Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-015

PANEL:	**Ms Karin Linnebach, Chairperson** **Dr. Sharon Macdonald** **Ms Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Janelle Pariseau of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**December 5, 6, and 16, 2016**
ISSUE(S):	**Whether the Appellant's application for Personal Injury Protection Plan benefits was correctly denied for filing past the two year limitation date.**
RELEVANT SECTIONS:	**Section 141(1) and 141(4) 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

Background

The Appellant was involved in a motor vehicle accident ("MVA") on November 16, 2004. Despite having significant injuries and a lengthy hospital stay due to these injuries, the Appellant did not make a claim for compensation with MPIC until she contacted MPIC by telephone on May 8, 2014, nearly nine and one-half years after the MVA.

The case manager issued a decision on August 29, 2014 denying entitlement to Personal Injury Protection Plan (PIPP) benefits. The case manager found that the Appellant had failed to report her claim within the two year limitation period in the MPIC Act. The case manager stated that the Appellant's reasons for reporting late were that she had sustained a traumatic brain injury and was mentally incapable of reporting it to MPIC; and she was afraid to report the claim to MPIC as she feared her traumatic brain injury and issues with her vision would result in her losing her driver's license. The case manager concluded that the Appellant had failed to provide a "valid excuse" for her delay in reporting.

The Appellant filed an Application for Review of the case manager's decision to the Internal Review Office. On December 9, 2014, the Internal Review Officer issued a review decision confirming the case manager's decision to deny the Appellant's claim for being "out of time". The Internal Review Officer found that the Appellant's evidence was that she assumed her husband had approached MPIC and that a claim had been denied; that the Appellant felt that due to her head trauma she had not been able to "think clearly" and therefore never thought to contact MPIC for clarification; and that the Appellant was concerned that if she did contact MPIC she might lose her driver's licence due to her deteriorating eyesight. The Internal Review Officer concluded that the Appellant had not provided valid reasons for not applying within the two year time limit. Further, the Internal Review Officer concluded that filing a claim nine and one half years post accident has prejudiced the position of MPIC to properly investigate the claim and administer any benefits to which the Appellant may have been entitled.

The Appellant filed a notice of appeal with the Commission stating that she disagreed with the Internal Review Decision of December 9, 2014. The issue in this appeal is whether the

Appellant's application for PIPP benefits was correctly denied as a result of the Appellant filing for benefits after expiry of the two year limitation date under the MPIC Act.

Evidence for the Appellant

The Commission heard evidence from the Appellant, her daughter, and her son-in-law.

The Appellant

The Appellant described her education and work history prior to the MVA. She had worked for many years in [text deleted] retail, after which she returned to school for upgrading and to obtain a diploma in [text deleted]. She stated that she was a very successful student and obtained her certificate to be [text deleted]. At the time of the MVA, she was doing casual work but expected to obtain more work in her chosen field [text deleted]. Prior to the MVA, she had no issues with her memory.

The Appellant described the events leading up to the MVA in great detail. She returned home from work an hour later than scheduled at approximately 6:45 pm. Her husband had not made any supper so she started to make supper for herself. Her husband was working on the car that was driven in the MVA and he wanted her to listen to it run. He became agitated when she questioned why she should. In order to keep her husband calm, she decided to comply and she went over to the car. She sat in the passenger's seat while her husband pulled the car out of the garage in order to hear it run. The car doors then locked and her husband started driving the car on the street. She argued with him that he should not drive the car because it was not insured for driving. Her husband wouldn't listen to her and continued to take the car for a drive. They went to the corner of the block and then along came another car "fishtailing" down the road. The other car hit theirs, but didn't stop so her husband decided to chase it. She remembers her yelling and

screaming at her husband to stop driving, but that he continued to chase the other car, ultimately overshooting the stop sign and landing in the ditch. The next thing the Appellant remembers after her car hit the ditch was waking up in the hospital. As a result of the MVA, her husband was charged with driving offences and was convicted.

The Appellant described her injuries from the MVA. She had an injured arm, broken hip, laceration to the forehead and a carotid cavernous fistula. She spent approximately 5 months in the hospital after the MVA. After her release from hospital, she returned home to her husband with a wheelchair and pain medication. It took nearly nine months before she started walking and she had to regularly attend for therapy.

The Appellant described her marriage both before and after the MVA. She described her husband's controlling and abusive behaviour towards her. Because of his behaviour she thought she should move in with her daughter after the MVA, but this wasn't feasible because her daughter lived in a smaller home with lots of stairs. Ultimately she left her husband and moved in with her daughter and her daughter's family. She described some ongoing conflict with her husband after the separation.

The Appellant stated that after the MVA she had problems with her memory and needed assistance managing her personal and financial affairs. While she used to handle her own financial affairs prior to the MVA, her husband took this over after the MVA. When she moved in with her daughter and her family, they took care of her finances and continue to do this to date. She relies on her daughter and son-in-law to help her with her affairs in general. This includes making sure she attends her medical appointments.

The Appellant explained in detail the history of the vehicle driven in the MVA and why she had it "parked" at the time of the MVA. In response to the question why she didn't contact MPIC about receiving PIPP benefits, she stated that her husband and her sister-in-law told her that she did not have coverage for her personal injuries because the vehicle was not insured for driving at the time of the MVA. While this didn't make sense to her, she trusted her sister-in-law. She believed her husband and his family did everything they could to investigate this issue. She stated she found it confusing.

Due to a domestic dispute which caused the Appellant to be removed from the home by the RCMP, the Appellant became separated from her husband in [text deleted] 2008. She contacted a lawyer regarding the separation in late 2009 or 2010, but had no discussions with the lawyer regarding her injuries at that time. It wasn't until she contacted a lawyer in May of 2014 in order to obtain a divorce that she decided to contact MPIC. She told this lawyer that she was expecting spousal support from her husband because she was in a car accident in an uninsured vehicle and her bodily injuries weren't covered by MPIC. The lawyer then explained that her injuries should be covered and directed her to contact MPIC.

The Appellant was cross examined by counsel for MPIC regarding her memory problems. The Appellant stated that she attended to [text deleted], a physical medicine and rehabilitation physician working at [hospital], monthly after the MVA and then yearly. She confirmed that she reported to [Appellant's rehab specialist] that she was having problems with her memory, but that she was never referred to a neurologist or a neuropsychologist at any point.

On cross-examination, the Appellant acknowledged that while her daughter and son-in-law assist her by reminding her of medical appointments, they do not attend the appointments with her. She confirmed that she drives herself to her medical appointments.

Counsel for MPIC questioned the Appellant regarding her chiropractor, [text deleted], and the report he provided. The Appellant attended to [Appellant's chiropractor] for approximately a year and a half because of her memory issues. She stated that she was attending to [Appellant's chiropractor] for "BrainCore Therapy" and that [Appellant's chiropractor] was trying to retrieve her short term memory "by brainwaves". The Appellant was not referred to [Appellant's chiropractor] by another doctor, but rather by her daughter who had been hired by [Appellant's chiropractor] to take courses to become a technician. The Appellant's daughter scheduled the appointment with [Appellant's chiropractor]. With respect to [Appellant's chiropractor's] conclusion in his report that following the MVA the Appellant's "cognitive abilities were greatly reduced and her emotional state was challenged at all levels", the Appellant stated that she had reported this to [Appellant's chiropractor] and had completed a questionnaire describing her symptoms.

Counsel for MPIC then questioned the Appellant regarding her knowledge of MPIC. The Appellant stated that before the accident she had limited knowledge about MPIC and had no knowledge about personal injury claims. While she had MVA related injuries back in the 1980s, she had never received any PIPP benefits for any personal injuries after 1994. She has never had a family member or friend that was injured in an MVA after 1994 and her only understanding of the no-fault insurance system is that you pay your insurance and then are covered.

The Appellant confirmed on cross-examination that she didn't believe her personal injuries were covered as the vehicle was uninsured. She stated that she knew that the vehicle was definitely not covered and that her husband contacted MPIC and was advised that she also had no claim for her personal injuries. She agreed with counsel for MPIC that she didn't trust her husband.

The Appellant acknowledged that she had contact with a lawyer at the time of separation from her husband in [text deleted] 2008 and that she advised this lawyer about the difficulties she was having with her moods and memory. She could not remember if this lawyer was ever told about the MVA.

When questioned about why she moved in with her daughter after her separation from her husband, the Appellant agreed that lack of income was one of the reasons that she moved in with her daughter. The Appellant was referred to a letter written on September 24, 2009 by [Appellant's rehab specialist] stating that she needs to live with one of her children as she does not get a good enough income to live on her own. The Appellant acknowledged that, notwithstanding her memory problems, [Appellant's rehab specialist] indicated that she could live on her own.

On cross-examination, the Appellant confirmed that she had applied for Canada Pension Plan (CPP) disability benefits after the MVA and that her application was initially denied. The Appellant explained that her children and [text deleted] sister assisted her with the process but that she had compiled the necessary paperwork and wrote down the information for them. The original application was completed while she was in hospital and [Appellant's rehab specialist] assisted her in completing the appeal forms. The Appellant hired an advocate from Saskatchewan for the appeal but this advocate quit two weeks before the appeal so her son-in-law took over.

The Appellant acknowledged that she testified at the CPP appeal and had no problems answering the questions posed by the CPP Review Tribunal. She confirmed that [Appellant's rehab specialist] wrote a letter in support of her appeal and that she received a letter from CPP on January 28, 2008 that she would be receiving funds from CPP.

With respect to her medical care, [text deleted] was the Appellant's family doctor for a number of years until he retired. The Appellant was unsure when he retired but believed it was after 2010 or 2011. She also saw [Appellant's rehab specialist] until he retired in 2010 or 2011. She stated that she has had a number of different doctors over the last few years. In response to counsel for MPIC's question whether she was ever advised by a doctor to apply to MPIC for her personal injuries, the Appellant stated she couldn't remember.

Counsel for MPIC questioned the Appellant regarding her ability to care for herself and her affairs. The Appellant acknowledged that she continues to take care of herself, doing her own cleaning and washing. She does her own household cleaning as required, but does things in spurts so not to "overdo" herself. While she manages her medication on her own, she is only taking two medications at this time. She acknowledged that she still drives a car but stated that she isn't the registered owner of the vehicle that she drives.

The Appellant was cross examined regarding her eyesight and a statement in the CPP Review Tribunal's decision that the Appellant stopped working in sales in 2001 "due to poor eyesight which affected her ability to drive and difficulty with bending and lifting". The Appellant indicated that this statement was incorrect and that she stopped working in retail because of downsizing. In response to the question whether she had problems with her eyesight in 2001, she said that her eyesight did not cause her to leave work and that the eye that was damaged in the

MVA was her "good one". She ultimately acknowledged that she had some difficulty with seeing while driving at night before the MVA due to the glare from lights, but that this became worse after the MVA.

The Appellant was questioned by counsel for MPIC about her case manager's file note that states the Appellant "also confirms due to the MVA her eye sight deteriorated and she feared opening up the claim presenting that she is disabled through CPPD as having disability in eye sight and that MPI would take her licence away". The Appellant disagreed with this statement and asserted that the discussion with her case manager concerned whether the Appellant would be able to drive that particular day and her case manager took her comments "out of context".

The Appellant was cross-examined on a written statement she provided to MPIC on May 16, 2014. The statement indicates that the Appellant did not report her injuries to MPIC sooner because she was mentally incapable to do so; that she had been classified as disabled and was afraid to report the claim and the brain injury because MPIC may take away her licence; and that she did not want to lose her licence and her independence. The Appellant said that although the statement is handwritten, someone from MPIC wrote the statement. The Appellant acknowledged she signed the statement and that the statement contains the following:

> I make this declaration freely and voluntarily and not under any compulsion either threatened or apprehended: And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of "The Canada Evidence Act."

The Appellant acknowledged that she "kind of" read the statement before she signed it, but added that her comprehension was not great and it was confusing. The Appellant stated she had wanted MPIC`s representative to contact her daughter so that her daughter could read the

statement. She said the statement was made when she was at the cottage and her daughter was working in the city.

[Appellant's son-in-law]

[Appellant's son-in-law] has known the Appellant for forty years and is married to her daughter, [text deleted]. He was asked about the time period three to four years before the MVA. He stated that he had children by that time and the Appellant regularly spent time with his family. The Appellant had no problems with her memory prior to the MVA and she was even-tempered, easy to communicate with, and managed all of her own affairs. Before the MVA, the Appellant went to college to take a [text deleted] course and she was a "straight A student".

Once the Appellant began dating her future husband, she didn't spend as much time with his family. However, [Appellant's son-in-law] still managed to bring the kids out for dinner with her approximately once per month.

After the car accident, his wife, [text deleted], would spend the entire evening with the Appellant when she was in the hospital and on the weekends they would all go to the hospital to see her. He was asked to describe the Appellant's mental state when she was in the hospital. [Appellant's son-in-law] stated that the Appellant was "different". She wasn't as confident. She couldn't tolerate a lot of noise or light and having the kids around was taxing for her.

[Appellant's son-in-law] stated that he became involved in the Appellant's CPP appeal when her advocate dropped the case just prior to the appeal hearing. He stepped in to assist the Appellant and, along with the Appellant's [text deleted] sister, they put together the paperwork for the

appeal. The Appellant verified the facts for the appeal, while [Appellant's son-in-law] did the bulk of the writing and made sure everything was sequential and coherent. [Appellant's son-in-law] presented for the Appellant at the appeal. The Appellant was successful on appeal and received CPP benefits, including a lump sum payment, in [text deleted] 2008.

The Appellant had planned to pay her advocate one-third of any lump-sum benefits received if she was successful on appeal. While the Appellant offered this amount to [Appellant's son-in-law], he declined, suggesting that she invest it, which she did. The Appellant decided to buy a cottage at [text deleted] with the rest of the lump-sum benefit.

The Appellant came to live with her daughter and [Appellant's son-in-law] in [text deleted] 2008, at which point he spent every day with the Appellant. When asked about the Appellant's memory after she moved into his household, [Appellant's son-in-law] stated that it was "not as sharp as it had been". The Appellant would forget minor things and it would frustrate her. She would put tools away in a safe place at the cabin and couldn't recall where she put them.

[Appellant's son-in-law] was asked to comment on the Appellant's temper after she had moved in with his family. [Appellant's son-in-law] stated that the Appellant was different; her demeanour wasn't as "even keeled". She always had "an underlying frustration" which he attributed to her memory and her inability to recall things quickly.

[Appellant's son-in-law] stated that, because of the Appellant's memory issues, they started to help her with banking and attending doctor's appointments. His wife is "on all of her accounts" to make sure bills are paid and they are aware of all medical appointments.

[Appellant's son-in-law] was cross-examined by counsel for MPIC. Regarding medical appointments, [Appellant's son-in-law] acknowledged that he does not accompany the Appellant to medical appointments and that the Appellant has never reported problems to him about attending medical appointments on her own. [Appellant's son-in-law] acknowledged that he has never called medical clinics to schedule appointments for the Appellant. After the Appellant attends an appointment, the clinic then sends out the notice of the next appointment time.

[Appellant's son-in-law] stated that [Appellant's chiropractor] is his chiropractor and he suggested that the Appellant see him. His wife attended the appointment with the Appellant.

Regarding the Appellant's MVA, [Appellant's son-in-law] stated that he never looked into the Appellant advancing a claim with MPIC for PIPP benefits. He was aware that the Appellant had problems with vehicle coverage and he was aware that the Appellant's husband was charged in connection with the MVA. [Appellant's son-in-law] acknowledged that he didn't trust the Appellant's husband and despite this lack of trust never advised the Appellant to contact MPIC directly. [Appellant's son-in-law] stated it wasn't the husband, but rather the husband's family that was looking after his affairs after the MVA because the husband was convalescing as well.

[Appellant's son-in-law] stated that his current job is as a project officer with [text deleted] and that between 2007 and 2016 he worked as an independent contractor with [text deleted] handling life insurance. When questioned about his knowledge of MPIC, he stated that his knowledge was limited and denied having any exposure to automobile insurance and MPIC while working in the insurance industry. He acknowledged that he was required to do continuing professional development as part of his insurance licence, but stated that he mostly focussed on the investment side because [text deleted] is a term insurance provider.

[Appellant's son-in-law] was questioned about the Internal Review Decision where it states that [Appellant's son-in-law] assumed the Appellant's claim would be denied as the Appellant did not have the vehicle properly insured. [Appellant's son-in-law] stated that he told the Internal Review Officer that he only sold life insurance and relied on what the husband's family told him - that there is no claim if there is no contract. [Appellant's son-in-law] denied telling this to the Appellant.

Regarding the Appellant's living arrangements, [Appellant's son-in-law] acknowledged that she splits her time 50/50 between living with his family and staying at the cottage. He and his family go to the cottage and stay with her almost every weekend in the summer as well as 50% of his holiday time.

[Appellant's daughter]

[Appellant's daughter] is the daughter of the Appellant and wife of [Appellant's son-in-law].

[Appellant's daughter] was asked by the Appellant's representative to describe the time spent with the Appellant during the time period three to four years before the MVA. She stated that the Appellant spent lots of time in [text deleted] with her and her children as the Appellant is close to them. She described the Appellant as vibrant, alive, active, caring, and methodical and stated the Appellant would do anything for her and her family.

[Appellant's daughter] stated that the Appellant had a very good memory before the MVA and when asked to describe her temper at that time, said the Appellant was "even keeled" and was

able to put the appropriate feelings with the situation she was going through. The Appellant did not require any assistance in managing her affairs.

[Appellant's daughter] was asked to describe the Appellant's relationship with her husband. She stated that she didn't find out that the Appellant got married until a week and a half after the fact. She understood that the wedding would be planned by the family, but learned that the Appellant's husband wanted the wedding with only his family in attendance. [Appellant's daughter] stated that while she initially was able to spend time with the Appellant, the husband became controlling after the marriage and it was more difficult to spend time with the Appellant. [Appellant's daughter] believed the Appellant wasn't encouraged to have a relationship with [Appellant's daughter] and her family. The Appellant wasn't "allowed" to come into [text deleted] whenever she wanted to as the husband had to approve the visits.

After the MVA, [Appellant's daughter] went to visit the Appellant in hospital every day. She stated that the hospital didn't have enough staff so she helped take care of her mother and was there to feed her. She stated that the Appellant was confused after the MVA and had no recollection of the MVA. She described the Appellant as very quiet and distant and stated that "she just wasn't herself".

[Appellant's daughter] was asked whether she contacted MPIC to file a personal injury claim on behalf of her mother. She stated that she had asked the husband's sister and brother-in-law to look into it because she had too much to do. The husband's family told her that the Appellant would have no right to a claim because the vehicle was improperly insured. [Appellant's daughter] stated that she believed the husband's family "because of the type of people they were". She was focussed on helping the Appellant recover and thought the husband's family

would “do the right thing” for them. It didn’t cross her mind to look into it further because she thought the information was the truth and her primary goal was to help the Appellant recover. The Appellant was not in a good state; she was depressed and traumatized not just from the MVA but also from the relationship she had with her husband.

After the Appellant was discharged from hospital, she went back to live with her husband. [Appellant’s daughter] wasn’t able to spend much time with the Appellant because the husband always told her that the Appellant needed time to rest. The husband said he was taking good care of the Appellant. [Appellant’s daughter] also believed the husband’s sister and brother-in-law were helping out. Every time she phoned the Appellant, the husband told her the Appellant was doing great. [Appellant’s daughter] later learned that the husband was not taking good care of the Appellant. The husband took it upon himself to cancel appointments that [Appellant’s daughter] believed the Appellant needed to recover.

After she separated from her husband, the Appellant came to live with [Appellant’s daughter] and her family. Since the Appellant has lived with them, [Appellant’s daughter] has learned that the Appellant’s memory is not very good. The Appellant doesn’t handle stress well and this affects her memory as well as her ability to think straight. In addition, the Appellant has mood swings that are more extreme, she doesn’t always react to situations appropriately and she “shuts down” a lot.

[Appellant’s daughter] keeps track of the Appellant’s appointments because if she doesn’t, the Appellant would never get to the appointment. [Appellant’s daughter] assists the Appellant with banking as instructed by her. The Appellant lives half of the time at the cabin and [Appellant’s

daughter] will also assist the Appellant with taking care of the cabin, making sure the yard is taken care of and doing anything else that needs to be done.

On cross-examination by counsel for MPIC, [Appellant's daughter] confirmed that the Appellant generally attends to medical appointments on her own but if the Appellant feels she needs extra support, [Appellant's daughter] or her husband will attend with her.

[Appellant's daughter] confirmed that she is a neurofeedback technician at [text deleted] Chiropractic and that she has been working there for 5 years. She acknowledged that the clinic sees patients who have been involved in car accidents, but stated that only the chiropractic side of the clinic direct bills MPIC for services. They do not do direct billing on the neurofeedback side so she hasn't dealt with any MPIC billing.

[Appellant's daughter] confirmed that she is generally aware that individuals in car accidents can make a claim with MPIC for personal injuries if they are in an accident. However, she was adamant that she had no knowledge of situations like the Appellant's.

[Appellant's daughter] stated that she did not assist the Appellant with her CPP application or have any role in the CPP appeal process.

[Appellant's daughter] confirmed that the Appellant spends 50% of the time at the cabin, spending most of the summer there. She estimated that the Appellant spends 75% of her time at the cabin alone. The Appellant drives herself to the cabin "most of the time" and does her own shopping. However, [Appellant's daughter] and her husband do the bigger grocery shopping when they come out to the cabin on weekends.

Evidence for MPIC

[MPIC's doctor #1] testified on behalf of MPIC. He described his education and training, stating that he completed his residency in family medicine as well as a fellowship in sports medicine. He has taken additional training in forensic review with the American Board of Independent Medical Examiners. He has conducted over 1100 forensic file reviews for MPIC since 2013. He has also conducted forensic file reviews for the Workers Compensation Board of Manitoba. Currently he spends one third of his time doing contract consulting work for MPIC. Besides being a primary care physician focussing on sports medicine, he is also currently [text deleted]. Based on his education, training and experience, [MPIC's doctor #1] was qualified as an expert physician in forensic file review.

[MPIC's doctor #1] was asked by MPIC to review the Appellant's file and provide a report, addressing the following issue: Whether the Appellant's carotid cavernous fistula was causally related to the MVA and, if so, was it medically probable that this fistula would lead to an inability on the part of the Appellant to be able to report her claim to MPIC until May 2014.

[MPIC's doctor #1] stated that he interpreted the question as addressing whether the Appellant had the capacity for decision-making. He was not evaluating whether or not the Appellant had a brain injury, but was addressing the role of the Appellant's carotid cavernous fistula on her decision-making abilities.

To be able to address this question, [MPIC's doctor #1] reviewed the literature on carotid cavernous fistula as this is a rare condition he has never encountered in his practice and is one that a person in his clinical practice would likely not see. [MPIC's doctor #1] described the steps

he takes in his clinical practice to familiarize himself with a rare condition, such as consulting with colleagues, reviewing textbooks, and doing a literature review on an electronic clinical resource. He is required to become familiar with the nature of the condition, the underlying physiology/anatomy, risk factors, complications, and appropriate treatment sources. [MPIC's doctor #1] explained that he is required to undergo similar standards in order to be able to provide an educated opinion for a forensic file review.

[MPIC's doctor #1] described what a carotid cavernous fistula is and how he came to the conclusion that the Appellant's carotid cavernous fistula is related to the MVA. [MPIC's doctor #1] also described what effects this condition could have on an individual's functioning, stating that the most frequent complications are ocular functioning. However, [MPIC's doctor #1] acknowledged that a wide range of complications are possible, including spontaneous hemorrhage, bleeding in the brain and stroke. While [MPIC's doctor #1] concluded that the Appellant's carotid cavernous fistula was related to the MVA, he also concluded that the fistula would not be expected to lead to impairment in memory in the absence of an associated structural complication. While a brain hemorrhage and/or stroke arising out of treatment can be a complication of a carotid cavernous fistula, if either were present he would expect evidence to show on a scan such as an MRI. The Appellant's MRI brain scan of January 17, 2015 showed no evidence of infarction. None of these complications took place.

[MPIC's doctor #1] was questioned about his conclusion that the Appellant's medical information does not support that she would have been unable to report her injuries to an insurance provider before May 2014. [MPIC's doctor #1] stated that, based on his review, the Appellant exhibits decision-making capacity. While [Appellant's rehab specialist] documented a sporadic report of memory loss, it would have been reasonable for additional assessments to

have been conducted, such as a mini-mental status test or a Montreal cognitive assessment. There should have been a referral to a neurologist or psychiatrist. [MPIC's doctor #1] concluded that the absence of those assessments by the treating physician suggests capacity was not in question despite the symptom of memory loss.

[MPIC's doctor #1] was asked whether his opinion would change if he was aware that while the Appellant testified at her CPP appeal hearing, the Appellant's son-in-law presented on the Appellant's behalf. His response was that this would not change his medical opinion that the Appellant didn't have reduced capacity. [MPIC's doctor #1] was asked whether his opinion would change if he was aware that the Appellant didn't fill out her own application for CPP benefits. His response was that not filling out the application doesn't change his opinion that she didn't have reduced capacity in light of the medical information. [MPIC's doctor #1] explained that in looking for evidence of reduced capacity he is looking for impairment in daily functioning showing that the Appellant requires supervision. He is looking for evidence that the Appellant isn't able to manage tasks such as banking, shopping, dressing, and the "basic activities of daily living". [Appellant's rehab specialist] failed to provide a detailed assessment of the Appellant's mental status, cognition or higher function and [MPIC's doctor #1] would expect to see that assessment if the Appellant is impaired.

In his report, [MPIC's doctor #1] stated that the Appellant's medical information does not contain evidence of impairment in executive functioning such that she would have been able to report injuries or initiate a claim. In his testimony, [MPIC's doctor #1] explained that executive functioning refers to the ability to understand, retain and communicate information, and consider the consequences of actions and alternatives to various decisions. One also needs to look at independent functioning, such as attending appointments, completing social tasks, participating

in social outings, and other acts society would expect of independent functioning. [MPIC's doctor #1] concluded that the Appellant's medical information did not provide a detailed assessment that those functions were reduced.

On cross-examination by the Appellant's representative, [MPIC's doctor #1] confirmed that he had never seen a patient with a carotid cavernous fistula and that this condition is identified and treated by radiology, neurosurgery and neurology.

[MPIC's doctor #1] agreed the mental tests and assessments he described are not the only way to assess poor memory as a patient's basic history should be reviewed. However, he indicated that those other assessments are encouraged as they are validated tools of assessment. He acknowledged that a doctor who has met and spoken to the patient to get to know her is in a better position to assess overall functioning and critical status.

[MPIC's doctor #1] was referred to the Disability Tax Credit Certificate that was completed by [Appellant's rehab specialist] where [Appellant's rehab specialist] checked off "yes" in response to the question whether the Appellant is markedly restricted in performing the mental functions necessary for everyday life. [MPIC's doctor #1] agreed that he has completed forms as part of his practice and would not check "yes" on a form if he was not comfortable in filling out the form.

Submission for the Appellant

The Appellant's representative submitted that the Appellant has provided a reasonable excuse for failing to contact MPIC regarding her bodily injuries from the MVA. The Appellant was seriously injured and has had difficulties with her cognitive abilities since the MVA. She was

also in an abusive relationship with the abusive behaviour continuing for some period after the separation in 2008. The Appellant was told she could not pursue a claim for compensation for her bodily injuries with MPIC because her vehicle was not adequately insured. The insurance situation was by no means "clear-cut".

The Appellant's representative submitted that prior to the MVA the Appellant had no cognitive difficulties and managed her own affairs. However, after the MVA the Appellant has required assistance in attending to appointments, managing her finances, pursuing her CPP appeal, and managing her household tasks. The Appellant's daughter and son-in-law have spent considerable time with the Appellant during her recovery from the MVA at the hospital and since her separation from her husband. They are therefore are in a good position to report on the Appellant's cognitive difficulties.

As her treating physician with whom the Appellant had significant contact, [Appellant's rehab specialist] was in the best position to assess the Appellant's abilities. The Appellant completed a Disability Tax Credit Certificate in April 2009 with [Appellant's rehab specialist] completing the practitioner's portion of the form. [Appellant's rehab specialist] ticked off "yes" in response to the question whether or not the Appellant is "markedly restricted in performing the mental functions necessary for everyday life", which is defined as follows:

> Your patient is considered markedly restricted in performing the mental functions necessary for everyday life (described below) if, all or substantially all the time, he or she:
>
> - Is unable to perform them by himself or herself, even with appropriate therapy, medication, and devices (for example, memory aids and adaptive aids); or
>
> - Requires an inordinate amount of time to perform them by himself or herself, even with appropriate therapy, medication, and devices. An inordinate amount of time means that your patient takes significantly longer than an average person who does not have the impairment.

Mental functions necessary for everyday life include:

- Adaptive functioning (for example, abilities related to self-care, health and safety, social skills and common, simple transactions);

- Memory (for example, the ability to remember simple instructions, basic personal information such as name and address, or material of importance and interest); and

- Problem-solving, goal-setting, and judgement, taken together (for example, the ability to solve problems, set and keep goals, and make appropriate decisions and judgements).
  Important – a restriction in problem-solving, goal-setting, or judgement that markedly restricts adaptive functioning, all or substantially all the time, would qualify.

The form then provides a non-exhaustive list of examples of "markedly restricted in mental functions necessary for everyday life". The Appellant's representative submitted that, whatever the cause, the Appellant is markedly restricted in performing the mental functions necessary for everyday life and this is supported by [Appellant's rehab specialist] as evidenced by his completion of the form. While we don't know what assessments [Appellant's rehab specialist] conducted, a physician wouldn't check off "yes" on a form unless they were confident in the knowledge that the patient was markedly restricted.

The Appellant's representative submitted that very little weight should be given to MPIC's documents and the testimony of [MPIC's doctor #1] because [MPIC's doctor #1] simply conducted a literature review and never examined and assessed the Appellant. In addition, MPIC's health care consultants restricted themselves to whether the Appellant's cognitive difficulties are related to the MVA. A reasonable excuse for failing to pursue an MPIC claim is not limited to injuries related to the MVA.

The Appellant's representative submitted that the MPIC documents do not describe the Appellant's life situation and that she was a victim of domestic abuse. The Appellant was in an abusive and controlling relationship. She was called names, was subject to physical violence and was kept away from her family. While the relationship ended in 2008, the abuse didn't end when the relationship did. The Appellant's husband continued to attempt to contact the claimant and the police became involved. MPIC file notes from May 2014 show that the Appellant at that late date was still concerned whether MPIC would provide any information concerning her claim to her former husband.

The Appellant's representative submitted that we must consider the impact of the cognitive struggles along with the evidence of an abusive relationship. The Appellant's abuser told her that no benefits were available. This made the situation more complex. It is also important to remember that the Appellant was hospitalized for 5 months and when discharged, she was in a wheelchair and had problems with her vision. The insurance situation wasn't as clear as it could be and therefore it is isn't unreasonable that the Appellant did not give the matter much thought at the time.

The Appellant's representative acknowledged that the length of delay is "not a short delay", but argued that any prejudice in this matter is minimal as there are extensive records from the hospital stay. Further, allowing the Appellant's appeal would not automatically entitle the Appellant to particular benefits in any event. While there is limited evidence on the Appellant's employment situation, the onus is on the Appellant to prove that she was regularly employed. The onus would also be on the Appellant to prove her medication and chiropractic expenses. In addition, MPIC has the power to require the Appellant to be assessed medically under section 144 of the MPIC Act.

The Appellant's representative submitted that the Appellant is not blameworthy in this matter. Rather, there were factors beyond her control. The nature of her relationship with her husband and her cognitive abilities prevented her from filing a claim. In all the circumstances, the Appellant has provided a reasonable excuse and her appeal should be allowed.

Submission for MPIC

Counsel for MPIC agreed with the characterization of the issue and that the main issues to consider are the length of the delay, whether there is any prejudice to MPIC and the reasons for delay.

Regarding the length of delay, counsel submitted that it is substantial. Under section 141 of the MPIC Act, the Appellant had until November 16, 2006 to contact MPIC. However, the first contact she made with MPIC was on May 16, 2014, 7 ½ years after time period expired under the MPIC Act. Counsel submitted that 7 ½ years of delay is extremely long and noted that the limitation periods in civil claims are much shorter. This gives the Commission some idea how inordinately long the delay is in this case.

With respect to prejudice, counsel for MPIC submitted that there is both inherent and specific prejudice. Information gathering and case management opportunities have been lost. If the Appellant had reported sooner, proper attempts at rehabilitation could have been made and further treatment modalities could have been explored. A proper evaluation of the alleged traumatic brain injury could have been explored. Neurologists could have been consulted. This was never done and therefore the beneficial effects of dealing with MVA injuries in a timely manner have been lost.

There would have been information that would have been gathered regarding promised employment at the time of the MVA. Currently the pre-accident reports regarding vision issues contain only a small number of optometrist notes. It is likely that given the time that has gone by, any pre-accident medical information may have been lost. This makes it very difficult to evaluate causation. The Appellant has testified that a number of her physicians have left practice. It is very difficult to gather information 10 years after the fact.

Regarding the Appellant's reasons for not filing a claim, the Appellant provided a sworn statement on May 16, 2014 where she clearly stated that she didn't pursue an injury claim because she feared her driver's licence would be taken away. While the Appellant has now stated that her verbal statement to her case manger was taken out of context, this nonetheless suggests indicia of executive function. The Appellant was concerned about driving, understood the consequences and attempted to mitigate these consequences. This shows the Appellant is able to deal with that kind of stress. She is aware of issues and concerns and addresses them in an appropriate manner.

While the Appellant and her family asserted that the Appellant was told by her husband's family that she did not have an MPIC claim, the Appellant's Application for Review states that it was her husband that told her she was not entitled to a bodily injury claim because of the insurance situation. Counsel for MPIC was clear that he did not, in any way, want to minimize the effects of the abuse on the Appellant or suggest that the Appellant was not in a difficult situation when she was with her husband. However, the Appellant left the abuse in 2008, only two years after the expiry of the time period within which to come forward to MPIC. It would have been

reasonable for the Appellant and her family, in the many years after separation, to double check the husband's information given their history.

With respect to the Appellant's alleged cognitive issues, counsel submitted that there is limited medical evidence pointing to a decline in executive function such that the Appellant was unable to report a claim to MPIC. In a letter to the Appellant's family physician dated June 23, 2005, [Appellant's rehab specialist] stated that he didn't think that the Appellant would be returning to any type of gainful employment and therefore should pursue a Canada Disability Pension. However, in the reasons given for this conclusion, [Appellant's rehab specialist] does not highlight anything related to a cognitive condition.

In a report dated September 24, 2009, [Appellant's rehab specialist] states that the Appellant needs to live with one of the children as she does not get a good enough income to live on her own. [Appellant's rehab specialist] identifies no concerns related to cognitive functioning. In his letter in support of the Appellant's CPP disability application, [Appellant's rehab specialist] stated that the Appellant sustained a head injury in the 2004 MVA which resulted in confusion, memory loss, and a right carotid cavernous fistula. However, [Appellant's rehab specialist] does not note any concerns with the Appellant living on her own and caring for herself or her affairs. Given this letter was produced for the Appellant's CPP appeal, these concerns would have been "completely relevant" to the appeal.

Regarding [Appellant's chiropractor's] report, counsel submitted that [Appellant's chiropractor] is not qualified to discuss a traumatic brain injury and no such injury has ever been diagnosed by any other practitioner. Counsel submitted [Appellant's chiropractor's] conclusion is theoretical and not based on the Appellant's specific limitations.

Counsel referred the Commission to an August 15, 2016 report of [MPIC's doctor #2], MPIC's Health Care Services consultant. [MPIC's doctor #2] was asked to address whether the medical information supports the Appellant's position that she suffered a traumatic brain injury in the MVA which impaired her ability to properly manage her affairs, including filing a claim in a timely fashion. [MPIC's doctor #2] concluded that, based on evidence from the accident scene, the Appellant sustained at most a minor concussion. [MPIC's doctor #2] also concluded that the Appellant's injury would not be expected to result in any long term or persistent impairment of cognitive functioning. [MPIC's doctor #2] concluded that there was no other evidence in the medical information of cognitive deficits of such a nature or severity that would prevent or impair the Appellant's ability to report a claim. While [Appellant's rehab specialist] made reference in the CPP documentation that the Appellant developed memory problems and confusion, [MPIC's doctor #2] was unable to find objective evidence of this. Further, [MPIC's doctor #2] stated that, unless severe, memory impairment alone would not be expected to prevent an individual from reporting a claim, and there is no documentation, objective or subjective, of impairment of judgment, reasoning or executive functioning.

Counsel submitted that [MPIC's doctor #1's] evidence was that a carotid cavernous fistula would not result in impairment in memory and there was no evidence that the Appellant had any impairment in executive functioning. Had such impairment existed, it would have been reasonable for the Appellant's health care providers to take steps to address memory loss if the memory loss impacts her functioning. While [MPIC's doctor #1] acknowledged that a carotid cavernous fistula is a rare condition that he has never treated, a literature review is an accepted means of learning about a condition.

With respect to the Disability Tax Credit Certificate, counsel submitted that this is a static form with a very broad definition. The best place to gain insight on the Appellant's condition is the narrative reports where [Appellant's rehab specialist], in his own words, described his understanding of the Appellant's limitations.

The main issues put forward by the Appellant and her representative are the Appellant's ongoing problems with memory and her temperament. Counsel submitted that these concerns would not impact her ability to contact MPIC. While the Appellant may require some assistance, it is not that she is incapable of functioning. She attends medical appointments alone unless she requests her daughter to attend with her. This shows the Appellant is able to understand her own needs. She is not an invalid who is unable to take of herself. Since the MVA, she has arranged and attended appointments for her cataracts, appointments with [Appellant's rehab specialist], 60 treatment sessions with [Appellant's chiropractor], and other treatment modalities. She has applied for disability benefits and participated in her CPP appeal. She decided to purchase a cottage at [text deleted] and her daughter confirmed that the Appellant goes up there by herself by car. The Appellant does some of her own shopping and she spends some of her time alone. Between her own efforts and those of her family, the Appellant is clearly able to pursue her own well-being.

Counsel submitted that overall, balancing the length of the delay, the prejudice for late filing and the reasons provided by the Appellant, the Appellant has not provided a reasonable excuse for failing to pursue a claim with MPIC for her bodily injuries in a timely fashion. Counsel therefore asked that the Appellant's appeal be dismissed.

The Appellant's Reply Submission

The Appellant's representative wanted to ensure the Commission understood that the Appellant's cognitive difficulties are only one of three factors to consider in combination. The Commission must also consider the Appellant's domestic situation as well as the nature of the insurance coverage in this case. It is an overall question of reasonableness based on the factors combined.

Factors which Argue to the Overall Justice of the Proceedings

The parties were asked by the Commission to comment on the fact that MPIC has acknowledged that some of the Appellant's injuries, such as the carotid cavernous fistula, are caused by the MVA and whether this should be considered a factor which argues to the overall justice of the proceedings. MPIC acknowledged that this is a factor for the Commission to consider, but submitted that this needs to be balanced against all of the factors. This is just simply part of the same analysis where the Commission must weigh all of the factors.

The Appellant's representative submitted that, in addition to the carotid cavernous fistula, the Appellant also has scarring from the MVA and she has never been compensated for this scarring despite the fact that it was clearly caused by the MVA. Disallowing her appeal would result in the Appellant never receiving compensation for injuries that are, without doubt, caused by the MVA.

Decision

Subsection 141(1) of the MPIC Act states that a claim for compensation shall be made within two years after the day of the MVA. However, MPIC may extend the time within which a claimant can file a claim. Subsection 141(4) states:

Corporation may extend time

141(4) The corporation may extend a time limitation set out in this section if it is satisfied that the claimant has a reasonable excuse for failing to make the claim within that time.

In this case, the Appellant failed to make a claim for compensation until almost 9 ½ years after the MVA. The issue is therefore whether the claimant has a reasonable excuse for failing to make her claim within the two years as set out in subsection 141(1).

For the reasons set out below, the Commission finds that the Appellant has not provided a reasonable excuse for failing to make a claim with MPIC within two years after the day of the MVA.

The Commission previously considered subsection 141(4) in AC-01-75. In addition to considering an Appellant's reasons for the delay, the Commission held it also considers the length of delay, the prejudice resulting from the delay, the conduct of the Appellant in contributing to the delay, and whether the Appellant has waived the right to apply for compensation under the Act.

The Commission notes that subsection 172(2) of the MPIC Act addresses the extension of time for filing an Application for Review if a claimant has a reasonable excuse and uses language almost identical to the language of subsection 141(1). In addition to the factors outlined above, the Commission also considers "any other factors which argue to the justice of the proceedings" when considering whether an Appellant has provided a reasonable excuse under subsection 172(2).[1] The parties did not dispute that this is an appropriate factor when considering whether the claimant has a reasonable excuse under subsection 141(4) and, as such, this factor will be

[1] See AC-06-142

considered as part of the analysis of whether the Appellant has provided a reasonable excuse for making her claim outside the time limits under the MPIC Act.

In their submissions, counsel for both parties focussed on the length of the delay, the prejudice from the delay and the Appellant's reasons for the delay. There was no evidence that the Appellant at any time waived her right to apply for compensation. The Appellant's representative asked that the Commission consider the following three factors in combination: the Appellant's cognitive difficulties, the Appellant's domestic situation, and the complexity of the insurance coverage.

Regarding the Appellant's report of cognitive difficulties such as memory loss, the Commission recognizes there are references in the medical reports that the Appellant reported difficulties with her memory since the time of the MVA. However, the Commission does not accept that the Appellant's memory difficulties impaired her to such a degree that she could not have contacted MPIC to inquire about filing a personal injury claim.

The Commission finds that the Appellant testified in a coherent manner. She was able to provide significant detail regarding many of the events of her life, including the events leading up to the MVA more than 14 years ago. The evidence showed that the Appellant gathered information for her CPP disability application and appeal and participated in the CPP disability appeal hearing, providing testimony to the Review Tribunal. After she was successful with her appeal, the Appellant made the decision to purchase a cottage at [text deleted]. The Appellant spends 50% of her time at the cottage with an estimated 75% of that time alone. She drives a vehicle, both in [text deleted] and on the highway; shops for herself as needed; attends appointments on her own; attends to her personal needs; and does household chores. While the Commission accepts that the

Appellant's family provide her with assistance as needed, there were no examples given by any of the witnesses that the Appellant was impaired in her ability to recognize problems and to request and obtain assistance to solve problems. The Commission accepts the evidence of [MPIC's doctor #1] that the Appellant exhibits decision-making capacity.

The Commission recognizes that on September 24, 2008, [Appellant's rehab specialist] completed the practitioner's portion of the Disability Tax Credit Certificate and checked off the box "yes" in response to the question whether the Appellant is "markedly restricted in performing the mental functions necessary for everyday life". However, the Commission finds that [Appellant's rehab specialist's] checking of "yes" is inconsistent with the viva voce evidence in this hearing and his narrative reports on file. For example, in a June 24, 2010 report, [Appellant's rehab specialist] states that the Appellant is "doing reasonably well apart from some swishing noises that she hears in her head at times" and noted that the Appellant was taking Naprosyn for her headaches "when she is under stress". The Appellant acknowledged in cross-examination that [Appellant's rehab specialist] did not, at any point, state that the Appellant could not live alone. While [Appellant's rehab specialist] may have indicated by checkmark in 2008 that the Appellant was "markedly restricted in performing the mental functions necessary for everyday life" for the purposes of the disability tax system, the Commission notes that there is no evidence of any medical testing or specialist report that supports this conclusion. The Commission accepts the conclusion of MPIC's Health Care Services consultant in the report dated August 15, 2016 that there is no other evidence in the medical information of cognitive defects of such a nature or severity that would prevent the Appellant or impair her ability to report a claim with MPIC.

The Appellant provided a report from [text deleted], a chiropractor at [text deleted] Chiropractic. His report states that the Appellant attended to him to "explore the benefits of BrainCore Therapy as a treatment for the traumatic brain injury" resulting from the Appellant's MVA. The Commission agrees with counsel for MPIC that there is no medical evidence before us showing that the Appellant was diagnosed with a traumatic brain injury. While [Appellant's chiropractor] references the Appellant having a traumatic brain injury, his report states that the purpose of evaluating the Appellant's brainwaves was not to diagnose but to provide treatment. Further, there is no evidence that [Appellant's chiropractor] had reviewed any of the medical reports before us and he was not called to testify at this hearing. With respect to [Appellant's chiropractor's] summary of the Appellant's symptoms in his report, the evidence of the Appellant was that she reported her symptoms to [Appellant's chiropractor] and had completed a questionnaire describing symptoms. Given these findings, the Commission gives little weight to [Appellant's chiropractor's] report regarding whether the Appellant suffered a traumatic brain injury due to the MVA and the effects any symptoms may have had on the Appellant's ability to make a claim with MPIC.

Regarding the Appellant's domestic difficulties, the Commission accepts that the Appellant's now ex-husband was controlling and abusive towards the Appellant. However, the evidence was that the Appellant separated from her husband in 2008 and went to live in a supportive environment with her daughter and her daughter's family. Given the nature of her relationship with her husband and that the Appellant clearly did not trust him, it would have been reasonable for her to make her own inquiries with MPIC regarding her personal injuries. The Commission finds that it was unreasonable for the Appellant not to have made inquiries until more than 6 years after her separation from her husband.

At the hearing, the Appellant stated she relied on her husband's family to make inquiries with MPIC. The Appellant provided no details of what requests she made of her husband's family. The Commission notes that these individuals were described as honest and trustworthy, yet they were not asked to provide any evidence in this matter to substantiate the Appellant's claims of reliance on them and their having provided false information. In any event, the Commission finds that it was unreasonable for the Appellant to continue to rely on information from her husband and his family for more than 6 years after her separation.

The Appellant's representative also submitted that a third factor is that the Appellant's insurance situation was not "clear cut". The Commission finds that the complexity of the insurance coverage supports the need for the Appellant to directly contact MPIC herself, especially after she had separated from her husband. The fact it was "complex" is a perfect reason for the Appellant to contact MPIC and make inquiries.

The Commission finds that making a claim with MPIC 7 ½ years after the expiry of the two-year period within which to make a claim is a very lengthy delay. Further, the Commission finds that there is inherent prejudice to MPIC given this lengthy passage of time. The Commission recognizes that there was a lost opportunity to gather information and case manage the Appellant's claim in the first few years after the MVA.

While there is no evidence that the Appellant waived her right to pursue her claim, the Commission finds that the Appellant's conduct in failing to pursue her claim in a timely manner was, as a whole, unreasonable. This conclusion may have been different had the Appellant pursued her claim within a reasonable amount of time after the separation from her husband. Rather, the evidence showed that it took the Appellant more than 6 years after she separated

from her husband to contact MPIC regarding her claim. This was a time period when the Appellant lived in a supportive environment with family members who would have assisted the Appellant if she needed them to.

Considering and weighing all the factors for consideration as a whole, and considering the totality of the evidence, the Commission finds that the Appellant has not provided a reasonable excuse for her failure to make a claim within two years after the day of the MVA. Accordingly, the decision of the Internal Review Office dated December 9, 2014 is upheld and the Appellant's appeal is dismissed.

Dated at Winnipeg this 21st day of February, 2017.

KARIN LINNEBACH

DR. SHARON MACDONALD

LINDA NEWTON