

Indemnity ('IRI') benefits, Permanent Impairment benefits, and was reimbursed for his costs in respect of a variety of therapeutic treatments relating to his injuries.

At the time of the accident, the Appellant was residing in the city of Winnipeg, but he moved to [Text deleted], Manitoba, in September 1996 and resided there until November 1996 when he moved to [Text deleted], Manitoba. In January 2001, the Appellant moved back to the city of Winnipeg until August 2001, and since that time has been residing in [Text deleted], Manitoba.

The Appellant's case manager was initially Sue MacCutcheon, and from March 1997 to September 1997, Marlene Taylor was case manager. [Text deleted]. Subsequently, his case managers were Les Parry, Fern Ross and Gord Whalen.

[Text deleted].

In the middle of 1999, MPIC terminated all of the Personal Injury Protection Plan benefits (hereinafter referred to as the 'PIPP benefits') which the Appellant had been receiving as a result of the motorcycle accident. As a result, the Appellant sought an Application for Review in respect of the termination of these benefits. The Internal Review hearing took place on December 10, 2001, and the Internal Review Officer rejected the Appellant's Application for Review in a decision dated January 10, 2002.

At the time of the appeal hearing on July 9, 2002, MPIC had taken the position that contrary to Section 160(a) of the Act, the Appellant knowingly provided false or inaccurate information to

MPIC regarding his travel/mileage expense claims for the years 1997, 1998 and 1999 and, as a result, the PIPP benefits were terminated.

The Appellant's Notice of Appeal, dated April 9, 2002, asserted that at no time did he seek or receive reimbursement for considerably more kilometres than he actually travelled in each of the years 1997, 1998 and 1999, and sought reinstatement of the termination of his PIPP benefits.

Internal Review Decision

The Internal Review Officer determined that the Appellant had sought and received reimbursement for considerably more kilometres than he actually travelled in the years 1997, 1998 and 1999. The Internal Review Officer found a significant pattern of overclaiming of travel expenses which did not, in his view, support inadvertence, or even carelessness, in the recording of the actual distances travelled.

At the Internal Review hearing, the Appellant was represented by Mr. Joseph Pollock who provided the Internal Review Officer with maps and print-outs from the Geographic Technology website. This material showed the most direct routes and the actual distances (expressed in tenths of a mile) from [Text deleted] (the closest large town between [Text deleted] and Winnipeg) and from [Text deleted] to various locations in Winnipeg (the Health Sciences Centre, the Pan Am Clinic, etc.). The Internal Review Officer stated:

I was advised that these distances are used by trucking companies and other businesses which pay their drivers based on mileage. They are therefore presumed to be conservative indicators of distance since businesses of this nature would not knowingly pay any more than necessary for their delivery services.

The Internal Review Officer also indicated that he was provided with similar materials showing routes and distances between various points within Winnipeg, as the Appellant was required frequently to attend for treatment at more than one facility.

The Internal Review Officer concluded that, based on the Appellant's pattern of his mileage claims, the Appellant had knowingly provided false or inaccurate information to MPIC, contrary to Section 160(a) of the Act. The Internal Review Officer stated:

According to the Geographic Technology materials:

1. [Text deleted] is normally 30.8 miles (49.3 kms) from the Health Sciences Centre. A single round trip would normally be **98.6** kms.

During the flood of 1997, Hwy. #59 – the most direct route from [Text deleted] to Winnipeg – was closed from April 27, 1997 to May 10, 1997.

During this time, a trip from [Text deleted] to the Health Sciences Centre required a detour through [Text deleted], MB which made the trip 53.8 miles (86.1 kms). A single round trip during this time would be **172.2** kms.

2. [Text deleted] is 27.7 miles (44.3 kms) from 83 Garry Street, Winnipeg (where the offices of the Redboine Institute and Physiotherapy Works! were located). A single round trip would be **88.6** kms.
3. [Text deleted] is 34.3 miles (54.9 kms) from the Pan Am Clinic. A single round trip would be **109.8** kms.
4. The distance between the Health Sciences Centre and the Pan Am Clinic is 4.6 miles (7.4 kms). This is relevant for the days when [C.C.] had to attend both facilities on the same day.

A review of the almost 600 trips recorded on the print-out you provided indicates the following:

1. Starting on May 22, 1997, [C.C.] routinely sought, and received, reimbursement for trips between [Text deleted] and the Health Sciences Centre (PAR) at the rate of 120 kms per round trip (an additional 21.4 kms for each of the 78 such round trips to December 31, 1997). This includes days when he attended twice at PAR (for physiotherapy and for

psychotherapy) but excludes days when he attended at more than one facility in Winnipeg (for example, PAR and the Pan Am Clinic).

On one occasion (October 6, 1997), [C.C.] sought, and received, reimbursement for 140 kms for the round trip from [Text deleted] to the Health Sciences Centre (an additional 41.4 kms).

During this same time period, he apparently took another 10 trips to the Health Sciences Centre which he either did not claim for, or was not paid by MPI for (this is not entirely clear from the material).

I note in passing that many of the trips which are shown as “Not paid” are for multiple sessions at PAR on the same days when [C.C.] sought, and received, reimbursement for 120 kms of travel.

Taking into account the 10 legitimate unpaid trips between [Text deleted] and PAR between May 22, 1997 and December 31, 1997 (a total of 986.0 kms), and looking at just the [Text deleted]-PAR trips for this time period, [C.C.] sought, and received, reimbursement for 1,612.0 kms which he never actually traveled.

In fairness to [C.C.], I noted also that the reimbursement sought and received by him for trips between [Text deleted] and the Pan Am Clinic was less than his entitlement on several occasions during this same time period. On June 19, 1997 and August 1, 1997, he was reimbursed for 100 kms per trip (as opposed to 109.8 kms), and on September 24, 1997, he was reimbursed for 100 kms even though he would likely have traveled approximately 106.0 kms. These numbers, however, pale in comparison to overages for the same time period.

2. The pattern continued in 1998 with at least 14 trips between [Text deleted] and PAR being reimbursed at the rate of 120 kms per trip.

In addition, there were 63 trips to 83 Garry Street for which [C.C.] was reimbursed at the rate of 100 kms per trip (an excess of 11.4 kms per trip for a total of 718.2 extra kms).

There were also 16 trips billed at 105 kms per trip, 3 trips at 110 kms per trip, 1 trip at 115 kms, and 2 trips at 120 kms per trip.

The total overage for the trips to 83 Garry Street alone in 1998 was 1,134.0 kms, although arguably this overage should be reduced by the 10 unclaimed trips to this location during 1998.

I also noted claims for at least 10 trips of more than 100 kms per trip for [C.C.] to travel from [Text deleted] to a location in St. Boniface. As you know, St. Boniface is closer to [Text deleted] than 83 Garry Street, and much closer than either PAR or the Pan Am Clinic.

There were also at least 26 trips to “School” (located at 960 Portage Avenue) claimed at 110 kms per trip. You will note from the materials which you provided that 960 Portage Avenue is only 6-8 blocks further from Portage Avenue and Notre Dame Avenue (the point at which the routes would differ) than the Health Sciences Centre. This still leaves an overage of at least 15 kms per trip (roughly 400 for the year).

The total excess claim for 1998 was at least 600 kms.

3. The pattern again continued during the first 6 months of 1999 (while S. M. was still the case manager) with claims of 105 kms per trip for at least 27 trips to St. Boniface, 83 Garry Street, or 960 Portage Avenue. Trips to the Health Sciences Centre (4 in total) continued to be claimed at 120 or 125 kms per trip.

There were also 47 trips claimed at 110 kms per trip for “School & Gym”. The gym is located at 83 Garry Street. One such round trip would be about 100 kms.

At the Internal Review hearing, the Appellant’s legal counsel claimed that a malfunctioning speedometer in the Appellant’s automobile caused the Appellant to overstate the mileage he was claiming when requesting compensation for travel expenses from MPIC.

In this respect, the Internal Review Officer stated:

....I should indicate that I reject the submission that a malfunctioning speedometer has anything to do with the distances being measured by the odometer.

The speedometer measures speed, while the odometer measures distance. The fact that the speedometer is showing speeds as much as 16% lower than the actual speeds being traveled does not mean that the odometer is measuring 16% fewer kilometres than are actually being traveled. The odometer measures distance based on the number of tire revolutions, regardless of the speed(s) at which the tires are rotating.

I was provided with evidence of a malfunctioning speedometer. I was not provided with any evidence of a malfunctioning odometer.

Discussion

The issue at the appeal hearing was whether or not MPIC was justified in terminating the PIPP benefits to the Appellant on the grounds that he had knowingly provided false or inaccurate information to MPIC, pursuant to Section 160(a) of the Act.

Section 160(a) of the Act states:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

- (a) knowingly provides false or inaccurate information to the corporation.

Appellant's Position

At the appeal hearing, the Appellant testified under oath and denied neither the information set out in the Internal Review Officer's decision dated January 10, 2002, as to the distances between [Text deleted] and various locations in Winnipeg, nor the accuracy in respect of his claims for travel allowances.

The Appellant, however, asserted in his testimony that he did not knowingly provide false or inaccurate information to MPIC. He testified that:

1. he was born and raised in the [Text deleted] but, for reasons not disclosed to the Commission, he left the [Text deleted] several years before the motorcycle accident and came Winnipeg to start a new life;
2. although he was unable to speak English, he was able to obtain employment as a meat cutter and commenced to rebuild his life in Winnipeg;

3. as a result of the single-vehicle motorcycle accident, he suffered multiple injuries which had a traumatic effect on his life;
4. his health and quality of life were substantially impaired by the accident, and he was unable to continue his employment and to enjoy many of his regular recreational and social activities;
5. while living in [Text deleted] and [Text deleted], he was required to travel to Winnipeg to attend medical appointments and to obtain treatment in respect of his injuries at the Health Sciences Centre, Redboine Institute, Physiotherapy Works!, or the Pan Am Clinic;
6. in addition to travelling to the various locations for treatment while he was in Winnipeg, he would travel to the library, to restaurants in order to eat meals, to a gymnasium to exercise, and to parks in order to relax. As well, due to his physical problems, he was required at times during the course of the day to attend at public washroom facilities;
7. having regard to his condition of health, his trips to Winnipeg were not only occasions to attend at medical appointments, physiotherapy treatments, etc., but were also for recreational purposes to assist him in coping with his physical conditions, to avoid depression, and to maintain a positive outlook on life.

The Appellant further testified that:

1. when he had made application for travel allowances from MPIC, he was unaware that he was required to record specifically the exact mileage of his return trips from his residence in rural Manitoba to the specific medical locations in Winnipeg;
2. when completing the applications for travel allowances, he estimated the distances of his return trips and included in them his attendances at the library, restaurants, public washrooms, gymnasiums, and parks;

3. at no time prior to the termination of his benefits was he advised by MPIC that he was violating any travel allowance policy of MPIC and, as a result, might lose his PIPP benefits because of a violation of Section 160(a) of the Act.

In his testimony, the Appellant denied that he intended to defraud MPIC in respect of his travel allowance and, in support of his position, further testified that:

1. in a decision dated January 10, 2002, the Internal Review Officer acknowledged that in 1997, he did not claim for 10 trips or, alternatively, MPIC did not pay him for these trips;
2. in his decision, the Internal Review Officer also noted on several occasions that the Appellant was reimbursed for amounts less than the actual mileage that he could have claimed;
3. it was contrary to his interest to attempt to defraud MPIC in respect of his travel allowances in order to obtain some small financial benefits and to put at risk the very substantial financial benefits he was obtaining from MPIC in respect of his IRI benefits, Permanent Impairment benefits, and reimbursement of the cost of therapeutic treatments in respect of his injuries.

The Appellant's wife, S.M., also testified on behalf of the Appellant. She referred to documents which she had prepared and which were filed as an exhibit in the appeal proceedings. These documents were related to the number of trips the Appellant had taken, their point of origin, distances he was required to travel, and whether or not he was paid for these trips.

Legal counsel for MPIC challenged the accuracy of some of the information contained in this document. In cross-examination, S.M. acknowledged that on several occasions, there was a

duplication of amounts claimed for the same trip. Subject to these errors, which were minor in nature, the document was not challenged by MPIC's legal counsel. This document established that in respect of all the trips that the Appellant had made for various treatments and medical visits arising out of the injuries since the date of the accident, 73% were paid by MPIC. As well, this document indicates that the Appellant did not submit travel accounts for 27% of these trips.

MPIC's Position

MPIC's legal counsel submitted that there was a pattern of significant overclaiming which was inconsistent with inadvertence, or even carelessness, when reporting the actual distances travelled by the Appellant. MPIC's legal counsel, therefore, asserted that this pattern established, on the balance of probabilities, that contrary to Section 160(a) of the Act, the Appellant did knowingly provide false or inaccurate information to MPIC which justified MPIC in terminating the PIPP benefits to the Appellant.

MPIC's legal counsel attacked the Appellant's credibility in respect of a submission made by his legal counsel at the Internal Review hearing in respect of a faulty speedometer which was contained in a 1978 Monte Carlo automobile owned by the Appellant. At the Internal Review hearing, legal counsel for the Appellant had provided the Internal Review Officer with a speedometer certificate dated March 27, 1998, which indicated that his automobile speedometer was defective and indicated speeds as much as 16% lower than the actual speeds being travelled. The Appellant's legal counsel asserted to the Internal Review Officer that the defective speedometer may have materially affected the accuracy of the odometer readings and, therefore, resulted in inaccurate mileage claims being provided to MPIC by the Appellant.

MPIC's legal counsel submitted that the Appellant had misled the Internal Review Officer because the Appellant knew that a faulty speedometer could only have adversely affected an odometer by recording lower distances travelled than were actually travelled—a position totally inconsistent with the Appellant's submission to the Internal Review Officer. MPIC's legal counsel further asserted that notwithstanding this knowledge, the Appellant had instructed his legal counsel to make a submission to the Internal Review Officer to the contrary in respect of the faulty speedometer in order to justify the inaccurate information the Appellant had provided MPIC in respect of his travel expenses.

Legal counsel for MPIC also asserted that in cross-examination at the appeal hearing, the Appellant had admitted that he couldn't even recall whether he had used the 1978 Monte Carlo that was the subject of the speedo card when he submitted his travel expense claims to MPIC. MPIC's legal counsel, therefore, submitted that the Appellant, by filing a speedo card with the Internal Review Officer in respect of the 1978 Monte Carlo, was attempting to mislead MPIC for the purpose of justifying his position that he had mistakenly submitted inaccurate travel expense claims.

In conclusion, MPIC's legal counsel submitted, having regard to the submissions the Appellant made to the Internal Review Officer in respect of the 1978 Monte Carlo speedometer and the speedo card, that the Appellant was not credible and that his explanation that he provided to the Commission should be rejected.

MPIC's legal counsel made a further submission in respect to the Appellant's credibility as follows:

1. the explanation provided by the Appellant relating to the accumulation of additional miles for attending at non-medical locations while in the city of Winnipeg should be rejected;
2. between the Internal Review hearing and the appeal hearing, there had been a substantial revision to the Appellant's position. Since the Appellant was unable to establish that a defective speedometer adversely affected the odometer readings of his automobile, he could not rely on this defence and, as an afterthought, testified before the Commission and provided an explanation as to his activities in Winnipeg to justify the overclaiming in respect of the kilometres as recorded in his application for reimbursement of travel expenses;
3. if the true reason why the Appellant provided inaccurate information to MPIC in regard to his travel distances was due to the non-medical activities that the Appellant had carried out while in Winnipeg, then this explanation would have been given by the Appellant's legal counsel to the Internal Review Officer at the Internal Review hearing, and the Appellant did not do so; and
4. therefore, the Appellant's explanation was not credible and could not rebut the inference that as a result of consistent overclaiming of the distances reflected in the travel allowance claims, he had knowingly provided false or inaccurate information to MPIC and, as a result, violated Section 160(a) of the Act.

In respect of the issue relating to the faulty speedometer, the Commission notes that:

- (a) In his decision dated January 10, 2002, the Internal Review Officer rejected the defence put forward by the Appellant's legal counsel that a faulty speedometer

- justified inaccurate mileage claims by the Appellant in respect of his request to MPIC to reimburse him for travel expenses.
- (b) In the Appellant's Notice of Appeal, he asserted that he had evidence to support his position that the speedometer and odometer were not properly functioning and no attempt was being made by the Appellant to receive mileage benefits to which he was not entitled. However, at the appeal hearing, legal counsel for the Appellant indicated that he would not be calling any evidence relating to a defective speedometer and would rely only on the testimony of the Appellant and his wife and supporting documentation.
- (c) Notwithstanding the position of the Appellant's legal counsel that he was not adducing any evidence to establish the faulty speedometer defence, legal counsel for MPIC, in order to challenge the credibility of the Appellant, called Mr. Gary Kemash to testify with respect to the issue of a faulty speedometer. Mr. Kemash, an MPIC employee with extensive experience in automobile mechanics, testified as to the relationship between a speedometer and an odometer. He further testified that a faulty speedometer that indicated speeds as much as 16% over the actual speeds being travelled by the automobile could cause the odometer readings to record fewer kilometres than were actually travelled.
- (d) At the conclusion of the examination and cross-examination of Mr. Kemash, Mr. Kemash was questioned by the Commission, and he acknowledged that a defective speedometer could cause the odometer to measure not only fewer kilometres but also greater kilometres than were actually being travelled. He further testified, without actually examining the defective speedometer in question, that he was not able to say what impact, if any, the defective speedometer would have had on the odometer

readings in respect of the motor vehicle in which the defective speedometer was located.

Decision

The Commission notes that the burden of proof is upon the Appellant to establish, on the balance of probabilities, that he did not knowingly provide false or inaccurate information in respect of his travel expenses and, as a result, MPIC was not justified in terminating the PIPP benefits, pursuant to Section 160(a) of the Act.

Section 160(a) of the Act provides:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(a) knowingly provides false or inaccurate information to the corporation.

The essential issue for determination by the Commission in this appeal was whether or not MPIC was justified in terminating the PIPP benefits to the Appellant because the Appellant knowingly provided false or inaccurate information in respect of his travel allowances to MPIC. MPIC does not dispute that the Appellant did take the trips that he alleged when claiming travel allowances, nor is there any dispute as to the number of kilometres the Appellant claimed in respect of each trip. The evidence establishes that having regard to the round-trip kilometres established by the Geographic Technology materials, the Appellant's claims for allowances in respect of each trip exceeded the distances for each trip as set out in the Geographic Technology materials.

The dictionary definition of the word ‘knowingly’ in *Blacks’ Law Dictionary 7th Edition (1999)* is as follows: “*it is an adjective of knowing; deliberate; conscious <a knowing attempt to commit fraud>*”.

The word ‘knowingly’ has been judicially considered in a number of cases. In *R v. Rees* [1956] 4 D.L.R. 2nd 406, a man’s defence to a charge of contributing to juvenile delinquency was that he honestly believed that the girl involved was over 18 years of age. His ignorance, which was established, was unanimously held by the Supreme Court of Canada to be with respect to a question of fact only and his conviction was quashed. At p. 412 D.L.R., p. 8 Can. C.C., Rand J. adopted what was stated by Professor Glanville Williams in his textbook, *Criminal Law*, at p. 131:

It is a general rule of construction of the word “knowingly” in a statute that it applies to all the elements of the actus reus.

And at p. 417 D.L.R., p. 13 Can C.C. Cartwright J. said:

It would indeed be a startling result if it should be held that in a case in which Parliament has seen fit to use the word ‘knowingly’ in describing an offence honest ignorance on the part of the accused of the one fact which alone renders the action criminal affords no answer to the charge.

In *Canada Post Corp. and Letter Carriers Union of Canada* 32 L.A.C. (3d) 86 (decided October 2, 1987), the issue in this arbitration related to an allegation by the union that a mail service carrier was unjustly discharged from his employment. The employer terminated the employment of the mail service carrier on the grounds that the mail service carrier operated a Canada Post vehicle while his driver’s licence was cancelled.

1. The union adduced evidence that the employee did not have knowledge that his driver’s licence in question had been cancelled at the time of the incident and, as a result, he did not knowingly drive the employer’s vehicle while unlicensed.

2. The employer asserted that the employee knew that his driver's licence had been cancelled and, notwithstanding that knowledge, drove his vehicle for a number of months until he was caught. Since this was a second offence, the employer asserted it had just cause to terminate the employment of the mail service carrier.
3. The employer alleged that the policy which the employee violated was:

If an employee knowingly drives a Corporation vehicle without the appropriate and valid driver's licence then the first offence will be punishable with a ten day suspension without pay, and a second offence will be punishable with discharge.

The arbitrator accepted the employee's explanation, upheld the grievance, and stated, in respect of the employer's policy, at page 11:

I interpret "knowingly" in that standard to mean either that the employee had actual knowledge of the inappropriateness or invalidity of his driver's licence or that he had good reason to know and thus should be imputed with such knowledge: see *R. v. Rees* (1956), 4 D.L.R. (2d) 406, 115 C.C.C. 1, [1956] S.C.R. 640 (S.C.C.), and *R. v. MacDougall* (1982), 142 D.L.R. (3d) 216, 1 C.C.C. (3d) 65, [1982] 2 S.C.R. 605 (S.C.C.).

In discussing the burden of proof, the authors of *The Law of Evidence in Canada – Second Edition*, at page 156, refer to the case of **Continental Ins. Co. v. Dalton Cartage Co.** [1982] 1 S.C.R. 164 and state:

Laskin C.J.C. further stated that the trier of fact could consider the cogency of the evidence and it was entitled to scrutinize the evidence with greater care if there were serious allegations to be established. In support of this position, he adopted Lord Denning's oft-cited words in *Bater v. Bater* [[1950] 2 All E.R. 458, at 459 (C.A.)]:

The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher standard of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is

considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

The allegation of substantial misconduct by MPIC against the Appellant is extremely serious, and the financial consequences to the Appellant in respect to the termination of his PIPP benefits were catastrophic. Therefore, the quality of the evidence required to satisfy the Commission, on the balance of probabilities, that the Appellant knowingly provided false or inaccurate information to MPIC under Section 160(a) of the Act must be clear and cogent.

The Commission has considered Section 160(a) of the Act in previous decisions.

In L.R.-99-160 (dated August 1, 2000), the Commission determined that MPIC had satisfied the burden of proof upon it, under Section 160(a) of the Act, when it found that the Appellant had submitted travel expense forms for specific locations which she did not, in fact, attend. The Commission concluded that the Appellant had lied about the destination and that she knew the course of conduct that she embarked upon was wrong. In this appeal, MPIC does not submit that the Appellant did not travel to the locations in question but claims that the Appellant consistently overstated the amount of the kilometres over several years and thereby inflated his travel expenses.

In M.G.-00-57 (dated February 6, 2001), the Commission dealt with the issue of whether the Appellant's falsehood must be material to justify the application of Section 160(a) of the Act. In this case, the Appellant falsely described his physical condition in a written statement to MPIC. The physical condition of the Appellant was inconsistent with video tapes obtained by the MPIC Special Investigation Unit and clearly indicated that portions of the Appellant's statement were

false. At the appeal hearing, legal counsel for the Appellant admitted that these statements were false but argued that the false statements were not material to justify the application of Section 160(a) of the Act.

The Commission determined in that case that in order for false statements to come within Section 160(a) of the Act, the statements must necessarily be material to the claim provided it was knowingly made. The Commission concluded that the Appellant's statements were intended to mislead the insurer, even though the insurer knew the true facts of the claim and that the attempt by the Appellant to defraud MPIC was destined to fail. However, in this appeal, the alleged overstatement of distances, as set out in the travel allowance claims by the Appellant, was material to the claim.

In this appeal, the Appellant denies that he knowingly provided false or inaccurate information to MPIC. He has provided an explanation which, if accepted by the Commission as credible, would lead the Commission to conclude, on the balance of probabilities, that he did not knowingly provide false or inaccurate information to MPIC to justify its termination of his PIPP benefits, pursuant to Section 160(a) of the Act.

MPIC's legal counsel has attacked the credibility of the Appellant's testimony and submits that the Commission should reject the Appellant's explanation in respect of reporting the distances relating to his request for travel allowances on the following grounds that:

- (a) the Appellant's explanation was an afterthought because he could not establish a faulty speedometer defence; and

- (b) the Appellant had attempted to mislead the Internal Review Officer in respect of the faulty speedometer at the Internal Review hearing.

As well, MPIC's legal counsel submitted that the significant pattern of overclaiming travel expenses did not support inadvertence or carelessness in recording the actual distances travelled by the Appellant, and was inconsistent with any credible explanation provided by the Appellant.

The issue of the Appellant's credibility is central in determination of this appeal. In **Faryna v. Chorny** [1952] 2 D.L.R. 354, the British Columbia Court of Appeal addressed the issue of the credibility of witnesses in civil proceedings. Mr. Justice O'Halloran, on behalf of the British Columbia Court of Appeal, stated:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The Commission finds that there is insufficient evidence to establish, on the balance of probabilities, that the Appellant knowingly provided false or inaccurate information to MPIC which would justify MPIC in terminating his PIPP benefits pursuant to Section 160(a) of the Act.

The Commission rejects MPIC's legal counsel's submission that the Appellant's credibility is adversely affected by the untimely explanation provided by the Appellant to the Commission.

The appeal before the Commission is a Trial De Novo, and the Appellant is entitled to raise any issues he wishes in his defence against the allegation that he violated Section 160(a) of the Act.

The Appellant is also free to withdraw any defence he raised before the Internal Review Officer, and not pursue that defence before the Commission.

Depending on the circumstances of the individual case, a variation or modification of the Appellant's defence before a Commission may or may not affect the Appellant's credibility. In this case, MPIC's witness, Mr. Gary Kemash, testified that a faulty speedometer could cause an odometer to record distances greater than the actual distance travelled by an automobile. Accordingly, there may have been validity to the initial defence raised by the Appellant before the Internal Review Officer, had this defence been pursued by Appellant's legal counsel at the appeal hearing.

The decision by the Appellant's legal counsel not to pursue this defence before the Commission, does not result in the automatic conclusion that a different defence raised by the Appellant before the Commission was an afterthought and, therefore, should be rejected by the Commission. Legal counsel for the Appellant indicated that he was not able to obtain the evidence he needed to support the Appellant's defense theory of a defective speedometer and, as a result, chose not to pursue this defence. In these circumstances, the Commission finds that the decision of Appellant's legal counsel not to pursue this defence at the appeal hearing did not adversely affect the Appellant's credibility before the Commission.

The Commission notes that the Appellant's counsel made all of the submissions before the Internal Review Officer, and the explanation provided by the Appellant to the Commission was not provided to the Internal Review Officer. Unlike the Internal Review Officer, the

Commission had the advantage of hearing the Appellant's testimony in respect of his explanation relating to his travel expense claims, both in the examination in chief and cross-examination

The Appellant testified in a clear, candid and cooperative fashion, and his evidence under oath was not contradicted by a vigorous cross-examination by MPIC's legal counsel. MPIC's legal counsel did not assert that the Appellant lied in respect to the locations he travelled to for the purpose of claiming a travel allowance, but only that the Appellant had overstated the distances which he travelled in order to inflate his travel expenses. The Commission accepts the testimony of the Appellant as credible in respect of his explanation relating to his reasons for overstating the distances in his travel expense applications to MPIC.

In order to attend medical appointments in Winnipeg, the Appellant was required to drive from either [Text deleted] or [Text deleted] to Winnipeg, which is approximately 34.3 to 49.3 km each way. While attending medical appointments in Winnipeg, it was not unreasonable for the Appellant to find it necessary to eat in restaurants when he was hungry and, having regard to his physical condition, to attend at public washrooms when the need arose. In addition, the Appellant testified that he was in constant pain due to the injuries sustained in the accident and, as a result, needed to relax in order to minimize his pain. He testified that after or between attending medical appointments in Winnipeg, he often sought to relax by visiting a public park, attending public libraries, or attending at a gymnasium to exercise.

The Appellant admitted in his testimony at the appeal hearing that he included the distances travelled to these various locations as part of his requests for reimbursement from MPIC for travel expenses. The Commission determines that the inclusion of these distances by the

Appellant in his requests for reimbursement of travel expenses was careless and should not have occurred.

However, the Commission finds that although the Appellant was careless in the manner in which he provided information to MPIC, he honestly believed that the information he was providing to MPIC in order to obtain reimbursement of travel expenses was both true and accurate. The Commission concludes that the Appellant did not knowingly submit false or inaccurate information to MPIC for the purpose of inflating the amount of money that he would receive from MPIC in respect of his travel expenses, contrary to Section 160(a) of the Act.

In the Internal Review Officer's decision dated January 10, 2002, he notes that the distance between the Health Sciences Centre and the Pan Am Clinic was 7.4 km. The Internal Review Officer further notes that having regard to the trip between [Text deleted] and the Health Sciences Centre, the Appellant claimed an additional 21.4 km for each of the 78 such round trips between May 22, 1997, and December 31, 1997. If, for example, the Appellant decided, after attending the Health Sciences Centre and prior to attending the Pan Am Clinic, that he required to eat lunch and drove to a restaurant in St. Boniface for that purpose, attended a public library while in St. Boniface or, having regard to his physical condition, felt it necessary to relax in the park or, while travelling from one location to another, needed to attend public washrooms, it would not be difficult for him to travel an additional 20 km between these various points.

The same conclusion can be made in respect of the Appellant's travel patterns in 1998 relating to 14 trips between [Text deleted] and the Health Sciences Centre, and in respect of 63 trips

between Garry Street where the Redboine Institute and Physiotherapy Works! are located, and where the Internal Review Officer indicates there was an excess of 11.4 km per trip.

In each of these instances, if the Appellant had attended at a restaurant, at one or more public washrooms, or decided to rest at a park in Winnipeg, it would not be difficult for him to accumulate 11.4 km in respect of each of these trips. The same conclusion can be made in respect of the pattern which continued during the first six months of 1999.

The Internal Review Officer, in his decision dated January 10, 2002, states:

The pattern of significant overclaiming (set out in more detail below under “Facts”) simply does not support inadvertence, or even carelessness, in the recording of the actual distances traveled.

The Commission rejects the Internal Review Officer’s conclusion in this respect and finds that the pattern of overclaiming is consistent with carelessness. Once the Appellant had made the initial estimate of the return trip between his home and a medical location, and included in this estimate other locations such as restaurants, washrooms, etc., it would not have been unusual for him to repeat the same or similar estimates in respect of future trips of a similar nature when completing new claims for reimbursement of travel expenses. As a result, such a repetition of the same or similar estimates in future claims relating to different medical locations would explain why such patterns were established and why such patterns are consistent with the Appellant’s carelessness.

In the Commission’s view, the patterns referred to by the Internal Review Officer in his decision dated January 10, 2002, wherein the Appellant consistently overstated distances he travelled, demonstrate that the Appellant was consistently careless in the manner in which he recorded

these distances for the purpose of claiming reimbursement for travel expenses. However, these patterns do not establish by clear and cogent evidence that the Appellant knowingly provided false or inaccurate information to MPIC, contrary to Section 160(a) of the Act.

The Appellant's credibility is bolstered by:

- (a) the Internal Review Officer's written comment in his decision that there were a number of trips to Winnipeg for which the Appellant did not claim a travel allowance. This evidence is inconsistent with a claimant who wishes to provide false and inaccurate information to obtain travel expense funds to which he is not entitled;
- (b) the Appellant's testimony that it was contrary to his self-interest to attempt to defraud MPIC of a relatively small amount of money in respect to travel allowances by inflating the number of kilometres and putting at risk the very substantial monetary payments he was receiving from MPIC.

The Appellant is an intelligent, articulate person who suffered permanent injuries as a result of the accident which has rendered him unable to financially support himself and required him to attend regularly in Winnipeg for therapeutic treatments. MPIC was providing the Appellant with substantial amounts of money in respect of Permanent Impairment benefits and IRI benefits. It was also paying substantial amounts of money to reimburse the Appellant in respect of attending such treatments as physiotherapy, etc. The Commission finds that the Appellant would not risk losing the PIPP benefits he was receiving in order to improperly obtain a relatively small amount of money in respect of the travel expenses.

The Commission rejects the submission by MPIC's legal counsel that the Appellant could not recall whether he had, in fact, used the Monte Carlo in respect of the travel expense claims. The Appellant testified at the appeal hearing that he, in fact, did use the 1978 Monte Carlo to travel to Winnipeg for the purpose of attending a number of medical and physiotherapy appointments for which he filed travel expense claims, but that he could not recall the exact time he used the car for that purpose. The Commission accepts the Appellant's testimony in this respect as credible.

The failure of the Appellant to recall the exact dates when he used the 1978 Monte Carlo in question is not surprising. Having regard to the effluxion of time between the time the Appellant submitted his travel expense claims between 1997 and the middle of 1999, and the time the Appellant testified on July 9, 2002, it would not be unusual that he could not recall the exact times he had used the 1978 Monte Carlo to travel to Winnipeg for medical appointments, etc. The Commission concludes that the Appellant's failure to recollect the exact times that he used the Monte Carlo to travel to Winnipeg for medical appointments, etc. does not detract from his credibility as a witness.

The Commission further finds that there is no evidence before the Commission to suggest that the Appellant intended to mislead MPIC when his legal counsel submitted to MPIC at the Internal Review hearing that the defective speedometer in the Monte Carlo adversely affected the odometer readings and resulted in inaccurate information being provided by the Appellant to MPIC in respect of his travel allowance claims.

Mr. Kemash, who was called by MPIC as an expert witness, testified that a defective speedometer could cause an odometer to measure not only fewer kilometres but also more kilometres than were actually travelled. The Commission, therefore, rejects the submission of MPIC's legal counsel that the Appellant knew that the defective speedometer would only cause the odometer to record a lesser distance rather than a greater distance than was actually travelled by the 1978 Monte Carlo. As indicated earlier in these Reasons, there may have been validity to the initial defense raised by the Appellant before the Internal Review Officer, had this defense been pursued by the Appellant's legal counsel at the appeal hearing. As a result, the Commission reiterates that there is no clear and cogent evidence before the Commission that the Appellant knowingly provided false or inaccurate information to MPIC, contrary to Section 160(a) of the Act.

The Commission also finds that the criteria used by the Internal Review Officer to establish that there was a violation of Section 160(a) of the Act was too narrow and, in the circumstances, unreasonable.

One of the purposes of Section 160(a) of the Act is to ensure that when claimants request reimbursement of travel expenses from MPIC, they provide accurate and true information in respect of distances travelled. However, it was not the intent of Section 160(a) that the accuracy or truthfulness of the information provided be based on the Geographic Technology website material used by the Internal Review Officer in determining that the Appellant had violated Section 160(a) of the Act.

In respect of Geographic Technology material used by the Internal Review Officer in his decision dated January 10, 2002, he stated:

At the hearing, you provided me with maps and print-outs from the Geographic Technology web site showing the most direct routes, and the actual distances (expressed in tenths of a mile), from [Text deleted], MB (the closest large town between [Text deleted] and Winnipeg) and from [Text deleted], MB, to various locations in Winnipeg (the Health Sciences Centre, the Pan Am Clinic, etc.).

I was advised that these distances are used by trucking companies and other businesses which pay their drivers based on mileage. They are therefore presumed to be conservative indicators of distance since businesses of this nature would not knowingly pay any more than necessary for their delivery services.

I was also provided with similar materials showing routes and distances between various points within Winnipeg as [C.C.] was frequently required to attend for treatment at more than one facility on the same day.

The PIPP guide provided by MPIC to claimants does not require claimants to use the Geographic Technology material for the purpose of determining the distances they claim for travel allowances. An examination of the PIPP guide provided by MPIC to claimants does not set out, in a detailed fashion, the manner in which travel allowance expenses are to be reported. These guidelines do not specifically require a claimant, in respect of requesting a travel allowance from MPIC, to record the exact kilometres from the specific point of origin of travel to a specific location that the claimant is required to attend and the claimant's return to the point of origin of the trip.

The Commission finds that when the Appellant made his requests for travel allowances, MPIC should not have expected that he would provide information in respect of the distances he travelled in the precise manner as set out in the Geographic Technology material. Failure by the Appellant, when making his requests for travel allowances, to comply with the distances as set

out in the Geographic Technology material does not constitute a violation of Section 160(a) of the Act.

Having regard to the totality of the evidence for the Commission, the Commission determines that the evidence is insufficient to establish in a clear and cogent fashion that the Appellant knowingly provided false or inaccurate information to MPIC contrary to Section 160(a) of the Act. The Commission concludes that MPIC was not justified in terminating the PIPP benefits of the Appellant.

It should be noted that the Internal Review Officer, in arriving at his decision, examined 600 trips made by the Appellant for which he claimed travel expenses between May 22, 1997, and the first six months of 1999 in determining that MPIC was justified in terminating the PIPP benefits of the Appellant, pursuant to Section 160(a) of the Act. The evidence does not indicate that, between May 22, 1997, and the date of the termination of the PIPP benefits in 1999, anyone from MPIC advised the Appellant that he was overstating the distances claimed and requested that he cease and desist from so doing and that non-compliance with the request would result in the termination of his PIPP benefits. As a result, prior to the termination of the PIPP benefits, the Appellant was not made aware that he was inaccurately reporting the distances for the purposes of seeking a travel allowance in accordance with the MPIC criteria, and he was given no opportunity to correct his purported misconduct or to provide MPIC with an explanation as to the manner in which he was determining the distances in question.

The Commission has previously dealt with MPIC's application of Section 160 of the Act.

In C.L.-AC-99-37, the Commission dealt with an appeal relating to the suspension of IRI benefits on the grounds that the Appellant had not complied with Sections 160(d) and (g) of the Act which state as follows:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(d) without valid reason, neglects or refuses to undergo a medical examination, or interferes with a medical examination, requested by the corporation;

....

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation.

The Commission, in its decision dated June 6, 2000, determined that:

We are of the view that the decision to suspend [C.L.'s] IRI benefits amounted to a rush to judgment, given the unusual lack of an explicit warning. When an MPIC case manager is dealing with an uncooperative claimant, the proper procedure (normally followed) is to issue a polite reminder of the importance of full cooperation—which was done in this case by Mr. Pike—to be followed, if necessary, by a clear warning that, if further failure occurs, Section 160 may be invoked. The concept of progressive warnings, well known to practitioners of employment law, is even more appropriate when invoking the penalty provisions of the MPIC Act, given the emotional turbulence experienced and the new procedural territory encountered by many MVA victims.

As a result, the Commission directed MPIC to reinstate the Appellant's IRI benefits, together with interest.

In L.R.-AC-99-160, the Commission, in its decision dated August 1, 2000, dealt with an appeal relating to the discontinuance of IRI on the grounds that the Appellant, contrary to Section 160(c) and (g), had, without valid reason, refused employment and without valid reason refused to follow and participate in a rehabilitation program made available by MPIC. In respect of this

portion of the appeal, the Commission rescinded the termination of the IRI benefits on the following grounds:

It is unquestionable that the attitude of [L.R.] up to September 14th, 1998, was largely uncooperative and, not infrequently, downright rude. However, there is no evidence that anyone had sat down with her or written to her to explain, clearly and firmly, what was required of her and the possible consequences of her failure to cooperate. It is for that reason, and because her attitude to that point can not be judged in the same light as that of an emotionally healthy person, that we find the discontinuance of her Income Replacement to have been premature.

However, the Commission did confirm the decision of MPIC to rescind the IRI payments because, contrary to Section 160(a) of the Act, the Appellant did knowingly provide false information to MPIC.

In L.P.-AC-98-172 (decided by the Commission on November 28, 2000), the Commission dealt with an appeal wherein MPIC had terminated the Permanent Impairment benefits and had reduced the IRI benefits of the Appellant on the grounds that the Appellant failed to comply with Sections 160(f) and (g) of the Act. Sections 160(f) and (g) of the Act provide:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

- (f) without valid reason, prevents or delays recovery by his or her activities;
- (g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation.

The Commission stated, at page 7 of its decision, that:

Lastly, Mr. Ludkiewicz argued that the decision of the Internal Review Officer must fail because there had been no documented warnings, either verbal or written, given before the termination of benefits pursuant to ss. 160(f) and (g). The Internal Review Officer assumed that [L.P.] refused to participate in a

gradual return to work program, yet there was no evidence that [L.P.] had ever refused such a program.

The Commission also stated, on page 9, that:

This Commission finds that there is insufficient evidence that [L.P.] refused to participate in a gradual return to work program. Even if that were so, without a clear warning or notice given by MPIC to [L.P.], that his benefits would be in jeopardy if he failed to cooperate, we find insufficient grounds upon which to reduce [L.P.'s] IRI on the basis of subsections 160(f) and (g) of the Act.

As a result, the Commission did rescind the decision of the Internal Review Officer, referred the termination of Permanent Impairment benefits back to MPIC for determination, and ordered reinstatement of the IRI benefits.

In J.M.-AC-96-36 (decided May 7, 2001), the Commission dealt with an appeal from a termination of IRI benefits on the grounds that the Appellant failed to comply with Section 160(c) of the Act which states:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment.

The Commission stated, on page 13 of its decision, that:

No evidence was presented at the hearing of the appeal of [J.M.'s] refusal to seek employment off the farm, and ss. 160(c) was not cited by either the Adjuster or the Internal Review Officer in either of their reasons for decision (although, this appears to be the justification for the reduction of IRI during the 1-year grace period). Nevertheless, this Commission finds that there is insufficient evidence that [J.M.], without valid reason, refused a new employment. Even if that were so, without a clear warning or notice given by MPIC to [J.M.], that her benefits would be in jeopardy if she failed to cooperate, we find insufficient grounds upon

which to reduce or terminate [J.M.'s] IRI on the basis of subsection 160(c) of the MPIC Act.

In O.S.-AC-00-93 (decided September 13, 2002), the Commission dealt with a decision by MPIC not to increase the IRI benefits to the Appellant because the Appellant had refused employment, contrary to Section 160(c) of the Act which states:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment.

The Commission stated, on page 17 that:

In this case, there is no evidence that MPIC gave reasonable notice to the Appellant that it was seeking to rescind and/or reduce the Appellant's entitlement to IRI benefits because the Appellant had allegedly failed to accept an offer of employment. Therefore, even if MPIC had been correct on the mitigation issue (which we find it was not), until MPIC gives reasonable notice to the Appellant of its intentions to terminate or modify the Appellant's entitlement to IRI benefits, MPIC cannot take any action against the Appellant under Section 160(c) of the Act to adversely affect the appellant's indemnity.

As a result, the Commission, in the O.S.-AC-00-93 case, rejected MPIC's position that the Appellant's IRI ought not to be increased because he refused an offer of employment as a caretaker.

In the past, the Commission has consistently interpreted the provisions of Section 160 of the Act to require MPIC to act reasonably in the exercise of its statutory discretion under Section 160 of the Act. The Commission has required MPIC to provide reasonable notice to the claimants when it intends to exercise its rights under Section 160 of the Act.

In the present case, the Commission finds that between May 22, 1997, and the middle of 1999, MPIC had paid the Appellant's travel allowance requests as set out in the Internal Review Officer's decision dated January 10, 2002. It is not unreasonable for the Appellant to, therefore, believe that he was not violating Section 160(a) of the Act in the manner in which he requested travel allowances.

The Appellant suffered significant physical injuries, has been permanently impaired as a result of these injuries, is unable to work and support himself, and is required to have long-term therapeutic treatments. Having regard to the severe consequences to the Appellant by the termination of PIPP benefits, the Commission finds that MPIC was required to give a clear warning to the Appellant that if he failed to comply with the provisions of Section 160(a) of the Act, his PIPP benefits would be terminated. The Commission, therefore, determines that MPIC has failed to give reasonable notice to the Appellant of its intention to terminate the Appellant's PIPP benefits and give the Appellant a reasonable opportunity to respond to said notice. Therefore, MPIC cannot, under Section 160(a) of the Act, terminate the Appellant's PIPP benefits.

In summary, the Commission finds that:

1. the Appellant did not attempt to mislead the Internal Review Officer at the Internal Review hearing or the Commission at the appeal hearing;
2. the Appellant's explanation as to why he overstated the actual mileage in his travel expense claims to MPIC was credible;

3. the manner in which he recorded the kilometre distances in his travel expense claims to MPIC was careless;
4. the Appellant honestly believed that the information he was providing to MPIC in order to obtain reimbursement of travel expenses was both true and accurate;
5. the Appellant has established, on the balance of probabilities, that he did not knowingly submit false or inaccurate information to MPIC with the purpose of inflating the amounts of money he would receive from MPIC in respect of his travel expenses, contrary to Section 160(a) of the Act; and, in addition,
6. MPIC failed to give the Appellant reasonable notice of its intention to terminate the Appellant's PIPP benefits. Until MPIC gives such notice to the Appellant and provides him with a reasonable opportunity to respond to said notice, MPIC cannot, under Section 160(a) of the Act, terminate the Appellant's PIPP benefits.

For the above-mentioned reasons, the Commission directs that the Appellant's PIPP benefits be reinstated from their date of termination, together with interest at the statutory rate from that date to the date of actual payment.

The Commission retains jurisdiction in this matter, and if the parties are unable to agree as to the amount of PIPP benefits, then either party may refer this dispute back to this Commission for final determination.

Dated at Winnipeg this 25th day of September, 2002.

MEL MYERS, Q.C.

COLON SETTLE, Q.C.

WILSON MacLENNAN

[Ed. Note: The note “[Text deleted]” indicates the removal of information which may identify individuals.]