Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-12-172

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms Mary Lynn Brooks** **Mr. Neil Cohen**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**June 25, 2014**
ISSUE(S):	**1. Whether there is new information within the meaning of Section 171 of the MPIC Act.** **2. Whether the Commission has jurisdiction under Section 171(2) of the MPIC Act.**
RELEVANT SECTIONS:	**Section 171 of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

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 three separate motor vehicle accidents on January 5, 1999, September 8, 2000 and July 23, 2002. A period of approximately 15½ years occurred between the initial motor vehicle accident of January 5, 1999 to the hearing of this appeal on June 25, 2014. During that period of time numerous medical reports were filed with the Commission; the Appellant filed two Applications for Compensation, resulting in two case management decisions,

two Internal Review Officer's decisions and two appeals to the Commission and decisions of the Commission dated January 8, 2001 and August 23, 2007. In view of the complexity of these issues and the effluction of time, the Commission feels it is necessary to set out chronologically the facts of these proceedings in order to understand the issues that the Commission was required to determine at the hearing of June 25, 2014.

Due to the bodily injuries which the Appellant sustained in the motor vehicle accidents, she was entitled to Personal Injury Protection Plan ("PIPP") benefits pursuant to Part 2 of the MPIC Act. MPIC determined that the Appellant's entitlement to receive Income Replacement ("IRI") benefits ended as of November 15, 2004 and that the Appellant was not entitled to any further PIPP benefits.

The Commission's Decision – August 23, 2007:

The Commission heard the Appellant's appeal in respect of the termination of her PIPP benefits on July 11, 2007 and issued a decision on August 23, 2007 dismissing the Appellant's appeal and stated:

> "The Appellant submits that she sustained various injuries and medical complaints as a result of the motor vehicle accidents. She relates the following conditions to her motor vehicle accidents:
>
> **Accident of January 5, 1999 -**
> - Temporomandibular joint complaints;
> - Headaches and nausea;
> - Whiplash injury, including upper back pain, neck pain and stiffness;
> - Numbness and tingling to her left arm;
> - Myofascial pain.
>
> **Accident of September 8, 2000 -**
> - Low back injury;
> - Vaginal bleeding;
> - Foot problems;

- Left knee injury;
- Carpal Tunnel Syndrome;
- Mobility issues.

Accident of July 23, 2002 -

- Ventral hernia;
- Left knee injury;
- Mobility issues;
- Arm spasms;
- Lower back injury;
- Headaches;
- Occipital neuralgia."

The Commission specifically referred to the Appellant's ventral hernia:

> "As a result of the foregoing injuries and medical conditions, the Appellant submits that she continues to be entitled to PIPP benefits, specifically as follows:
> ...
> - **Permanent Impairment Benefits** – the Appellant seeks Permanent Impairment benefits for the following conditions:
>   - post-traumatic Stress disorder
>   - hives and rashes
>   - left knee injury
>   - right heel injury (including Achilles Tendon)
>   - back injury
>   - arthritis in her feet
>   - Carpal Tunnel Syndrome
>   - <u>Scarring from the ventral hernia</u>
> ..." (underlining added)

The Commission further stated in its decision:

> "Upon hearing the testimony of the Appellant, 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 the Appellant has not established, on a balance of probabilities, that:
>
> 1. her ongoing medical problems which prevent her from working are related to any of her three motor vehicle accidents; and
> 2. her ongoing medical problems which form the basis of her claim for in-clinic care, a walker and/or a wheelchair, pharmacological treatment, a weight-loss program and additional permanent impairment benefits are related to any of her three motor vehicle accidents.

> Particularly, there was a lack of corroborating medical evidence to establish, on a balance of probabilities, that the Appellant's various injuries and medical complaints which prevent her from working or which form the basis for her claim for in-clinic care, a walker and/or a wheelchair, pharmacological treatment, a weight-loss program and additional permanent impairment benefits were caused by any of her three motor vehicle accidents. The Commission also accepts the conclusions of the Internal Review Officer set out in his decision of February 2, 2005, where he finds that:
>
> > The conditions that can be ascribed, with any confidence, to your motor vehicle accidents are: some degree of TMJ dysfunction, perhaps some degree of difficulty with the left patella, and diffuse soft tissue complaints. I agree with [MPIC's Doctor's] assessment that there is nothing there that would prevent you from doing a sedentary job, and there is certainly nothing there that creates an entitlement to IRI benefits. I am also adopting [MPIC's Doctor's] opinions which form the basis for the denial of coverage to you for in-clinic care, a walker, or a wheelchair, and pharmacological treatment."

The Appellant was entitled, within 30 days after receipt of the Commission's decision, or within such further time as the judge allows, to seek leave to appeal to a Judge of the Manitoba Court of Appeal. The relevant provisions of the MPIC Act are Sections 187(1), 187(2) and 187(3) of the MPIC Act.

> **Appeal to Court of Appeal**
>
> 187(1) The appellant or the corporation may appeal the decision of the commission to The Court of Appeal.
>
> **Appeal with leave**
>
> 187(2) An appeal under subsection (1) may be taken only on a question of jurisdiction or of law and only with leave obtained from a judge of The Court of Appeal.
>
> **Application for leave to appeal**
>
> 187(3) An application for leave to appeal shall be made within 30 days after the applicant receives a copy of the decision of the commission, or within such further time as the judge allows.

Instead of seeking leave to appeal in accordance with Section 187 of the MPIC Act, the Appellant requested a review of the Commission's decision dated August 23, 2007 in a series of letters to MPIC dated July 3, 2011, February 3, 2012 and March 11, 2012. In her submissions to MPIC the Appellant stated that she had new information pursuant to Section 171(1) of the MPIC Act and requested MPIC to make a fresh decision in respect of her claim for compensation.

Section 171(1) of the MPIC Act states:

> **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.

Case Manager's Decision – April 4, 2012:

In response to the Appellant's submissions, the case manager wrote to the Appellant on April 4, 2012 and advised her that:

1. The Appellant's letters contained new arguments but did not contain any new information.
2. As a result the Appellant's application was rejected because the Appellant's submissions did not cause MPIC to reconsider her application for compensation pursuant to Section 171(1) of the MPIC Act.

Internal Review Officer's Decision - October 15, 2012:

The Appellant filed an Application for Review of the case manager's decision on May 20, 2012. On October 15, 2012 the Internal Review Officer issued a decision and stated that:

1. The Appellant's Application for Review was rejected and the case manager's decision was confirmed.
2. The Appellant did not provide any evidence to support her position that there was new information which required MPIC to make a fresh decision pursuant to Section 171(1) of the MPIC Act.
3. "Accordingly, this Review Decision maintains the position taken by the Commission's binding decision of August 27 (sic), 2007, and no new fresh decision will be made."

In this decision the Internal Review Officer noted that the Appellant had requested a permanent impairment award related to the ventral hernia. The Internal Review Officer rejected this submission on the grounds that the medical evidence did not establish that there was a causal connection between any of the motor vehicle accidents and the Appellant's ventral hernia. The Internal Review Officer noted that the surgeon, who operated on the Appellant in respect of the ventral hernia, stated in a report to MPIC dated May 27, 2004 that:

> "...However, I would find it very difficult to attribute this hernia to her motor vehicle accident..."

The Internal Review Officer further noted there was some confusion to the description of the hernia and stated:

> "The hernia referred to by [Appellant's Surgeon] and previous care providers, was later diagnosed as a ventral abdominal hernia. The clarification of the type of hernia you experienced was evident and is documented in the Commission's decision letter in August, 2007."

The Internal Review Officer also noted that [Appellant's Doctor #1], who was the Appellant's medical doctor, provided a history of the surgical correction of the hernia and did not suggest anything more than a temporal relationship between the abdominal hernia and the accident of July 2002. The Internal Review Officer stated:

> "While you have supported the file with evidence that you have had several hernia operations, there is insufficient evidence to conclude that your hernia, on the balance of medical probabilities, occurred due to the motor vehicle accident of July 23, 2002. The totality of medical evidence related to all three motor vehicle accidents were incorporated in the Appeal Commission's decision and there is nothing to suggest the matter was not properly before the Commission.
>
> In any event, I am upholding the case manager's' position and conclude that your file continues to lack corroborating evidence to support your position or, a new decision."

Notice of Appeal:

The Appellant filed a Notice of Appeal on November 6, 2012. In her appeal the Appellant stated:

> "Appeal to MPI was under Sections 171(1) & 171(2). Benefits were terminated based on misinformed medical opinion. New medical info regarding injury from third mva."

The Appellant's daughter wrote to the Commission on November 26, 2012 and stated that the Claimant Adviser is no longer representing the Appellant and she is requesting confirmation that the Appellant's appeal has been accepted under Sections 171(1) and 171(2) of the MPIC Act. This was the first time that the Appellant raised Section 171(2) in the appeal. The Appellant's daughter included a number of attachments to her letter of November 26, 2012 alleging errors and omissions in violation of the MPIC Act that were made by MPIC.

In a further submission to the Commission dated June 20, 2013 the Appellant's daughter requested that a hearing date be set by the Commission. In her submission, the Appellant's daughter set out a series of allegations of inappropriate conduct by MPIC's case manager and the Internal Review Officer in dismissing the Appellant's Application for Review.

Case Conference:

The Commission scheduled a Case Conference for May 7, 2014 to clarify the issues under appeal and to discuss any other preliminary matters the parties wished to address prior to the hearing of the appeal. The Appellant submitted additional medical information to the Commission.

A discussion took place between the parties in respect of the issues which were to be determined in the appeal. MPIC's legal counsel expressed concerns as to the Commission's jurisdiction to hear the appeal on the grounds of res judicata in regard to the Commission's previous decision of August 23, 2007.

As a result of discussions between the Commission and the parties the Commission formulated the following two issues which required determination:

1. Has new information been provided following the Commission's decision of August 23, 2007 and prior to the Internal Review Decision of October 15, 2012, which should have caused MPIC to issue a fresh decision in regard to the Appellant's claim?

2. Does the Commission have jurisdiction in this case to hear an appeal, pursuant to Section 171(2) of the MPIC Act, in respect to a decision and if so, has MPIC committed an error which should cause it to reconsider its decision?

Bifurcation of Appellant's Section 171(2) Appeal:

MPIC's Submission:

On May 9, 2014 MPIC's legal counsel wrote to the Commission indicating that the only issue that could properly be considered by the Commission is set out in the first issue in respect of new information pursuant to Section 171(1) of the MPIC Act. In respect of the second issue relating to the Commission's jurisdiction to hear an appeal pursuant to Section 171(2) of the MPIC Act, MPIC's legal counsel stated:

"Subsection 171(2) of the *Act* gives the corporation the jurisdiction to correct an error prior to the claimant initiating the review/appeal process to correct the decision. This subsection does not create a separate and distinct right to a review/appeal. The appellant is stating that MPI should have identified an error in the evidence which was the basis for the initial decision prior to her filing her review of the decision, and because MPI did not identify what she claims to be a substantive error she can appeal that initial decision again even though the Commission has already determined the initial decision was correct.

The logical extension of the appellant's argument on subsection 171(2) of the *Act* is that every time MPI issues a decision (approximately 17,000 decisions a year) it has to issue a second decision saying that it re-examined all the evidence that was the basis for the first decision and concluded that there was no errors. Otherwise, if MPI does not issue this second decision confirming there were not errors in the first decision the appellant is entitled to re-engage the appeal process even though the Commission made a decision determining that the first decision was proper. That is what the appellant is seeking to do in this case and it is an abuse of process to do so. The Commission rendered its decision and the matter is concluded. The only way in which the decision of the Commission could possibly change is if new evidence that did not exist at the time of the Commission rendered its decision is produced. The appellant has submitted evidence which she is claiming to be new evidence, MPI decided it was not new evidence. Whether or not it is new evidence is a legitimate question for the Commission to consider. It is the only issue for the Commission to consider on this appeal."

On May 15, 2014 MPIC's legal counsel further submitted:

"This is further to my letter to you of May 9, 2014. In that letter I set out the Corporation's position with respect to the appellant's attempt to incorporate subsection 171(2) of the *Act* in the within Appeal.

Having given it some further thought, it is my view that the "171(2) issue" should be dealt with and resolved prior to the commencement of the Appeal Hearing of the I.R.O. decision dated October 15, 2012.

For the most part, it would appear that the appellant's Appeal is based upon argument related to subsection 171(2) of the *Act* rather than the new information issue. The issue of the Commission's jurisdiction to her an Appeal under subsection 171(2) should be resolved prior to the hearing.

Therefore, it is my suggestion that we use the June 25, 2014 date set aside for the Appeal Hearing to hear arguments on the jurisdictional issue. Because the issue is one of jurisdiction, the Commission's decision on the issue could give rise to a potential Appeal to the Court of Appeal by either of the parties.

Again, it is the writer's view that this issue should be resolved prior to any hearing on the evidence being heard."

A copy of MPIC's legal counsel's submissions were provided to the Appellant by the Commission on May 20, 2014.

Appellant's Response:

The Appellant responded to MPIC's submissions and indicated that the Commission should hear both issues under appeal.

On June 23, 2014, the Commission set out the procedure by which the Commission would deal with the preliminary issues prior to the hearing of any evidence:

1. Bifurcation

   This will be the first preliminary matter to be addressed at the commencement of the hearing. The parties were provided with three cases on this issue and the Commission had previously requested that these legal authorities be addressed when making a submission on the Commission's jurisdiction in respect of this appeal. The Commission will first hear submissions from MPIC, followed by submissions from the Appellant.

2. Whether s. 171(2) MPIC Act is applicable to this appeal

   The Commission will hear submissions from both parties on this issue, with the Appellant providing her submissions first, followed by MPIC.

3. New information, as referred to in s. 171(1) MPIC Act

   In respect of new information under s. 171(1) MPIC Act, the Commission must be guided by the principles set out in *Shier v. MPIC [2008] 305*, a decision of the Manitoba Court of Appeal. In this decision, the Court of Appeal considered the Commission's application of *R. v. Palmer [1980] 1 SCR 759*, which sets out the test for fresh evidence under the Criminal Code as follows:

   1. The evidence should generally not be admitted if, by due diligence it could have been adduced at trial;

   2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue on the trial;

   3. The evidence must be credible in the sense that it is reasonably capable of belief; and

4. The evidence must be such that if believed, it could reasonably, when taken with other evidence at trial be expected to have affected the result."

In *Shier*, the Manitoba Court of Appeal determined that these principles were applicable to the meaning of new information under section 171(1) MPIC Act. The Court of Appeal rejected MPIC's position that the Commission erred in applying the *Palmer* principles and stated:

"These principles offer logical and reasonable considerations when exercising discretion under s. 171(1) to make a fresh decision because of new information, whether that exercise of discretion if by MPIC at first instance, or by the Commission on the hearing of an appeal. The purpose of s. 171(1) is to allow MPIC to render a fresh decision because it has received new information which affects and alters the original decision. I think it is important to remember that this section is about reconsideration of a decision and not re-evaluating a change in status of a claimant that is contemplated by other sections of the Act..."

Because the onus is on the Appellant on this issue, the Appellant will be required to make submissions with respect to new information with regard to the above mentioned principles. The Commission will hear first hear submissions from the Appellant, followed by submissions from MPIC.

Bifurcation:

At the appeal hearing on June 25, 2014 the Commission heard submissions from MPIC's legal counsel on the issue of bifurcation. MPIC's legal counsel submitted that:

1. The purpose of subsection 171(2) of the MPIC Act permitted MPIC to correct any errors prior to the Appellant initiating a review/appeal process.
2. The subsection does not create a separate and distinct right to review the appeal.
3. Prior to hearing the evidence in respect of the issues under appeal, the Commission should hold a hearing to determine the Commission's jurisdiction, and if MPIC did not agree with the Commission's decision on jurisdiction it would have the right of appeal to the Court of Appeal.

The Commission rejected MPIC's submission with respect to its third argument and adopted the decision of the Manitoba Court of Appeal in *Tyndall v. Sheeters, Deckers & Cladders Section of*

the Sheet Metal Workers' International Association, Local 511, 1998 CanLII 6762 (MB CA)

which stated:

> "Although there were many grounds of appeal argued before us, in my opinion this case falls to be decided on one issue, namely: Did the motions court judge err in determining that it was permissible for the respondent by way of a preliminary objection to attack the jurisdiction of the arbitration board? In effect, did he apply the now largely discredited doctrine of preliminary or collateral question which he ought not to have done?
> ...
> A convenient starting point for a brief review of the current state of the law is the decision of Dickson J. (as he then was) in ***Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation***, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227 at 233, in which he discussed, in the context of the role and scope given to specialist administrative tribunals, the decreasing usefulness of the so-called "preliminary or collateral issue" doctrine. This was often used as the justification for a superior Court to entertain a challenge to a tribunal's jurisdiction as a preliminary issue:
>
> > With respect, I do not think that the language of "preliminary or collateral matter" assists in the inquiry into the Board's jurisdiction. One can, I suppose, in most circumstances subdivide the matter before an administrative tribunal into a series of tasks or questions and, without too much difficulty, characterize one of those questions as a "preliminary or collateral matter."
> > ...
> > The question of what is and what is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may doubtfully be so.
>
> Five years later, in ***Syndicat des employés de production du Québec v. C.L.R.B.***, 1984 CanLII 26 (SCC), [1984] 2 S.C.R. 412 at 421, the Supreme Court put the matter this way :
>
> > Another error which has sometimes been regarded as jurisdictional is one relating to a matter which is preliminary or collateral, but supposedly essential to the exercise of the jurisdiction as a kind of condition thereof. This however is a fleeting and vague concept against which the courts were warned by this court . . . once the initial jurisdiction of the administrative body holding the hearing has been established at the outset.
>
> ...
> So long as the guiding statue authorizes the board to enter into the inquiry in the first place, then, save exceptional circumstances, the board has the jurisdiction to deal with whether a particular issue comes within its scope and mandate, subject of course to judicial review at the conclusion of the proceedings, applying the appropriate measure of curial deference." (Underlining added)

The Commission also adopted the decision of The Manitoba Court of Appeal in *Turnbull v. Canadian Institute of Actuaries* 1995 CanLII 6265 (MB CA) wherein the Court stated:

> "Counsel for the Institute emphasized that the Supreme Court decision in *Matsqui* is consistent with a long line of administrative law decisions which mandate that, save for exceptional circumstances, the administrative process should be allowed to run its own course. This is to avoid bifurcated proceedings with the attendant further delay, proceedings that may turn out to be redundant or unnecessary, and to give the administrative tribunal an opportunity to correct its own errors. Typical of this approach is the fairly recent decision in *Ontario College of Art v. Ontario (Human Rights Commission)* 1993 CanLII 3430 (ON SCDC), (1993), 99 D.L.R. (4th) 738, where the Ontario Divisional Court held an application for judicial review involving allegations of bias and delay to be premature since the administrative proceedings had not been concluded..." (Underlining added)

In arriving at its decision, the Commission noted the provisions of the MPIC Act which grants jurisdiction to the Commission to hear an appeal by an Appellant from a decision of MPIC's Internal Review Officer. An Appellant under Section 172(1) has a right to have a decision by MPIC reviewed by an Internal Review Officer and upon receipt of that decision, the Appellant has a right pursuant to Section 174(1) and 174(2) to appeal the decision to the Commission:

> **Appeal from review decision**
>
> 174(1) A claimant may, within 90 days after receiving notice of a review decision by the corporation or within such further time as the commission may allow, appeal the review decision to the commission.
>
> **Requirements for appeal**
>
> 174(2) An appeal of a review decision must be made in writing and must include the claimant's mailing address.

Once the Appellant filed her appeal of the Internal Review decision, the Commission was statutorily required to hear and determine the Appellant's appeal on its merits.

Section 182(1) of the Act provides:

> **Hearing of appeal by commission**
>
> 182(1) The commission shall conduct a hearing in respect of an appeal filed under this Part.

Decision:

1. MPIC issued an Internal Review decision dated October 15, 2012 denying the Appellant's claim for compensation and provided written reasons for the decision pursuant to Section 173(2) of the MPIC Act.
2. Pursuant to Section 174(1) of the MPIC Act, the Appellant filed a Notice of Appeal in respect of the Internal Review decision of October 15, 2012.
3. Pursuant to Section 182(1) of the MPIC Act, the Commission is statutorily required to conduct a hearing in respect of the appeal since the initial jurisdiction to conduct a hearing was established once the Appellant filed her appeal.
4. The Commission was entitled to exercise its jurisdiction to hear and determine the appeal on its merits.

For these reasons the Commission rejected MPIC's submission in respect of bifurcation and proceeded to hear the Appellant's appeal in respect of Sections 171(1) and 171(2) of the MPIC Act.

Review of MPIC's Decision - Section 171(2) of the MPIC Act:

The issue that the Commission was required to determine pursuant to Section 171(2) of the MPIC Act was:

1. Does the Commission have jurisdiction in this case to hear an appeal, pursuant to Section 171(2) of the MPIC Act, in respect to a decision and if so, has MPIC committed an error which should cause it to reconsider its decision?

Section 171(2) of the MPIC Act states:

> **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
>
> (b) the decision contains an error in writing or calculation, or any other clerical error.

The Appellant submitted that subsequent to the decision of the Commission dated August 23, 2007, the Appellant had discovered during the course of processing the Appellant's Applications for Compensation that MPIC had committed a number of errors and as a result the Commission should order MPIC to reconsider the Commission's decision of August 23, 2007.

MPIC's legal counsel submitted that:

1. Section 171(2) of the MPIC Act does not create a separate and distinct right of review of appeal by an Appellant.
2. This section gives MPIC the jurisdiction to correct an error prior to the claimant initiating the review/appeal process to correct MPIC's decision.
3. The Appellant does not have a right, pursuant to Section 171(2) of the MPIC Act, to appeal the decisions of the Internal Review Officer to the Commission.

The Appellant's representative responded that the Appellant had discovered significant errors in the manner in which MPIC processed the appeal and therefore the Commission had jurisdiction

to determine that MPIC did commit significant errors and could order MPIC to reconsider its decision to deny the Appellant PIPP benefits under the MPIC Act.

The Commission noted in a discussion with the Appellant's representative that once the Commission issued its decision to terminate the Appellant's PIPP benefits on August 23, 2007, the Appellant was entitled to challenge that decision by seeking leave to appeal of the Commission's decision to the Manitoba Court of Appeal, pursuant to Section 187(1) of the MPIC Act which states:

Appeal to Court of Appeal

187(1) The appellant or the corporation may appeal the decision of the commission to The Court of Appeal.

Section 187(2) of the MPIC Act requires that an appeal can only be taken on a question of jurisdiction or law only with leave obtained from a judge of the Court of Appeal and that such appeal must be made within 30 days after the applicant receives a copy of the decision of the Commission. The Commission noted that the Appellant had not sought to appeal the Commission's decision of August 23, 2007 to the Manitoba Court of Appeal.

The Appellant's representative made a submission to the Commission that the Commission had the jurisdiction to hear and determine the Appellant's appeal pursuant to Section 171(2) of the MPIC Act.

MPIC's legal counsel submitted that in regard to the provisions of Section 171(2) of the MPIC Act, the Appellant did not have a right to pursue this appeal.

Decision:

After hearing the submissions of both parties, the Commission adjourned the proceedings for a short period of time. Upon reconvening the hearing, the Commission issued its decision dismissing the Appellant's appeal on the following grounds:

1. If in its opinion it believes a substantive, procedural or clerical error has occurred in the decisions rendered by MPIC's case manager or an Internal Review Officer, MPIC is granted, pursuant to Section 171(2), the sole discretion to reconsider these decisions at any time prior to an appeal being filed by the Appellant.
2. The only specific power the Appellant has under Section 171(2) of the MPIC Act is that prior to the Appellant applying for a review of the decision or appealing a review decision, the Appellant may request MPIC to correct a substantive, procedural or clerical error in respect of its decision.
3. The appeal was heard by the Commission on July 11, 2007 and the Commission issued its decision dismissing the Appellant's appeal in respect of the termination of her PIPP benefits on August 23, 2007.
4. Once the Commission issued its decision on August 23, 2007 rejecting the Appellant's appeal relating to the termination of PIPP benefits, the Appellant had no right under Section 171(2) to file a Notice of Appeal on November 6, 2012 which would require the Commission to exercise its jurisdictions to review its previous decision of August 23, 2007.
5. The only remedy available to the Appellant in respect of the Commission's decision of August 23, 2007 was to file an appeal to the Manitoba Court of Appeal under Section 187(1) of the MPIC Act and the Appellant failed to do so.

New Information – Section 171(1) of the MPIC Act:

The issue that the Commission was required to determine pursuant to Section 171(1) of the MPIC Act was:

1. Has new information been provided following the Commission's decision of August 23, 2007 and prior to the Internal Review Decision of October 15, 2012, which should have caused MPIC to issue a fresh decision in regard to the Appellant's claim?

Section 171(1) of the MPIC Act provides:

> **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.

In respect of new information under s. 171(1) MPIC Act, the Commission must be guided by the principles set out in *Shier v. MPIC [2008] 305*, a decision of the Manitoba Court of Appeal. In this decision, the Court of Appeal considered the Commission's application of *R. v. Palmer [1980] 1 SCR 759*, which sets out the test for fresh evidence under the Criminal Code as follows:

1. The evidence should generally not be admitted if, by due diligence it could have been adduced at trial;

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue on the trial;

3. The evidence must be credible in the sense that it is reasonably capable of belief; and

4. The evidence must be such that if believed, it could reasonably, when taken with other evidence at trial be expected to have affected the result."

Hernia:

The Appellant's representative submitted that there was new information available to MPIC relating to the Appellant's hernia which required MPIC to review the information in order to make a fresh decision in respect of the Appellant's claim for compensation.

The Appellant's representative asserted that:

1. Prior to the motor vehicle accident of July 23, 2002, the Appellant had never had a hernia.
2. As a result of the motor vehicle accident on July 23, 2002 the Appellant suffered from an umbilical/ventral hernia which required [Appellant's Surgeon] to perform surgery.
3. The case manager had left [Appellant's Surgeon] with the impression that the Appellant had a hernia prior to the July 23, 2002 motor vehicle accident.
4. [Appellant's Surgeon], in error, diagnosed the Appellant with an umbilical hernia when in fact the Appellant's hernia was a ventral hernia.
5. [Appellant's Surgeon] erred when he stated in his letter to the case manager that he had not had the opportunity to assess the Appellant prior to October 2002 and that he was unable to state whether the Appellant had a pre-existing condition in respect of a hernia.
6. [Appellant's Surgeon] had been misinformed by MPIC's case manager on the Appellant's medical circumstances and provided a wrong opinion.
7. As a result of this misinformation, [Appellant's Surgeon] concluded that there was no causal relationship between the Appellant's hernia and the motor vehicle accident.

MPIC's legal counsel submitted that the Appellant's submission was not new information, but was re-argument of the same issues that had been considered by the Commission when it issued its decision on August 23, 2007 in which the Commission had concluded that the Appellant's ongoing health problems, including the hernia, were not causally related to the motor vehicle accident.

MPIC's legal counsel further submitted that the case manager did not misinform [Appellant's Surgeon]. MPIC's legal counsel referred to the case manager's letter to [Appellant's

Surgeon] of May 14, 2004 wherein she reported the Appellant's complaint that her hernia was caused by the motor vehicle accident. The case manager stated:

> "...This accident reportedly caused initial loss of feeling to the left side of her face, shoulder and arm, pain and soreness in her left hip, left knee, neck and back, a hernia from the seatbelt, migraine/stress rash with hives, anxiety and "damage to her left breast"." (underlining added)

This letter demonstrates that the information contained in the case manager's letter of May 14, 2004 filed in evidence at the original hearing of the Commission was not new information with the meaning of Section 171(1) of the MPIC Act.

MPIC's legal counsel also referred to the Commission's decision of August 23, 2007 wherein the Commission specifically identified that the Appellant was seeking PIPP benefits as a result of the motor vehicle accident due to "scarring from ventral hernia". In its decision the Commission clarified the surgery performed by [Appellant's Surgeon] was a ventral hernia and that [Appellant's Surgeon] had not misdiagnosed the nature of the hernia.

MPIC's legal counsel submitted that [Appellant's Surgeon] did not err in concluding the Appellant's hernia was not causally connected to the motor vehicle accident. In the decision of February 2, 2005, the Internal Review Officer stated:

> "You have an umbilical hernia. You attribute this to your July 2002 motor vehicle accident on the grounds that your seatbelt extender buckle sat where the hernia is located. You attribute considerable disability and impairment to this condition. You were, however, examined by a specialist, [Appellant's Surgeon], on October 2, 2002. His report of May 27, 2004 says, "I would find it very difficult to attribute this hernia to her motor vehicle accident." There is, therefore, no acceptable medical evidence that suggests this hernia has anything to do with your car accident(s)." (underlining added)

MPIC's legal counsel therefore asserted that the submissions made by the Appellant's representative in respect of [Appellant's Surgeon's] medical opinion relating to the hernia was

not new information which was not considered by the Commission when it determined that MPIC was correct in terminating the Appellant's PIPP benefits in its decision of August 23, 2007.

Decision:

The Commission finds that the Commission's decision of August 23, 2007 did consider all of the medical evidence when concluding that there was no causal relationship between the motor vehicle accident and the Appellant's hernia.

The Commission determines that the documentation submitted by the Appellant's representative in support of his position that the Appellant's hernia was caused by the motor vehicle accident is not new information within the meaning of Section 171(1) of the MPIC Act for the following reasons:

1. In its decision of August 23, 2007 the Commission confirmed the decision of the Internal Review Officer and rejected the Appellant's appeal.
2. The Internal Review Officer's decision of February 2, 2005 specifically stated that [Appellant's Surgeon] found it difficult to attribute the Appellant's hernia to her motor vehicle accident and concluded there was no acceptable medical evidence to suggest that the hernia had anything to do with the car accident.
3. When confirming the Internal Review Officer's decision, the Commission had to consider [Appellant's Surgeon's] report of May 27, 2004 in respect of causality when it determined there was no causal relationship between the motor vehicle accident and the Appellant's hernia.
4. The Commission further noted in its decision of August 23, 2007 that the scarring from the Appellant's ventral hernia was an injury the Appellant was seeking a PIPP benefit.

5. The Commission, in its decision of August 23, 2007, included the Appellant's complaint of a hernia injury and found there was no causal relationship between the ventral hernia and the motor vehicle accident.

For these reasons the Commission finds that the information submitted by the Appellant's representative does not constitute new information which would cause MPIC to make a fresh decision in respect of the Appellant's claim for compensation and the Commission therefore dismisses the Appellant's appeal in this respect.

Reports of [Appellant's Doctor #1] and [Appellant's Doctor #2]:

The Appellant also submitted the following documents as new information at the hearing:

1. [Appellant's Doctor #1's] report of August 26, 2012 - In [Appellant's Doctor #1's] letter to the case manager on August 26, 2012, she indicated that the Appellant was seen on July 30, 2002 by [Appellant's Doctor #2], a physician at the Appellant's clinic and was diagnosed with an abdominal hernia.
2. Diagnostic CT scan – lumbosacral spine of November 2001.
3. [Appellant's Doctor #2's] Patient Encounter History of July 30, 2012. The Appellant reported that she was involved in a motor vehicle accident on July 23, 2002. The history further states:

> "...in for f/u regarding car accident that happened July 23, 2002. A taxi went through a red light and nailed her on the door – her side T-boned. Went to the hospital at the [hospital]. Xrays negative. Comes back for query hernia in the umbilicus area. Pain control is good right now. She will f/u with [text deleted]. Just wanted to make sure that the hernia was okay.
> EXAM: Today, there is an umbilical hernia. It is reducible easily.
> Increases with cough and increase in abdominal pressure.
> A: Umbilical hernia. This is new. Query related to her car accident on the 23rd.
> P: Will refer her to a general surgeon for an opinion on repair. Patient will f/u with [Appellant's Doctor #1] (?) and of note, patient was wearing a seatbelt."

4. CT scan – abdominal region of November 18, 2011.

The Appellant submitted that this information was new and therefore the Commission should direct MPIC to reverse its decision in respect of the Appellant's claim for PIPP benefits. MPIC's legal counsel submitted this information was not new and therefore there was no obligation for MPIC to make a fresh decision in respect of the Appellant's claim for PIPP benefits.

Decision:

The Commission is bound by the Manitoba Court of Appeal's decision in *Shier vs. MPIC* (supra) which set out the criteria that the Commission is required to determine if evidence is fresh evidence within the meaning of Section 171(1) of the MPIC. Act. In *Shier vs. MPIC* (supra) the Court of Appeal stated:

1. The evidence should generally not be admitted if, by due diligence it could have been adduced at trial;

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue on the trial;

3. The evidence must be credible in the sense that it is reasonably capable of belief; and

4. The evidence must be such that if believed, it could reasonably, when taken with other evidence at trial be expected to have affected the result.

The Commission rejects the reports of [Appellant's Doctor #1] and [Appellant's Doctor #2] as new information on the grounds that this evidence could have been available to the Appellant if by due diligence it had been adduced at the hearing of the Commission on July 11, 2007 on the following grounds:

1. The Appellant was aware that [Appellant's Doctor #2] had seen the Appellant and made a diagnosis based on investigation which probably included X-ray reports. That

information was available to the Appellant had [Appellant's Doctor #2] been requested to provide a report to the Appellant.

2. [Appellant's Doctor #1] was the Appellant's physician at the time of the motor vehicle accident and her report could have been obtained prior to the Commission's hearing of July 11, 2007.

In *Shier vs. MPIC* (supra) the Court of Appeal stated that for the information to be new, the evidence needs to be relevant in a sense that it bears upon a decisive or partially or potentially decisive issue on the trial. In the Commission's decision of August 23, 2007 the critical issue between the parties is whether the Appellant's injuries were caused by the motor vehicle accident.

The Commission finds that the reports of [Appellant's Doctor #2] and [Appellant's Doctor #1] are not relevant in the sense that these documents did not establish there was a causal relationship between the motor vehicle accident and the Appellant's hernia.

The Commission also finds that the diagnostic CT scan of the lumbrosacral spine of November 2001 and the CT scan of the abdominal region of November 18, 2011 do not assist the Appellant in establishing this is new information under the meaning of Section 171(1) of the MPIC Act. The information contained in these two reports is not relevant in the sense that they do not establish there was a causal relationship between the motor vehicle accident and the Appellant's hernia.

The Commission therefore finds, having regard to the documentary evidence, the submissions of the Appellant and MPIC and the principles set out in *Shier vs. MPIC* (supra), that the Appellant

has not established on a balance of probabilities that it has adduced new information which would cause MPIC to make a fresh decision in respect of the Appellant's claim for compensation. For the reasons outlined herein, the Commission dismisses the Appellant's appeal.

Dated at Winnipeg this 7th day of August, 2014.

MEL MYERS, Q.C.

MARY LYNN BROOKS

NEIL COHEN