



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by B.M.
AICAC File No.: AC-00-107

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Yvonne Tavares
Mr. Les Cox

APPEARANCES: The Appellant, B.M., was represented by Mr. Ellery Strell;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: December 21, 2001, October 7 & 8, 2003, November 3, 2003

ISSUE(S): Termination of Income Replacement Indemnity Benefits

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance
Corporation Act ('MPIC Act')

MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

B.M. (hereinafter referred to as the "Appellant") was driving a motor vehicle in Winnipeg on January 7, 2000 and had stopped at an intersection when her car was struck from the rear by a truck. At the time of the impact she stated she felt numbness in her legs and felt weak and after obtaining particulars from the driver of the car that struck her car she was able to drive home.

The Appellant was seen by Dr. Peter Lim on January 8, 2000 in respect of the motor vehicle accident and in his Initial Health Care Report Dr. Lim reports that the Appellant complained that

she was feeling nervous, complained of headaches and in his diagnosis he indicated that there was a bruise to her right thigh.

The Appellant and her husband, both university graduates, emigrated to Canada with their children from Europe several years ago and, like many immigrants, were unable to find employment consistent with their university training.

At the time of the accident the Appellant held the following four jobs:

1. [text deleted] – part-time employment which involved administrative duties including data entry and the operation of a mail machine.
2. [text deleted] – part-time employment which involved janitorial cleaning of a bank building.
3. [text deleted] – part-time employment which involved the janitorial cleaning of a bank building.
4. [text deleted] – part-time employment, one day a week, demonstrating and selling cosmetics.

In respect of her employment at [text deleted], the Appellant worked an average of 25 hours per week, from 8:00 a.m. to 4:30 p.m., performing clerical work. In respect of her employment with [text deleted] she worked evenings, Monday to Friday, approximately 13 hours per week at two bank locations and her duties involved mopping floors, vacuuming floors, washing windows, dusting desks, picking up garbage, cleaning bathrooms, toilets and sinks, cleaning floors, sink and table in kitchen.

In respect of her employment at [text deleted] she worked approximately 13 hours per week, Monday to Saturday, approximately 1 hour per night at a [text deleted] and at a Bakery, with duties similar to the cleaning duties she had at [text deleted].

In respect of her employment with [text deleted] the Appellant worked regularly one day a week demonstrating and selling cosmetics.

In addition to her four jobs, the Appellant carried out her homemaking duties as a mother and wife to her two children and husband.

As a result of the injuries she sustained in the motor vehicle accident, the Appellant did not return to [text deleted] until May 1, 2000. The Appellant testified at the appeal hearing that she was unable to return to her other three occupations as a result of the injuries she sustained in the motor vehicle accident.

The Appellant saw Dr. T.J. Krocak on January 31, 2000 in respect of the medical complaints relating to her motor vehicle accident. In a report to MPIC dated March 2, 2000 Dr. Krocak reports:

On examination: Right temporomandibular joint tenderness, mouth opening restricted due to pain in right temporomandibular joint. Neck, upper traps muscle spasms. Head movements restricted due to pain. Lower back paraspinal muscle spasms, tenderness. Restricted movements of flexion, extension due to lower back pain.

[B.M.'s] diagnosis include; right temporomandibular joint dysfunction, upper and lower back strain. Secondary problems of adjustment disorder and sleep disorder.

At the request of MPIC the Appellant was interviewed and examined by Dr. I.I. Mayba on March 22, 2000. Dr. Mayba indicates the Appellant complained of ongoing pain to her neck and back and, as a result of his examination and interview of the Appellant, x-rays were done at the Manitoba Clinic on March 22, 2000. Dr. Mayba, in his report to MPIC dated March 22, 2000, states:

This patient has pre-existing degenerative changes in her cervical and lumbosacral spine, and cervical and lumbar discs. She sustained a soft tissue strain of her neck and low back, and bruises to the right shin and left lower leg, and strain of left rib cage. Her progress has been satisfactory. The prognosis is good. She has now no impairment. I expect no permanent impairment and no sequelae from the effects of this accident. I anticipate in the future that she will be bothered by her pre-existing conditions.

In response to questions raised by MPIC, Dr. Mayba stated:

1. Diagnosis: Soft tissue strains to neck, low back and left rib cage. Objective findings are given in the report.
2. She has no functional deficits pertaining to this accident at this time. In my opinion, she is able to return to her work as a file clerk, office cleaner/janitor and fragrance consultant.
3. In my opinion, she required no active treatment and no manipulations or therapies.
4. She does have a functional overlay to her symptomatology. She has now no impairment to the musculoskeletal system due to this accident. I anticipate in the future that she will be bothered by her pre-existing conditions.

On receipt of that report the case manager wrote to the Appellant by letter dated April 13, 2000 and advised the Appellant that:

1. Dr. Mayba in his examination had found no functional deficits and that in his view the Appellant was able
2. She had received a medical report from Dr. Krocak who had concluded as a result of his examination on February 22, 2000 that the Appellant would be able to return to work in six to eight weeks;
3. Having regard to these two medical reports, indicated to the Appellant that in the absence of any current medical substantiation of an objective functional impairment, the Appellant was not precluded from returning to work on April 18, 2000 and that as a result no further entitlement to IRI benefits would be continued past that date.

On April 19, 2000 the Appellant made application for an internal review of the case manager's decision.

On May 12, 2000 Dr. Krocak wrote to MPIC and in this report appears to have modified his position in respect of the Appellant's ability to return to work as a janitor. He states:

[B.M.] came to see me on April 13, 2000 (sic) with subjective complaints of neck, upper traps, lower back, hips and buttocks pain. Sleep disorder waking up at 3 to 4 hours of sleep. Feeling tired, no energy, exhausted. Continuous headaches and left jaw pain.

She has seen Dr. Curran; he suggested facial surgery to relieve some of the problems with the jaw and headaches.

[B.M.] described her duties at the bank that require lifting boxes and/or containers with paper and her duties of cleaning. Both activities require lifting, carrying, use of both arms and stooping over.

Physical examination; temporomandibular joint tenderness, pain on mouth opening, clicking sound in left TMJ. Tenderness over neck and upper traps area with trigger points. Restricted head movements. Lower back and buttock muscle spasms with trigger points. Restricted movements of lumbar spine due to pain.

[B.M.] will require relief of severity of her symptoms before she will be able to return to her physically demanding position. (underlining added)

Subsequent to the motor vehicle accident the Appellant had been treated by a physiotherapist, Mr. Charbonneau. In a Health Care Provider Progress Report to MPIC, dated April 18, 2000, Mr. Charbonneau indicated that he had examined the Appellant on April 12, 2000, diagnosed that she had myofascial restrictions in respect of her neck and low back, and indicated that in his view the Appellant was able to perform her full work duties in conjunction with receiving physiotherapy treatments.

In a further report to MPIC, dated June 22, 2000, Mr. Charbonneau indicated that he had examined the Appellant on June 21, 2000 and diagnosed TMJ pain, neck and hip stiffness and concluded that the Appellant had been fully functional with symptoms as well as other areas of tenderness and tightness. Mr. Charbonneau further indicated that the Appellant's condition was 90% resolved from the initial injury.

Dr. Michael J. MacKay, Medical Consultant, MPIC's Health Care Services Team, was requested by the Internal Review Officer to review the medical file. Dr. MacKay provided an Inter-Departmental Memorandum to MPIC dated July 12, 2000 wherein he noted the conflict between the diagnosis of Mr. Charbonneau and the diagnosis of Dr. Kroczak. However, Dr. MacKay referred to Dr. Mayba's opinion which indicated that the Appellant was capable of performing her occupational duties and that Dr. Mayba's opinion corroborated the opinion of Mr. Charbonneau. Dr. MacKay determined that the objective medical evidence does not identify an impairment of physical function arising from the motor vehicle accident in question which would have prevented the Appellant from performing all of her occupational duties including heavy lifting.

Internal Review Decision

On August 8, 2002 the Internal Review Officer wrote to the Appellant and in her decision she upheld the case manager's decision of April 13, 2002 and dismissed the Application for Review. The Internal Review Officer, after considering the medical reports of Dr. Kroczak, the physiotherapist Mr. Charbonneau, MPIC's Medical Consultant Dr. MacKay and the report of Dr. Mayba, concluded that there was insufficient subjective evidence to support the existence of occupational disability and, therefore, having regard to the purposes of Section 110(1) of the MPIC Act the Appellant was no longer qualified for Income Replacement Indemnity ('IRI') benefits.

The Appellant filed a Notice of Appeal on August 11, 2000 and in her Notice of Appeal stated:

I stil (sic) have strong pain in my temples, jaws, neck and hips. I move my head with difficulties as well as serious problem when I am walking. I am not able to open my

mouth enafe (sic), and it cause pain when I am eating. I am not able to do my cleaning job and operate on mail machine.

Subsequent to the Internal Review decision and filing of the Notice of Appeal, a number of medical reports were received by the Commission during the course of the appeal hearings.

Dr. Curran, an Oral Surgeon, examined the Appellant on March 15, 2000 which was approximately two months after the motor vehicle accident. In his letter to MPIC dated July 15, 2002 Dr. Curran indicates that the Appellant's initial complaints after the motor vehicle accident were neck and back pain and, as well, jaw pain with stiffness of jaw becoming prominent within a few weeks after the motor vehicle accident. Dr. Curran concluded, as a result of his examination, that the Appellant suffered from some myofascial pain affecting her jaw muscles which restricted her jaw motion and he treated the Appellant in this respect. Dr. Curran concluded his report by stating:

In summary, my opinion is that the patient did indeed develop a temporomandibular disorder characterized primarily by moderate myofascial pain in the jaw muscles and although it may have developed after the accident did result from the accident having developed in continuity with other related symptoms affecting the back and neck. I do not believe that the temporomandibular disorder would be sufficient to prevent the patient from working. . . .

Dr. Krocak, the personal physician of the Appellant, in a report to MPIC dated January 29, 2002, indicated that the Appellant was capable of performing office related lighter duties but could not perform the more physically demanding duties as she did prior to the incident in question. Dr. Krocak referred the Appellant to Dr. Johnson, who is a physiatrist in the Department of Medicine at the Rehabilitation Hospital.

Dr. Johnson, in a report to MPIC dated March 8, 2002, indicated that:

- A. He assessed the Appellant on February 26, 2001 and treated her on May 4, 2001, July 6, 2001, July 20, 2001, August 13, 2001, September 10, 2001, September 24, 2001, October 11, 2001 and December 13, 2001.
- B. He was informed by the Appellant that prior to the motor vehicle accident she had no medical problems.
- C. After the motor vehicle accident she was having problems with her jaws, was seeing Dr. Curran in that respect and had a great deal of pain to her face.
- D. She had non-restorative sleep since the motor vehicle accident and was awakened many times during the night due to pain in her neck and lower back.

Dr. Johnson in this report further stated:

Summary and Opinion:

[B.M.] is a [text deleted] year old woman who was injured when she was struck from behind by another vehicle January 7, 2000. She has experienced ongoing pain in her jaws, head, neck, shoulders, mid and lower back and left (more than right) leg since the collision. She has not been able to successfully return to her work and pre-collision activities because of the pain. She has a significantly non-restorative sleep pattern since the collision as well and this has complicated her life considerably.

I feel this woman's clinical presentation is a result of the soft tissue injuries she incurred as a result of her motor vehicle collision of January 7, 2000. From my assessments of [B.M.], I feel she is presently suffering from myofascial pain affecting the muscles of mastication, neck, shoulders paraspinal muscles and the buttock muscles on the left. The pain in the left leg is referred from above. She has no evidence on my examinations of a radiculopathy. I don't feel she required any surgery for her problem.

I feel she is legitimately injured and at this point, the treatment process is being affected by her significant sleep disorder. This has contributed to her levels of depression, anxiety and her overall experience of discomfort. There is a good chance that pain is the major factor affecting her ability to achieve a restorative sleep pattern

. . . .

She states that she has to be able to bend, reach, pull, push, twist, lift and perform repetitive tasks involving her arms in order to complete her work assignments. She has significant problem dealing with cleaning her own house due to the pain that occurs with repetitive activity and bending. Regarding the job demonstrating cosmetics, she has not been able to carry the product.

She has also found that she loses her train of thought and she finds continual speaking to bother her jaws and it also fatigues her significantly. She is not able to put the energy she needs into the work to effectively promote the product.

All of her jobs have a significant physical component (according to her description).

. . . .

From my treating [B.M.], I found clear evidence of myofascial trigger points located in the muscles around the face, neck, shoulder and hip girdle, lower back and legs. She also has evidence of tender spots in the posterior ligaments of her spine. The needling of all of these trigger points have revealed localized twitch responses, often with appropriate referral of pain, when the tender taut bands are pierced by the needle. These are objective findings indicating the presence of taut bands in the muscles treated. With these findings, the probability that [B.M.] is suffering myofascial pain is very high. This type of pain is very common after motor vehicle collisions and the probability of having sleep disorder associated with myofascial pain is also extremely high.

Therefore, in order to answer your question asking if, whether on a balance of probabilities, [B.M.] is able (or unable) by reason of physical or mental injuries from the accident, entirely or substantially able (or unable) to perform the essential duties of the various employments she held at the time of the accident, I have to say that I am not able to give an opinion with the information available. I think [B.M.] would have a significant degree of difficulty performing physically demanding and repetitive jobs with the physical findings that she presents with.

Dr. Johnson also indicated in this report that the Appellant be referred to a psychologist in respect of chronic pain.

Dr. Johnson's report was provided to Dr. Michael MacKay, Medical Consultant Health Care Services, for his comments. Dr. MacKay, after reviewing several medical reports including Dr. Johnson's, concluded:

1. [B.M.'s] reported symptoms as outlined in Dr. Johnson's report are not solely the result of the medical conditions arising from the incident in question. It is my opinion that the medical conditions [B.M.] has been diagnosed as developing as a result of the incident have healed and that if [B.M.] is compliant with the exercise program she has been advised to perform independently then further functional recovery will likely occur.
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4. Further myofascial trigger point treatments, will not likely result in a functional improvement.
5. Psychological evaluation might assist [B.M.] in dealing with her chronic pain in a more effective manner. (underlining added)

6. The medical evidence does not identify [B.M.] as having a physical impairment of function based on objective findings to the extent that she is unable to perform her occupational duties, if she so desires. The information indicates that [B.M.'s] inability to return to her pre-collision occupational duties is a result of her pain, which appears to be soft tissue in origin and not a result of pathophysiological abnormality involving the muscles, tendons, ligaments and/or nerves.

In view of the conflict in the medical opinions of Dr. Johnson and Dr. MacKay, MPIC referred the entire medical file, including Dr. Johnson's report dated March 8, 2002 and Dr. MacKay's report dated March 27, 2002, to Dr. H. Sommer, MPIC Medical Director, Health Care Services, who in a report to MPIC, dated May 16, 2002, at page 3 states:

CONCLUSIONS

Diagnosis

Possible Stress/Anxiety Disorder (underlining added)

Discussion

Little is known about the claimant's pre-existing status. This limits one's ability to establish to what degree, if any, her current physical/psychosocial state can be apportioned to the motor vehicle collision of January 7, 2000.

Based on the mechanism of injury described and the claimant's response as documented at her initial clinical evaluation by Dr. Lim and self-reported in her Application for Compensation, it is improbable that she sustained a significant neuromusculoskeletal injury in the course of the collision. Inasmuch as her symptoms appear significantly out of proportion to her physical signs at such an early stage, there is support that a significant psychosocial component was contributing to her presentation. It remains unclear to what extent the claimant's psychosocial condition was pre-existing or directly attributable to the stress of the motor vehicle collision. (underlining added)

Dr. Sommer rejected the medical opinion of Dr. Johnson and the treatment that he was providing to the Appellant and concluded:

In summary, there is insufficient clinical documentation that the claimant has sustained a neuromusculoskeletal injury as a result of a motor vehicle collision. In addition, there is evidence of psychic stress and possibly post-traumatic stress. The latter needs to be reviewed by a mental health expert in the setting of a clear understanding of the claimant's pre-existing psychological status. (underlining added)

Dr. Sommer recommends:

3. A referral to Dr. El-Khatib or other mental health care expert is strongly supported. It remains unclear whether this is a matter related to the motor vehicle collision.
4. Further myofascial treatment by injection is not indicated for many of the reasons mentioned above. The diagnosis appears flawed and the techniques used have not been validated. Notwithstanding these facts, the claimant has already received eight sessions of therapy without any measurable gain in pain relief or function. Accordingly she is a treatment failure by these techniques and no further myofascial treatment is necessary or advisable.

At the request of the Commission, and legal counsel for both parties, legal counsel for MPIC requested Dr. El-Khatib, a clinical psychologist, assess whether the Appellant by reason of physical or mental injury sustained in the motor vehicle accident of January 7, 2000, was entirely or substantially unable to perform the essential duties of various employments that she held at the time of the accident.

Dr. El-Khatib was provided with the entire medical file and he saw the Appellant for a clinical interview and psychological testing on July 18 and 31, 2002. Dr. El-Khatib provided a report to MPIC dated August 14, 2002 wherein he concluded:

With the information available to this writer at this point and on a balance of probabilities, [B.M.] does not present with sufficient criteria to grant the diagnosis of psychological/mental disorders. [B.M.] is not unable, by reason of mental or psychological difficulties to continue with her ongoing part-time employment. She does not have a significant degree of psychological difficulties to hinder her current employment or possible physical improvement with the continuation of her ongoing treatments. There is no indication of sleep disturbance, chronic pain, or depression at present. There is no indication of possible perpetuating factors associated with other psychological difficulties.

Legal counsel for the Appellant referred the medical opinions of Dr. MacKay dated March 27, 2002, Dr. Sommer dated May 16, 2002 and Dr. Curran dated June 14, 2002 and other reports to Dr. Johnson for his comments.

Dr. Johnson in his report to legal counsel dated September 13, 2002 states that in his view the Appellant's complaints of having pain in neck, shoulders, mid/lower back and left leg were not reported prior to the motor vehicle accident of January 7, 2000. Dr. Johnson found it difficult to consider that the Appellant would be holding down four jobs if she was experiencing her present physical problems prior to the collision in question. He further found that the Appellant had been very straightforward in her presentation, had not tried to hide the fact that she was emotionally as well as physically affected by the collision and concluded that the information that she provided to him about her medical complaints were credible. He also states:

A possible mechanism for the ongoing and diffuse nature of her pain at this point may be explained but the concept of central sensitization. This is a situation created when there is an exaggerated response of the central nervous system (CNS) to a peripheral stimulus that is normally painful. It is believed that the CNS, as a result of the bombardment of afferent impulses to the spinal cord, experiences a change in the chemical, synaptic, molecular and possibly, anatomical change in the neurons, both at the spinal and supraspinal levels. This allows for increased synaptic efficiency and "cross talk" between neuron, modulating their response. This response is modulated neurochemically. The pain she initially experienced in the motor vehicle collision had the potential to "sensitize" the CNS and this degree of sensitivity has not been reduced.

There have been several conditions grouped into what can be called Central Sensitivity Syndrome. These include restless leg syndrome, irritable bowel syndrome, temporomandibular joint syndrome, regional fibromyalgia/myofascial pain syndrome, fibromyalgia syndrome, chronic fatigue syndrome, irritable bowel syndrome, tension-type headache, migraine, multiple chemical sensitivity, primary dysmenorrhea and periodic limb movement disorder. This condition is seen mostly in women and the symptoms include pain, fatigue, poor sleep, paresthesia and a state of global hyperalgesia. No structural pathology is present in the conditions which can be identified by usual laboratory tests and x-rays. This condition is not classified as a psychiatric illness. It has been termed a "third paradigm" illness (first paradigm – pathology with structural changes; second paradigm – psychiatry). They are characterized by neurohormonal

aberrations leading to central sensitivity. Changes in neuroendocrine functions and abnormality in brain function have been demonstrated.*

She has had a significant emotional reaction to her injury. She was unsure of what had happened initially after the collision. She was frightened by the noise and sudden loss of control of her situation. She experienced chest pain after the collision and was concerned about her heart. She has not had a restorative sleep since the collision and she has experienced ongoing pain. By her report, she had never experienced a loss of ability to do what she expected of herself prior to this collision. The inability to function at her expected levels has upset her considerably. (underlining added)

Dr. Johnson had not received Dr. El-Khatib's report dated August 14, 2002 when he provided his report to MPIC dated September 13, 2002. Dr. Johnson further stated in his report:

It is my opinion that [B.M.] has impairment physically and emotionally since her motor vehicle collision January 7, 2000. I reviewed the Physical Demands Analysis of the work that she was doing prior to the collision.

She has been able to continue with about 25 hours per week at [text deleted]. She experiences more pain and fatigue at the end of the day than at the beginning. The work with the two cleaning companies was done after work and on weekends. She has had one day per week that she demonstrated and sold cosmetics.

At this point, although she would not come to physical harm by doing all four jobs, it is my opinion that the pain she experiences and its consequences (poor sleep quality, fatigue, increased jaw pain, altered concentration, anxiety, and depression) would also continue to increase. I feel her mental state would not improve and has a probability of deteriorating if her pain was significantly increased.

There has been considerable concern that [B.M.] could not have been injured badly enough physically to have the problems that she presently has. There have been no hard objective findings linking her symptoms to the collision. The present belief seems to be that the injury is based more in emotionality than physicality. Neither physician, Dr. MacKay or Dr. Sommer, really supports the concept of myofascial pain, its diagnosis or treatment. Both indicate the controversy surrounding this diagnosis. Both physicians support a psychological basis for [B.M.'s] present condition and completely reject any legitimate physical suffering. I feel the concept of central sensitivity helps to bridge the gap and explain the diffuse nature of the ongoing symptoms. Physical and emotional factors have to be considered to be at play in her condition, not one or the other. (underlining added)

There is no question that [B.M.] has been upset about the events since the collision. Her life has been changed very significantly by her post-collision circumstances. She reports that she has a sleep disorder and has morning stiffness and experiences fatigue during the

* These concepts are discussed in the book "Myofascial Pain and Fibromyalgia – Trigger Point Management" by E&I Rachlin (2002)

day. The lack of sleep is reported to be due to pain in that she is not able find a comfortable position and she has to change positions frequently to avoid build up of the pain.

Non-restorative sleep has been well documented to create a generalization of pain to all body quadrants over time. At nearly three years after the collision, I feel the initial injury has healed but the effects of the pain in the early period post-collision has set her up for ongoing generalized pain and fatigue. There are specific regions (mostly affecting the left side of her body) from which she experiences more intense pain but the generalized pain is also present. From the records that I have available, I am not aware that she had a sleep disturbance prior to the collision.

Wherever the line is drawn, this woman has had a significant change in her ability to function since January 7, 2000. In my opinion, she suffered an impairment in function which precludes her from managing the physical work that she did prior to the collision.

MPIC provided Dr. Sommer with a number of medical and other reports, as well as the report of Dr. Johnson dated September 13, 2002, and requested his assessment. Dr. Sommer forwarded an Inter-Departmental Memorandum dated October 28, 2002 to MPIC wherein he commented on the clinical records of Dr. Muncner who had treated the Appellant prior to the motor vehicle accident between June 25, 1998 and February 16, 2000. Dr. Sommer concluded that, in the immediate six month period prior to the motor vehicle accident, the Appellant had been documented on several visits to have a variety of somatic complaints including low back pain, temporomandibular joint stress and anxiety. The latter condition was felt to be sufficiently severe as to warrant management by the anxiety reducing medication, Ativan.

Dr. Sommer further stated in this Inter-Departmental Memorandum that the nature of the presenting complaints following the motor vehicle accident were qualitatively similar to those that were pre-existing. After reviewing the Functional Assessment of the Home Environment by NRCS Dr. Sommer concluded that:

the discrepancy between symptoms and signs, or perceived and observed function is indicative of underlying psychological factors influencing the claimant's presentation. Diagnostic possibilities include somatoform disorder, anxiety disorder, depression,

factitious disorder, or malingering. A majority of the observations made by the NRCS consultant are inconsistent with a primarily organic problem. (underlining added)

In respect of Dr. El-Khatib's opinion relating to the psychological status of the Appellant, Dr. Sommer stated:

While the claimant may not meet the diagnostic criteria for a psychological/mental disorder, she was noted to be sufficiently depressed and anxious to warrant ongoing pharmacological management. Notwithstanding this issue, she was considered to be fit for her part-time occupation. Upon reviewing the psychologist's opinion, it does not appear that Dr. Muncner's clinic notes were available for his review as the claimant had pre-existing psychic and somatic complaints prior to her January 7, 2000 motor vehicle collision. (underlining added)

In respect of Dr. Johnson's opinions, as set out in his report dated September 13, 2002, Dr. Sommer rejects Dr. Johnson's medical opinion that the Appellant's condition can be attributed to central sensitization which is based on animal research. Dr. Sommer also rejects that the treatments performed by Dr. Johnson of ongoing trigger point injection and paraspinous block injections. Dr. Sommer also disagreed with Dr. El-Khatib's assessment of the Appellant's psychological status.

Dr. Sommer concludes:

CONCLUSIONS

Diagnoses

- Probable Chronic Pain Disorder Associated with Psychological Factors
(underlining added)

Discussion

Pain Disorders are one of the classes of the Somatoform disorders and are characterized as a condition where pain is the predominant focus of clinical attention. Pain Disorders may be further sub-classified according to the presence of psychological or medical factors. Psychological factors are generally considered to play a primary role in the onset, severity and exacerbation or maintenance of the painful symptoms.

A pain disorder is considered chronic when there is persistence of pain symptoms in the absence of an identifiable anatomic source beyond six months. Chronic Pain Disorders

are self-perpetuating conditions where the symptoms persist well beyond the natural history of the condition that precipitated it. Somatic symptoms, oftentimes out of proportion to the objective physical findings, are a frequent finding. Also typical of Chronic Pain Disorders is the apparent worsening of the condition remote from the time of injury with spreading of symptoms to involve additional anatomic sites including multiple organ systems.

The diagnostic criteria for Pain Disorders are summarized in the following table:

DIAGNOSTIC CRITERIA FOR PAIN DISORDER
<ol style="list-style-type: none"> 1. Pain in one or more anatomical sites that is the predominant focus of the clinical presentation and is of sufficient severity to warrant clinical attention. 2. The pain causes clinically significant distress or impairment in social, occupational or other important areas of functioning. 3. Psychological factors are judged to have an important role in the onset, severity, exacerbation, or maintenance of the pain. 4. The symptom or deficit is not intentionally produced or feigned. 5. The pain is not better accounted for by a Mood, Anxiety or Psychotic Disorder and does not meet the criteria for Dyspareunia.

In respect of causation, Dr. Sommer states:

Causation

In the claimant's case there is ample evidence of multiple somatic complaints with associated anxiety prior to her motor vehicle collision of January 7, 2000. Accordingly, she has a well-established pre-existing condition.

While the motor vehicle collision may have represented a causal mechanism of musculoskeletal injury, the clinical documentation does not indicate a disorder that is substantially different from her pre-existing status. It appears that the claimant's pre-existing condition has adversely affected her ability to "recover" from her apparent musculoskeletal symptoms rather than the reverse. The observed magnitude of disability is out of proportion to any medically objectifiable neuromusculoskeletal diagnosis.

Therefore, based upon a review of the clinical documentation, and with a reasonable degree of medical certainty, a causal link between the claimant's current medical condition and the motor vehicle collision of January 7, 2000 is medically improbable.

In respect of the Appellant's work capacity Dr. Sommer was of the view that the Appellant was capable of returning to the work that she was carrying on prior to the motor vehicle accident.

Subsequent to Dr. Sommer's report, Dr. Johnson provided a report to the Appellant's legal counsel dated October 7, 2002. Dr. Johnson states:

If it was not clear from the information in the report of September 13, 2002, I feel the pain and lack of sleep which resulted after her motor vehicle collision caused any emotional sequelae that she has at this time. It is not the other way around. She is making slow but steady progress at this point and I will continue seeing her whether it is sanctioned by MPI or not. I feel she is making the most of the results of the treatment that she has had and will continue to do so in order to get as much of her pre-collision life back as she can. (underlining added)

APPEAL

The relevant legislation governing this issue is:

Section 110(1)(a) of the MPIC Act:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

The Appellant had appealed the rejection by the Internal Review Officer of her claim for IRI benefits in respect of the loss of her employment as a result of the motor vehicle accident.

The Appellant testified at the hearing and asserted that prior to the motor vehicle accident she did not have any pain to her neck, back and jaw and that she was able to carry out four different jobs without any problems. During the day she was employed at [text deleted] in a clerical capacity, and in the evenings was employed by two cleaning firms during the work week. She testified

that the cleaning jobs were quite physical and her duties required her to bend, lift, walk, kneel, crouch and squat and that she was able to do these activities without difficulty. In addition, she testified that she was employed as a cosmetics demonstrator and sales person one day a week. This job required her to stand all day which she also did without difficulty.

The Appellant indicates that as a result of the motor vehicle accident she developed pain to her neck, back and jaw and that she received a series of physiotherapy treatments which, in her view, did not bring her back to her pre-accident condition. She was able to return to work on May 1, 2000 and was able to carry out some but not all of her duties at [text deleted]. She testified that her employer did modify her duties which enabled the Appellant to return to work at the [text deleted].

She further testified that she was unable to continue with her three part time jobs due to the pain and discomfort to her neck, back and shoulders. She also testified that she had been receiving treatments from Dr. Johnson which had provided some improvement to her medical condition. However, notwithstanding this treatment, she testified that she was unable to return to her pre-accident status and, therefore, was unable to return to her three part-time jobs that she held prior to the motor vehicle accident.

The Appellant testified that prior to the accident she did not suffer from any long term pain in her neck, back, shoulders or jaw which would have prevented her from working three part-time jobs. She further testified that as a result of a visit from her sister who lived in Europe the Appellant became very concerned about her sister's health and this caused her a great deal of emotional trauma resulting in anxiety and depression for short periods of time. In respect of her complaints the Appellant was treated by Dr. Muncner and obtained medication in respect of these

complaints. She also testified that the only back pain that she ever had prior to the motor vehicle accident was for a period of only two weeks and was solely related to her work activities. She also acknowledged that she had an ear problem prior to the motor vehicle accident which had been medically treated successfully.

In cross-examination the Appellant acknowledged that the work that she performed prior to the motor vehicle accident in respect of the part-time jobs was difficult but she was able to physically and emotionally cope with these jobs. She further maintained in cross-examination without contradiction that prior to the accident she did not suffer from any pain to her neck, back and shoulders which would have prevented her from working the three part-time jobs.

Dr. Johnson testified and confirmed the opinions he provided in his medical reports which were filed with the Commission. He acknowledged on cross-examination that his diagnosis of myofascial pain and the needling treatment was controversial and was not accepted by many members of the medical profession. However, he maintained that the diagnosis and treatment were valid and in his view were of assistance to the Appellant.

Dr. Johnson further testified that:

- A. as a result of the motor vehicle accident the Appellant was in constant pain which prevented her from doing the part-time jobs after the motor vehicle accident occurred;
- B. in his view this pain was due to the development of myofascial pain directly caused by the injuries she sustained in the motor vehicle accident;
- C. the motor vehicle accident of January 7, 2000 physically and emotionally impaired the Appellant causing her chronic pain and prevented her from returning to her pre-accident condition which would have permitted her to continue with her three part-time jobs;
- D. the pain that the Appellant was experiencing was caused by the motor vehicle accident and resulted in her poor sleep quality, fatigue, increased pain, jaw pain, anxiety and depression which have impaired her ability to return to her pre-employment status.

Dr. Johnson further testified that:

- A. both Dr. MacKay and Dr. Sommer reject the concept of myofascial pain, his diagnosis and treatment of the Appellant but both doctors support a psychological basis for the Appellant's present condition;
- B. he disagreed with Dr. MacKay and Dr. Sommer who are of the view that the pain suffered by the Appellant was of a solely psychological nature and had no physical basis;
- C. both physical and emotional factors have to be considered when assessing the ability of the Appellant to return to her part-time jobs.

Dr. Sommer testified in examination-in-chief that:

- A. he rejected Dr. Johnson's opinion that the Appellant was suffering from myofascial pain and rejected the treatment provided by Dr. Johnson;
- B. he had examined the clinical notes of Dr. Muncner, who had treated the Appellant prior to the motor vehicle accident, and concluded that in an immediate six month period prior to the motor vehicle accident Dr. Muncner documented that the Appellant, on several visits, had demonstrated a variety of somatic complaints including low back pain, temporomandibular joint stress and anxiety;
- C. the Appellant was suffering from a probable chronic pain disorder associated with psychological factors which pre-existed the motor vehicle accident and was not caused by the motor vehicle accident.

In cross-examination, the Appellant's legal counsel attacked Dr. Sommer's medical opinion that the chronic pain disorder pre-existed the motor vehicle accident. He reviewed with Dr. Sommer the Appellant's testimony and Dr. Muncner's clinical notes in respect of the Appellant's medical complaints prior to the motor vehicle accident.

As a result of this cross-examination Dr. Sommer modified his position in respect of the causation of the chronic pain syndrome. Dr. Sommer acknowledged that the clinical notes of Dr. Muncner did not establish that prior to the motor vehicle accident the Appellant suffered from a chronic pain which was qualitatively similar in nature to that which existed after the motor vehicle accident. Dr. Sommer testified that if the Appellant had not complained of somatic complaints such as low back pain, temporomandibular joint stress and anxiety prior to the motor

vehicle accident, then in his view the Appellant was suffering from a chronic pain disorder which may have been caused directly by the motor vehicle accident.

Dr. Sommer further testified although he disagreed with Dr. El-Khatib's diagnosis that the Appellant did not suffer from a chronic pain disorder, and that this chronic pain disorder did not prevent the Appellant from returning to her three part-time jobs after the motor vehicle accident.

Submissions by Legal Counsel

In argument legal counsel for the Appellant submitted that:

- A. The Appellant established, on the balance of probabilities, that as a result of the motor vehicle accident she was injured both physically and psychologically.
- B. Having regard to the testimony of Dr. Johnson, the motor vehicle accident injuries caused the Appellant to develop a myofascial pain syndrome. This syndrome resulted in the Appellant having pain to her neck, back and shoulders and caused the Appellant's inability to sleep. As a result the Appellant developed a chronic pain syndrome.
- C. The combination of the myofascial pain syndrome and the chronic pain syndrome which the Appellant suffered from prevented her from returning to work in the three part-time jobs that she held prior to the motor vehicle accident.
- D. Dr. Krocak, the Appellant's physician who physically examined the Appellant on several occasions and interviewed her concluded that the injuries the Appellant sustained in the motor vehicle accident prevented her from returning to her physically demanding jobs.
- E. In conclusion, contrary to Section 110(a) of the MPIC Act, MPIC improperly terminated the IRI benefits the Appellant had been receiving in respect of the loss of her employment.
- F. The appeal should be allowed and the IRI benefits reinstated from the date they have been terminated by MPIC.

MPIC's legal counsel, not surprisingly, disagreed with the submission of the Appellant's legal counsel. MPIC's legal counsel asserted that:

- A. Prior to the motor vehicle accident the Appellant suffered from the same complaints that she suffered after the accident and having regard to the medical opinions of Dr. Sommer, Dr. MacKay, Dr. El-Khatib and Dr. Mayba the Commission should reject this appeal.
- B. The Appellant's injuries in the motor vehicle accident were very slight soft tissue injuries and that they could not have resulted in the development of a myofascial

- pain syndrome or a chronic pain syndrome.
- C. The Commission should accept Dr. Sommer's and Dr. MacKay's opinion to reject Dr. Johnson's diagnosis of myofascial pain syndrome and his treatment.
 - D. The Commission should accept Dr. El-Khatib's opinion that she did not suffer from chronic pain syndrome.
 - E. The Commission should accept the medical opinion of Dr. Sommer and Dr. MacKay that none of the injuries incurred by the Appellant as a result of the motor vehicle accident either physically or emotionally prevented the Appellant from returning to her three part-time jobs after the motor vehicle accident.
 - F. Having regard to the totality of the medical evidence, the Appellant did not establish, on the balance of probabilities:
 - i. she suffered from any significant emotional or physical injuries as a result of the motor vehicle accident; and
 - ii. the injuries which she did sustain as a result of the motor vehicle accident did not impair her ability to return to work on the three part-time jobs that she held out prior to the motor vehicle accident.
 - G. The appeal should be dismissed and the decision of the Internal Review Officer confirmed.

Discussion - Conflict in Medical Evidence

There is a conflict in the medical evidence in respect of the following matters:

1. The nature of the Appellant's injuries arising out of the motor vehicle accident.
2. The causal connection between the motor vehicle accident and the Appellant's alleged medical complaints.
3. The Appellant's ability to perform her three part-time jobs after the motor vehicle accident.

A. Appellant's Injuries

(i) Myofascial Pain Syndrome

1. (a) Dr. Johnson asserts that the Appellant suffered from a myofascial pain syndrome which in the course of time developed into a chronic pain syndrome.
- (b) Dr. Sommer and Dr. MacKay reject the diagnosis of a myofascial pain syndrome.

(ii) Chronic Pain Syndrome

2. (a) Dr. El-Khatib, a Clinical Psychologist, determined that the Appellant did not suffer from a chronic pain syndrome.
- (b) Dr. Sommer, who is an experienced Psychiatrist, and a Medical Director of MPIC's Health Care Services, testified that he is familiar with and frequently treats patients with chronic pain syndrome and concluded the Appellant did suffer from a chronic pain syndrome associated with psychological factors. Dr. Sommer's diagnosis in respect of chronic pain syndrome was shared by Dr. MacKay, who is also a Medical Consultant with MPIC, and Dr. Johnson.

(iii) Causation

3. (a) Dr. Johnson consistently maintained that:
 - (i) the motor vehicle accident caused the Appellant's myofascial pain which, in the course of time, developed into a chronic pain syndrome;
 - (ii) this condition did not pre-exist the motor vehicle accident.
- (b) Dr. Sommer initially was unclear as to whether the Appellant's chronic pain disorder associated with psychological factors were pre-existing or directly attributable to the motor vehicle accident. After examining Dr. Muncner's clinical notes he concluded that this condition was pre-existing and was not caused by the motor vehicle accident. However, as a result of his cross-examination by Appellant's counsel, Dr. Sommer modified this position and was unable to maintain his position that the Appellant's chronic pain syndrome was not caused by the motor vehicle accident. He testified in cross-examination that, absent the somatic pain complaints by the Appellant prior to the motor vehicle accident, the Appellant's chronic pain disorder may have been caused directly by

the motor vehicle accident.

(iv) Appellant's Ability to Perform Three Part-Time Jobs

4. (a) Dr. Krocak, who personally examined the Appellant and treated her in respect of her motor vehicle injuries, concluded that these injuries prevented the Appellant from returning to her physically demanding part-time jobs.
- (b) Dr. Johnson, who personally examined the Appellant over a period of time, testified that the Appellant's chronic pain disorder prevented the Appellant from returning to her three part-time jobs.
- (c) Dr. Sommer and Dr. MacKay both concluded that the Appellant's chronic pain syndrome did not prevent the Appellant from returning to her three part-time jobs after the motor vehicle accident.

Discussion

1. The Commission notes that there is a disagreement between Dr. Johnson and Dr. Sommer as to the basis of the Appellant's chronic pain syndrome after the motor vehicle accident. Dr. Johnson concludes that this chronic pain syndrome is both a physical and psychological basis. Dr. Sommer concludes that the syndrome is only psychological in nature. However, both Dr. Sommer and Dr. Johnson agree that after the motor vehicle accident the Appellant was suffering from a chronic pain syndrome.
2. Dr. Johnson has consistently maintained that the Appellant's chronic pain syndrome was a direct cause of the motor vehicle accident. Dr. Sommer, in cross-examination, modified his position in respect of causation and cannot disagree with Dr. Johnson's medical opinion as to the causal connection between the injuries the Appellant sustained in the motor vehicle accident and the motor vehicle accident.

3. The fundamental difference between the medical opinions of Dr. Johnson, Dr. Sommer and Dr. MacKay relates to the Appellant's capacity to return to work in respect of her three part-time jobs. Dr. Johnson and Dr. Krocak are of the view that the Appellant was, at the time of the termination of her IRI benefits on April 18, 2000, incapable of returning to her three part-time jobs. Dr. Sommer and Dr. MacKay on the other hand are of the view that on April 18, 2000 the Appellant was capable of returning to her three part-time jobs notwithstanding the existence of a chronic pain syndrome.

In resolving the conflicting medical opinions the Commission must assess the credibility of the Appellant in respect of her testimony that as a result of the pain, fatigue, depression and headaches that she suffered subsequent to the motor vehicle accident she was unable to return to her three part-time jobs.

The Commission notes that Dr. MacKay and Dr. Sommer's medical opinions and Dr. Sommer's testimony are based on a paper review of the medical reports and other documentation in the Appellant's MPIC file. Neither Dr. MacKay nor Dr. Sommer personally interviewed the Appellant and, therefore, both doctors were not in a position to personally assess the Appellant's credibility as it relates to her medical history both prior to and after the motor vehicle accident and her ability to return to work in respect of her three part-time jobs.

Dr. Johnson, like Dr. Sommer, is an experienced physiatrist. However, unlike Dr. Sommer and Dr. MacKay, both Dr. Krocak, the Appellant's personal physician, and Dr. Johnson were able to personally examine and treat the Appellant on a number of occasions over a period of time. As a result both Dr. Krocak and Dr. Johnson were able to personally assess the Appellant's credibility as it relates to her capacity to return to work at the three part-time jobs. The

Commission therefore determines that Dr. Johnson and Dr. Krocak were in a better position than either Dr. Sommer or Dr. MacKay to assess the Appellant's credibility in respect of her return to work on the three part-time jobs after the motor vehicle accident.

The Commission concludes that having regard:

- (a) to the consistency of Dr. Johnson's medical opinions and testimony; and
- (b) to the personal knowledge that Dr. Krocak and Dr. Johnson had from interviewing and treating the Appellant over a period of time;

the Commission gives greater weight to Dr. Krocak's and Dr. Johnson's medical opinions when there is any conflict between these medical opinions and those of Dr. Sommer or Dr. MacKay.

The Commission further determines that:

- (a) the Appellant was both an impressive, intelligent and credible witness who answered the questions both in examination-in-chief and in cross-examination in a straightforward manner without any equivocation.
- (b) the Appellant was a very hard working individual who immigrated to Canada, together with her husband and children, to achieve a better life for herself and her family and as a result worked at four jobs.
- (c) prior to the motor vehicle accident she did not suffer from any chronic pain.
- (d) the Appellant's medical complaints, prior to the motor vehicle accident, in respect of depression caused by her sister's health and neck and back pain caused by her caretaking jobs were of a temporary and not permanent nature.
- (e) the Appellant's medical problems in respect of her ear prior to the motor vehicle accident were not relevant to any issues before the Commission.
- (f) as a result of the motor vehicle accident she suffered from poor sleep, fatigue,

anxiety and depression, and chronic pain to her neck and back which impaired her ability to return to her pre-employment status.

The Commission therefore concludes that:

1. Dr. Johnson's medical opinions and testimony corroborate the Appellant's testimony that she did not suffer from a chronic pain syndrome prior to the motor vehicle accident. Dr. Sommer in his testimony was not able to challenge the Appellant's testimony or Dr. Johnson's medical opinions in this respect.
2. After the motor vehicle accident the Appellant suffered from a chronic pain syndrome and this is corroborated by Dr. Johnson, Dr. Sommer and Dr. MacKay.
3. The Appellant's testimony that the chronic pain syndrome was caused by the motor vehicle accident is corroborated by Dr. Johnson and is not challenged by Dr. Sommer.
4. The Appellant's testimony that her chronic pain, fatigue, headaches and inability to sleep prevented her from returning to work on the three part-time jobs that she held prior to the motor vehicle accident is corroborated by Dr. Johnson and Dr. Krocak.

The Commission therefore concludes that, on the balance of probabilities, the Appellant has established that as a result of the motor vehicle accident:

1. the Appellant suffered from a myofascial pain syndrome and a chronic pain syndrome which was directly caused by the motor vehicle accident on January 7, 2000;
2. that the Appellant's myofascial pain syndrome and chronic pain syndrome prevented the Appellant from returning to work on her three part-time jobs.

The Commission therefore finds that the Appellant has established, on a balance of probabilities, that MPIC erred in terminating her IRI benefits on April 18, 2000 and directs MPIC to reinstate these payments retroactive to April 18, 2000 in respect of the entitlement of the Appellant to IRI benefits, 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 compensation, then either party may refer the dispute back to the Commission for final determination.

Dated at Winnipeg this 19th day of December, 2003.

MEL MYERS, Q.C.

YVONNE TAVARES

LES COX