Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-50

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms Mary Lynn Brooks** **Mr. Guy Joubert**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**November 10, 2011**
ISSUE(S):	**1. Entitlement to chiropractic treatment benefits beyond March 2006** **2. Whether the Appellant is required to repay an overpayment of Income Replacement Indemnity benefits.**
RELEVANT SECTIONS:	**Sections 136(1)(a), 171, 189, 190, 191 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) of Manitoba Regulation 40/94**

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

Reasons For Decision

[The Appellant] was involved in a motor vehicle accident on April 8, 2002. The Appellant experienced neck and lower back pain with right upper limb numbness following the motor vehicle accident. X-rays of the cervical and thoracic spine revealed no fractures, however, degenerative changes were noted to the mid to lower thoracic spine. Chiropractic treatments

were initiated within several weeks of the collision. Physiotherapy treatment was initiated in May of 2002.

In view of persistent symptoms, the Appellant was assessed in October 2002 for a multi-disciplinary rehabilitation program by [rehab clinic]. At that time the Appellant reported pain relating to her low back, upper back, neck, left shoulder, anterior chest and left ankle/foot. As well, occasional bilateral hand numbness was also noted. The Appellant reported almost constant pain with sitting, standing, lying down, bending and lifting aggravating her symptoms. Based on the assessment, [rehab clinic's] diagnoses included mild mechanical low back pain (mild to moderate in severity) and myofascial pain syndrome relating to the shoulders and neck (mild to moderate in severity). The report concluded that the Appellant was capable of at least a sedentary work capacity and a stretching and strengthening program for the upper body, along with stabilization was recommended.

In an inter-departmental memorandum dated January 8, 2007 [MPIC's doctor], MPIC's medical consultant, provided the following summary of the Appellant's treatment:

> "A rehabilitation program began in November 2002. By April 2003, [rehab clinic's doctor] noted the claimant slowly improving symptomatically and described as quite functional with farm duties. The claimant had been provided with a chest harness, assisting and holding her shoulders back, improving posture while working. The claimant was continuing to utilize massage and chiropractic treatment for symptomatic control. The claimant was encouraged to remain as active as possible.
>
> A chiropractic report of July 14, 2003 noted attendance for spinal adjustments and active release technique, at a frequency of once weekly, or as farm duties allowed.
>
> Through June 2004, the claimant continued to attend for spinal adjustments once weekly and noted to "work as much as possible on the farm"."

On October 19, 2004 [rehab clinic's doctor] re-evaluated the Appellant. The Appellant was complaining of pain to her neck, upper back, lower back, jaw, bilateral shoulders and hands/fingers along with numbness relating to the left arm. [Rehab clinic's doctor] indicated that

the Appellant continued to experience myofascial neck and shoulder pain (moderate in severity) and mild mechanical low back pain (mild in severity). He noted that the Appellant was feeling subjectively worse than on prior assessments and all the symptoms reported as being at grade 10/10. The Appellant continued to receive chiropractic and physiotherapy treatments from time to time.

MPIC requested that [text deleted], MPIC's chiropractic consultant, review the medical necessity of the Appellant receiving ongoing chiropractic treatment. In July of 2005 [MPIC's chiropractor] recommended ongoing care for a further six to eight weeks provided that the care was outcome based. In an inter-departmental memorandum dated January 6, 2006 to the case manager, [MPIC's chiropractor] indicated that he was unable to provide an opinion because he had not received any further chiropractic reports outlining the Appellant's condition after his previously recommended trial of chiropractic treatments.

On January 23, 2006 the case manager wrote to the Appellant confirming a telephone discussion of January 20, 2006. The case manager set out a summary of their discussion:

- "You advised you had been treated 3 times by a Chiropractor in [text deleted]. He subsequently advised you that you should not have to come back to see him unless you have a fall, etc. You are forwarding the Chiropractor's name and address so that I may obtain more information on the type of treatment and treatment plan.

- We discussed chiropractic treatments at [text deleted]. I explained that our Chiropractic Consultant required the attached forms to be completed, outlining how you felt **after** the six (6) week treatment period August 22, 2005 to September 30, 2005. This will enable him to determine if any improvement was obtained after the six (6) week treatment period."

On June 22, 2006 [MPIC's chiropractor] wrote to the case manager and stated:

> "For the purpose of this dictation I reviewed the medical package in some detail particularly the more recent information dating back to January 20045 from [Appellant's chiropractor #1].
>
> After reviewing the information on file, as well as several Status Inventories, it is my opinion that by March 2006 the claimant would have reached maximum therapeutic benefit with respect to chiropractic care.
>
> There is insufficient evidence on file to suggest that she meets the criteria for supportive care. Given the date of loss and the care to date it is my opinion that on-going chiropractic care is unlikely to have further sustainable therapeutic benefit and that she has likely reached her maximum therapeutic benefit."

Case Manager's Decision:

The case manager wrote to the Appellant on August 2, 2006 advising that her file had been submitted for review to [MPIC's chiropractor] and based on his opinion, the Appellant was advised that on-going chiropractic care would not be covered beyond March 2006.

On September 14, 2006 the Appellant's legal counsel sent an Application for Review of the case manager's August 2, 2006 review. In the Application for Review the Appellant stated:

> "I continue to require treatment in order to maintain my physical condition to be able to farm.
> Without treatments I could not continue my business."

In his letter to MPIC, the Appellant's legal counsel stated:

> 'The review with regard to ongoing treatment speaks for itself. [The Appellant's] medical evidence is that she continues to require therapy in order to maintain her ability to carry on with her business. That review should be determined on the basis of medical evidence and we suggest to you that her attending medical personnel confirm that she remains in need of chiropractic care. She will be obtaining reports from [Appellant's chiropractor #1] and [Appellant's physiotherapist #1] to support this ongoing need."

The physiotherapist, [text deleted], provided an Initial Therapy Report to MPIC on November 16, 2006 and stated:

1. She assessed the Appellant on September 26, 2006.

2. The Appellant reported low back pain, scapular neck and jaw pain.
3. Pain levels were reported as aggravated by weather changes, tractor work, gardening and other bending/lifting tasks.
4. Her jaw symptoms were aggravated with chewing and she also noted disturbed sleep patterns.
5. Based on the assessment, she felt that the Appellant's presentation was consistent with "myofascial" condition.
6. As of November 2006 the Appellant was attempting to cut back on her heavier jobs at work.
7. The goal of the treatment was to increase the range of motion and to decrease pain levels.
8. The therapies to be provided on a weekly basis included myofascial release techniques, acupuncture and flexibility exercises.
9. 12 to 16 weeks of treatment would be required.

[MPIC's doctor], medical consultant with MPIC's Health Care services Team, was provided with the physiotherapy treatment plan outlined by [Appellant's physiotherapist #1]. After reviewing the Appellant's entire medical file, [MPIC's doctor] provided an inter-department memorandum on January 8, 2007 and stated:

> "Based on review of the available medical documentation, myofascial pain syndrome (upper back and shoulder region) and mechanical lumbar pain occurred as a result of the motor vehicle collision. The claimant has received treatment over the years subsequent to the collision. In the past two years, treatment has been primarily chiropractic. The physiotherapy treatment being recommended in November 2006 is to be specifically directed at the myofascial component. On a balance of probability, these symptoms continue to relate to the motor vehicle collision, with the claimant able to function at most of her job duties. In my opinion, the treatment being recommended may be beneficial in terms of reducing pain component and improving function. In this regard, it is my opinion that it is medically reasonable for the claimant to attend the treatment as outlined on a weekly basis over a twelve week period. An update should be obtained at

approximately the sixth to seventh week point to assess response to treatment." (underlining added)

On January 30, 2007 the physiotherapist, [Appellant's physiotherapist #1], stated:

"Progress Note as requested: [the Appellant] was unable to attend since January 4th d/t poor weather conditions and vehicle problems. She has had gradual, steady improvement over the sessions, especially since deciding to not participate in the very heavy farm work at home. She is still active on the farm, but has tried to decrease the amount of heavy lifting for a time. She saw a dentist in early January to receive a jaw splint which has helped to decrease headaches and some neck discomfort. The right scapular area pain levels are steady at 3-4/10 and are helped with the hot tub, stretches and positioning. The lower back strain she now feels since calving started is about 5/10 and is helped with hot tub, stretches, and pilates exs. Cold weather decreases flexibility overall.

On examination, right shoulder slightly elevated. Cervical ROM: forward flexion ¾ with tightness across the cervical/thoracic junction, extension 2/3 with tightness into the neck, right rotation ¾, left 2/3 with posterior and contralateral neck soreness. Shoulder ROM R/L: flexion 168/162; abduction 162/175, external rotation 41/45, adduction equal with pulling R>L. Left thoracic rotation ½ with tightness at waist level, right 2/3. Lumbar ROM: forward flexion hands to distal shins, extension 1/3 with pulling in lumbar region and sterna area, lateral flexion 2/3 with contralateral pull. Tightness throughout paraspinals is present R>L, but less than previously.

Treatment: myofascial release, acupuncture, muscle energy, monitoring of flexibility and stabilization exs."

On August 23, 2007 [Appellant's chiropractor #1], [text deleted], provided a letter and stated:

"[The Appellant's] chronic neuromusculoskeletal signs and symptoms respond to supportive care as she has reached her maximum therapeutic benefit and periodic trials of therapeutic withdrawal have led to deterioration and failure to sustain previous therapeutic gains. This form of care is beneficial in controlling [the Appellant's] exacerbations of symptoms as she continues to perform normal activities of daily living and work." (underlining added)

On August 23, 2007 [Appellant's physiotherapist #1] provided a report to the Appellant and stated:

"As we discussed yesterday, I do believe that you would probably benefit from ongoing intermittent sessions of physiotherapy for problems related from your MVA in 2002.

> Your pain levels certainly decrease as well as ROM increase after a few physiotherapy sessions as last evidenced in late '06 into early '07."

The Internal Review Officer wrote to [MPIC's chiropractor] on April 7, 2008 and provided him with [Appellant's physiotherapist #1's] reports dated November 16, 2007 and August 13, 2007 and a report from [Appellant's chiropractor #1] dated August 23, 2007. The Internal Review Officer requested [MPIC's chiropractor] to advise whether the Appellant had reached maximum therapeutic benefit and if so, did she require supportive treatment as a result of the motor vehicle accident. In an inter-departmental memorandum of April 15, 2008 [MPIC's chiropractor] replied:

> "For the purpose of this dictation, I reviewed the medical package in detail, particularly a report from [Appellant's physiotherapist #1] dated November 16, 2006, a report from [Appellant's physiotherapist #1] dated August 13, 2007, and a report from [Appellant's chiropractor #1] dated August 23, 2007. I also reviewed my previous dictations as well as previous information from [Appellant's chiropractor #1] along with all the pain status in this period.
>
> With respect to your primary question regarding the claimant having reached maximum therapeutic benefit, given the date of loss and the relatively unchanged condition of the patient, it is my opinion that the claimant has long since reached maximum therapeutic benefit with respect to passive inventions (sic).
>
> To answer your question regarding chiropractic care, there is no recent subjective or objective information that would provide evidence that the claimant would meet the criteria for supportive care. It is my opinion that the claimant has also reached maximum medical improvement. Current file contents did not provide evidence to suggest that ongoing physical treatments would be medically required subsequent to the motor vehicle accident in question." (underlining added)

Internal Review Officer's Decision – Chiropractic Care:

The Internal Review Officer wrote to the Appellant's legal counsel on February 11, 2009 and advised that she was confirming the case manager's decision of August 2, 2006 with respect to the termination of funding for chiropractic treatment beyond March of 2006. The Internal

Review Officer stated:

> "...It is apparent that your client had reached maximum medical improvement and, therefore, all funding for these treatments was properly ended effective March of 2006."

The Internal Review Officer indicated that she was relying on [MPIC's chiropractor's] review as set out in his inter-departmental memorandum dated April 15, 2008 as her reasons for this decision and stated:

> "I agree with [MPIC's chiropractor's] conclusions. I am, therefore, confirming the case manager's decision of August 2, 2006 to the effect that your client is not entitled to chiropractic benefits, as a result of her motor vehicle accident of April 8, 2002, beyond March, 2006."

Notice of Appeal:

Legal counsel for the Appellant filed a Notice of Appeal dated May 4, 2009 on her behalf, indicating that:

> "The internal review officer failed to properly consider that passive chiropractic/physiotherapy treatments are still warranted to maintain the claimant's condition, even though she otherwise may have reached maximum therapeutic benefit."

Prior to the appeal hearing, the Commission received the following reports:

1. Report from [Appellant's physiotherapist #2] dated April 5, 2010, [text deleted], to [Appellant's doctor] at [text deleted] which stated:

   "Thank you for your referral for this [text deleted] year old lady with multiple pain areas. History of MVA in 2002 with back, neck and jaw pain following. Currently she reports pain levels 4-9/10 in the mid thoracic area with back to front and down the back to the hips L>R. The neck and scapular area is constantly stiff and sore. She does have a clunking feeling/noise in the left posterior hip and into the left anterolateral ribs. Worst pain today is substernal and which she feels is coming from the mid back.

   [The Appellant] actively works to decrease stiffness and pain levels with biking or

> walking, pilates, stretches daily, hot tub 1-2xdaily and uses a massage chair. She wears a thoracic belt to help keep her shoulders straight and recently started using a lumbar support when doing harder work. She reports occasional tingling in her hands at night." (underlining added)

On examination, the physiotherapist further reported a number of areas where the Appellant indicated tightness and tenderness. The physiotherapist recommended myofascial release be applied and indicated exercises were reviewed with the Appellant and to try increasing length of time of the stretches and that acupuncture may be added to the treatment in the following week. This letter included a handwritten note from the physiotherapist dated August 18, 2010 as follows:

> "Since the MVA in 2002, she has attended in 2003, 2006, 2007, and 2010 for problems that have all resulted and continued from the MVA in 2002. These all seem to be related."

2. Report from [Appellant's chiropractor #2], [text deleted] dated April 21, 2010 who stated:

> "[The Appellant] presented herself in my office on August 2, 2007 for an initial examination and treatment as her regular chiropractor was unavailable. During the consultation, the above patient informed me that she had a previous MVA on April 8, 2002 and that her problems stemmed from that accident. She stated that her initial injuries were whiplash, pain across the midback and into both shoulders as well as hip/lower back pain on the left side. Another symptom that coincided with the accident was stomach irritation, that was relieved with a spinal adjustment.
>
> Upon examination, it was established that her symptoms were chronic and were consistent with her previous complaints from the accident. At the time of her initial visit, she had been seeing a chiropractor on a regular basis for maintenance care.
>
> She has continued to seek my care for her chronic injuries as stated above on an as needed basis and will need maintenance treatments to relieve her symptoms as they arise." (underlining added)

3. In a letter dated April 26, 2010 [Appellant's chiropractor #1] indicated that he had been

treating the Appellant for two years before the accident and subsequent to the accident of April 18, 2002. He stated:

"Previous to the accident [the Appellant] experienced minimal cervical, thoracic, and lumbosacral signs and symptoms that were well controlled with treatment on an as needed basis.

After the accident of April 18, 2002 [the Appellant] reported an increase in signs and symptoms as follows:

Signs

[The Appellant] is currently experiencing moderate hypertonicity of the right cervical, thoracic, and lumbar spine paraspinals, moderate hypertonicity of the right scalene, traps, levator, pectorals, and deltoids. There is moderate tenderness to palpation of the right cervical, thoracic, and lumbar spine. Cervical spine right rotation, extension, and flexion is moderately reduced. The thoracic spine flexion and extension is moderately reduced. Lumbar spine extension, right rotation, and right lateral flexion is mildly reduced.

Symptoms

Her entire right side generates most of her physical complaints and work limitations. She always feels like her right mid-back, shoulder, cervical spine and low back are not functioning right and thus will give her pain and work limitation. Her symptoms are increased with physical labour and with normal daily activities. Her low back will ache and she will find it difficult to change positions especially in bed. She has occasional pain down both legs described as sciatica and both her arms will fell (sic) numb from the elbows to the hands occasionally.

Impression

[The Appellant] is at less-than-full functional status due to her cervical, thoracic, and lumbar spine symptoms and the associated neuromusculoskeletal dysfunction. As the majority of her signs and symptoms increased after the motor vehicle accident of April 18, 2002 it is reasonable to conclude that the accident was a significant contributing factor to her present health status." (underlining added)

4. On April 27, 2010 the physiotherapist, [Appellant's physiotherapist #2] reported:

"[The Appellant] requested physiotherapy for continuing pain and tightness. Attached is a copy of the assessment report sent to [Appellant's doctor] this month. [The Appellant] has had ongoing problems since 2002, requiring physiotherapy since the MVA. I believe her problems are myofascial restrictions that could well be related to the MVA experienced in 2002."

The Commission received a two page document from MPIC's legal counsel, entitled Clinical Guidelines for Chiropractic Practice in Canada. In this document the terms "Preventative/Maintenance Care" and "Supportive Care" are defined as follows:

> "**Preventative/Maintenance Care**: Any management plan that seeks to prevent disease, prolong life, promote health and enhance the quality of life. A specific regimen is designed to provide for the patient's well-being or for maintaining the optimum state of health.
>
> **Supportive Care**: Treatment for patients who have reached maximum therapeutic benefit, but who fail to sustain this benefit and progressively deteriorate when there are periodic trials of withdrawal of treatment. Supportive care follows appropriate application of active and passive care including rehabilitation and life style modifications. It is appropriate when alternative care options, including home-based self-care, have been considered and attempted. Supportive care may be inappropriate when it interferes with other appropriate primary care, or when the risk of supportive care outweighs its benefits, i.e. physician dependence, somatisation, illness behaviour, or secondary gain."

Appeal:

The first issue under appeal is whether the Appellant is entitled to further chiropractic treatments beyond March 2006 funded by MPIC as a result of her motor vehicle accident of April 8, 2002.

The relevant provision of the MPIC Act provides:

> **Reimbursement of victim for various expenses**
>
> 136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:
>
> (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

Manitoba Regulation 40/94 provides:

> **Medical or paramedical care**
> **5** Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The*

> *Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:
>
> (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

The Appellant testified that:

1. As a result of the motor vehicle accident she developed consistent pain, primarily to the right side of her body and particularly to her right mid-back, shoulder, cervical spine, and low back which caused her a great deal of pain and limited her ability to work on the farm.
2. Her symptoms increased with physical labour and daily activities, and as a result she attended in [text deleted] to receive chiropractic and physiotherapy treatments to treat her myofascial pain.
3. As a result of this chronic pain she was unable to continue working and this is one of the reasons why the farm was sold.
4. Without seeing a chiropractor on a regular basis (several times per month) she would be unable to function and carry out her daily duties.
5. In addition to being treated by chiropractors and physiotherapists; she constantly exercised by walking, stretching and biking in order to reduce her stiffness and pain.

The Appellant was cross-examined by MPIC's counsel and MPIC did not call any witnesses.

Submissions:

The Appellant's legal counsel extensively reviewed the reports from the chiropractors,

[Appellant's chiropractor #1] and [Appellant's chiropractor #2], from the physiotherapists, [Appellant's physiotherapist #1] and [Appellant's physiotherapist #2] as well as the reports from [rehab clinic's doctor] and [MPIC's doctor].

The Appellant's legal counsel disagreed with [MPIC's chiropractor] who was of the view that there was no subjective or objective evidence to show that the Appellant met the criteria for supportive care. The Appellant's legal counsel referred to the definition of maintenance care and supportive care as provided in the document entitled "*Clinical Guidelines for Chiropractic Practice in Canada*" and submitted that having regard to the reports of the Appellant's caregivers as well as the reports from [rehab clinic's doctor] and [MPIC's doctor], there was ample evidence to support the Appellant's position that she was entitled to supportive care.

The Appellant's legal counsel submitted that MPIC erred in terminating the Appellant's chiropractic treatments beyond March 2006 and requested that the Commission allow the Appellant's appeal in this respect and reject the Internal Review Officer's Decision of February 11, 2009.

MPIC's legal counsel relied on the chiropractic report of [MPIC's chiropractor] who concluded that the Appellant had reached maximum therapeutic benefit with respect to passive interventions, and there was no recent or subjective information that would provide evidence that the Appellant met the criteria for supportive care. MPIC's legal counsel submitted that MPIC was therefore justified in terminating the Appellant's chiropractic treatments beyond March 2006.

Discussion:

The Commission finds that there was ample evidence to support the Appellant's position that although she may have reached maximum therapeutic benefit, she required supportive care in order to carry out her daily activities.

The Appellant testified in a direct and unequivocal fashion that prior to the motor vehicle accident she experienced pain to her neck and lower back, but was able to control this with treatment on as needed basis. She further testified that:

1. After the motor vehicle accident she suffered from significant medical problems primarily to the right side of her body and due to the pain to her right mid-back, shoulder, cervical spine and low back this affected her ability to carry out her daily activities and her ability to work on the farm.
2. The physical labour on the farm resulted in increased symptoms of pain to both legs, numbness to her arms and elbows.
3. She attempted to deal with her physical problems aggressively by seeing a number of physiotherapists and chiropractors and only with their assistance in receiving treatment from time to time was she able to function and carry out her daily activities.
4. She was unable to continue with physical labour on the farm and sought employment.
5. She established a regime of exercise by walking to reduce the stiffness and pain.

The Commission finds that she was a credible witness and her testimony was corroborated by the chiropractors, [Appellant's chiropractor #1] and [Appellant's chiropractor #2], the physiotherapists [Appellant's physiotherapist #1] and [Appellant's physiotherapist #2]. These caregivers all had an opportunity of personally examining the Appellant and were able to assess her credibility.

On the other hand [MPIC's chiropractor] only conducted a paper review and did not have the opportunity of personally examining the Appellant and testing her credibility. In these circumstances the Commission gives greater weight to the opinions of the Appellant's caregivers than it does to the opinion of [MPIC's chiropractor].

The Commission concludes that after review of the reports from the Appellant's caregivers that they consistently determine that she required chiropractic treatments on an occasional basis in order to sustain and carry on her daily activities. The Commission finds that if the chiropractic treatments were not provided to the Appellant on a regular basis, her condition would deteriorate and she would not be able to carry out her ordinary activities of daily life.

Decision:

For these reasons the Commission rejects the decision of the Internal Review Officer dated February 11, 2009 which relied on [MPIC's chiropractor's] chiropractic report to terminate funding of the Appellant's chiropractic care in March 2006. The Commission therefore determines the Appellant has established on a balance of probabilities that chiropractic treatment was medically required in accordance with Section 5(a) of Manitoba Regulation 40/94. The Commission allows the Appellant's appeal in respect of chiropractic care and rescinds the Internal Review Officer's Decision of February 11, 2009.

Repayment of Income Replacement Indemnity ("IRI") Overpayment:

The second issue in appeal is whether the Appellant's entitlement to IRI ended on January 1, 2004 and if so, whether she must repay $14,391.26 to MPIC.

At the time of the motor vehicle accident of April 9, 2002 the Appellant was a self-employed farmer. As a result of the injuries sustained in the motor vehicle accident by the Appellant she was not able to earn an income pursuant to Section 81(2)(a)(ii). As a self-employed full-time earner she was entitled to receive IRI on the basis of the gross income determined in accordance with the regulation for an employment of the same class or the gross income that she earned from her employment, whichever was the greater.

The Appellant's Gross Yearly Employment Income ("GYEI") from self-employment is determined by Section 3(2) of Manitoba Regulation 39/94 and pursuant to this provision the Appellant's GYEI resulted in her receiving the minimum wage amount because it was the greater amount as outlined under this provision.

MPIC received the Appellant's 2003 Income Tax information which resulted in a reported income of $658.52 plus $144 capital cost allowance ("CCA") adjustment. This resulted in an amount below the Appellant's GYEI of $14,040 and as a result she was entitled to receive IRI.

MPIC did not request the Appellant to provide her full Income Tax return for 2004, but did request that she submit her full 2005 Income Tax return. MPIC noted that on receipt of this return, the Appellant was claiming a CCA deduction on her return. Section 3(1)(a) of Manitoba Regulation 39/94 does not permit CCA to be deducted from the Appellant's income for the purposes of IRI benefits. As a result MPIC adjusted the Appellant's IRI pursuant to Section 3(1) of Manitoba Regulation 39/94. This resulted in the Appellant receiving an overpayment in the amount of $8,097.06.

MPIC requested the Appellant to submit her 2004 Income Tax return. Upon review of the 2004

Income Tax return MPIC discovered that a CCA was also used as a deduction on this return by the Appellant.

MPIC determined that the 2005 Income Tax information indicated that there was a total income of $7,052.33 and when the CCA was added in it amounted to a total income of $41,679. In respect of the 2004 Income Tax return this resulted in income of $7,535 plus $35,047, making a total taxable income of $42,582. As a result the adjusted incomes for 2004 and 2005 resulted in an overpayment to the claimant of $18,708.12.

In an interdepartmental memorandum dated June 23, 2006, MPIC's senior case manager stated:

> "...I am of the opinion we made a procedural, or substantive, error in not requesting the **full** 2004 income tax return. If this return had been requested, the necessary adjustment to her total income would have been made, income replacement indemnity would have been terminated and the outstanding amount owed for 2004 would be collected. The Claimant would not be in an over-payment situation for 2005.
>
> We can recover an over-payment 2 years back from the date the over-payment was discovered under Section 189(2) of the Manitoba Public Insurance Corporation Act. The over-payment was discovered on May 26, 2006, so the amount owing for the period from May 26, 2004 to June 30, 2005 (when the initial over-payment would have been discovered and IRI terminated) is $9,118.12 (not including interest).
>
> The claimant would not have been in an over-payment in 2005 if we had caught the initial over-payment in 2004. The claimant provided the information for her 2004 income that she thought we required and we accepted it. To go back to her now and say that she owes for both 2004 and 2005 would be harsh."

On July 5, 2006 MPIC's Manager of Casualty & Rehabilitation Regional Services wrote to the case manager and stated:

> "I agree the clmt didn't do anything wrong here, that said, she received monies she wasn't entitled to. It's not about whose fault it is. We paid in good faith, but realized when we did the reconciliation that she was overpaid.
> Considering that she got the "best of" at the time of the 180, she may well be getting more than she lost even w/o the overpayment.
> I (sic) any event, she received monies that she's not entitled to and I think we should recover all that the legislation allows. I don't think we should be "harsh" about how we

do this. We don't want to create a hardship, but that said, she wasn't entitled to this money. Is she entitled to an impairment that we could offset? Is there future IRI that we can offset?

As [case manager] pointed out, we can recover an over-payment 2 years back from the date the over-payment was discovered under Section 189(2) of the Manitoba Public Insurance Corporation Act. The over-payment was discovered on May 26, 2006. I think we should recover any overpayment from May 26, 2004 to date. No interest."

Case Manager's Decision:

On August 2, 2006 the case manager wrote to the Appellant and stated:

"As discussed, a decision has been made regarding your entitlement to Income Replacement Indemnity (IRI) benefits. You are no longer entitled to IRI benefits based on the income tax information, effective immediately.

Your income tax returns were obtained for the years 2004 and 2005. Manitoba Regulations 39/94 states that capital cost allowance or allowance on eligible capital property is not recognized as an expense when calculating self-employment income. The total income when this deduction is not included in the calculation for 2004 is $42, 582.00 and $41,679.00 for 2005.

IRI ceases when the gross income in any given year exceeds the gross yearly employment income that your IRI is based on. Your gross yearly employment income is based on $15,808.00 so you are no longer entitled to IRI benefits, effective immediately.

A reconciliation was completed and your (sic) have been overpaid $18,708.12.

Section 189(1) of the Manitoba Public Insurance Corporation Act states that the Corporation shall be reimbursed for any overpayment for the amount in which the person is not entitled. It goes on to state that the Corporation can recover up to two years back from the date the overpayment was discovered.

The overpayment was discovered on May 26, 2006 so Manitoba Public Insurance will be looking for recovery back to may 26, 2004. The amount owing for the period from May 26, 2004 to present is $14,391.26."

Application for Review:

On September 14, 2006 the Appellant's legal counsel wrote to MPIC enclosing an Application for Review of MPIC's decision requesting reimbursement of the overpayment. In his letter the Appellant's legal counsel stated:

"The issue of termination of income replacement is not being appealed. [The Appellant]

was never notified of the regulations with regard to the determination of income for farmers. Although there is no logical reason to disallow capital cost allowance in a highly capital industry, we concede that is what the regulations state. The fact that there may or may not have been an overpayment, however, was not within our client's control. Your office was well aware of the nature of [the Appellant's] occupation and source of income. I am advised that they have done in depth analysis of her occupation and what she is capable of doing.
The legislation provides in section 171(2) that: The Corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider a decision if:

a) in the opinion of the corporation, **a substantive or procedural error was made in respect of the decision;** or
b) **the decision contains an error in writing or calculation, or any other clerical error.**

The errors committed by the staff go beyond simple errors. They are substantive errors in procedure which occurred over a period of time. In accordance with section 191: **"the Corporation is not entitled to reimbursement of any amount paid to a person as a result of the decision unless the amount was obtained by fraud"**.

There was no fraud alleged against [the Appellant] nor was there any fraud committed. On the basis of the statutory authority, we therefore respectfully request that you rescind the decision of August 2, 2006 with regard to the claim for reimbursement."

Internal Review Decision, February 11, 2009 – Repayment of IRI:

On February 11, 2009 the Internal Review Officer wrote to the Appellant's legal counsel indicating that she was confirming the case manager's decision which determined that the Appellant's entitlement to IRI ended January 1, 2004 and that she must repay $14,391.26 to MPIC. In her reasons for this decision the Internal Review Officer stated:

"As you will recall, the facts of the IRI decision were that your client had a GYEI calculated for her of $15,808.00 Therefore, when your client's 2005 tax returns were received and there was a capital cost allowance of $32,795.00, this was added back into her income which provided the amount stated above.

Capital cost allowance cannot be deducted from your client's income for MPI's purposes. When your client's 2004 income tax returns were reviewed, her income was set at $42,582.00 by MPI. It is clear that both in 2004 and 2005, your client's net income exceeded her Gross Yearly Employment Income. Therefore, under section 110(1)(e) of *The Manitoba Public Insurance Corporation Act*, your client was no longer entitled to Income Replacement Indemnity benefits from January 1, 2004.

…Your client's accountant submitted the 2005 tax return on May 16, 2006. It was

reviewed and a note was sent to the case manager on May 26, 2006 requesting the 2004 income tax return. That tax return was received from the accountant on June 7, 2006.

This information had not previously been submitted and not previously reviewed. Once MPI realized that your client's earnings exceeded her GYEI, a calculation was made to determine the amount of the overpayment she had received. A decision letter was then sent out advising her that her IRI had been terminated and that she was required to refund the overpayment.

…In conclusion, your client's income in 2004 and 2005 exceeded her Gross Yearly Employment income, or GYEI, and, as a result of Section 110(1)(e) of *The Manitoba Public Insurance Corporation Act*, she is no longer entitled to IRI benefits beyond January 1, 2004. As a result of this disentitlement, she was overpaid IRI benefits and those need to be repaid to Manitoba Public Insurance."

The Appellant filed a Notice of Appeal on May 4, 2009 and stated:

"As for the overpayment, the internal review officer failed to consider that the overpayment arose through MPI's procedural or substantive error, which precludes them from collecting back the overpayment."

Appeal:

The relevant provisions of the Act are:

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

Claims corporation may reconsider before application for review or appeal

171(2) The corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider the decision if

(a) in the opinion of the corporation, a substantive or procedural error was made in respect of the decision; or

Corporation to be reimbursed for excess payment

189(1) Subject to sections 153 (payment before decision by corporation), 190 and 191, a person who receives an amount under this Part as an indemnity or a reimbursement of an expense to which the person is not entitled, or which exceeds the amount to which he or she is entitled, shall reimburse the corporation for the amount to which he or she is not entitled.

Time limitation for recovery of payment

189(2) The corporation may commence an action to recover an amount to which it is entitled to be reimbursed

(a) within two years after the day the amount is paid to the person; or

No reimbursement of amount paid before review or appeal

190 If, on an application for review or appeal, the corporation or the commission cancels an indemnity or expense or reduces the amount of an indemnity or expense that has been paid to a person, the corporation is not entitled to reimbursement of any amount paid to the person before the review decision or the commission's decision, unless the payment was obtained by fraud.

No reimbursement of amount paid before reconsideration

191 If a decision is reconsidered and changed by the corporation under subsection 171(1) or clause 171(2)(a), the corporation is not entitled to reimbursement of any amount paid to a person as a result of the decision unless the amount was obtained by fraud.

Neither party adduced testimony from any person in respect of this appeal.

Submissions:

Both counsel agreed that the Appellant had not received the overpayment as a result of any fraud on her part. MPIC agreed that the Appellant had provided the information for her 2004 income

which she thought was required and which MPIC accepted.

MPIC's legal counsel argued that:

1. Pursuant to Section 171(1) of the MPIC Act, the Corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of this claim.
2. MPIC had requested the Appellant's 2005 Income Tax return and upon review of that return noted that the Appellant had deducted the CCA from her income.
3. MPIC then requested the 2004 Income Tax return and discovered that the Appellant had also deducted the CCA to determine her income.

4. With this information MPIC was entitled to make a fresh decision and request reimbursement of the overpayment.

In response, the Appellant's legal counsel submitted that:

1. MPIC had made a substantial procedural error in failing to obtain the Appellant's 2004 and 2005 Income Tax returns in a timely fashion.
2. These Income Tax returns would have demonstrated that the Appellant had deducted the CCA in determining her yearly income.
3. MPIC was not entitled pursuant to Section 171(2) to make a fresh decision and to request reimbursement pursuant to Section 189(1) and (2) of the MPIC Act if there was no fraud involved by the Appellant.
4. The power of the Corporation to receive reimbursement for an excess payment under Section 189(1) and (2) are subject to the provisions of Section 190 and 191 which state that the Corporation is not entitled to reimbursement of any amount paid to a person as a

result of a decision unless the amount was obtained by fraud.

5. Since MPIC agreed that the Appellant had not obtained the overpayment by fraud, counsel for the Appellant maintained that MPIC was barred from requesting repayment.

Discussion:

The Commission agrees with the submission of the Appellant's legal counsel that the overpayment is not recoverable. MPIC acknowledged that the Appellant had not acted fraudulently. In an interdepartmental memorandum dated January 23, 2006 to the Claims Management Supervisor, the senior case manager indicated that in her opinion MPIC made a procedural or substantive error by not requesting the full 2004 Income Tax return. She stated:

> "If this return had been requested, the necessary adjustment to her total income would have been made, income replacement indemnity would have been terminated and the outstanding amount owed for 2004 would be collected. The Claimant would not be in an over-payment situation for 2005."

We find that as a result of MPIC failing to request relevant Income Tax information on a timely basis, MPIC had reconsidered and changed its decision and that pursuant to Section 191, MPIC is precluded from recovering the overpayment.

The Commission therefore allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated February 11, 2009 in respect of the requirement for the Appellant to repay the sum of $14, 391.26 to MPIC.

Dated at Winnipeg this 20th day of December, 2011.

MEL MYERS

MARY LYNN BROOKS

GUY JOUBERT