Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-151 and AC-10-166

PANEL:	**Ms Yvonne Tavares, Chairperson** **Ms Laura Diamond** **Ms Mary Lynn Brooks**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski and Ms Jillian Nichols.**
HEARING DATE:	**November 1 and 2, 2011**
ISSUE(S):	**1. Whether the Appellant was properly classified as a "non-earner".** **2. Whether the Appellant is entitled to IRI benefits with respect to promised employment.** **3. Whether the Appellant is entitled to further physical therapy treatments.**
RELEVANT SECTIONS:	**Sections 70(1), 85(1) and 136(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act'), Section 8 of Manitoba Regulation 37/94 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

Facts and Background:

The Appellant was involved in two motor vehicle accidents. The first motor vehicle accident occurred on October 26, 2004. Following the accident, the Appellant reported severe pain in her neck, upper and lower back and right jaw. Due to the bodily injuries which she sustained, she

became entitled to Personal Injury Plan Protection ("PIPP") benefits in accordance with Part 2 of the MPIC Act.

At the time of this motor vehicle accident, the Appellant was a self-employed [professional], [text deleted]. As a result of a number of case management and Internal Review Decisions with which she disagreed, the Appellant filed appeals with the Commission. The Commission held a hearing on October 13 and 14, 2010 and issued a Decision and Reasons for Decision in AC-05-102 and AC-06-168, dated December 21, 2010.

As a result of the Commission's decision of December 21, 2010, the Appellant was found to be entitled to reimbursement, with interest, of the cost of medications - Temazepam, Spasmhalt and Triazolam. The Commission found that the Appellant was not entitled to reimbursement for the cost of certain other medications, travel expenses, photocopy expenses, eye examination and eyeglass expenses, chiropractic treatment expenses, ART therapy expenses, TENS machine, trigger point treatment expenses and a contoured pillow. The Commission also found that the Appellant's Gross Yearly Employment Income and Income Replacement Indemnity ("IRI") benefits had been correctly assessed and calculated and that she was not entitled to IRI benefits beyond July 11, 2005.

The Appellant was involved in a second motor vehicle accident on February 26, 2010. She reported injuries to her neck, upper back, lower back and jaw, headaches and insomnia. The Appellant indicated that this delayed her return to her [text deleted] practice, and necessitated further treatment, including trigger point injections and physiotherapy.

The Appellant is appealing two Internal Review Decisions arising out of this second motor vehicle accident with respect to the following issues:

1. Entitlement to further physical therapy treatments (Internal Review Decision dated November 30, 2010); and
2. Income Replacement Indemnity Classification and Benefits (Internal Review Decision dated November 3, 2010).

Preliminary Matter – Allegation of Bias

The hearing into the appeals arising out of the motor vehicle accident of February 26, 2010 was originally scheduled to proceed before this panel on June 28, 2011. However, issues arose regarding the submission of further evidence, and the hearing scheduled for June 28, 2011 was adjourned. A case conference hearing was scheduled for September 12, 2011 to discuss the status of the appeals and other issues. At the case conference hearing on September 12, 2011, the Appellant submitted that the panel assigned to hear the appeal was biased and should not hear or decide her appeal. The Appellant took the position that the same three panellists who had heard her appeal and issued a Decision and Reasons for Decision in AC-05-102 and AC-06-168, dated December 21, 2010, could not now fairly and effectively decide the issues in the current appeal.

The Appellant submitted that in her earlier appeal, the three panellists had failed to take into account numerous reports, failed to take into account critical evidence and caused her a great deal of damage. She submitted that the Commission had failed to ensure that MPIC referred her to a psychiatrist to see if she was able to participate in a graduated return to work program. The panel had also failed to take into account significant evidence regarding her entitlement to

physiotherapy. The Appellant contends that if she had received further physiotherapy at that time, she might not have needed it after her second motor vehicle accident.

Counsel for MPIC indicated that MPIC did not see the panel as biased and disagreed with the submission of the Appellant in its entirety.

The panel considered the submission and allegations of the Appellant regarding the bias of the panel and concluded that the Appellant failed to establish any basis for actual or apprehended bias on the part of the panel.

The panel notes the comments of [text deleted] in the decision of The Manitoba Court of Appeal dated [text deleted], where it considered the Appellant's appeal from the decision of the Commission dated December 21, 2010 and her allegation of bias against the Commission at that time.

In reviewing the Commission's decision in that appeal, the Court stated:

> It is manifest that the decisions made by the Commission, without exception, were fact-based and entirely dependent upon the material before it. Fundamentally, the applicant disagrees with the Commission's view of the level of her incapacity arising from the accident and its duration. The Commission's response to the applicant's contentions was, correctly, to assess each issue in accordance with the medical and other evidence.

The Court of Appeal found no merit in the Appellant's allegation of bias against the Commission.

The panel concluded that it was once again willing and able to listen to the facts and submissions in connection with the Appellant's appeal and to deal with the issues before it in a fair manner.

The current appeal involves a fresh set of facts, circumstances and issues to be determined. The Appellant has failed to show that any of the three panellists are actually biased against her. Nor has it been shown that there is a reasonable apprehension of biased appraisal and judgment of the issues to be determined. The parties were advised that the current appeal involves a new hearing, and that evidence and full submissions would be heard from both the Appellant and MPIC.

Accordingly, the hearing into the Appellant's new appeal proceeded and was heard on November 1 and 2, 2011. The Commission heard evidence and submissions in regards to the Appellant's classification as a non-earner, her entitlement to IRI benefits with respect to promised employment, and the Appellant's entitlement to further physical therapy treatments.

1. THE INTERNAL REVIEW DECISION NOVEMBER 30, 2010 - ENTITLEMENT TO FURTHER PHYSICAL THERAPY TREATMENTS:

Following the motor vehicle accident of February 26, 2010, MPIC provided funding for six physiotherapy sessions for the Appellant. On October 21, 2010 the Appellant's case manager denied her physiotherapist's request of September 13, 2010 to fund an additional six sessions of physiotherapy treatment.

The Appellant sought an Internal Review of this decision, and on November 30, 2010, an Internal Review Officer for MPIC confirmed the case manager's decision and dismissed the Appellant's Application for Review, concluding that the medical information did not support further physical therapy as being medically required. The Internal Review Officer agreed with the opinion of the physiotherapy consultant with MPIC's Health Care Services Team that the Appellant had been educated in an appropriate home exercise program and would be able to maintain and/or improve her condition with regular and consistent exercises performed in a

home setting. In spite of her complaints of continued symptomatology, the Internal Review Officer was of the opinion that any gains from a supervised exercise program and instruction on exercise progression had already occurred and that there were no functional deficits noted that would preclude her from proceeding with her home exercise program independently.

Evidence and Submission for the Appellant:

The Appellant described the second motor vehicle accident, which occurred on February 26, 2010, when her vehicle was rear-ended as she was stopped for a pedestrian at a crosswalk. At that time, she was still seeing [Appellant's doctor #1] for trigger point injection treatments arising from her first motor vehicle accident. She was seeing him approximately every three weeks and when the second motor vehicle accident occurred on a Friday, she already had a follow-up appointment scheduled for the following Monday.

The Appellant attended at her appointment with [Appellant's doctor #1] on Monday morning, and told him that she had been in a rear-end motor vehicle accident on the Friday. He examined her for any injuries which may have arisen out of the second accident, and proceeded to administer the trigger point injections. He advised her to come back in two weeks for follow-up. She saw him on March 15, 2010 and attended again on March 29, 2010 for trigger point injections. At that time, [Appellant's doctor #1] completed MPIC forms for submission. He also referred her to see [Appellant's doctor #2] regarding spinal block injections and in regard to obtaining a possible CT scan of her lower back and prescribed Robaxacet.

At that time, the Appellant was also pursuing psychological treatment with [Appellant's psychologist]. She also consulted with [Appellant's doctor #3], who she understood was an expert in Chinese Pain Medicine. The Appellant saw [Appellant's doctor #3] on May 10, 2010

for an assessment. He recommended acupuncture, but, as the Appellant testified, she had attempted this following her first motor vehicle accident with no success. Instead, [Appellant's doctor #3] recommended manual therapy to try and remove the lumps in the back of her neck, where the muscles had been injured. The Appellant pursued this therapy, and during the last couple of appointments with him, went into his gym, where he began to show her how to use machines in order to use movement to start building her upper body strength. However, the Appellant testified that her neck was so damaged and there were so many lumps and lesions which needed to be moved manually, that she was able to receive only limited benefit from the exercises. After six appointments, [Appellant's doctor #3] completed a form requesting funding for further treatment from MPIC. However, funding for this treatment was denied by MPIC.

Until the second motor vehicle accident, [Appellant's doctor #1] had been focussing on her upper back and neck. In May 2010, [Appellant's doctor #1] referred her to [Appellant's doctor #4] for trigger point injections which were administered into her lower back as well.

The Appellant continued to have difficulty sleeping. She used sleep medications, and described a difficult period when she tried to wean herself from this medication. She described this as traumatic, and throughout she continued to have all her pain. The Appellant testified that she continued with her trigger point injections, even to the time of the hearing, as well as continuing to see [Appellant's psychologist], for pain control, every two weeks. She indicated that the trigger point injections just blocked the pain but that the pain remained. She described her back as "on fire", with lumps that were not able to be moved without some manual therapy. The Appellant described therapy which she received from the chiropractor, [Appellant's chiropractor], which allowed these lumps to be moved.

The Appellant submitted that her treating physician, [Appellant's doctor #4], supported further physical therapy in a number of reports. On May 17, 2010, he provided a diagnosis in regards to injuries sustained in the motor vehicle accident of February 26, 2010 as including:

> ...Worsening of a chronic mechanical upper back pain syndrome and a recurrence of a mechanical low back pain syndrome.

While recommending continued local anesthetic injections, he also recommended:

> If the local anesthetic injections are pursued. I also recommend that [the Appellant] also pursue a graduated active exercise program directed by a physical therapist for maximum benefit.
>
> Without further pain management intervention, the prognosis for further improvement in [the Appellant]'s clinical status and functional abilities remains guarded. The goal of the interdisciplinary treatment recommendations referred to above is to restore [the Appellant]'s functional abilities to her pre-MVA level.

On July 16, 2010 the Appellant's case manager wrote to [Appellant's doctor #4], approving six trigger point sessions and a graduated exercise program.

After researching various physiotherapy clinics, the Appellant found [physiotherapy clinic], which offered the type of physiotherapy recommended by [Appellant's doctor #4]. The physiotherapist, [Appellant's physiotherapist], submitted a report to MPIC on August 15, 2010 seeking approval for a graduated active exercise program consistent with the recommendations made by [Appellant's doctor #4]. He indicated that the Appellant appeared to be a good candidate for the program and that his assessment findings were consistent with [Appellant's doctor #4]'s diagnosis of chronic neck and low back mechanical pain and trigger points. He outlined the specific goals of an active based program for the Appellant:

> A. Education focusing on:
> 1. Independent care of her condition
> 2. Pain control and management
> 3. Ideal body mechanics and how to use her physical abilities efficiently in a given work environment

4. Improved posture and positioning at their workstation
5. Health and wellness

B. Graduated and supervised active mobilizing and stretching the neck, mid back and lumbar regions. Also, stabilizing and strengthening of these areas.

C. postural exercises of the neck and back

D. conditioning and endurance training of the upper body

In a subsequent therapy report dated September 13, 2010 [Appellant's physiotherapist] indicated that there were some gains experienced and that the patient was responding to the plan. He noted that further potential gains were possible and recommended further physiotherapy treatment and trigger point treatment from [Appellant's doctor #4]. He requested approval for a further six sessions.

[MPIC's physiotherapist #1], the physiotherapy consultant with MPIC's Health Care Services Team, reviewed the Appellant's file on September 30, 2010. He noted that the goal of rehabilitation for individuals with myofascial pain syndrome is to preserve function and promote independence, but treatment should not require lengthy rehabilitation beyond a standard four to six week physical therapy program.

> It is acknowledged that the claimant appears to have improved with the treatment of trigger point injections combined with a graduated active exercise program. It is anticipated that the claimant has been educated in an appropriate home exercise program, and will be able to maintain and/or improve her condition with regular and consistent performance of a home exercise program.
>
> The writer spoke with [Appellant's doctor #4] regarding his treatment. He indicated that he recommended a month off from the trigger point injections, to see how the claimant would do with her home exercises, and he will reassess and make recommendations at that time.

However, in spite of these comments, [MPIC's physiotherapist #1] concluded that additional physical therapy treatment was not medically required. The case manager and Internal Review Officer agreed with this conclusion.

However, the Appellant submitted that the further physical therapy had been recommended by her caregiver, [Appellant's doctor #4], and that the physiotherapist who was treating her had agreed, documenting improvement, and noting that while she was not at maximum medical improvement there was potential for further gains.

She noted that [Appellant's doctor #4] addressed this again in a report dated September 27, 2011 when he indicated:

> There is significant medical literature supporting the use of myofascial trigger point injections in the treatment of various chronic benign pain syndromes that are associated with myofascial pain. As such, these treatments are medically required.
>
> It is also medically recommended that patients pursuing myofascial trigger point injections also pursue physical therapy directed at the tender and hypertonic muscles identified...
>
> As well, [the Appellant] also medically requires a graduated active exercise program as I had previously recommended in my report to [MPIC case manager] at MPI dated May 17, 2010. As I previously indicated, the graduated active exercise program should be directed by a physical therapist such as a physiotherapist.

The Appellant submitted that the case manager, in denying further treatment, was not only ignoring [Appellant's doctor #4]'s reports and recommendations, but also was contravening her own assessment, which she had communicated to [Appellant's doctor #4] in a letter dated July 16, 2010, indicating:

> As per your recommendations, if a graduated active exercise program will be beneficial after the TPI's, a maximum of 24 physiotherapy sessions would be considered at [the Appellant]'s choice location.

[Appellant's doctor #4] reported to the Appellant's case manager on February 18, 2011, describing the treatments which she had received and her continuing symptoms.

> Today, [the Appellant] indicated that she continues to suffer with upper back pain that ranges between 4 and 8 out of 10 in intensity on a visual analogue scale. Low back pain on the left side persists and was rated to range between 2 and 6 out of 10 in intensity on a visual analogue scale. [The Appellant] is currently taking Robaxicet on a PRN basis (0-3 tabs daily) and applies diclofenac cream to the affected regions twice daily with benefit noted. [The Appellant] pursues daily stretching exercises as well as isometric exercises at home.
>
> [The Appellant] has continually noted throughout my reassessments that she was having significant functional impairments because of her ongoing pain symptoms. Significant sleep disturbances were also noted.
>
> Clinical examination demonstrated numerous tender myofascial trigger points along the upper trapezius, levator scapulae, and longissimus thoracis muscles mostly on the right side. Tenderness and myofascial hypertonicity were also noted along the paralumbar region on the left side. Tenderness was noted along the left sacroiliac joint.
>
> My recommendations at this time include the following:
>
> 1. [The Appellant] should continue using her current pharmacological agents.
> 2. [The Appellant] should continue pursuing daily stretching and isometric exercises...

The Appellant submitted, as supported by [Appellant's doctor #4] in his report of February 18, 2011, that an interdisciplinary approach to pain management was required in her case, and that further physical therapy treatment was medically required as a result of injuries sustained in the motor vehicle accident of February 26, 2010.

Evidence and Submission for MPIC:

Counsel for MPIC referred the panel to a file note created by the case manager, [MPIC case manager], on August 17, 2010, following her review of [Appellant's physiotherapist]'s August 15, 2010 report with physiotherapist, [MPIC's physiotherapist #2], from MPIC's Health Care Services Team. At that time six regular sessions, falling within the regular fee schedule for active based education and self-management, were approved. The note stated:

> Assessment recommends a reconditioning program [text deleted] at fees billed outside the fee agreement which is contrary to the active graduated exercise program considered before.

Counsel acknowledged that these six regular sessions with a focus on active exercise were not in fact what had been recommended by [Appellant's doctor #4] and [Appellant's physiotherapist].

However, counsel for MPIC relied upon the report of [MPIC's physiotherapist #1] dated September 30, 2010 which indicated treatment should not require lengthy rehabilitation beyond a standard four to six week physical therapy program. Counsel submitted that there may have been some misunderstanding created when the treatment was referred to as a graduated active program. This was clarified in a report from [MPIC's physiotherapist #1] dated March 3, 2011. He stated:

> It should be noted that the claimant was not referred for traditional physiotherapy "treatment" but rather a specific type of program. [Appellant's doctor #4] recommended a "*graduated active exercise program directed by a physical therapist*." The focus of this exercise program would on "*active exercise and education towards self-management*," as stated to [Appellant's physiotherapist] in the Case Manager's fax dated August 17, 2010.

[MPIC's physiotherapist #1] stated that it was unclear from [Appellant's physiotherapist]'s reports why further in-depth clinic care would be considered medically required. The claimant had attended for six sessions which would be considered an adequate course to provide instruction in an appropriate home exercise program. Therefore, counsel for MPIC submitted that regardless of what [Appellant's doctor #4] had recommended, it was [MPIC's physiotherapist #1]'s opinion that the Appellant did not require further treatment.

Counsel for MPIC also referred the panel to a report from [independent doctor] dated October 13, 2011. [Independent doctor] was asked whether further physiotherapy treatments were medically required due to the 2010 motor vehicle accident and indicated:

> The medical file review did not indicate a physical medical condition present as related to the February 26th, 2010 motor vehicle accident, for which further physiotherapy treatments would be medically required.

Counsel for MPIC submitted that the physiotherapy treatment which the Appellant had already received had been successful and that no further physiotherapy treatments were medically required as a result of injuries sustained in the motor vehicle accident of February 26, 2010.

Discussion:

The relevant Section of the MPIC Act is:

> **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;
>
> (b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

The onus is on the Appellant to show, on a balance of probabilities, that the further physical therapy treatment which she seeks is medically required as a result of injuries sustained in the motor vehicle accident.

The panel has reviewed the evidence on the Appellant's file, as well as her testimony and submission and the submission of counsel for MPIC. We are of the view that the case manager's decision to deny further treatments in the Appellant's active physical therapy program, and the Internal Review Decision which upheld it were in error.

In arriving at our decision, the panel has considered the initial recommendation of [Appellant's doctor #4], on May 17, 2010, when he recommended that if local anesthetic injections were pursued, the Appellant should also pursue a graduated active exercise program directed by a physical therapist for maximum benefit. This was reiterated in a prescription note dated August 6, 2010 "For graduated active exercise program to begin A.S.A.P." Clearly, [Appellant's doctor #4] was of the view that a two-pronged approach, involving trigger point treatments and active exercise would be beneficial for the Appellant.

However, following a review with [MPIC's physiotherapist #2], from MPIC's Health Care Services, the Appellant's case manager reviewed the active graduated exercise program, and instead approved six regular physiotherapy sessions. On August 17, 2010, she indicated to [Appellant's physiotherapist], that the reconditioning program proposed was not approved.

> …Instead, we are prepared to fund a trial of physiotherapy at one session per week for 6 weeks in conjunction with the trial TPI's. The sessions would fall within the regular fee schedule and be no different than the regular service provided (active exercise and education towards self-management).

[Appellant's physiotherapist] completed these treatments, reporting functional objective gains, including 20% gains in overall neck motions, less trigger points and less spasm and muscle and

muscle tone. He recommended further physiotherapy, as the patient was responding to the plan. On November 25, 2010, he stated:

> There was a definite change in her symptoms and physical signs over her course of treatments in August with [Appellant's doctor #4]'s treatment and my program…
>
> To see a response this quickly in such a chronic condition is a very encouraging sign of further successes with physiotherapy and injection therapy. [The Appellant] has not reached her maximum improvement and there is no question there is further potential gains…

This request was reviewed by [MPIC's physiotherapist #1], who also had the opportunity to review [Appellant's doctor #4]'s reports and acknowledge that the Appellant appeared to have improved with the treatment of trigger point injections combined with a graduated active exercise program. However, he still concluded that additional physical therapy treatment was not medically required. The panel finds that, given the information which [MPIC's physiotherapist #1] had from the Appellant's caregivers, it is difficult to understand his recommendation to deny the further treatments.

On April 11, 2011, the Appellant's case manager wrote to her approving recommendations made by [Appellant's doctor #4] for another series of local anesthetic injections, with a maximum of three physiotherapy sessions to refresh her education of home exercises for self-management. [MPIC's physiotherapist #1] again took the view, on March 3, 2011 that the six week course of physiotherapy which the Appellant had already received was sufficient, and MPIC did not approve the active program which had been recommended by the Appellant's caregivers.

Recent reports from [Appellant's doctor #4], including the report of September 27, 2011 continued to opine that the Appellant "…medically requires a graduated active exercise program…directed by a physical therapist such as a physiotherapist".

Accordingly, the panel has concluded that the evidence before the Commission clearly establishes that the active physical therapy treatment recommended by [Appellant's doctor #4] and the physiotherapist, [Appellant's physiotherapist], was medically required in regard to injuries sustained by the Appellant in the motor vehicle accident of February 26, 2010. [Appellant's doctor #4] recommended and prescribed it and the Appellant experienced benefits as a result. Her treating caregivers continued to recommend further treatment as medically required for her condition.

As a result, the decision of the Internal Review Officer dated November 30, 2010 will be overturned by the Commission and the Appellant's appeal upheld. The Appellant will be entitled to twelve weeks of physical therapy treatments, as recommended by [Appellant's doctor #4] in his reports.

2. INTERNAL REVIEW DECISION – NOVEMBER 3, 2010 – CLASSIFICATION AND IRI BENEFITS:

At the time of the February 26, 2010 motor vehicle accident, the Appellant was making plans to resume her [text deleted] practice effective March 1, 2010. She had been off work since March 2008 due to restrictions placed upon her practice of [text deleted] by the [Appellant's professional licensing body]. The issues with the [Appellant's professional licensing body] were resolved in February 2010. The Appellant filed her application with the [Appellant's professional licensing body] on February 25, 2010 and paid her fees to resume practicing [text deleted] effective March 1, 2010. Following the motor vehicle accident, the Appellant reported that she was not able to resume her [text deleted] practice and applied for Income Replacement Indemnity ("IRI") benefits from MPIC.

On August 23, 2010, MPIC's case manager wrote to the Appellant to advise her as follows:

> For the purpose of determining entitlements, a classification must be determined. In order to resume your [text deleted] practice you were required to file an application and pay your fees by March 1, 2010. Your application was received February 25, 2010 and your fees were paid March 1, 2010, and as of this date your right to practice was resumed to "active" status.
>
> Based on the above, your earner classification is a "non earner" (Section 70(1) of the Manitoba Public Insurance Act). As a non earner, there is an entitlement to Income Replacement Indemnity (IRI) if during the first 180 days you are unable to hold employment you would have held during that time period.
>
> A Job Demands Analysis was completed on March 26, 2010, the conclusion was that you were in the process of setting up your business and your plan was to begin practicing [text deleted] on March 1, 2010, which classifies you as a non-earner with promised self-employment as governed under Section 85(1).
> In order to qualify for IRI benefits following the 7 day wait [Section 152(2)], there must be a physical or mental injury resulting from the accident that entirely or substantially precludes you from performing the essential duties of your occupation (Section 8 of the Manitoba Regulations 94).
>
> On March 26, 2010 a Percentage of Duties Summary was also completed by [Appellant's occupational therapist], [text deleted]. In his report dated April 23, 2010, he gathered information that confirmed your essential duties and categorized these duties at a sedentary level of demands. He also reported you appeared capable of completing each of your essential duties while using pacing techniques and occasional rest breaks as needed, but deferred your cognitive issues which you reported as decreased concentration in relation to sleep medication and the main reason you cited as your inability to work.
>
> Based on the totality of medical information, our Health Care Services Team conducted reviews on May 11, July 16 and August 23, 2010. From a physical perspective, the opinion of May 11 and August 23, 2010 confirmed you demonstrated the physical capabilities to resume your self employed occupation with recommended pacing techniques and occasional rest breaks as required.
>
> From a psychological perspective, the opinion of July 16, 2010 also confirmed you were capable of practicing [text deleted] as there was insufficient medical documentation to substantiate you suffered any type of psychological injury as a result of the motor vehicle accident of February 26, 2010.
>
> In view of the above, you are not entitled to IRI benefits under PIPP.

The Appellant disagreed with that decision and sought an Internal Review. In a decision dated November 30, 2010, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision of August 23, 2010. The Internal Review Officer found that the case manager's decision correctly classified the Appellant as a non-earner for the purpose of qualifying for IRI benefits. Further, the Internal Review Officer found that the medical information on the Appellant's file did not support that she sustained a physical or mental injury resulting from the accident that precluded her from performing the essential duties of her occupation following the motor vehicle accident.

The Appellant has now appealed that decision to this Commission. The issues which require determination on this appeal are:

1. whether the Appellant was properly classified as a non-earner; and
2. whether the Appellant is entitled to IRI benefits.

Evidence and Submission for the Appellant:

The Appellant submits that she was improperly classified as a non-earner at the date of the motor vehicle accident. She contends that she was making plans to start her practice effective March 1, 2010. She maintains that she was in the process of making arrangements to resume the practice of [text deleted] effective March 1, 2010 and actively involved in setting up her [text deleted] practice. She had dropped off her application to the [Appellant's professional licensing body] on February 25, 2010. She had applied for admission to the [text deleted]. She had attended a [text deleted] education program at the [Appellant's professional licensing body]. She was therefore already active in resuming her [text deleted] practice for March 1, 2010. As such, she maintains that she was actively working as of the date of the accident and therefore she should not be classified as a non-earner for the purposes of entitlement to IRI benefits.

With respect to her ability to work after the motor vehicle accident of February 26, 2010, the Appellant maintains that she was unable to resume her practice [text deleted] after the accident due to both a physical inability to work and a psychological inability to work. The Appellant maintains that her pain prevented her from working after the accident. She was still in pain from her first motor vehicle accident of October 26, 2004, and it only worsened after the subsequent motor vehicle accident of February 26, 2010. The Appellant argues that her pain complaints following these accidents prevent her from holding employment.

With respect to her mental and psychological inability to work, she maintains that her cognitive difficulties are caused by the medications she relies upon and her pain experience. The Appellant testified that even with the use of sleep medications, sleep is very difficult for her and this has continued ever since her first motor vehicle accident of October 26, 2004. She advises that since the first motor vehicle accident, she has had to use sleep medications in order to sleep. Her sleep problems are due to her pain. Further, the Appellant claims that even when she does sleep, her sleep is not restorative. Therefore, the Appellant argues that her pain complaints resulting from the injuries sustained in the motor vehicle accident of February 26, 2010, prevent her from sleeping and the lack of sleep leads to mental dysfunction on her part.

The Appellant argues that a [text deleted] needs her full faculties in order to practice [text deleted]. She submits that it would have been irresponsible for her to have begun practicing [text deleted] on March 1, 2010, given that she sustained the same injuries as in her previous accident. She maintains that she wasn't sleeping and she needed to go back on sleep medications as her pain was so intense. She required the sleep medications in order to get any sleep. Therefore, the Appellant argues that she was not in a position to take on clients, because she was not in a

physical or mental state to handle [text deleted]. She maintains that it would have been irresponsible and contrary to professional standards for her to have taken on clients in her state, following the motor vehicle accident.

The Appellant testified that she maintained her practising status with the [Appellant's professional licensing body] in order to be able to start practicing [text deleted] when she was healthy enough to do so. The Appellant submits that she has not been in a position to take on clients since the motor vehicle accident of February 26, 2010. Further, she argues that she was following the advice of her doctors who were advising her not to work because of her pain complaints. She submits that she followed the advice of her doctors and has not returned to work pending the resolution of her injuries from the motor vehicle accident.

Evidence and Submission for MPIC:

Counsel for MPIC submits that the Appellant was properly classified as a non-earner with promised employment as of March 1, 2010. She argues that the Appellant was not able to resume her [text deleted] practice until she had paid her practicing fees. The Appellant's practicing fees were paid effective March 1, 2010, and as of this date her right to practice was resumed to "active" status. Therefore, counsel for MPIC submits that as of the date of the accident, February 26, 2010, the Appellant was a non-earner and properly classified as such by MPIC.

Counsel for MPIC submits that the Appellant did not sustain a physical or mental injury as a result of the February 26, 2010 motor vehicle accident, which prevented her from holding employment following that accident. In support of her position, counsel for MPIC relies upon

the job demands analysis that was completed by [Appellant's occupational therapist]. In his report dated April 23, 2010, [Appellant's occupational therapist] reports that:

> Based on the information obtained during this meeting, as well as this evaluator's observations during this interview, [the Appellant] appears to be capable of completing each of the above noted essential job duties. Based on her reports of ongoing pain experience, she may benefit from the use of pacing techniques and occasional rest breaks as needed. Observations were made over a period of 2 hours on March 26th, and it is therefore unclear whether her current tolerance would enable her to complete these duties on a full-time basis at this time. It should be noted that the evaluation of cognitive issues such as decreased concentration related to her sleep medication is beyond the scope of the requested assessment and of this evaluator. Therefore further feedback from her physician regarding the impact this may have on her ability to complete her required job duties may be warranted as this is her main complaint limiting a return to work at this time. There was no objective medical information available for review at the time of this assessment to indicate [the Appellant] is not currently capable of performing this sedentary level of work however should additional information become available at a later date the above opinion may change to reflect this new information.

Counsel for MPIC submits that there were no significant objective or subjective functional physical limitations being reported by the Appellant at the time that the Job Demands Analysis was completed and according to the Job Demands Analysis, the Appellant was capable of performing the sedentary level of work as a [text deleted].

Counsel for MPIC also refers to the report of [independent doctor] dated October 13, 2011. [Independent doctor] completed a file review of the Appellant's file in order to provide his opinion with respect to the Appellant's appeal. With respect to whether or not the Appellant was capable of working as a self-employed [text deleted] as of March 5, 2010, [independent doctor] responded that:

> The provided medical documentation indicated that this client was in the process of returning back to her prior work as a self-employed [text deleted] immediately prior to the motor vehicle accident of February 26th, 2010. There is no evidence of either a physical or psychological rationale presented in the file at the point March 5th, 2010 (approximately 1 week following the February 26, 2010 motor vehicle accident) as to why this client would not be able to return to work as a self-employee [text deleted].

With respect to the Appellant's psychological ability to return to work, counsel for MPIC relies upon the opinion of [MPIC's psychologist], psychological consultant to MPIC's Health Care Services. In an inter-departmental memorandum dated August 29, 2011, [MPIC's psychologist] reports that:

> Based on the review of the recent file documentation, it remains the writer's opinion that there is no indication that the claimant is unable to work due to a psychological condition arising from the February 26, 2010 MVA. This was previously suggested in the July 2010 review by the writer...

Counsel for MPIC therefore submits that there are no physical or psychological injuries resulting from the motor vehicle accident of February 26, 2010, which prevented the Appellant from working as a self-employed [text deleted] following that accident. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review Decision of November 3, 2010 should be confirmed.

Discussion:

The relevant sections of the MPIC Act are as follows:

> **Definitions**
>
> 70(1) In this Part,
>
> **non-earner"** means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or student.
>
> **Entitlement to I.R.I. for first 180 days**
>
> 85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:
>
> (a) 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;
>
> (b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

Section 8 of Manitoba Regulation 37/94 provides that:

> **Meaning of unable to hold employment**
> **8** A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Upon hearing the testimony of the Appellant and after a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that:

1. the Appellant was properly classified as a non-earner for purposes of determining her entitlement to IRI benefits; and
2. the Appellant is not entitled to IRI benefits as a result of her promised employment as a [text deleted] commencing March 1, 2010.

On February 26, 2010, the Appellant was not practicing [text deleted]. Although she had filed her application with the [Appellant's professional licensing body], practicing fees were paid effective March 1, 2010. Accordingly, the Commission finds that the Appellant was properly classified as a non-earner, as she was not in fact self-employed as a [text deleted] entitled to practice [text deleted] in the Province of Manitoba on February 26, 2010.

With respect to the Appellant's entitlement to IRI benefits as of March 1, 2010, the onus is on the Appellant to show, on a balance of probabilities, that she was unable to perform the essential duties of her promised employment as a [text deleted], as a result of physical or mental injuries arising from the motor vehicle accident of February 26, 2010. The Commission has carefully reviewed the medical evidence presented and concluded that, while the Appellant may have been

reporting some symptoms following the accident, the evidence fails to establish that she was unable to work as a [text deleted] as a result of those injuries.

The Commission relies upon the Job Demands Analysis and Percentage of Duties Assessment completed on March 26, 2010 by [Appellant's occupational therapist], occupational therapist and the review thereof by [MPIC's occupational therapist], occupational therapist with MPIC's Health Care Services. In her inter-departmental memorandum dated May 11, 2010, [MPIC's occupational therapist] notes the following:

> In the PCA assessment of March 26, 2010, [the Appellant] reported her injuries as sore neck, upper and lower back, shoulder pain, headaches, jaw pain and insomnia. [The Appellant] demonstrated the ability to ambulate around her home without difficulty. She was able to ascend and descend the stairs to the second floor without apparent or reported difficulty and tolerated approximately one hour of consecutive sitting at the kitchen table during the assessment. She reported her main difficulty was lack of sleep and difficulty focusing at times. [The Appellant] reported that during the week of the assessment she was able to clean the whole house with pacing and occasional rest breaks as needed. [The Appellant] was reported as functional and independent with all personal care activities and therefore did not qualify for PCA assistance.
>
> A Job Demands Analysis and Percentage of Duties Assessment (JDA/POD) was completed on March 26, 2010 by [Appellant's occupational therapist], Occupational Therapist, the report is dated April 23, 2010. [The Appellant] reported she is a self-employed [text deleted] specializing in [text deleted]. The job description was made reference to the National Occupational Classification (NOC) [text deleted]. The exertion level rated herein is considered as "limited". Essential job duties reported within the JDA/PDA report were documented as follows; meetings in the community and in her home make up an additional 45% of the job demands, office duties, preparing cases and administrative duties make up 45% of the job demands and driving makes up the remainder 10% of the job demands performed. Physical abilities in performing the required tasks are documented as follows; sitting on a constant basis (>67%), trunk flexion on a constant basis for mostly seated activities, neck flexion on a occasional to frequent basis (11-66%), reaching waist to shoulder on a occasional to frequent basis, manual handling on a occasional to frequent basis, lifting less than 5 kg on an occasional basis (11-32%) and carrying less than 5 kg on an occasional basis.
>
> During the assessment, [Appellant's occupational therapist] reported that [the Appellant] was able to attend and participate appropriately during their meeting and demonstrated the ability to sit in an upright position in a regular kitchen chair while maintaining proper posture for the majority of the 2 hour appointment. It was noted that during this time [the Appellant] sat without obvious discomfort or frequent weight shifts or positional changes. [The Appellant] also demonstrated the ability to ambulate throughout the house

> independently without apparent or reported difficulty. She was able to ascend and descend the stairs to the second floor office without limitation. At the time of the assessment [the Appellant] reported that she was capable of managing all of her required home management activities including heavier cleaning tasks. She reported that she was able to bend forward at the waist to access low levels without limitation as preferred in order to help stretch out her lower back.
>
> During the JDA/PDA assessment [the Appellant] had indicated that decreased concentration related to sleep medication is the main limiting factor in her not returning to work at this time. [Appellant's occupational therapist] defers comment on the limitation cognitive issues play in her return to work at this time.
>
> Based on physical findings and demonstrated activities, [Appellant's occupational therapist] opined that [the Appellant] is capable of completing each of the essential job duties outlined above and based on reports of ongoing pain experience, [Appellant's occupational therapist] recommended that [the Appellant] utilize pacing techniques and occasional rest breaks as needed to complete required tasks. [Appellant's occupational therapist] indicated that it is unclear as to whether observations during the two hour period were reflective of work on a full time basis however opines that there is no objective medical information to indicate the (sic) [the Appellant] is not currently capable of performing this sedentary level of work.
>
> Based on the documentation provided, [the Appellant] demonstrated the physical capabilities to resume her occupation as a self-employed [text deleted] with recommended pacing techniques and occasional rest breaks as required; however further clarification should be obtained as to whether decreased concentration limits [the Appellant]'s return to work at this time.

The Commission recognizes that pain can be a disabling factor. However, we find that the evidence before us, including the Claimant's Reported Level of Function forms and the reports of her caregivers, demonstrate tolerances for sitting, standing and repetitive movement which fall within the tolerance levels expected of a sedentary occupation. We find that the Appellant's own reported tolerances, even with her pain complaints, provide for a sedentary level of function and did not prevent her from functionally performing the essential duties of her promised employment.

With regard to the Appellant's psychological status, the Commission accepts the opinion of [MPIC's psychologist] that there is no psychological diagnosis or injury resulting from either

motor vehicle accident which prevents the Appellant from returning to work as a [text deleted]. In [MPIC's psychologist]'s inter-departmental memorandum dated July 16, 2010, [MPIC's psychologist] opines that "Based on the writer's review of the file documentation pertaining to both the October 26th, 2004 and February 26th, 2010 mvas, it is the writer's opinion that there is insufficient medical documentation to substantiate that the claimant suffered any type of psychological injury as a result of either mva". [MPIC's psychologist] reiterated his opinion in his inter-departmental memorandum dated August 29, 2011 wherein he stated that:

> Based on a review of the recent file documentation, it remains the writer's opinion that there is no indication that the claimant is unable to work due to a psychological condition arising from the February 26, 2010 MVA. This was previously suggested in the July 2010 review by the writer. The recent file report from [Appellant's doctor #4] in June 2011, in fact, indicates that the claimant has returned to work as a [text deleted].
>
> [Appellant's psychologist]'s recent report of June 27, 2011 does not alter the writer's previous opinion as his report focuses on information provided by the claimant regarding her reported difficulties following the 2004 and 2010 MVA's and does not appear to be an actual opinion from [Appellant's psychologist] indicating that the claimant is not able to work as a [text deleted] at the present time. Furthermore, [Appellant's psychologist] indicates that the reason the claimant contacted him was to provide "*a written response to your question about possible connection between your motor vehicle accident (MVA) of October 24, 2004 and your past and present problems with managing anxiety"*. As indicated above, the writer and AICAC have both concluded that the 2004 MVA did not result in psychological injuries and was not the reason the claimant sought treatment from [Appellant's psychologist] approximately 3 years after the MVA. Finally, despite the claimant's statements that she is not able to work as a [text deleted] due to pain/anxiety/sleep problems, it does not appear that she has continued treatment with [Appellant's psychologist] to address these issues.
>
> Therefore, it is the writer's opinion that there is no indication that the claimant is not able to work as a [text deleted] due to the February 26, 2010 MVA as previously opined.

Further, in his testimony before the Commission [MPIC's psychologist] acknowledged that while the Appellant had some symptoms such as insomnia and anxiety, there was no psychological diagnosis connecting these symptoms to a psychological condition or injury arising from the motor vehicle accident. As a result, the Commission finds that the Appellant did not establish, on a balance of probabilities, that she sustained a psychological injury as a result of

the motor vehicle accident of February 26, 2010 which would prevent her from performing the essential duties of her promised employment.

As a result, the Commission finds that the Appellant has not established that there were any essential duties of her occupation as a [professional] that she was substantially unable to perform following March 1, 2010. Therefore, the Commission finds that the Appellant is not entitled to IRI benefits arising from the February 26, 2010 motor vehicle accident. Accordingly, the Appellant's appeal is dismissed and the Internal Review Decision dated November 3, 2010 is confirmed.

Dated at Winnipeg this 18th day of January, 2012.

YVONNE TAVARES

LAURA DIAMOND

MARY LYNN BROOKS