Automobile Injury Compensation
Appeal Commission

Annual Report
2021-2022

Manitoba

Automobile Injury Compensation Appeal Commission
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MINISTER
OF LABOUR, CONSUMER PROTECTION AND GOVERNMENT SERVICES

Room 343
Legislative Building
Winnipeg, Manitoba R3C 0V8
CANADA

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, 2022.

Respectfully submitted,

Honourable Reg Helwer
Minister of Labour, Consumer Protection and Government Services
Minister responsible for the Manitoba public service
Minister responsible for the Public Utilities Board

MINISTRE
DU TRAVAIL, DE LA PROTECTION DU CONSOMMATEUR
ET DES SERVICES GOUVERNEMENTAUX

Bureau 343
Palais législatif
Winnipeg (Manitoba) R3C 0V8
CANADA

Son Honneur l'honorable Janice C. Filmon, C.M., O.M.
Lieutenante-gouverneure du Manitoba
Palais législatif, bureau 235
Winnipeg (Manitoba) R3C 0V8

Madame la lieutenante-gouverneure,

J'ai le privilège de soumettre à Votre Honneur, à titre d'information, le rapport annuel de la Commission d'appel des accidents de la route pour l'exercice terminé le 31 mars 2022.

Le tout respectueusement soumis,

Monsieur Reg Helwer
Ministre du Travail, de la Protection du consommateur et des Services gouvernementaux
Ministre responsable de la fonction publique
Ministre responsable de la Régie des services publics

Labour, Consumer Protection and Government Services
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Honourable Reg Helwer
Minister of Labour, Consumer Protection and Government Services
Room 343 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, 2022 which includes a summary of significant decisions.

Yours truly,

LAURA DIAMOND
CHIEF COMMISSIONER

ANNUAL REPORT OF THE AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION FOR FISCALYEAR 2021/22

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 2021/22, which is April 1, 2021 to March 31, 2022, was the 28th full year of operation of the Commission.

The Commission has 10 staff which include the chief commissioner, two part-time deputy chief commissioners, a director of appeals, three appeals officers, a secretary to the chief commissioner and two administrative secretaries. 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 2021/22, 140 appeals were filed at the Commission, compared to 204 in the fiscal year 2020/21.

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 2021/22 fiscal year, 52% of all appellants were represented by the Claimant Adviser Office, compared to 51% in 2020/21.

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 140 new appeals that were filed during the 2021/22 fiscal year, 110 appellants pursued the option of mediation.

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

Hearing Procedure

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

Case Conferences

Management of appeals by case conference continues to be an important part of the Commission's hearing schedule. Over the last 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 2021/22. 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 2021/22, appellants were successful in whole or in part in 41% of the appeals heard by the Commission, compared to 9% in 2020/21. In addition, the work of the Commission resulted in the resolution of 2 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.

- 9 days of hearings were scheduled but the appeals were withdrawn or settled prior to the commencement of the hearing.

Hearing Activity

The following table shows the number of hearings held in the last six fiscal years:

Fiscal Year	Hearings	Case Conferences	Total Hearings
2021/22	26	45	71
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

The following table shows 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
2021/22	55	9	45	9	118
2020/21	35	6	52	4	97
2019/20	41	7	91	14	153

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 2021/22:

- Files were indexed within 1.84 weeks of receipt of MPIC's file and additional material compared to 2.25 weeks in 2020/21 and 1 week in 2019/20.
- Hearing dates were scheduled, on average, within 16.86 weeks from the time the parties were ready to proceed to a hearing. This compares to 15 weeks in 2020/21 and 7 weeks in 2019/20.
- The Commission prepared 17 written decisions in 2021/22, compared to 12 written decisions in 2020/21. The average time from the date a hearing concluded to the date the Commission issued an appeal decision was 7.9 weeks in 2021/22, compared to 10 weeks in 2020/21 and 13.19 weeks in 2019/20.
- Section 182.1(1) of the MPIC Act gives the Commission discretion to dismiss all or part of an appeal at any time if the Commission is of the opinion that the appellant has failed to diligently pursue the appeal". The Commission issued 6 decisions under this subsection in 2021/22. The time from the date the hearing concluded to the date the Commission issued the decision was 4.7 weeks.

The Commission's appeals officers continue to provide substantial administrative support to the case management of appeals. The complexity of cases and the inclusion of multiple issues under appeal included in one MPIC internal review decision results in increased case management and larger volume Bodily Injury Claim Files.

- The Commission completed 91 indexes in 2021/22, compared to 130 indexes in 2020/21 and compared to 102 indexes in 2019/20.
- The average indexed file included 136 tabbed documents for the 2021/22 fiscal year, compared to 121 tabbed documents in 2020/21 and 107 in 2019/20.
- Staff prepared 45 supplemental indexes in 2021/22, compared to 70 supplemental indexes in 2020/21 and 72 in 2019/20. 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 136 indexes in 2021/22, as compared to 200 indexes in 2020/21 and 174 indexes in 2019/20.

As of March 31, 2022, there were 407 open appeals at the Commission, compared to 368 open appeals as of March 31, 2021 and 396 open appeals as of March 31, 2020.

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 was one application for leave to appeal in 2021/22. Leave to appeal was denied.

In the Commission's 28 years of operation, as of March 31, 2022, 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 2021/22.

Information Required Annually (per Section 18 of The Act)	Fiscal Year 2021/22
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 2021/22.

1. Failure to Pursue the Appeal

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

There are several circumstances in which an appellant may fail to diligently pursue their appeal. For example, in some cases, the appellant has not taken active steps to communicate with the Commission. In other cases, the appellant has failed to attend case conferences and meet deadlines set by the Commission.

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

Case #1
The Appellant in this case did actively participate in his appeal initially; however, subsequently, he failed to attend case conferences and meet deadlines set by the Commission.

The Appellant was involved in a motor vehicle accident (MVA) in June, 2004 which unfortunately resulted in quadriplegia.

When the Appellant was not satisfied with benefits he sought to obtain from MPIC, he appealed to the Commission and participated in the mediation process offered by the Automobile Insurance Mediation (AIM) office. When the matter was not resolved at mediation, Commission staff wrote to the Appellant advising that a case conference would be set.

A series of case conferences were held to clarify the issues under appeal and discuss procedural issues and representation. In order to confirm his availability, and to schedule and provide notice of the case conferences (which are often held by teleconference) the Commission communicated with the Appellant by telephone, email, regular mail and Xpresspost. Sometimes the Appellant responded to these communications in a timely manner, and sometimes he did not respond at all.

The Appellant then obtained representation from the Claimant Adviser Office (CAO). The CAO attended a case conference to advise that despite numerous messages left for the Appellant, they had been unable to obtain instructions from him on any outstanding matters. A further case conference was scheduled, and again, the CAO advised that the Appellant had not responded to telephone calls or emails. A few weeks later, the CAO advised the Commission that it no longer represented the Appellant.

The Commission contacted the Appellant by regular mail and email, noting the CAO's withdrawal of representation and providing notice of a scheduled case conference, asking him to confirm receipt of the letter and notice of the conference. The Appellant did not reply or respond to follow up emails reminding him of the conference. When he did not attend the conference, the Commission sent him a Notice of Withdrawal of his appeal which he could complete and return. When this was not received and the Appellant did not contact the Commission, he was advised that his appeal would be held in abeyance for three (3) months. He was also informed that pursuant to subsection 182.1(1) of the MPIC Act, the Commission could dismiss an appeal, if the Commission determined that an Appellant had failed to diligently pursue it. To avoid this process, the Appellant must contact the Commission to explain why he had not pursued his appeal.

After three (3) months passed without contact from the Appellant, the Commission sent a letter to the parties, delivered by regular mail and email, advising that a hearing would be scheduled to consider the dismissal of the Appellant's appeal. A Notice of Hearing setting out a date for the hearing of whether the Appellant had failed to diligently pursue his appeal and whether it should be dismissed, was delivered by Canada Post to the Appellant and MPIC, according to the rules set out in the MPIC Act. Email and voice message reminders were also provided to the Appellant.

The Appellant did not reply to any of these notices or messages and did not attend the appeal hearing. Counsel for MPIC attended and the Commission proceeded to hear their submission.

The Commission concluded that the Appellant had been provided with proper notice and had an opportunity to be heard at the hearing, but failed to attend. He did not take advantage of numerous opportunities to submit in writing why his appeal should not be dismissed. No explanation was provided by him.

Reviewing the history of the Appellant's delay, the Commission noted that on numerous occasions the Appellant had not taken care to respond to the Commission's or CAO's requests for input. He had not done anything to further the appeal over a 2 year period. The Commission concluded that the Appellant had not pursued his appeal with care and perseverance.

The Commission therefore found that the Appellant had failed to diligently pursue his appeal and the Appellant's appeal was dismissed.

Case #2

In this case, the Appellant advised the Commission that she did not want to pursue her appeal at the present time.

The Appellant was involved in an MVA in July, 2017. She filed two Notices of Appeal (NOAs) with the Commission in February, 2018; one with respect to personal care assistance benefits and the other with respect to rental of a hospital bed. A lengthy case management process then ensued in the Appellant's appeals.

In October, 2019, the Appellant advised the Commission that she could not move forward in her appeals because she had to "take care of other legal matters first". The Commission then sent an

email to the Appellant explaining that in the event an appellant does not take active steps to pursue their appeal, the Commission does have the power to consider whether to dismiss the appeal. The Commission asked for a further explanation as to why the Appellant could not pursue her appeals and how her other legal matter impacted her ability to pursue her appeals at the Commission. No further explanation was provided by the Appellant.

In March, 2020, the Commission contacted the Appellant by telephone to schedule a case conference. The Appellant advised that she was unable to schedule anything as "she was currently in the process of taking MPI to court". In May, 2020, the Commission sent the Appellant a letter enclosing a Notice of Withdrawal. The Appellant did not return the Notice of Withdrawal to the Commission.

The Commission then wrote to the parties in August, 2021, advising that the Appellant had not provided any further information to the Commission. Therefore, the Commission determined that it would schedule a hearing to determine whether the Appellant had failed to diligently pursue her appeals, within the meaning of subsection 182.1(1) of the MPIC Act, and, if so, whether the Commission should dismiss her appeals.

The Appellant did not attend the hearing. The Notice of Hearing sent to the Appellant by regular mail was not returned to the Commission. Although the Appellant was not present at the hearing, the Commission found that she had been given proper notice of the hearing. As well, she had been given the opportunity to make written submissions or otherwise be heard in respect of the dismissal of her appeals. Due to pandemic concerns, the hearing was held by teleconference, as indicated in the Notice of Hearing.

The panel found that the Appellant, after filing her NOAs and participating in mediation, had done nothing to advance or pursue her appeals. She failed to respond to the numerous letters and email messages from Commission staff, other than advising that she had other matters with MPIC that needed to be taken care of first. She failed to provide any further details, or to explain how this prevented her from pursuing her appeals. The onus was on the Appellant to show that she had diligently pursued her appeals and that the appeals should not be dismissed. The panel found that the actions of the Appellant described above showed that she had clearly failed to pursue her appeals in a careful, persistent or diligent manner.

The Commission therefore found that the Appellant had failed to diligently pursue her appeals and the Appellant's appeals were dismissed.

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

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

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

Case #1

The Appellant was involved in an MVA in November, 2018. She received Personal Injury Protection Plan (PIPP) benefits in the form of Income Replacement Indemnity (IRI) until these were discontinued pursuant to her case manager's decision dated February, 2020. In accordance with the notice provisions in the case manager's decision, the Appellant applied for an internal review within the 60-day time limit. The IRD of July, 2020 upheld the case manager's decision and notified the Appellant of their "APPEAL RIGHTS" including the 90-day time limit within which to appeal the IRD, in writing, to this Commission. In December, 2020, the Commission received an NOA filed by the Appellant, 57 days past the 90-day time limit to file an appeal. Due to pandemic concerns, the hearing was held by teleconference.

Subsection 174(1) of the MPIC Act provides the Commission with discretion to extend time for appealing an IRD. MPIC counsel submitted the following factors for the Commission's consideration in determining the issue:

1. The length of the delay beyond the 90-day statutory time limit;
2. The reasons for the delay;
3. Whether the delay caused prejudice;
4. Whether MPIC waived the delay;
5. Any other factor relevant to a fair outcome of the issue.

The Appellant did not dispute that she received the IRD sometime in mid-July 2020. She said that she checked her mail regularly and there was no evidence that her rural mail service was unreliable or unduly delayed. The Commission deemed that she would have received her IRD no later than July, 2020 and therefore the 90-day time limit put her filing deadline in October, 2020. The Commission's receipt of the NOA in December, 2020 rendered the filing 50 days late.

The Commission acknowledged that it had granted extensions for late filings of both shorter and longer duration than was found in this case. There was no evidence of prejudice and MPIC had not waived the 90-day time limit. The important factor in this case was the Appellant's reasons for delay.

The Appellant explained that "there was so much going on" and she "could not handle things" when she received the IRD. She testified that she perhaps missed the "APPEAL RIGHTS" notice in the IRD, or that she "would have read over the letter, not really knowing…" She said that she had "bad anxiety" from her MVA and was taking medications, although she did not specify what. She mentioned that "it was COVID and [she] couldn't go nowhere" and she "got behind" because she "was not in good shape mentally after the accident."

The Appellant did not testify as to what medications she was taking or that they adversely affected her ability to manage her affairs. The Appellant agreed that she had never been hospitalized for mental health issues, and she was able to manage her necessities of daily living. She admitted that she knows she had to "keep up with stuff." She did not present medical evidence of her anxiety.

The Commission considered the Appellant's awareness of the time limit for filing her request for an internal review, which she filed on time. The Indexed File contained MPIC reports of conversations in which the Appellant was advised not to wait for documents before filing her internal review as this may prejudice her position by putting her outside of that filing deadline. The Commission acknowledged and sympathized with the Appellant's stress reaction to the process, but also noted that the appeal process is straightforward and uses a relatively simple form. The IRD clearly set out her appeal rights, including the 90-day filing deadline, various methods for contacting the Commission, and information about obtaining free, independent assistance.

The Commission concluded that in considering all the relevant factors surrounding the delay, the extension of time would be declined. The Commission found the Appellant to be a competent and articulate individual who was comfortable with, and in fact preferred putting things in writing. She had access to a telephone and internet service both of which she had competently utilized, in the past. There was no evidence that the Appellant suffered an impairment that would prevent her from understanding and acting upon her appeal rights.

Case #2

The Appellant was involved in an MVA in November, 2017. He received PIPP benefits for rehabilitation from his injuries. MPIC conducted a Transferable Skills Analysis and Labour Market Study to determine suitable and available employment for the Appellant in his geographical area. His case manager rendered a decision advising him that his income from his determined employment would terminate in March, 2021, after his one year job search period. In accordance with the notice provisions in the case manager's decision, the Appellant applied for an internal review within the 60-day time limit. An IRD dated May, 2020 upheld the case manager's decision.

In January, 2021, the Commission received the Appellant's NOA. The Appellant hand-wrote on the face of the NOA, "Filed late due to COVID19 issues." Due to pandemic concerns, the hearing was held by videoconference.

The Appellant submitted that he had always filed "in a very timely fashion." He described past dealings with MPIC which he characterized as "having to jump through hoops" in order to comply with MPIC requirements, such as providing his tax returns, which were apparently lost by MPIC. He equated that to this situation, saying that he filed his NOA about 10 days after receiving the IRD. However, he did not hear from anyone, and so filed it again in January, 2021.

After submitting his first NOA, he testified that he had a telephone conversation with a male individual who confirmed receipt of his first NOA. Following this, he received emails advising him that he could not move the appeal ahead until he signed off on another appeal, which he said he did. He testified that he absolutely understood there was a 90-day filing deadline and maintained that he filed his NOA on time. He then said that, after filing his first NOA, he followed up with the Commission by email.

The Appellant denied that he was confusing circumstances related to filing his MPIC internal review with circumstances related to filing his NOA with the Commission. The Appellant admitted that he had "many, many emails to corroborate" his testimony, but did not know he needed to submit

evidence. He confirmed receipt and review of the Commission's Guidelines for Hearings which sets out the ability to file additional evidence.

He said that the reason he wrote "I know this is late" on his January, 2021 NOA was because he knew "this one" was late. He did not retain a copy of the first NOA. He described himself as a precise and articulate person. He did not indicate on his January, 2021 NOA that he had filed a prior one on time because he was under extreme duress, facing eviction, anticipated his hydro being cut off, and had a noisy downstairs neighbour, which hampered his sleep.

During closing submissions, the Appellant repeated that he was very careful and filed everything in a timely manner. He then mentioned that when he filed his January, 2021 NOA he had contracted COVID19.

MPIC counsel reviewed the factors for the Commission's consideration in determining the issue under appeal (as noted in the previous summary). MPIC counsel submitted that the onus is on the Appellant to show that an extension of time is appropriate and the Appellant's evidence revealed inconsistencies. In particular, his written comment on his January, 2021 NOA acknowledging that the NOA was late was not consistent with his testimony that he filed a prior NOA on time. The Appellant's statement that he did not know he could file the email evidence of his first NOA, was also not consistent with reading that information in the Hearing Guidelines. The Appellant provided no medical documentation corroborating his COVID19 illness, which was also inconsistent with his written material.

The Commission found noteworthy inconsistencies in the Appellant's evidence. His January, 2021 NOA spoke about his MVA-related injuries and how he was not able to see his doctors due to COVID19. He stated that work was unavailable due to COVID19. He never stated that he was ill from COVID19 or that it hampered his filing. He wrote on his NOA that he realized it was late. This was notably different from his testimony about filing an NOA on time.

The Appellant admitted that he received his IRD, was aware of the 90-day filing deadline, and was intelligent, articulate and careful. This was inconsistent with other testimony that he did not know what to write on the NOA when it asked for his reasons for appeal. Further, a February, 2021 letter from the Commission informed the Appellant that if a medical reason delayed his timely filing, he may submit a medical report to support that, the cost of which may be covered by the Commission.

The numerous material inconsistencies led the Commission to conclude that the Appellant's testimony was neither credible nor reliable. The Commission declined to exercise its discretion to grant an extension of time.

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

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

Case #1

In this case, the issue was whether the death of the Appellant's late husband was caused by injuries sustained in the MVA.

The Appellant represented the estate of a deceased individual who passed away in hospital, one week after an MVA in April, 2013. The Appellant took the position that the death was a result of MVA-related injuries, but MPIC was of the view that the passing was not causally related to the MVA. The issue on appeal was whether the deceased's death was caused by the MVA, thereby giving rise to an entitlement to benefits from MPIC.

The deceased was driving on the highway during a snowstorm when his vehicle slid off the roadway and became stuck in a snowbank. He and his wife were unable to exit the vehicle and remained there for some hours until a passerby provided assistance. After they returned home he began to feel unwell, complaining of low back pain. He attended at hospital twice. At first he was discharged showing improvement. Two days later he presented to hospital again with a productive cough and complaining of right-sided chest discomfort and numbness in his right arm. His white blood cell count, urea and creatinine levels were raised. He was anemic with abnormal liver function. He was admitted with a diagnosis of right lung pneumonia and passed away the next day. The hospital discharge summary indicated that the death was due to pneumonia, end-stage renal failure and Type II diabetes.

The deceased's wife testified at the hearing and expressed her dismay with the care her husband received in the hospital. She was of the firm belief that her husband got sick because his clothes got wet while stuck in the vehicle after the MVA and that he was not well after that. She submitted that this was the cause of his illness (combined with lack of access to good medical care) and resulted in his untimely death.

The Appellant also provided a report from a physician with expertise in respiratory medicine, who described the deceased's confinement in the vehicle for hours before returning home complaining of cold, chill, shivering and back pain. He noted poorly controlled diabetes and renal failure and found the deceased suffered from right-sided pneumonia and possible right pleural effusion, the result of being confined in a closed space and unable to move around. Deep breathing and coughing were compromised due to chest pain. He opined that both his diabetes and chronic renal disease reduced the effectiveness of the immune system, leading to pneumonia causing death.

MPIC submitted that the evidence showed the deceased was a very sick man before the MVA, with a shortened life expectancy due to smoking, uncontrolled diabetes, obesity, hypertension, a prior plural effusion and kidney disease. The MVA was relatively minor in nature. The deceased did not ask for an ambulance or seek to be transported to hospital, preferring instead to go home. He was not transferred to hospital until 3 days later, when hospital records reported a 2-3 day history of feeling generally unwell but without reference to chills, shivering or having been involved in an MVA. There was no note of exposure to cold temperatures and suspected pneumonia was not diagnosed at that time.

The deceased had suffered from lower back pain for some time even prior to the MVA, but an x-ray taken at the hospital did not suggest any pathology or a link between the back pain and the MVA.

MPIC noted that the doctor upon whose report the Appellant relied had not examined the deceased after the MVA, and had based his report upon erroneous facts which were not supported by the medical evidence. Evidence from MPIC's medical consultant, who reviewed the hospital reports, showed that when the deceased was first discharged from hospital his clinical picture did not present an individual experiencing respiratory compromise secondary to confinement or even a patient in the early stages of developing pneumonia. The findings upon admission to hospital the day before his death suggested only a presumed pneumonia and supported the conclusion that the deceased's kidneys were failing.

The panel considered the evidence before it and noted that although the deceased had been confined inside the vehicle, he had not been confined to a specific seat or forced to lay flat. He was able to move around and change positions to different seats, turning the car motor on and off. The evidence reviewed did not lead the panel to conclude that the deceased was confined and immobilized in the vehicle in a manner that compromised respiratory function.

The respiratory doctor's report did not account for the days of delay in the diagnosis of pneumonia or the absence of fever, poor air entry or weak vital signs. A chest x-ray report noted the persistence of patches that suggested a condition pre-dating the MVA. It was not until he returned to hospital a few days later that he showed signs of suspected pneumonia. Elevated creatinine levels and abnormal liver were found.

The panel concluded that the death was not caused by the MVA. Along with pneumonia, the deceased suffered from pre-existing uncontrolled diabetes and renal failure, all noted by the attending physician upon his death. The evidence established that all of these conditions led to his demise. On a balance of probabilities, there were too many variables and pre-existing conditions to find that the MVA caused confinement with resulting respiratory compromise leading to pneumonia and causing his death. The evidence established that the deceased suffered from uncontrolled diabetes, renal failure and pneumonia which were not caused by the MVA.

Based on the above, the panel found that the MVA was not found to have materially contributed or caused the conditions or the death of the deceased and the appeal was dismissed.

Case #2

In this case, the issue was whether the Appellant's right neck and shoulder injury was causally connected to the MVA.

The Appellant was in an MVA in October, 2009. She suffered injuries to her right neck and shoulder when she reached from her driver's seat between the bucket seats, into the back seat, to try and brace her daughter from the side impact of another vehicle. She received PIPP benefits for therapeutic treatment and income replacement.

A July, 2011 Functional Capacity Evaluation (FCE) concluded that the Appellant met the medium strength physical demands of her employment as either a food and beverage server or bartender. In December, 2013 the Internal Review Officer upheld a case manager's decision to terminate the PIPP benefits on the basis that her accident-related injuries did not preclude her from holding her determined employment as a server/bartender. Essentially, MPIC considered that her ongoing complaints were related to non-MVA conditions. The Appellant appealed that decision to the Commission. Due to pandemic concerns and the fact that the Appellant now resided outside of the province, the hearing was conducted by videoconference.

The Appellant testified that she, her daughter and the other minor passenger were transported by ambulance to the hospital. The Appellant reported right arm and shoulder pain, as well as headache. The Appellant confirmed that she had a pre-existing right shoulder/scapula injury and wrist fractures (caused by a fall) from which she had not fully recovered at the time of the MVA. Nonetheless, she had recently been offered employment as a cook during this recovery period, until such time as she fully recovered and became eligible for call-back to her server/bartender position.

She commenced the position as cook shortly after the MVA, at reduced hours of 35 hours per week. Her employer accommodated her right shoulder and neck injuries by providing cutting and preparation work areas at a suitable height. She nonetheless experienced pain and headaches performing these duties, and never achieved the anticipated 35-hour work week. This employment ended in January, 2010.

In November, 2009, the Appellant followed the recommendation of her physiotherapist that she undergo a cervical spine x-ray because her injuries appeared more serious than the diagnosed whiplash. The x-ray revealed no fractures, but there appeared to be a straightening of the normal curvature of her neck, which was attributed to neck pain and muscle spasm.

Another x-ray of her shoulder in January, 2010, again revealed no bone or joint abnormality. However, the Appellant was experiencing increased right neck, scapular and shoulder pain, cervical segmental dysfunction and sensory deficits in her right arm, as well as dizziness, impaired memory and anxiety/depression.

Her wrists had healed and shortly after ending her employment as a cook in January 2010, she was called back to her former employment, on a part-time basis, bartending and performing VLT duties, in the motel lounge. However, the warmer weather brought increased clientele for the lounge and VLTs, and her employer now required her to carry large, drink-filled trays on the palm of her upturned right hand, held at shoulder height or higher. Her shoulder/neck injury prevented her from performing this duty and her employer could not offer full-time hours. This work ended again in the summer of 2010.

In January, 2011, the Appellant attempted a return to part-time duties at a VLT lounge located across from her former employer, as well as part-time server duties with her former employer. However, her former employer soon required her to carry large banquet trays at shoulder height on the palm of her right hand, which she could not perform. Her employment with both employers ended in the spring of 2011 when activity increased, and they could no longer accommodate her inability to carry

large trays. She was still experiencing headaches, soreness and tenderness on her right-side neck and shoulder.

The Appellant testified that the FCE ordered by MPIC did not test the actual duties required of her long-time employer in carrying large, food or drink-laden trays at shoulder height or higher, balanced on her upturned right palm. She argued that the FCE was not a valid analysis of her particular circumstances. The Appellant consistently attempted other kinds of employment that did not require particular strength, straight arm, or overhead lifting using her right arm.

One medical report referenced a potential genetic health condition that may cause her tendons to be overly flexible, which MPIC relied upon to conclude that her neck and shoulder issues were not MVA-related. The Appellant pointed out subsequent medical reports that concluded she did not suffer from this condition. She also noted that a subsequent fall damaged the tendon in her left arm which had fully healed and therefore contradicted the genetic issue. Conversely, none of her right neck and shoulder problems existed prior to the MVA, and they had not abated since the MVA.

She acknowledged the numerous unrelated family stressors she experienced and agreed that stress can affect pain, but said that while the stress may have increased her headaches, stress never altered her shoulder pain or function. She was forthright in discussing other documented falls and injuries she experienced, and from which she recovered.

MPIC's Health Care Services (HCS) medical consultant testified to his reports in which he noted that the Appellant had returned to work, which he assumed was without restrictions. The consultant relied on the FCE that concluded the Appellant demonstrated the medium strength ability required for both the "Food and Beverage Server" and "Bartender" occupations. He conceded that the Appellant's assertion that her real life work duties were not tested, may be true.

The consultant looked to the pre-existing right shoulder issues and noted that post-MVA, there were apparent inconsistencies in the Appellant's reports of right neck and shoulder pain. This led him to question the causal relationship between the MVA, and the persisting and potentially worsening shoulder condition. It troubled him that there was no clear diagnosis. Based upon the file documentation, the consultant concluded there was no causal relationship between the MVA and her ongoing neck and shoulder complaints. Therefore, he concluded that the Appellant was able to resume her normal work duties as a bartender.

The consultant conceded that it was possible that the Appellant's periodic return to work and resumption of her work duties made her symptoms worse, which resulted in periods of recovery and relapse and apparent inconsistent reporting. He also conceded that about 8-10% of individuals can have chronic suffering of whiplash-associated injuries.

The Commission found that the Appellant had proven causation for her neck and shoulder injuries based upon her credible testimony, the medical documentation of those ongoing complaints, the consultant's misinformation about critical underlying facts, which undermined his conclusions, and his evidence that a percentage of individuals can suffer chronic symptoms of whiplash.

The Commission found that the consultant had relied on the FCE which did not properly document the Appellant's real life job requirements and was therefore deficient in concluding that she was able to return to her former occupation as a bartender/server.

Based on the above, the panel found that the Appellant had met the onus of establishing, on a balance of probabilities, that her medical condition was causally connected to the MVA, and her appeal was allowed. The matter was referred back to MPIC to calculate her compensable IRI as a bartender.

Case #3

In this case, the Commission found that the Appellant did not meet the onus of establishing, on a balance of probabilities, that her medical condition was caused by the MVA.

The Appellant was in an MVA in September, 2006. She suffered injuries as a result of the MVA, and received physiotherapy treatment which concluded in December, 2006. She contacted her case manager in July, 2007, to seek funding for chiropractic treatment, but funding was denied. Subsequently, the Appellant contacted MPIC in July, 2008, and advised that, as of February 2008, due to the injuries sustained in the MVA, she was unable to continue her employment as a teacher's aide. She requested IRI benefits. MPIC denied those benefits on the basis that there was no causal connection between her current symptoms and the MVA. The Appellant appealed MPIC's decision to the Commission. Due to pandemic concerns, the hearing was held by videoconference.

At the appeal hearing, there was no dispute that the Appellant had suffered an injury in the MVA. There was also no dispute between the parties that the Appellant was suffering from diverse and significant symptoms, although not all medical practitioners agreed on the cause or diagnosis of her medical condition. The dispute was whether there was a causal connection between the Appellant's MVA injury and her medical condition.

The initial injuries reported by the Appellant following the MVA were back and neck pain, and that she felt nauseous. The physiotherapist who treated the Appellant following the MVA assessed her with "cervical & lumbar whiplash associated strain", and reported her to be "much improved" upon her discharge from physiotherapy on December 5, 2006.

It was the Appellant's position that her back and neck pain were not resolved following her discharge from physiotherapy in December, 2006, but continued thereafter, and in fact got worse. In addition, it was the Appellant's position that her nausea was a continuing condition caused by the MVA that got worse, and thus the significant gastrointestinal issues that she experienced were caused by the MVA. The Appellant argued that her medical condition, encompassing her back and neck pain and her gastrointestinal issues, was causally connected to the MVA. The Appellant relied on the evidence of her treating sports medicine physician, who attributed her medical condition to the diagnosis of somatic symptom disorder, and on the evidence of two chiropractors, who attributed her medical condition to the diagnosis of craniocervical instability (CCI) and cerebellar tonsillar ectopia (CTE).

It was MPIC's position that the Appellant's MVA injury resolved upon her discharge from physiotherapy, or shortly thereafter. MPIC argued that the Appellant's subsequent medical condition, including her gastrointestinal issues and also her somatic symptom disorder, was not caused by the

MVA. MPIC relied on the evidence of its HCS medical consultant, a sports medicine physician, in this regard.

The panel carefully considered the testimony of all of the witnesses, as well as the documentary evidence and the submissions of counsel. The panel considered each component of the Appellant's medical condition separately.

Back and Neck Pain: Although the Appellant testified that her back and neck pain continued following her discharge from physiotherapy, the panel found that the contemporaneous documentary evidence, which was considered to be more reliable than the Appellant's recollection, did not support the Appellant's testimony. Therefore, the panel found that the Appellant had not met the onus of establishing, on a balance of probabilities, that her back and neck pain continued following her discharge from physiotherapy in December, 2006.

Somatic Symptom Disorder: The Appellant's treating sports medicine physician first saw her in April, 2008, nineteen months after the MVA. He testified that he was of the opinion that the Appellant's MVA injury to her neck and back developed into a somatic symptom disorder, which was caused by the MVA. He said that his opinion was based on the continuity of the Appellant's symptoms from the MVA to date. In contrast, the HCS medical consultant's opinion was that he could not causally connect the Appellant's medical condition to the MVA, because her MVA injury had resolved following physiotherapy, and any medical condition arising after that was not caused by the MVA. Given that the panel found that the Appellant did not establish that her back and neck pain continued following her discharge from physiotherapy in December, 2006, the panel gave less weight to the opinion of the Appellant's physician, and preferred the opinion of the HCS medical consultant. The panel therefore found that the Appellant had not met the onus of establishing, on a balance of probabilities, that she suffered from a somatic symptom disorder that was causally connected to the MVA.

Gastrointestinal Issues: The Appellant said that the significant gastrointestinal issues that she experienced in 2007 and thereafter were related to the nausea which she felt immediately following the MVA. However, apart from an initial report of nausea that she made in September, 2006, to both her family physician and physiotherapist (on the same day), there was nothing in the contemporaneous documentary evidence indicating that the Appellant reported any episodes of nausea or vomiting until her attendance at her family physician in February, 2007, and then subsequent hospital attendances in May and June, 2007. Further, since late 2007, the Appellant's gastrointestinal issues have been diagnosed by gastroenterologists as irritable bowel syndrome (IBS), and she has been treated for that condition and received medication for it by those specialists. They have never said that the IBS was caused by the MVA.

The HCS medical consultant said that the gastrointestinal issues experienced by the Appellant in 2007 were not connected to her neck and back pain. His opinion was that it was not probable that a person would have an improving soft tissue injury, and then later develop a gastrointestinal condition that was causally connected to it. He had never seen that in his years of practice. The panel accepted the HCS consultant's evidence and opinion on this issue. Therefore, panel found that the Appellant

had not met the onus of establishing, on a balance of probabilities, that the significant gastrointestinal issues that she experienced were caused by the MVA.

CCI/CTE: The Appellant's chiropractors were of the opinion that the Appellant suffered significant alar ligament damage in the MVA, resulting in the diagnoses of CCI and CTE. In contrast, the HCS medical consultant was of the opinion that the Appellant's MVA injury could not have been related to CCI. He said an injury of that nature would have made itself apparent within a few hours of the MVA, which was not the case here. The Appellant's own treating sports medicine physician was himself sceptical of the diagnosis of CCI, expressing the opinion that most radiologists would not give that diagnosis. He called CCI a "fad", likely to "fizzle out over time". The panel preferred the evidence provided by the HCS consultant (and also the Appellant's physician) to that of the Appellant's chiropractors. The panel found that the HCS consultant 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. This was in contrast to the report of one of the Appellant's chiropractors, which did not address any of the Appellant's prior history. The other chiropractor had not previously treated any patients with this condition, and had not noted any problems with the Appellant's neck when he first treated her in 2007. Therefore, the panel did not find his evidence on this issue to be persuasive. Therefore, the panel found that the Appellant had not met the onus of establishing, on a balance of probabilities, that she suffered from a medical condition known as CCI or CTE that was causally connected to the
MVA.

Based on the above, the panel found that the Appellant had not met the onus of establishing, on a balance of probabilities, that her medical condition was causally connected to the MVA, and her appeal was denied.

4. Entitlement to Income Replacement Indemnity (IRI) benefits

Under the MPIC Act, an appellant may be entitled to IRI benefits if he or she is unable to work for a period of time. If the appellant was working at the time of the MVA, IRI benefits may be available if the accident injuries rendered the appellant unable to entirely or substantially perform the essential duties of their employment.

Where a person is a non-earner at the time of the accident, subsection 85(1) of the MPIC Act entitles that person to IRI benefits for the first 180 days after the accident in certain circumstances. (Other provisions apply after 180 days.)

Case #1
The Appellant was injured in an MVA in October, 2018. He was not working at the time of the MVA. In November, 2018, the Appellant contacted MPIC, to inquire about IRI benefits. MPIC denied the Appellant's request for IRI benefits for the first 180 days following the date of the accident, and the Appellant appealed that decision to the Commission. Due to pandemic considerations, the hearing was held by videoconference.

The issue on appeal was whether the Appellant was entitled to IRI benefits under subsection 85(1) of the MPIC Act, which provides that a non-earner is entitled to IRI benefits for any time during the first 180 days after an MVA where he or she is unable to hold an employment that he or she "would have held" during that period if the accident had not occurred.

The Appellant was the only witness, and he testified and was cross-examined at the hearing of his appeal. At the time of the MVA, he was attending a government course; the MVA occurred in the final week. It was in that last week that he had planned to meet with potential employers, and due to the MVA he lost the opportunity to do so. He said that it was clear that because of the MVA, he couldn't find a job. The Appellant had come to Canada as a skilled immigrant in late May, 2018. He had completed a professional business administration program at a university in his country of origin in 2012. In that country he had worked as a purchasing manager, with a background in human resources. The Appellant said that realistically, he wasn't expecting to find this type of job in Canada. He knew that he would have to find an entry-level position and then move up.

The panel accepted the Appellant's testimony that he had the intention and motivation to work at the time of the MVA. However, the Appellant acknowledged that he was selective in the employment that he was willing to accept. He wanted an office job that would help him in his future endeavors, and he declined at least two employment opportunities (one of which was approximately one week prior to the MVA). The Appellant's evidence was clear that in the time between turning down the first job and the MVA, he did not receive any formal job offers. He was also clear that he was not promised a job when he began the government course in October, 2018, and that there were no specific job interviews set up for him in connection with that course.

The panel noted that while the Appellant believed that he would find a job after he completed the course that he was taking at the time of the MVA, and that he missed out on the opportunity to do so due to the MVA, this belief did not constitute evidence that the Appellant "would have held" employment during the relevant time period. There was no evidence before the panel that the Appellant had received any formal job offer or promise of employment from the time of the MVA until March, 2019, when the Appellant advised the case manager that he had declined the second job offer. (The panel found that by March, 2019, the Appellant was no longer unable to hold employment due to his MVA injury.)

Due to the lack of evidence, it was not possible for the panel to determine, on a balance of probabilities, that it was likely that the Appellant would have held employment from the time of the MVA to March, 2019, had he not been injured in the MVA.

As a result, based on all of the above, the panel found that the Appellant had not met the onus of establishing, on a balance of probabilities, that he was unable to hold an employment that he would have held during the first 180 days following the MVA, if the accident had not occurred. Therefore, he was not entitled to IRI on that basis, and his appeal was dismissed.

Case #2

The Appellant was injured in an MVA in November, 2010. Due to injuries sustained in the MVA, the Appellant was not able to return to work and received IRI benefits from MPIC. MPIC also funded physiotherapy treatment and a psychological assessment. When she made limited progress, a

structured work hardening/reconditioning program was provided. The rehabilitation team recommended that she was fit to return to work on a graduated return to work basis, but her family doctor did not agree and she continued to receive IRI.

After reviewing independent physiatrists' assessment reports, MPIC's medical consultant concluded there was no physical diagnosis to account for the Appellant's widespread symptomatic presentation.

Psychological treatment was offered, but an independent neuro-psychological assessment did not find MVA-related psychological factors limiting her return to work.

Approximately a year and a half after the MVA, the Appellant's IRI benefits were terminated by MPIC.

The Appellant submitted upon internal review that she was in constant pain, experiencing numbness in her arm, hands, face and feet, with sleep disruption. She claimed that the MVA had aggravated her pre-existing fibromyalgia. The IRD concluded that although she had initially sustained an exacerbation of a pre-existing cervical and low back condition, the more widespread and severe symptoms which followed were atypical for a trauma induced injury.

The issue before the Commission was whether the Appellant was entitled to further IRI benefits. The parties agreed that the Commission may consider both her ability to work and the cause of her injuries.

The panel reviewed a wide variety of medical and other documentation from the Appellant's file, including reports from her caregivers. In addition, the panel heard testimony from the Appellant and from the rehabilitation specialist whose clinic had provided the Appellant's work hardening program.

The panel found the evidence of the Appellant, as expressed to her caregivers and in testimony at the hearing, to be inconsistent and therefore unreliable. She complained, at different times, and to different people, of pain in one arm or shoulder, and then the other, while failing to mark the region on a pain diagram. She complained of pain that would prevent her from doing even modified, restricted work duties. Her evidence that she was disabled by pain with few abilities was not corroborated by the other evidence.

MPIC's medical consultant noted significant differences throughout the Appellant's file on the issue of causation. After reviewing new information from pain specialists, the consultant was unable to find a correlation between her diagnosis and ongoing pain. Physiatrists could not connect her ongoing pain-focused behavior to the MVA or conclude that it prevented participation in a gradual return to work program.

The panel noted that it tends to place a good deal of weight upon the reports of primary caregivers who often have the opportunity to see their patient both before and after the MVA and who follow their care and treatment. But in this case, the panel also found it necessary to place sufficient weight upon the conclusions of specialist physiatrists who did not find there was serious injury following the MVA, aside from some degenerative changes and the Appellant's subjective reports of pain.

Although her family physician continued to describe the Appellant's pain as she reported it, the physician did not provide as thorough an analysis of how it continued to be connected to the MVA, regardless of how many years had passed and how few objective findings the specialists' assessments and investigations confirmed.

The panel did not hear evidence of specific trauma or injury to the areas complained of. Physical examination, x-ray and nerve conduction studies found them to be normal.

Nor was there evidence regarding results of the Appellant's attempts to gradually return to work as recommended, since she did not fully cooperate with the graduated return to work programs proposed for her.

The panel found that the Appellant failed to show, on a balance of probabilities, that when her benefits were terminated she was still suffering from a condition caused by the MVA and the appeal for further IRI benefits was dismissed.

5. Reimbursement of Expenses

The MPIC Act and Regulations contain many provisions dealing with the reimbursement of expenses. Paragraph 136(1)(d) of the MPIC Act provides for the reimbursement of expenses which are prescribed by regulation. Section 138 of the MPIC Act also allows for the funding of expenses, where such expenses are "necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market".

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

Case #1

The Appellant was involved in an MVA in November, 1995. The Appellant's vehicle was rearended by another driver and the Appellant sustained soft tissue injury to her neck and back. The MVA also exacerbated her pre-existing bipolar disorder.

The Appellant managed her pre-existing psychological condition which had worsened after the MVA with medication and regular psychotherapy. She brought her parrot to her psychotherapy sessions. Her parrot died and she requested reimbursement from MPIC for two replacement parrots on the basis that these were "service" or "therapy" birds. MPIC denied this expense and the Appellant appealed that decision to the Commission. Due to pandemic considerations, the hearing was held by videoconference.

The Appellant testified to her worsening psychological condition, which was supported by documentation that included MPIC's increased permanent impairment award for that injury, as well as her psychotherapist's reports. The Appellant testified to her own management of her condition through her diligent regimen of medication, and keeping active with hobbies and volunteer work.

Further, she detailed how taking responsibility, caring for and educating herself in the training of her birds, was an important part of her strategy of distracting herself from her suicidal thoughts. This became very apparent after her first bird died. She testified that she replaced her first bird with two birds so that they could be companions for one another. The Appellant's psychotherapist had submitted a series of progress reports that documented how her first bird had provided a sense of purpose, comfort and companionship to the Appellant, which assisted her "from committing suicide."

The submissions of the parties included arguments about whether the birds qualified as either "service" or "emotional support" animals. They agreed that this type of expense fell within section 138 of the MPIC Act, which reads as follows:

> **Corporation to assist in rehabilitation**
> **138** Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

Similar to the decision in *Menzies v. MPIC,* 2005 MBCA 97, the Commission focused on the purpose of the expense, as opposed to the exact nature of the expense, and found that this particular expense did not fall within section 10 of Manitoba Regulation 40/94. As such, there were no applicable limitations in the regulations on the exercise of the power conferred under section 138.

While MPIC is not obligated to reimburse a claimant for every possible expense that might contribute to rehabilitation or lessen a disability, the Commission found that the request in this case was not in the nature of a "comfort" expense. The psychotherapist's reports provided compelling evidence of how the Appellant used her bird to maintain and develop her coping skills, by engaging in its bonding and behavioural training.

The Commission found it was not necessary to make findings as to whether the birds were "service" or "emotional support" animals. Pursuant to section 138, the Commission found that the Appellant had proven, on a balance or probabilities that, her training, care and maintenance of a bird contributed to her rehabilitation by lessening her mental disability and facilitating a return to a normal life. The Commission found that there was no medical evidence that the Appellant required two birds to maintain her coping skills, particularly given the Appellant's testimony that she acquired a second bird for the birds' benefit.

As such, the Commission found it necessary and advisable to fund the cost of one bird. The appeal was allowed and the matter was referred back to MPIC for reimbursement of the purchase of one bird.

6. Termination of Benefits

Section 160 of the MPIC Act states that MPIC may terminate benefits where the claimant knowingly provides false or inaccurate information to MPIC. It also allows for a termination of benefits where a claimant refuses or neglects to undergo a medical examination, when requested by MPIC.

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

Case #1

The Appellant was injured in an MVA on July, 2008 when, as a pedestrian standing on the street, a passing vehicle struck her elbow. She sought treatment, was off work from her job as a secretary/clerk and received IRI benefits from MPIC.

After several years off work, she attended MPIC requested independent physiotherapy and psychological assessments. The physiotherapy assessment report concluded that she no longer suffered from a medical condition arising out of the MVA that would disable her from employment. The psychological assessment resulted in a diagnosis of a pain disorder and the approval of further psychological treatment. She received physical and rehabilitation treatment for chronic pain.

After some time, MPIC's neuropsychological and psychological consultants also concluded that the Appellant was no longer prevented by MVA-related injuries from working at her job.

Knowingly Providing False and Misleading Information

Private investigation video surveillance and reports obtained by MPIC and reviewed by its physiotherapy, psychology and medical consultants were compared with the activity and function forms which the Appellant had completed for MPIC. This led MPIC to the conclusion that the Appellant did not have a pain disorder as she had reported, and that she had knowingly provided false and inaccurate information to the corporation. Her benefits were terminated, pursuant to paragraph 160(a) of the MPIC Act.

The issues on appeal were whether the Appellant was entitled to further IRI benefits and whether her benefits were properly terminated pursuant to paragraph 160(a) of the MPIC Act.

A panel of the Commission heard the testimony of the Appellant and several expert witnesses, viewed video surveillance, read documents and reports on file and heard the submissions of the Appellant and MPIC.

Compared to the videos, the panel noted that the forms filled out by the Appellant were not complete, with many omissions and under-reporting of her daily activities and abilities. When considered alongside her reports to case managers and at the physiotherapy and psychological assessments, the panel found that the Appellant had exaggerated her symptoms and condition. The Appellant was not able to explain the numerous inconsistencies in a credible manner and the panel found that she had exaggerated her symptoms and condition and knowingly provided false and inaccurate information to MPIC.

Ability to Work

When assessing the Appellant's ability to return to work, the panel relied upon reports and testimony from the Appellant's family doctor, psychologist and a physical/rehabilitation physician specializing in the assessment and treatment of chronic pain. The panel placed a great deal of weight upon the

evidence of these three expert witnesses. All were experienced in their fields with high levels of training, and had ample opportunity over the course of many sessions and several years to assess the Appellant's condition and abilities. All concluded clearly and unequivocally that she did not have the ability to return to work.

Although MPIC's medical, psychological and physiotherapy consultants opined that the Appellant was able to work, evidence from an occupational therapist established that the MPIC experts had limited information about the demands of the job. The panel did not give the same weight to their evidence on this point as it did to that of the experienced caregivers who treated the Appellant consistently over a long period and had the opportunity to learn about the demands of the job and her challenges.

The panel found that the Appellant had met the onus upon her of showing that she was not able to perform the essential duties of her employment.

Termination of Benefits

While the Appellant could still be entitled to IRI benefits based upon her ability to work, section 160 of the MPIC Act allows MPIC to refuse to pay compensation, or reduce, suspend or terminate this benefit, as a result of the Appellant providing false or misleading information. The panel had to determine the appropriate consequences for the Appellant's contravention of paragraph 160(a) of the MPIC Act. It considered whether her psychological and pain conditions constituted factors which might mitigate in favour of substituting consequences other than the termination of benefits which had been imposed by MPIC.

The panel found that the weight of evidence established that the Appellant suffered from a chronic pain disorder, adjustment disorder with depressed mood and maladaptive coping strategies such as to mitigate her behavior in the provision of false or inaccurate information to MPIC. The Commission found that the termination should be varied and that her benefits should be suspended rather than terminated.

In determining the appropriate length of the suspension, the panel took into account the date range of the forms and logs she completed, as well as the video evidence. The dates of her exaggerated presentation to the physiotherapy and neuropsychology assessment consultants were also considered, along with the date of her more moderate presentation to her treating psychologist (in July, 2010) who did not encounter the same symptom magnification at that point.

The panel concluded that the Appellant's benefits should be suspended for the period of time surrounding her exaggerated reports and presentations. Her benefits should be reinstated as of the date (July, 2010) when she was able to engage in and avail herself of treatment from her psychologist and other caregivers, who at that point did not raise concerns regarding symptom magnification or exaggeration of pain.

Accordingly, the appeal from the Appellant's termination of benefits was allowed, in part, and the IRD varied to suspend her benefits in November, 2008 and reinstate them as of July, 2010.

Case #2

The Appellant was in an MVA in October, 2010. He suffered injuries as a result of the MVA, and received physiotherapy and chiropractic treatment as well as IRI benefits.

After a period of time, MPIC determined that it was necessary to obtain further information regarding the Appellant's function. The case manager scheduled the Appellant for a FCE in early March, 2018 at a rehab facility. A letter was sent in mid-February to the Appellant confirming the details of the appointment. The letter advised the Appellant to call the rehab facility if he was unable to attend the appointment. The Appellant did not contact the rehab facility and did not attend the scheduled appointment.

MPIC sent a further letter to the Appellant, noting his failure to attend the appointment, and offering possible alternate dates for the FCE appointment. The letter advised the Appellant that his PIPP benefits would be suspended if he did not contact the rehab facility to reschedule the FCE appointment. The Appellant did not do so, and MPIC sent a further letter to the Appellant, suspending his PIPP benefits. MPIC extended the deadline by one further week, after which it advised the Appellant that his benefits would be terminated. The Appellant did not contact the rehab facility in that week, and so MPIC issued a decision letter at the end of March, 2018, terminating the Appellant's PIPP benefits. That decision was upheld at Internal Review.

The Appellant appealed the decision to the Commission. Due to pandemic concerns, the hearing was held by videoconference. The issue on appeal was whether the Appellant's PIPP benefits were correctly terminated under paragraph 160(d) of the MPIC Act, which provides that MPIC may refuse to pay compensation or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person "without valid reason, neglects or refuses to undergo a medical examination" requested by MPIC.

The parties agreed that the Appellant had neglected to undergo a medical examination, the FCE, requested by MPIC. Therefore, the panel considered whether he had a valid reason for so doing. It was the Appellant's position that he did not open the case manager's letters when they were received, and that his failure to do so was due to his psychological condition, from which he suffered for a considerable period of time. This constituted a valid reason for missing the scheduled FCE appointments.

It was MPIC's position that the Appellant did not have a valid reason for his failure to attend the FCE, and that the Appellant had not established that he was suffering from a diagnosed psychological condition such that he would have been unable to open and deal with his mail at the relevant time.

As a preliminary matter, the panel considered the Appellant's testimony regarding his psychological state. The Appellant said that he wasn't in any state to deal with his mail at the relevant time, and he did not open most of his mail when it was received. The only mail that he did open was his IRI cheques from MPIC (which was the only mail he was expecting from MPIC), and he had also instructed others to do so in his absence. He also testified regarding the multiple stressors that he was facing at the relevant time. This was corroborated by the testimony of his family physician, and also by documentary evidence on file. Based on the evidence, the panel found the Appellant's testimony

to be credible and reliable. The panel accepted the Appellant's testimony, and in particular, that he did not become aware of the FCE appointments until early April, 2018, when he opened all of his mail.

The panel then considered documentary medical evidence on file which addressed the Appellant's psychological condition, noting that the issue was whether the Appellant suffered from a psychological condition, which resulted in a valid reason for his neglecting to attend the FCE. The panel was not concerned with whether any such psychological condition was caused or contributed to by the MVA, and no comments were made in that regard. After reviewing the documentary evidence, which included medical reports from the Appellant's primary physician, as well as four mental health professionals and three HCS consultants, all of whom commented on the Appellant's psychological difficulties, the panel found that there was significant medical evidence that the Appellant suffered from a psychological condition, for a considerable period of time.

The panel further found that, based on the Appellant's evidence, the documented reports of his psychological condition and the evidence of his primary physician, the Appellant had met the onus upon him to establish that he was suffering from a psychological condition at the relevant time (February and March, 2018), and that the psychological condition prevented him from opening and dealing with his mail. Consequently, the panel found that the Appellant had established, on a balance of probabilities, that he had a valid reason for neglecting to attend the medical examination (the FCE appointments) requested by MPIC, and that his PIPP benefits were not correctly terminated by MPIC, because paragraph 160(d) of the MPIC Act did not apply in the circumstances. His PIPP benefits were therefore reinstated.

7. **Catastrophically Enhanced Benefits**

The MPIC Act and Regulations provide a definition of "catastrophic injury". Appellants who unfortunately suffer catastrophic mental or physical injuries as a result of MVAs are entitled to certain enhanced PIPP benefits under the MPIC Act. In the following case, the issue was whether the Appellant's circumstances met the definition of "catastrophic injury".

Case #1

The Appellant was involved in an MVA in April, 1999 when she struck a pedestrian on the highway who deliberately walked into the path of her vehicle and crashed through her windshield. This was a traumatic experience for the Appellant and she was diagnosed with Post Traumatic Stress Disorder (PTSD) and Major Depressive Disorder (MDD) for which she received regular psychiatric and psychological counselling. Six years later, the Appellant was a passenger when involved in a second highway collision from which she suffered a fractured sternum and an aggravation of her PTSD and MDD.

MPIC paid the Appellant PIPP benefits, including an 80% Permanent Impairment (PI) award for a "Non-Psychotic Mental Disorder". The Appellant requested that MPIC characterize her PTSD and MDD as a "catastrophic" injury, which would entitle her to increased PIPP benefits. MPIC denied this request and the Appellant appealed that decision to the Commission. Due to pandemic considerations, the hearing was held by videoconference.

"Catastrophic injury" is defined in the MPIC Act, and for the purposes of the Appellant's situation, the relevant provision was Schedule 4, paragraph 1(e)(i), specifically whether her psychiatric condition impaired her ability to perform the activities of daily living to such an extent that she required continuous supervision in an institutional or confined setting, or periodic supervision in such a setting for 50% or more of the time.

The Appellant testified that she lived at home with her husband and adult daughter. She said that she has never felt safe since the MVAs and would rather die than return to a psychiatric hospital setting. She was terrified to travel in a car. The second MVA psychologically "broke her" and left her with chronic physical pain. She said that her psychiatrist and psychologist, at whose offices she attended on a regular basis, considered her injuries to be "catastrophic." Her psychologist in particular provided her with coping strategies which she utilized at home.

The Appellant relied upon family members to drive and accompany her whenever she left the house, which she was too anxious to do on her own, despite her psychologist encouraging her to do so. She described being a prisoner in her own home. The Appellant's husband testified to their struggles at trying to have someone present with the Appellant to deal with her mood swings, and suicidal thoughts. The Appellant testified that her suicidal thoughts were curbed by her overwhelming fear of being placed in a hospital setting.

There were no medical certificates, reports or documents that stated she must be monitored or supervised in her home. The Appellant's daily log of activities showed that over a two-week period she went on shopping, restaurant and family outings, albeit always accompanied. She did not require permission to leave her home and was not subject to a curfew or any monitoring.

Despite numerous psychiatric and psychological reports on file that documented the Appellant's anxiety, "looseness of association, suspicion and paranoia bordering on psychosis", none of these documented that the Appellant required hospitalization, supervision, or was a health or safety risk to herself or anyone else. Further, the documents noted that her psychological factors made it difficult for her to travel independently and therefore she sought out a companion, but this was not otherwise mandated.

The issue involved the statutory interpretation of paragraph 1(e)(i) and the meanings of the phrases "requires continuous supervision", "institutional" and "confined" setting. The Commission followed the approach set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 that the words of an Act should be read in their ordinary grammatical sense, in harmony with the scheme and object of the entire act, and in accordance with the intention of the legislators. The Commission agreed with prior decisions that the purpose of the Act was to create "…an all encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile."

The Commission noted that, while useful, dictionary definitions are not determinative. The Commission also considered the general principal that all texts in a statute are drafted for a reason. As such, by defining "catastrophic injury" in a separate Schedule, the legislators intended to treat victims who suffered "catastrophic injuries" as a specific subset of victims who suffered "bodily injuries".

The Commission approached the interpretation of the Schedule 4 definition of "catastrophic injuries" by utilizing the fundamental principle that the meaning of a word is its usage in language. As such, "supervision" was considered in the context of parents, teachers, coaches, employers or health care-givers who all provide supervision and how these contexts involved a measure of skill in providing oversight, correction, and control over another individual, with consequences for inappropriate behaviour.

The definition of "catastrophic injury" spoke of supervision in an "institutional or confined setting", which reinforced the notion of control and authority in that, adults carrying on their activities of daily living outside of such settings, are generally autonomous and self-governing, because society trusts that adults typically conduct themselves in a socially safe and appropriate manner.

The Commission looked to certain sections of the Mental Health Act (MHA) to exemplify the meaning of the word "requires", in a mental health context. The "need" (or requirement) for supervision under the MHA is linked to whether a lack of supervision would cause a patient serious harm to either themselves or others, or suffer substantial mental or physical deterioration. This criteria is established by a psychiatrist. The Commission did not go so far as to find that the MPIC Act equated "requires" with "authorized by law", but rather, a reasonable interpretation of "required" meant a credentialed health care professional had made a clear statement that supervision was necessary, including comment on the nature and scope of the supervision.

On the interpretation of "institutional or confined setting", the Commission found that in its ordinary and grammatical use in everyday language we understand such a setting to be one which is beyond the person's circumstances to change of their own free will, whether that be confinement to a wheelchair or confinement to a jail cell: the individual cannot simply rise up from the wheelchair or open the cell door. Because the words "institutional" and "confined" were joined by the word "or", the Commission found that the word "institution" colours the more general phrase "confined setting" with a more restricted meaning. The Commission therefore interpreted "confined setting" as limited to a particular location where something takes place. Finally, the phrase "to such an extent" alerts the reader to consider the seriousness of the impairment that would "require…supervision in an institutional or confined setting."

On the facts of this case, while the Appellant relied heavily on her family members to accompany her and provide companionship, there was no clear statement from her health care professionals that she required supervision in an institutional or confined setting. In fact, her caregivers encouraged her to venture out on her own. The Commission found that the Appellant's family did not provide supervision within the meaning and context of the Schedule 4 definition, nor was the Appellant confined to her home, despite her testimony of feeling like a prisoner there. Finally, even if her family did provide supervision, the evidence did not establish that such supervision occurred 50% or more of the time.

As a result, the panel found that the Appellant had not met the onus of establishing, on a balance of probabilities, that her circumstances met the definition of "catastrophic injury". Therefore, her appeal was dismissed.