



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by R.W.
AICAC File No.: AC-03-195**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms Diane Beresford
Mr. Paul Johnston

APPEARANCES: The Appellant, R.W., was represented by Mr. David G. Newman, Q.C.;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

HEARING DATE: May 4 & 5, 2005

ISSUE(S): 1. Entitlement to Income Replacement Indemnity ('IRI') benefits beyond May 20, 2003;
2. Entitlement to further medical treatment benefits beyond May 20, 2003.

RELEVANT SECTIONS: Section 110(1)(a) of the Manitoba Public Insurance Corporation ('MPIC') Act and Section 5 of Manitoba Regulation MRP 215 - 40/94.

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

R.W. (hereinafter referred to as the 'Appellant') was involved in a motor vehicle accident on December 4, 2001, was taken to the Seven Oaks Hospital and was treated and released that day. The Appellant was seen by her personal physician, Dr. K. Saunders on December 5, 2001 who stated:

. . . At that point in time she presented with complaints of diffuse pain, especially involving the left chest wall, the left shoulder, left hip, left hand, neck, mid and lower

back regions. On examining her it was obvious that she had been involved in a significant impact as she was indeed suffering with diffuse evidence of injuries. There was (sic) significant contusions about the left hip and chest wall regions. There was extensive contusion about the left shoulder and was an obvious crush injury involving the left hand. Her abdomen was soft and her chest was clear. She had a hematoma about the left temple region as well as a small laceration in this area. Neurologically exam was normal. She had evidence of diffuse cervical, thoracic and lumbar myofascial pain and was tender diffusely on palpation of the cervical, thoracic, and lumbar spine regions. I advised her that she was suffering with diffuse and multiple soft tissue injuries. I prescribed a course of Celebrex 200 mg. twice daily and arranged for reassessments.

Dr. Saunders further stated that:

1. he saw her again on December 13 and 31, 2001, January 23, 2002 and on March 5, 2002.
2. the Appellant commenced receiving chiropractic treatments in January of 2002.
3. when he examined the Appellant on March 5, 2002, she continued to suffer with significant pain about her left shoulder and left neck regions and continued to have occasional paresthesia radiating down her left arm and left hand, which had been crushed in the accident, and which remained quite painful about the thumb and third finger regions.
4. in respect to the rest of her injuries, for the most, they have resolved or significantly improved at that point.
5. his major concern with the Appellant's return to work at [text deleted], at this point in time, is that she continued to suffer with myofascial pain about the left shoulder and neck regions.
6. he recommended that the Appellant stay off work for a further two weeks and hoped thereafter she would be able to return to work on a graduated work program.

Dr. Saunders provided further reports to MPIC as follows:

- (a) in a report dated May 2, 2002 he indicated that he examined the Appellant on April 29, 2002 and that she continued to suffer with significant lower back and left hip pain and stated:

. . . The pain is constant but is aggravated with activity. . . Physical exam found her to be persistently tender over the second through fourth lumbar spines with a lot of tenderness on palpation about the left hip region.

and that the Appellant informed him that she had returned to work.

- (b) in a report dated July 5, 2002 he indicated that he examined the Appellant on June 28, 2002 and at that point in time stated:
 - i. she reported a severe flare-up of the lower back pain and that this pain was radiating down her left leg and did not involve both hips.
 - ii. she had returned to work to her full and usual duties on June 18, 2002 and during a course of approximately one week she suffered with progressive and increasing pain which became debilitating.

- iii. she found that after one week she was no longer able to continue on with her usual duties at work.
- iv. on examining her he found her to be quite tender over her bilateral sacroiliac joints and diffusely over the lumbosacral spine region.
- v. she had suffered a significant flare-up of her lower back pain on attempts at increasing her physical activities.
- vi. he intended to refer her to Dr. Chernish for the purpose of dealing with her pain management.

Dr. Saunders referred the Appellant to Dr. Chernish and in a letter to him dated July 5, 2002 stated:

The lady was previous was (sic) very stoic and had no major ongoing medical problems. Since her motor vehicle accident she has been complaining specifically of diffuse back pain, which has been most notable in the lower back region. She is also suffering with symptoms compatible with left sided sciatica. She had undergone an extension course of physiotherapy and chiropractic manipulation. She did try returning to work on June 18, however, suffered significant flare up in her lower back difficulties. I have started her on a course of Amitriptyline and she continues on with a course of Vioxx daily and Tylenol #3 as necessary.

At this point in time, I feel it would be prudent for assessment with yourself to assess with regards to her chronic pain and any suggestions you would have with regards to further management. I have discussed the possibility of acupuncture treatment with her and if indeed you feel that may be helpful, she would be willing to proceed with same.

On August 21, 2002 Dr. Chernish wrote to Dr. Saunders and indicated that:

1. he examined the Appellant on August 20, 2002 and noted on palpation there was some myofascial activity in the left gluteus minimus, the thoracic paraspinal musculature and the rhomboids on the left.
2. the Appellant commenced to receive acupuncture treatments from Dr. Chernish. (underlining added)

On November 15, 2002, eleven and one-half (11 ½) months after the motor vehicle accident, Dr. Saunders provided a further report to the case manager wherein he stated:

1. the Appellant's complaints indicated that she is suffering with significant bilateral shoulder and lower back pain and that this lower back pain radiates to both buttocks.
2. the Appellant was using Amitriptyline on the advice of Dr. Chernish to deal with her difficulty in sleeping.
3. Dr. Chernish had suggested that the Appellant try a course of an antidepressant to

determine if this would assist in pain control.

4. Dr. Chernish was trying a course of acupuncture to treat the Appellant.
5. "I am hoping that the aforementioned treatment will attenuate her pain to the level where she will be able to participate in a functional restoration program. This lady did not have any pre-existing or unrelated conditions which would be responsible for ongoing symptoms and I would note that I have known her for a long time as a patient and have always found her to be a rather stoic individual. The persistence of her symptomatology is very disturbing to her and she is keen for a return to usual activities including work. Unfortunately, she finds a significant increase in pain in the aforementioned soft tissue regions with any increase in activity level.

I believe that she is totally incapacitated as (sic) this point in time as it appears that even mild activities have caused significant increase in pain. . . . " (underlining added)

6. Dr. Chernish also recommended that the Appellant participate in a functional restoration program.

Dr. Chernish provided a report to the case manager on November 26, 2002. In response to questions from the case manager, Dr. Chernish stated in part:

1. The current nature and extent of her symptoms are soft tissue pain of the left shoulder, hip and low back. This is associated with a sleep disturbance, and some mood disturbance.
- . . .
3. I feel that there are not any pre-existing or unrelated conditions which may delay her recovery or response to her ongoing symptoms.
4. As to work capacity I do not believe that [R.W.] is capable of returning to her occupation at the present time. Her pain is the limiting factor at present. She would be capable of doing sedentary work, I believe. (underlining added)

In the month of December 2002 the Appellant was referred by MPIC to Associated Rehabilitation Consultants of Canada, Ltd. ('ARCC') to begin a functional restoration program to assist her in returning to work.

On January 3, 2003 ARCC provided the case manager with a Multidisciplinary Assessment of the Appellant. In this assessment of the Appellant reported the following areas of discomfort:

1. **'Left Hip Pain'**. The claimant complained of constant aching pain in her left hip area which sometimes gives her a feeling of grabbing and spasm in the area. She

indicated that she would feel this pain more with climbing stairs.

2. **'Upper Back Pain'**. She complained of continuous aching pain between her shoulder blades. This pain can sometimes radiate to her neck and she would feel stiffness in her neck from time-to-time. She stated that she is unable to carry medium weight grocery bags. She indicated that she has to change her position while sitting because she gets pain in her upper back area if she stays in one position for a long time.
3. **'Low Back Pain'**. This is an intermittent and sharp pain in the lower back area, which comes and goes. She indicated that she used to bowl in the past, but because of her low back pain she is unable to participate in bowling anymore.

The claimant states that she is in discomfort 7 days a week and anytime that she is awake. Overall, her worst pain is 10/10 on the visual analog scale. The least pains are 4/10, and the average is 6/10. The best time of day is in the morning when she first wakes up. The worst times of the day are in the evening and at nighttime. She described the severity of her pain as "moderate" and she stated that she has difficulty dealing with her pain. To relieve the pain she would take her medications or try to massage the areas. The claimant indicated that her pains have somewhat improved compared to when they first started.

In this initial assessment by ARCC the Appellant was diagnosed with myofascial pain syndrome in a moderate-severe range in respect of the lumbar and gluteal region and neck and shoulder area. This report further stated:

Diagnoses

....

The subjective complaints were consistent with the objective findings. Symptom magnification was not evident.

Prognosis

The claimant's prognosis for complete resolution of pain complaints is fair. The painful condition has now been present approximately one year and has been resistant to some treatment modalities. She should gain some pain relief with participation in an active rehabilitation program. The claimant has **not** reached her Maximal Medical Improvement (MMI) from a physical point of view. It is medically probable that the claimant will achieve further symptomatic reduction with medical, or other rehabilitative interventions.

The claimant's prognosis for complete restoration of function is good. We are of the opinion that in her present condition the claimant is **not** yet fully capable of resuming her pre-accident occupation as a cleaning person. With rehabilitative efforts and pain

management strategies, there is no reason why she could not, or should not, return to her previous occupation as a cleaning person.

The overall prognosis is fair to good due to minimal findings on physical examination and that the claimant appeared to a motivated person in participating in a rehabilitation program. (underlining added)

On January 21, 2003 ARCC provided the case manager with a Physical Demands Analysis confirming that the cleaner's job at [text deleted] was classified at a medium demand level. In respect of the cleaner's job, the report stated that there was no possibility to complete a graduated return to work at modified duties because there were no light duties within in this job and that all job duties must be completed by the cleaner.

The ARCC Functional Restoration program commenced in the month of December 2002. On January 23, 2003, approximately thirteen (13) months after the motor vehicle accident, Dr. Chernish wrote to the case manager in response to questions put to him and stated:

1. [R.W.] continues to get neck, back, shoulder and left hip pain. These pains have been getting worse with her program at ARCC. . . .
2. She does not have any pre-existing or unrelated conditions which may delay recovery and be responsible for her ongoing symptoms.
3. Her pain is getting worse with her increase in activities. She finds significant benefit with acupuncture treatments, I would like to treat her once per week while she is attending her current therapy program. I would like to then reassess her pain complaints once she has finished her current therapy program.
4. I note that her subjective complaints are worse since starting her program. (underlining added)

However, on February 14, 2003 ARCC provided the case manager with a Discharge Report indicating that:

1. the Appellant's status had improved and that the Appellant was fit for a graduated return to work program.
2. the Appellant had achieved a functional strength demand of "medium" level and there are no medical restrictions which prevented the Appellant from returning to work, other than complaints of injured-scapular and left hip pain.

3. the Appellant's functional limitations observed were due to self limitations based on the Appellant's pain.

MPIC forwarded the Appellant's file to Dr. Michael J. MacKay, Medical Consultant with MPIC's Health Care Services, with a request that he review the file and determine the following:

1. Does the medical evidence presently contained in the file indicate [R.W.] regained the ability to return to the employment she was performing at the time of the December 4, 2001 motor vehicle accident?
2. Does the medical evidence indicate [R.W.] requires further therapeutic interventions in order to address the medical condition(s) she developed secondary to the incident in question and if so, what interventions are required?

Dr. MacKay reviewed all of the relevant reports and provided an Inter-Departmental Memorandum to the case manager dated April 30, 2003 wherein he stated that:

1. from a functional standpoint the objective evidence indicates that the Appellant's medical condition had improved as a result of therapeutic interventions and that the Appellant demonstrated a physical ability to perform her pre-accident occupational duties at the same level as she performed prior to the motor vehicle accident.
2. in his opinion the Appellant had received appropriate therapeutic interventions and had reached the stage where she should be able to continue a program independently.
3. he was of the opinion that therapeutic intervention was not medically required in the management of the Appellant's condition.

Case Manager's Decision

The case manager wrote a letter to the Appellant, dated May 12, 2003, advising her that the medical evidence indicated that the Appellant could perform her occupational duties and as a result she was no longer entitled to IRI benefits as of May 20, 2003. The case manager further advised the Appellant that further medical intervention was no longer required to address the Appellant's medical conditions arising out of the motor vehicle accident and as a result MPIC would no longer fund further medical treatment after May 20, 2003.

Upon receipt of this decision the Appellant filed an Application for Review to an Internal

Review Officer, dated June 1, 2003.

On June 25, 2003 Dr. Saunders wrote to the Internal Review Officer and advised him that he had most recently examined the Appellant on May 28, 2003 and at that point in time the Appellant was continuing to complain of ongoing lower back pain which radiated to the left hip and down the left leg and that she experiences a continual dull ache. Dr. Saunders was extremely critical of the Discharge Report of ARCC in respect of the Appellant's chronic pain and stated:

[R.W.] has specific concerns as they relate to the summary report from ARCC. Specifically, with regards to the section on presenting problems and goals she notes that the problem involving her left hip pain and weakness secondary to muscle imbalances has not been addressed. The report dated February 14, 2003 states that the "left hip pain is manageable but still present". [R.W.] presently states that the pain in her left hip is a major limiting factor in any routine activities, not only work related activities but also those which she must carry out at home. She is having a great deal of difficulty coping with the ongoing lower back and left hip pain. She also has specific concerns as they relate to her ability to perform crouching, squatting, and kneeling. The report states "[R.W.] demonstrated crouching, squatting and kneeling on an occasional basis in her work simulation tasks." Given her work as a cleaner in a [text deleted] these aforementioned needs are required on an ongoing and frequent basis. At present she is rarely crouching, squatting, or kneeling and is very concerned as her ability to continue on with same.

Dr. Saunders also reviewed the ARCC Discharge Report in respect of the objective testing performed by ARCC and he took issue with a number of discrepancies which indicated, rather than demonstrating improvement in the Appellant's physical condition, showed that she had in fact regressed. He stated in respect to the Appellant that:

- (a) her cervical range of motion decreased during the course of her rehabilitation program between December, 2002 and January, 2003 and with the exception of flexion, all of her values are below the norm.
- (b) with regards to lumbar spine range of motion, once again her values all decreased during the course of her rehabilitation program and with the exception of flexion all of her scores were significantly below the norm.
- (c) on the sit and reach test, once again her measurements deteriorated as a result of her rehabilitation program and dropped her from the 40th percentile on January 6, 2003 to the 30th percentile on January 29, 2003.

- (d) straight leg raising on the right side objectively decreased from 84 degrees on December 20, 2002 to 74 degrees on January 29, 2003 and on the left side remained relatively static at 68 degrees and 67 degrees respectively. As a result these values are below the norms for both lower limbs.
- (e) maximal grip strength, throughout the course of her program, decreased from December 13, 2002 to January 28, 2003 and in all trials remained significantly below the expected norm for a woman her age.
- (f) the leg lift assessment showed some improvement between December 13, 2002 and January 6, 2003 but then subsequently decreased once again by her final assessment on January 28, 2003. At that point in time her percentile ranking was at the 30-35th percentile.
- (g) the athletic therapist who reported the aforementioned findings stated that R.W. “displayed increased function based on her objective test results and her clinical presentation. [R.W.] continued to complain of near constant interscapular pain and left hip pain despite various therapeutic interventions”.

Dr. Saunders further stated that:

1. the objective evidence in the ARCC report indicates that there was no improvement on many of the tests that were carried out on the Appellant.
2. the Appellant disputed the fact that she achieved significant improvement as a result of her attendance in the ARCC program especially as it relates to her lower back and left hip.
3. the Appellant believed that there were significant inconsistencies in the ARCC report and that she required further ongoing treatment and assistance from Dr. Chernish to assist her in recovering from her injuries and that MPIC was not justified in terminating her IRI.

The Internal Review Officer provided Dr. MacKay, MPIC’s Medical Consultant, with a copy of the reports of Dr. Chernish and Dr. Saunders. Dr. MacKay was requested to determine whether these reports indicated the Appellant had a physical impairment of function that in turn would prevent her from performing her pre-accident occupational duties. In an Inter-Departmental Memorandum dated October 14, 2003, Dr. MacKay noted that:

1. the information from Dr. Saunders does not identify any physical impairment of function that would preclude the Appellant from performing her full-time occupational duties.
2. there was no specific condition arising from the accident that would account for her ongoing symptoms.

Internal Review Officer’s Decision

The Internal Review Officer forwarded his decision, dated October 23, 2003, confirming the case manager's decision and rejecting the Appellant's Application for Review.

In respect of the Appellant's entitlement to IRI the Internal Review Officer stated:

Under Section 110(1)(a), your entitlement to IRI ends if you regain the ability to hold the employment you held at the time of the accident.

The objective medical evidence has been reviewed by Dr. MacKay on two occasions, most recently on October 14, 2003. Dr. MacKay is emphatic that the evidence does show you could perform your occupational duties at [text deleted] if you wanted. You went through a restoration program at ARCC. Their discharge reports goes through all the various tests conducted. While some of the tests show a decrease in certain areas of functioning, many of the tests show an increase in functioning. The conclusion that there are no medical restrictions preventing you from returning to your pre-accident job seems reasonable. You said at the hearing that you generally worked 3 ½ to 4 hours per day and there seems no reason that you cannot continue to do this. The fact that you have myofascial pain syndrome does not mean that you cannot work. (underlining added)

In respect of the issue of funding for treatment, the Internal Review Officer stated that:

That the following two conditions, which must be met before MPI becomes obligated to reimburse a claimant for expenses incurred for medical or paramedical care:

1. the expenses must be incurred because of the accident (i.e. the treatments must have been directed towards an injury sustained in the accident) in accordance with Section 136(1)(a) of the *Act* (copy enclosed); and
2. the treatment must have been "medically required" in accordance with Section 5 of Manitoba Regulation MR P215-40/94 (copy enclosed).

Dr. MacKay's initial review of April 3, 2003 (sic) reasonably indicates that you had reached a stage where you could continue with a program independently. You have been provided with education regarding proper exercise and proper biomechanics and posturing. Dr. MacKay felt that if you were compliant with this home-based program, you would likely experience further functional gains and a decrease in symptoms.

Accordingly, the decision to end further funding for treatment is supportable and reasonable. I do note that the decision letter of May 12, 2003 speaks of no further funding for medical intervention and this is perhaps too broad a statement as Dr. MacKay only indicated no further therapeutic treatment was required.

Notice of Appeal

The Appellant filed a Notice of Appeal with the Commission dated December 18, 2004:

I am appealing MPI's decision as I am still suffering from my injuries sustained in my automobile accident of Dec 4, 2001. I am still attending regular treatments and doctor appointments for these injuries. I have tried to get on with my daily life responsibilities and daily duties with pain a constant reminder of my injuries. I've tried returning to work only to pay the price later . . . more pain. Based on this I believe MPI should still be responsible for my treatments and monies I am losing because of this accident. I was not attending physio, chiro, or acupuncture (sic) prior to my accident, and now I am going for treatments for injuries sustained in this accident on a regular basis. I am not being selfish, but want to be able to continue to carry on with my life not having the constant pain that now occurs regularly when I try to get on with my daily responsibilities. I've tried to cut back on my treatments as this is an expense that is being paid by myself by doing daily excises (sic) shown for strengthening by MPIC's ARRC (sic) program. Unfortunately this does not help relieve the pain. Please consider my application of appeal.

On September 3, 2004, Dr. Saunders provided a letter to the Commission in support of the Appellant's appeal, a copy of which was forwarded to MPIC. In this letter Dr. Saunders is critical of the findings of the Internal Review Officer in his decision dated October 23, 2003 and states in respect of paragraphs 9, 10 and 14 of the Internal Review Officer's decision:

Most specifically, I disagree with fact #9 in which ARCC indicated that [R.W.'s] functional status had improved and that she was capable of medium level work. In my correspondence to Mr. Morley Hoffman, dated June 25, 2003, I pointed out many inconsistencies in the report from ARCC. I specifically showed that in many areas there was in fact no improvement in [R.W.'s] condition and that in several areas there was actually deterioration in her objective status. In the Inter-Departmental Memorandum dated October 14, 2003, from Dr. Michael MacKay to Mr. Morley Hoffman, Dr. MacKay dismissed these findings and suggested that there was no medical abnormality that would support her ongoing symptoms and functional limitation. It was my impression that she had a well documented chronic myofascial pain pattern which actually was clearly demonstrated on her testing by ARCC and which did not improve with her various treatments as provided through their program.

In point #9, when discharged from ARCC on February 14, 2003, they indicated that she was fit for a graduated return to work program at a medium level of work. Again we dispute this fact given that in the individualized testing there were several areas where there was no improvement and several areas where she had actually shown deterioration in the objective testing. I am dismayed at the scarcity of commentary on these findings as they were reported by the ARCC therapist. [R.W.'s] myofascial pain was considerable and it is my opinion that the program really had not resulted in any significant improvement in her physical function.

In point #10 Dr. MacKay goes on to suggest that there was no objective evidence that [R.W.] could not return to her pre-accident employment. Again, my personal interpretation of the reports from ARCC suggests otherwise. I would also note that at no point in time did Dr. MacKay actually examine [R.W.] and therefore I am somewhat surprised that he can be so emphatic in his assessment of her.

Finally, in point #14 in the memo dated October 14, 2003 “Dr. MacKay noted that there was no physical impairment of function that would preclude you from performing your full time occupational duties. Dr. MacKay noted there is no specific condition arising from the accident that would account for your ongoing symptoms. No tests have identified any abnormalities involving the hip that accounts for your continued reporting symptoms and functional limitations.”

I believe these statements are erroneous as well. I believe that [R.W.] underwent very significant soft tissue trauma as a result of her motor vehicle accident and has gone on to developed (sic) a chronic myofascial pain syndrome. I believe that [R.W.] has chronic ongoing pain that is quite disabling to her. As is the case with this diagnosis, x-rays and other investigations are invariably normal. This does not rule out significant symptomatology which can significantly limit function. I believe that the reports from ARCC indicate that she does have evidence of ongoing myofascial dysfunction and that she did not achieve significant improvement objectively as a result of their treatments. [R.W.] has been very cooperative and has tried every treatment possible but remains very limited with significant ongoing pain. I definitely believe that she is not capable of returning to her pre-accident status as a result of her chronic ongoing difficulties and that in enforcing (sic) her to do so is a significant stressor for her. (underlining added)

Dr. MacKay was requested by the case manager to review Dr. Saunders’ opinion as set out in his report dated September 3, 2004. In reply, Dr. MacKay provided the case manager with an Inter-Departmental Memorandum dated October 5, 2004 wherein Dr. MacKay stated:

1. he had reviewed ARCC’s Discharge Report dated February 14, 2003 which provided that the Appellant’s medical condition improved with her participation in the program that she was fit to return to employment via a gradual return to work program.
2. the report documents a number of areas where the Appellant’s physical condition improved and he notes several areas where the Appellant’s condition declined in performance.
3. that from an objective standpoint the Appellant demonstrated the ability to return to a level of work compatible to that which she was performing prior to the motor vehicle accident in question.
4. that the Appellant’s condition showed some deterioration in certain areas but these were few and of no significance when considering what impact this deterioration had in respect of her overall condition.
5. that the more functional parameters such as lifting capacity, overall strength and stamina improved to the extent that the Appellant was able to return to her pre-

- accident occupation with no restrictions.
6. that in his opinion the medical evidence does not indicate the Appellant required further therapeutic interventions to address a condition she developed secondary to the motor vehicle accident.

Appeal

The appeal hearing was held on May 4 and 5, 2005 and the Appellant was represented by Mr. David G. Newman, Q.C., and Mr. O'Neill represented MPIC.

The relevant provisions of the Act in the respect to this appeal are:

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;

Manitoba Regulation 40/94

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

The Appellant testified that prior to the motor vehicle accident on December 21, 2001:

1. she never had a back or neck problem and never required chiropractic, physiotherapy or acupuncture treatments.
2. she worked as a cleaner at the [text deleted] for fifteen to twenty-five (15 to 25) hours a week cleaning the premises. This work was physical in nature and included cleaning windows, floors, toilets and vacuuming of carpets. In order to carry out these activities she was required to push and pull and reach, as well as squat and kneel. From time to time she was required to assist members of the Filipino Community when they participated in [text deleted] activities at the [text deleted] and this required her to work additional hours beyond her regular hours of work.

3. she enjoyed her work and indicated that it provided her with independence.
4. she was happily married, was an active homemaker who did all of the cooking, baking and cleaning at home, and at the family cottage.
5. she actively gardened, both at home and at the family cottage and jointly participated with her husband in the yard work at these premises.
6. she had a very close relationship with her children and grandchildren who she saw on a regular basis both at her home and at her family cottage.
7. (a) she regularly held family gatherings for her children and grandchildren at her home for Christmas, Easter, and Thanksgiving.
(b) in preparation for these festivities she decorated the home and the Christmas tree, and did all of the baking and cooking for the entire family for these events.

The Appellant further testified that as a result of the motor vehicle accident:

1. she suffered injuries to her body and this resulted in a great deal of pain to her neck, left shoulder, left hip and lower back and that this pain was chronic, extremely intense, disabling and had a traumatic effect on her daily activities both personally and at work.
2. despite the medical interventions by Dr. Saunders and Dr. Chernish and at ARCC, she never recovered from this pain.
3. despite her chronic pain she attempted to return to work in the spring 2003 but was unable to do so due to the neck, shoulder and back pain;
4. due to this chronic pain:
 - (a) she was unable to continue her homemaking activities, her husband was required to do the cleaning and meal preparation as well as the yard work and gardening both at home and at the cottage.
 - (b) she is unable to fully participate in the family gatherings at Christmas, Easter and Thanksgiving.
5. she no longer has the patience to deal with her grandchildren or relate to them as she had in the past as a result her relationship with her grandchildren had deteriorated.
6. she is unable to take her annual winter vacation to Mexico since she was unable to sit on an airplane for long periods of time.
7. she had carried out faithfully any instructions she received from ARCC but none of these activities provided her with any great relief.
8. she was receiving some relief in respect of her chronic pain from the acupuncture treatments provided by Dr. Chernish.

The Appellant's testimony in respect of the traumatic effects on her life were corroborated by the testimony of both her husband and one of her daughters.

Dr. Saunders, the Appellant's personal physician, also testified at the hearing and stated that prior to the motor vehicle accident:

1. the Appellant had no pre-existing problems to her neck and back and did not require any chiropractic, physiotherapy or acupuncture treatment;
2. the Appellant was very stoic and it was only after the motor vehicle accident that she complained about intense pain to her neck, back and left shoulder.

Dr. Saunders further testified that:

1. he became concerned that there was no improvement to the Appellant's pain complaints in respect of her neck, back and left shoulder;
2. he noted that she was unable to return to work at the [text deleted];
3. because of his concerns in respect of what appeared to be a chronic pain, he referred the Appellant to Dr. Chernish for the purpose of dealing with her pain management;
4. Dr. Chernish diagnosed that the Appellant was suffering from myofascial pain in the neck, back and left shoulder, and commenced acupuncture treatments;
5. Dr. Chernish reported to him that the Appellant was suffering from myofascial pain, was incapacitated in her ability to return to work and that any form of physical activities caused significant increase in the Appellant's pain to her left shoulder, hip and low back.

Dr. Saunders further testified that:

1. the Appellant continued to complain of ongoing low back, left hip and left shoulder pain and that any kind of activity increased this pain;
2. that he received a copy of ARCC's multi-disciplinary Assessment dated January 3, 2003 and noted that this report concluded that the Appellant was suffering from myofascial pain syndrome moderate/severe range in the neck, low back and shoulder and that this painful condition had become resistant to treatment modalities;
3. that despite these conclusions the report determined that the Appellant was physically capable of returning to work as a cleaner at [text deleted].
4. he noted a number of discrepancies in the ARCC report as set out in his letter to the Internal Review Officer dated June 25, 2003;
5. this report demonstrated there had been no improvement in respect of the Appellant's pain to her lower back and left hip and that ARCC had erred in concluding that the Appellant was physically capable of returning to work.

Dr. Saunders further testified;

1. that in his letter to the Commission dated September 3, 2004 he reiterated his previous criticisms of the ARCC report which Dr. MacKay MPIC's Medical Consultant had relied upon in determining the Appellant was physically capable of returning to work.
2. that ARCC's report was flawed and as a result Dr. MacKay and the Internal Review Officer erred in determining the Appellant was physically capable of returning to work.

Dr. Saunders also testified that:

1. in his view the Appellant was an honest and credible person who never had any physical complaints prior to the motor vehicle accident and was not a malingerer.
2. he agreed with ARCC's diagnosis that the Appellant has suffered from myofascial pain syndrome to her neck, shoulder and back.
3. despite the medical interventions the Appellant had developed a chronic pain syndrome which had rendered her unable to work as a cleaner at [text deleted].
4. in his view the Appellant should continue to be treated by Dr. Chernish for the purpose of pain management.

Dr. MacKay, MPIC's Medical Consultant, in his testimony:

1. corroborated the medical opinions he provided to MPIC.
2. reviewed all of the relevant medical reports and supported ARCC's Discharge Report, that the Appellant had improved sufficiently and that she was capable of returning to work in a gradual return to work program.
3. that contrary to Dr. Saunders' opinion, he was of the view that there were a number of areas where the Appellant's physical condition had improved and also acknowledged that several areas in the Appellant's physical condition had declined.
4. that from an objective standpoint the Appellant had demonstrated the ability to return to a level of work compatible with that which she performed prior to the motor vehicle accident in question.
5. that Appellant's deterioration in certain areas was minimal and that her physical ability to lift and her overall strength and stamina had improved to the extent that she was capable of returning to her pre-accident employment without any restrictions.

In cross-examination Dr. MacKay testified that:

1. he never personally examined the Appellant but conducted a paper review of the relevant medical reports.
2. his responsibility was to solely determine whether the Appellant physically had the capacity to return to work.
3. in arriving at his decision that she was physically capable of returning to work, he did not consider the impact on the Appellant of her chronic pain.
4. the responsibility for assessing chronic pain resided with the case manager and that it was not part of his responsibility in making this assessment.

Submissions

At the conclusion of the evidence the Commission heard submissions from both legal counsel.

Mr. Newman, on behalf of the Appellant, reviewed all of the testimony of the Appellant, her husband and her daughter as well as the relevant medical reports and the testimony of Dr.

Saunders and Dr. MacKay. Mr. Newman stated that:

1. Dr. MacKay had not personally examined the Appellant but had prepared his medical opinion based on the Appellant's medical file at MPIC.
2. Dr. Saunders' medical opinion should be accepted in preference to Dr. MacKay's since he had a long-standing relationship with the Appellant, had examined her prior to and after the motor vehicle accident and found her to be a credible person.
3. that Dr. Chernish had also personally examined the Appellant after the accident and found her to be a credible person and had treated her for her chronic pain.
4. that the Commission should reject the ARCC reports because they were inconsistent with the testimony of the Appellant in respect of chronic pain and the medical opinions of both Dr. Saunders and Dr. Chernish who corroborated the Appellant's testimony in respect of her chronic pain.
5. the Appellant's testimony was corroborated by both the Appellant's husband and her daughter.

Mr. Newman submitted that:

1. in these circumstances the Internal Review Officer had relied on the flawed reports of ARCC and Dr. MacKay and rejected the medical opinions of Dr. Saunders and Dr. Chernish and the Appellant's chronic pain complaints.
2. the Appellant had established on the balance of probabilities due to her chronic pain that she was incapable of returning to work and was entitled to reinstatement of the IRI benefits.
3. the Appellant had established on the balance of probabilities that the acupuncture treatments provided by Dr. Chernish were medically required, and that the Internal Review Officer erred in terminating, the reimbursement in respect of these treatments.

Mr. O'Neill, on behalf of MPIC, submitted that :

1. both Dr. Saunders and Dr. Chernish, where the Appellant's caregivers and her advocates, and the Commission had to carefully weigh their testimony on behalf of the Appellant.
2. the Appellant was personally observed by members of ARRC in respect of the manner in which the Appellant participated in the rehabilitation program and that they had concluded the Appellant had physically recovered to the point where she was capable of returning to her pre-accident employment.
3. Dr. MacKay, after reviewing all of the medical reports, was justified in concluding that although the Appellant had not made a complete and total recovery, she had physically improved to the point where she was capable of returning, to her pre-accident employment.
4. the Internal Review Officer was justified in relying on the reports of ARCC and Dr. MacKay in concluding that the Appellant was physically capable of returning to her pre-accident employment and as a result MPIC was justified in terminating her IRI benefits.
5. the Appellant's appeal should be dismissed in respect of her claim for reinstatement of IRI benefit.

In respect of medical treatment, Mr. O'Neill referred to the ARCC reports and to the testimony and reports of Dr. MacKay which supported the Internal Review Officer's decision that there was no medical requirement to justify the continuation of any medical intervention in respect of treating the Appellant's physical complaints in respect to her neck, back and left shoulder. Mr. O'Neill therefore submitted that the Internal Review Officer was correct in deciding that MPIC was justified in terminating the reimbursement of medical expenses with respect of the Appellant and as a result the Appellant's appeal should be dismissed in respect of her claim for reimbursement of medical expenses.

Discussion

Both parties, in their submission to the Commission, agreed that as a result of the motor vehicle accident which occurred on December 4, 2001 the Appellant suffered soft tissue injury to her left shoulder, left hip and lower back which resulted in a diagnosis of myofascial pain syndrome and which caused the Appellant to complain about chronic pain. MPIC as well, acknowledged the Appellant's medical condition and provided IRI benefits and reimbursed the Appellant in respect of medical expenses until May 20, 2003 when these benefits were terminated.

However, MPIC and the Appellant disagreed as to whether the Appellant's chronic pain prevented her from returning to work and in respect of MPIC's obligation to reimburse the Appellant in respect of her medical expenses. MPIC concluded, on the basis of the medical reports of ARCC and Dr. MacKay, that the Appellant was functionally capable of returning to work and did not require any further medical treatment and as a result terminated the IRI benefits and payment for medical treatment. On the other hand the Appellant supported by the medical reports of Dr. Saunders and Dr. Chernish submitted that the chronic pain to her neck, shoulder

and lower back prevented the Appellant from returning to her pre-employment status and that medically she continued to require medical treatment by Dr. Chernish. As a result the Appellant asserted she was entitled to the reinstatement of IRI benefits and to the continuation of MPIC's obligation to reimburse her for her acupuncture treatments.

The Commission has in the past recognized that as a result of chronic pain an Appellant could be entitled to receive IRI benefits. For example in the case of *Re G.L. (AC-03-66)* the Commission, in its decision dated August 11, 2004, stated:

The Commission in the decision *T.U. (AC-03-07)* stated at page 9:

Despite the Appellant's ongoing complaints of pain, little weight was given to her subjective concerns. Judicial treatment of subjective pain complaints in disability cases is considered by Richard Hayles in his book, Disability Insurance, Canadian Law and Business Practice, Canada: Thomson Canada Limited, 1998, at p. 340, where he notes that:

Courts have recognized that pain is subjective in nature. They have also acknowledged that there is often a psychological component in chronic pain cases. Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary*, Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:

In my view it is not of any particular importance to determine the precise medical nature of the plaintiff's pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.

In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.

The Commission was referred to the case of *Nova Scotia (Worker's Compensation Board) v.*

Martin et al [2003] S.C.J. No. 54, Mr. Justice Gonthier stated:

1 Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians. . .

Decision
Income Replacement Indemnity Payments (IRI)

The Commission finds that the Appellant was a credible person who testified in a straightforward and unequivocal fashion in respect of the impact the chronic pain had upon her personal life, her inability to return to her pre-accident employment status and her need for medical treatment in respect of the chronic pain. The Appellant's testimony in respect of the traumatic effects of the myofascial pain syndrome as a result of the motor vehicle accident, is corroborated not only by the testimony of her husband and her daughter and Dr. Saunders, but also by the reports of Dr. Saunders and Dr. Chernish.

The Appellant's credibility is also confirmed by ARCC in the following reports:

1. ARCC, in its initial assessment of the Appellant, informed the case manager on January 3, 2003 that it had diagnosed the Appellant with a myofascial pain syndrome in a moderate-severe range in respect of her neck, shoulder area and lower back. This assessment was made approximately thirteen (13) months after the motor vehicle

accident, when ARCC considered that the Appellant's subjective complaints of pain were consistent with ARCC's objective findings. ARCC further stated in respect of the Appellant's complaints "*symptom magnification was not evident*". ARCC also noted in this report that the Appellant appeared to be a motivated person participating in the rehabilitation program.

2. In its Discharge Report dated February 14, 2003, ARCC stated that:
 - (a) the Appellant continued to complain of near constant interscapular pain and left hip pain despite various therapeutic intervention during the programming as well as continued acupuncture treatments performed by Dr. Chernish;
 - (b) the Appellant was a pleasure to work with during her rehabilitation and despite her pain complaints the Appellant attempted all exercises required and worked independently to reduce her level of pain.

The Commission accepts the Appellant's testimony in respect of all issues in dispute in this appeal.

Dr. Saunders, the Appellant's personal physician, testified in a clear and convincing fashion and corroborated the Appellant's testimony in respect of all issues in dispute in this appeal and the Commission accepts his testimony. Dr. Saunders testified that:

1. prior to the motor vehicle accident the Appellant had no major ongoing medical problems, that she was a stoic person who had never complained about any major medical problems.
2. he had examined the Appellant shortly after the motor vehicle accident and that he continued on a regular basis to see the Appellant in respect of her motor vehicle accident injuries.
3. during these examinations she had complained consistently about the pain to her left side of her neck, left shoulder and lower back.
4. as a result of the Appellant's failure to make a recovery from the chronic pain to her neck, shoulder and back, he referred her to Dr. Chernish for the purpose of pain management during the month of July 2002 which was approximately one and a half (1 ½) years after the motor vehicle accident had occurred.

The Commission also accepts the medical opinions of Dr. Chernish in respect of any of the issues in dispute in this appeal. The Commission notes that Dr. Chernish, like ARCC, diagnosed that the Appellant suffered from myofascial pain to her neck, shoulder and back and he commenced acupuncture treatments. Dr. Chernish, like Dr. Saunders, had concluded that the Appellant's complaints of chronic pain were genuine.

The Appellant testified that as a result of participating in ARCC's Functional Restoration program, her chronic pain to her neck, shoulder and back increased rather than decreased and as a result she was not capable of returning to work as a cleaner. The Appellant's testimony in this respect is corroborated by Dr. Chernish's report to MPIC, dated January 23, 2003, wherein he indicates that the Appellant continued to have pain to her neck, back shoulder and left hip and that these pains were getting worse as a result of her participation in the ARCC Rehabilitation program.

In sharp contrast to Dr. Chernish's medical opinion, ARCC on February 14, 2003 provided a Discharge Report to MPIC which indicated the Appellant's status had improved enough and that she was fit for a graduated return to work program.

The Commission finds that the testimony of the Appellant, in respect of her medical condition at the time of the Discharge Report, is corroborated by Dr. Chernish's report of January 23, 2003 and that ARCC erred in concluding that Appellant had improved as a result of the Rehabilitation program and was fit for a graduated return to work program.

Contrary to the conclusions in the Discharge Report, the Appellant testified that when she attempted to return to work as a cleaner, her physical exertions in carrying out her job duties resulted in extreme pain to her neck, back, shoulder and left hip and as a result she was unable to continue to work as a cleaner.

Dr. Saunders, in his criticism of ARCC's Discharge Report, corroborates the Appellant's condition in respect of her physical incapacity to return to work as a cleaner. Dr. Saunders found

significant discrepancies between his assessment of the Appellant's medical condition and ARCC's findings in its Discharge Report. Dr. Saunders testified that:

1. ARCC had disregarded the Appellant's concerns about her ability to crouch, squat, and kneel.
2. ARCC's conclusion that the Appellant was physical capable of returning to work was contradicted by ARCC's own conclusions in that it showed that there was a cervical range of motion which had decreased during the course of her Rehabilitation program.
3. the Appellant's maximal strength and leg lift deteriorated during the course of this program.
4. on the whole, the objective evidence in the ARCC report demonstrated, in respect of many of their tests demonstrated the deterioration of the Appellant's physical functions.
5. in his opinion, the discharge report did not support ARCC's conclusion that the Appellant was physically capable of returning to work but rather supported the Appellant's position of her physical incapacity to return to work as cleaner.

The Commission finds that Dr. Saunders criticisms of ARCC's Discharge Report not only corroborate the testimony of the Appellant but are consistent with Dr. Chernish's medical opinion that the Appellant was not fit for a graduated return to work program as a cleaner.

For these reasons, the Commission:

- (a) accepts the testimony of the Appellant, that she was incapable of returning to work due to the chronic pain, and the medical opinions of Dr. Saunders and Dr. Chernish who corroborate the Appellant's testimony in this respect.
- (b) rejects the Discharge Report issued by ARCC that the Appellant was fit for a graduated return to work program.

The Commission notes that Dr. MacKay, MPIC's Medical Consultant, unlike Dr. Saunders and Dr. Chernish, conducted a paper review of the Appellant's medical file and did not physically examine the Appellant and as a result did not have an opportunity of assessing her credibility. Dr. MacKay testified that in arriving at his opinion that the Appellant was physically capable of returning to work, he had reviewed all of the relevant medical information and had concluded that the Appellant had the functional capacity to return to her pre-employment status.

However, Dr. MacKay candidly admitted in his testimony that he did not consider or assess whether or not the Appellant's complaints of chronic pain would have prevented her from carrying out the physical duties of a cleaner. Dr. MacKay testified that the responsibility for determining the scope and impact of the Appellant's chronic pain was the sole responsibility of the case manager and was not part of his responsibility as MPIC's Medical Consultant.

The Commission therefore, finds that Dr. MacKay was not in a position to determine whether or not the Appellant's chronic pain prevented her from returning to work as a cleaner. The Commission also finds that Dr. MacKay in arriving at his medical opinion, relied primarily on the flawed ARCC's Discharge Report and as a result he erred in rejecting the medical opinions of Dr. Saunders and Dr. Chernish as to the Appellant's fitness to participate in a graduated return to work program.

The Commission therefore, concludes that the Internal Review Officer, relying on the flawed ARCC Discharge Report and the incomplete medical opinion of Dr. MacKay, erred in finding MPIC was justified in terminating the Appellant's IRI benefits. The Commission therefore finds the Appellant has established, on the balance of probabilities that as a result of the injuries she sustained in the motor vehicle accident, she was unable to return to her employment as cleaner on May 20, 2003 and that the Internal Review Officer erred in terminating the IRI payments to the Appellant in accordance with Section 110(1)(a) of the Act.

Reimbursement of Medical Expenses

The Internal Review Officer in his decision dated October 23, 2003, relying on the medical opinion of Dr. MacKay, concluded that:

1. the Appellant had reached the stage where she could continue with the home based

program and would not require any further medical intervention.

2. the Appellant was being provided with education regarding proper exercise as well as proper biomechanics in posturing and if the Appellant complied with this home based program she would likely experience further functional gains and the decrease in symptoms.

The Internal Review Officer, as a result of adopting Dr. MacKay's medical opinion, concluded for these reasons that medical treatment was not medically required pursuant to Section 5 of Manitoba Regulation MRP 215 40/94.

The Appellant testified that the acupuncture treatments that she received from Dr. Chernish were extremely helpful in respect of reducing her chronic pain. Dr. MacKay had conducted a paper review in determining that there was no need for on going medical treatment. Unlike Dr. Chernish, Dr. MacKay did not physically examine the Appellant and therefore was not in the position to assess her credibility. The Commission finds, however, that since Dr. Chernish had personally examined and treated the Appellant he was in a better position than Dr. MacKay to assess her credibility and determine whether or not there was a medical requirement for the Appellant to continue to receive the acupuncture treatments.

Dr. Chernish, in his report dated January 23, 2003, stated that the Appellant received significant benefit from acupuncture treatments and the Appellant in her testimony confirmed this benefit. In these circumstances the Commission gives greater weight to the medical opinion of Dr. Chernish than it does to Dr. MacKay and therefore finds that the Internal Review Officer erred in rejecting Dr. Chernish's medical opinion and accepting Dr. MacKay's medical opinion in respect of the medical treatment.

For these reasons, the Commission finds that the Appellant has established on a balance of

probabilities, that the acupuncture treatments were medically required and that the Internal Review Officer erred in his decision, dated October 23, 2003 in terminating the Appellant's entitlement to reimbursement in respect of medical expenses. The Commission therefore determines that MPIC is required to reimburse the Appellant in respect of the cost of her medical expenses relating to the acupuncture treatments pursuant to Section 5 of Manitoba Regulation MRP 215 – 40/94.

Conclusion

The Commission finds that, for the reasons cited above, the Internal Review Officer erred in his decision dated October 23, 2003 when he terminated the Appellant's IRI payments and MPIC's obligation to reimburse the Appellant in respect of her medical expenses in relation to her acupuncture treatments. As a result the appeal is allowed and the Internal Review Officer's decision dated October 23, 2003 is rescinded.

The Appellant shall be entitled to IRI benefits and reimbursement of medical expenses together with interest from May 20, 2003.

Dated at Winnipeg this 9th day of August, 2005.

MEL MYERS

DIANE BERESFORD

PAUL JOHNSTON