of the MVA. Calculation of net income is set out in section 10 of Regulation 39/94. MPIC takes the determined GYEI and deducts income tax and CPP contributions (and, if applicable, applies certain tax credits pursuant to subsection 10(3)). Subsection 10(4) deems GYEI to be pensionable earnings. Subsection 10(6) states that CPP contributions are payable as an employee's contribution, calculated in respect of the victim's pensionable earnings.

Pursuant to section 197 of the MPIC Act, the calculation of net income requires MPIC to first deduct a claimant's actual CPP disability income from GYEI. This ensures that a claimant does not receive a double benefit from two insurance schemes for the same injury. The Appellant did not take issue with this principal. MPIC next deducts the statutory (i.e., per the Income Tax Act) income tax and CPP contribution. The Appellant argued that MPIC was 'double-dipping' by deducting both his CPP disability income and his CPP contribution.

The panel determined that, at the time of his MVA, the Appellant's self-employment gross income constituted pensionable earnings from which he was required to calculate and pay statutory CPP contributions. Post-MVA, the MPIC Act and Regulations deemed the Appellant's determined GYEI to be pensionable earnings from which MPIC similarly calculated and deducted CPP contributions (consistent with simulating the Appellant's pre-MVA circumstances). The panel was mindful that the Appellant's post-MVA CPP disability income was a separate income stream for him. This income was taxable to him but was not subject to a CPP calculation and deduction. The panel found that MPIC's calculation and deduction of a CPP contribution from MPIC's GYEI was a correct calculation for establishing the Appellant's tax-free IRI benefit, consistent with the goal of compensating him for his MVA losses.

On the issue of how MPIC treated the Appellant's DTC, the Appellant's premise was that the MPIC Act did not state that the date of the MVA determined how IRI was calculated. He argued that MPIC applied this criteria inconsistently. To illustrate, he pointed out that MPIC stopped applying a child tax credit to his taxable income once his children reached age 18, despite initially applying the child tax credit at the time of the MVA. Since there was no provision in the MPIC Act or Regulations that allowed MPIC to stop applying the child tax credit, the decision to discontinue the credit when the children reached age 18 was arbitrary and clearly not based upon the date of the MVA. Therefore, MPIC's rationale for disallowing the DTC on the basis that the Appellant did not have this deduction at the time of the MVA was similarly arbitrary. The Appellant argued that MPIC did not apply tax credits based upon the date of the MVA, but rather upon the basis that it benefitted MPIC. He argued that the DTC should be applied in accordance with subsection 10(3) of the MPIC Act, which would benefit the Appellant by increasing his IRI.

The panel found that this interpretation of the MPIC Act and Regulations would not simulate the Appellant's pre-MVA circumstances. The Appellant was not entitled to a DTC pre-MVA. Further, the Appellant was able to apply his DTC to his additional post-MVA investment income, which under his scenario, potentially allowed him to double benefit from his DTC. Therefore, the panel found that to require MPIC to apply the Appellant's DTC to his notional taxable income, while also allowing the Appellant to use his DTC against his actual income, would result in

overcompensation to the Appellant. The panel found that this scenario would be inconsistent with the MPIC Act's purpose of fairly compensating the victim for his MVA losses.

The panel disagreed with the Appellant's argument that MPIC inconsistently applied the 'date of the MVA' criteria in respect of tax credits. Had the accident not occurred, the Appellant's child tax credits would have similarly been discontinued when his children were no longer dependents at age 18. In compensating the Appellant for his MVA losses, MPIC simply replicated what the Appellant's situation would have been pre-MVA, and discontinued the tax credit.

The panel found that the Appellant failed to prove, on a balance of probabilities that MPIC incorrectly calculated the Appellant's IRI benefit by deducting both the CPP contribution and CPP disability income from the Appellant's GYEI. The panel also found that the Appellant failed to prove, on a balance of probabilities that MPIC incorrectly applied the legislation when it refused to apply the Appellant's DTC to increase his IRI benefit. The appeals were dismissed.

The Appellant sought leave to appeal the Commission's decision to the Manitoba Court of Appeal. The application for leave was denied.