



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by W.W.
AICAC File No.: AC-04-24**

- PANEL:** Mr. Mel Myers, Q.C., Chairman
The Honourable Mr. Wilfred De Graves
Dr. Patrick Doyle
- APPEARANCES:** The Appellant, W.W., appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms. Kathy Kalinowsky.
- HEARING DATE:** November 17, 2005
- ISSUE(S):**
1. Whether there is “new information” sufficient to permit the corporation to make a fresh decision”.
 2. Whether, on the balance of probabilities, there is a causal relationship between the symptoms suffered by the Appellant and the motor vehicle accidents of October 13, 1994, March 31, 1995 and/or March 26, 1997 that would entitle her to reinstatement of her PIPP benefits.
 3. Whether the Appellant qualifies for IRI benefits in relation to her absence from work in April 2000, and since August 2000
 4. Whether the Appellant qualifies for PIPP benefits to cover, *inter alia*, reimbursement of the costs of a walker, cane, wrist supports, various kitchen devices and a bed.
- RELEVANT SECTIONS:** Section 171(1) 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

W.W. (hereinafter referred to as the 'Appellant'), was involved in a series of four (4) motor vehicle accidents from October 1994 through May 1998. For the first three (3) of the accidents, the Appellant was insured with MPIC. The fourth accident occurred when the Appellant was resident in another province and insured with another insurer and is not at issue in this appeal.

Following a two (2) year recuperation from the first accident, during which she received IRI, and other benefits, the Appellant returned to work in September 1996. She continued to receive chiropractic treatments under the Personal Injury Protection Plan ('PIPP') until the summer of 1999 when the benefits were terminated by the case manager. In 2000, upon again becoming unable to work, the Appellant sought Income Replacement Indemnity ('IRI) and other benefits and was denied. Her appeal of the Internal Officer reviews of these decisions was rejected by the Commission, January 26, 2001 on the basis that there was no connection between her disability and the motor vehicle accidents.

Shortly after the Commission's decision, the Appellant's symptoms were diagnosed as fibromyalgia resulting from the motor vehicle accidents. She informed her case manager of the diagnosis and again asked for reinstatement of her benefits. MPIC has taken the position that they are bound by the 2001 decision of the Commission. In this appeal, the Appellant is arguing that the diagnosis of fibromyalgia proves a link between her

disability and the accidents such that MPIC should make a fresh decision in her case and reinstate her benefits.

The purpose of this hearing is to determine if information submitted by the Appellant in support of her claims, is “new information” in the sense required by s. 171(1) of the MPIC Act sufficient to permit the Corporation to make a fresh decision in relation to the claim of the Appellant. Section 171(1) reads:

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

The Commission does not, in this decision, address the merits of the Appellant’s claims for benefits.

Background

On October 13, 1994, the Appellant was injured in a accident when the car in which she was the driver, was struck from behind by another car while she was stationary in traffic. The impact was of sufficient force to propel her vehicle into the two vehicles stopped in front of her injuring her neck, lower back and right shoulder. As a result of the accident, the Appellant was unable to continue with her employment and received Income Replacement Indemnity and other benefits while she was off work. On March 31, 1995, the Appellant was in a second, less severe accident in which the vehicle she was driving was again hit from behind while she was stationary in traffic.

The Appellant returned to work in September, 1996, “with restrictions from lifting and with the proviso that she ... continue with her work-hardening conditioning program, ... [and] use chiropractic treatment and medication to manage her symptoms”. On March 26, 1997, the Appellant suffered a third motor vehicle accident in which her car was again hit from behind while stationary in traffic. On April 21, 1997, the case manager issued a decision terminating chiropractic treatment. The Appellant sought a review of this decision.

In August 1997, the Appellant moved to [text deleted] and continued her employment working with special needs children in the schools. On September 23, 1997, the Appellant again requested a review of the April 21, 1997 commenting:

I still experience a lot of pain in my lower back and it makes it very difficult (sic) to do employment and close to normal housework. I AM FAR FROM BEING ALL BETTER ALSO THIS IS NOT IN MY HEAD. I have had two separate (sic) chiropractors (who have never met or talked) tell me exactly the same things. ... Also confirming that the problem I have is going to be a chronic and permanent (sic) problem DUE TO THE ACCIDENT IN OCTOBER 13, 1994.” (emphasis in the original)

It was the Appellant’s position, that, while she had been able to return to work, she was not at that time, healed from the first accident.

On December 29, 1997, the Internal Review Officer issued a decision in which he found no reason to interfere with the April 21 decision noting that treatment would now be funded under through the March 1997 accident.

The fourth accident occurred May 31, 1998. Since she was by then a resident of [text deleted] and no longer insured by MPIC, this accident is not at issue in this appeal.

On June 7, 1999, and June 30, 1999, the case manager issued decisions terminating chiropractic treatment funding and refusing to fund certain other treatments. On September 16, 1999, the Internal Review Officer upheld both of these decisions on the grounds that the Appellant had reached her “maximum medical improvement” and that her ongoing symptoms were not related to the motor vehicle accidents. On January 2, 2000, the Appellant sought an appeal of this decision with the Commission.

As she became unable to work through 1999, the Appellant sought reinstatement of PIPP benefits. On September 1, 2000, the case manager denied the Appellant’s request. She sought review and on October 3, 2000, the Internal Review Officer issued a second decision upholding the case manager’s decision on the basis that there was no connection made between the symptoms suffered and the “accidents on October 13, 1994 and March 26, 1997 (or either of them) necessary to trigger your entitlement to further PIPP benefits.”

On October 10, 2000, the Appellant sought an appeal of these decisions on the grounds that the symptoms from which she suffered were “repercussions of the original injury Oct. 13, 1994.” The Appeal was held January 24, 2001. In its decision of January 26, 2001, the Commission upheld the September 16, 1999 and October 3, 2000 decisions, adopting the reasons of the Internal Review Officer.

New Information

On May 4, 2001, the Appellant wrote to MPIC in relation to her 1994 and 1997 claims stating:

There has been new findings in my case. (sic) I had an appointment with a Dr. VanGoor (sic) [who] is very well known ... for being able to find out back problems. There is now evidence as to a permanent condition that was caused by the first accident October 13, 1994. ...

Dr. Vangoor ... had told me that I had Ostioarthritis (sic) in that area. The only way I could get it in that area is if I had an accident or injury to it . He also stated ... that I have a condition called **fibromyagia** (sic). These two complications together have caused me to become disabled and unable to work with no income.

... This [fibromyalgia] syndrome /disorder can be caused by an injury or trauma. ...

Dr Vangoor did explain to me that a lot of people with this Fibromyagia unfortunately end up being misdiagnosed for many years before they find it to be Fibromyagia. (emphasis in the original)

With this letter, the Appellant also sent some internet information on fibromyalgia and copies of her Disabled Persons Placard and the application form for same.

Following a further letter from the Appellant, May 11, 2001, the case manager issued a decision, May 14, 2001, denying further PIPP benefits on the basis that there was no causal relationship between the Appellant's symptoms and the accidents. The Appellant immediately responded with more information, urging a reconsideration of her file and requesting another appeal. She received a reply, dated May 31, 2001, stating:

It should be noted that M.P.I. is bound by the January 24, 2001 decision outlined by the Automobile Injury Compensation Appeal Commission. ...

Your most recent correspondence did not provide any new medical documentation which can be reviewed by our Health Care Services Team. We will be abiding by the A.I.C.A.C. decision and your file will remain closed.

The Appellant continued to write to the case manager urging him to reassess her claim enclosing information including:

- A February 24, 2002 medical report from Dr. Vangoor, stating. “On July 16, 2001 [the Appellant] was diagnosed to have post-traumatic fibromyalgia (sic). ... [A] rheumatologist, Dr. J. Paul Ryan in June 2001, ... agreed that she had the symptoms suggestive of fibromyalgia”.
- A diagnosis of her primary medical condition as “post-traumatic fibromyalgia”, *per* Dr. Bozyk, May 22, 2002.
- Application for a Disabled Persons Placard on the basis of a long term disability resulting from, *inter alia*, fibromyalgia, signed by Dr. Vangoor, May 1, 2001.
- A copy of *Lylock v. Phan*, [1998] A.J. No. 1334, a case from the Alberta Court of Queen’s Bench acknowledging the existence of “post-traumatic fibromyalgia” arising out of a motor vehicle accident. (at para 31)

The case manager referred the materials to Dr. Baydock, the Medical Consultant with the Health Care Services department of MPIC, who advised that the information did “not support a medically probable relationship between the motor vehicle collision in question and a diagnosis of fibromyalgia.” He also noted that the American College of Rheumatology has suggested that the prefix “post-traumatic” not be used with fibromyalgia because there is a “lack of proof of association between trauma and fibromyalgia.”

On July 24, 2002, the case manager issued a decision letter to the Appellant rejecting the claim of the Appellant and commenting:

I find the material you forwarded isn't new information within the meaning of Section 171(1) of the Act. A fresh decision regarding your entitlement to PIPP benefits from the 1997 accident is not called for. The decisions made previously by the case manager, internal review and the commission will not be changed.

On May 22, 2002, the Appellant submitted an invoice for walker, cane, wrist supports, and kitchen aids required to assist in daily living. On July 25, 2002, the case manager issued a further decision denying to cover the costs of the walker, cane, wrist supports and kitchen aids on the same grounds as the July 24, 2002 decision.

Following further correspondence between the Appellant and the case manager, MPIC undertook a review of all of the Appellant's claims in relation to the alleged connection between the accidents and the diagnosis of fibromyalgia. On November 18, 2002, Dr. Baydock advised the case manager that he was still of the opinion that a causal connection between the fibromyalgia and the accidents had not been made. He stated:

1. The causes of fibromyalgia are unknown.
2. Any association between fibromyalgia and trauma is based upon retrospective, non-controlled studies using mainly anecdotal recall of potential associations.
3. In 1996, a working group of experts published a consensus statement in the Journal of Rheumatology that recommended abandoning the condition of "post-traumatic" fibromyalgia as the association between trauma and fibromyalgia could not be objectively supported.

In a Decision Letter, December 6, 2002, the case manager copied Dr. Baydock's memorandum to the Appellant and rejected her claim for PIPP benefits. On January 3, 2003, the Appellant sought review of the three decisions of the case manager.

On April 7, 2003, the Appellant submitted for reimbursement, an invoice for a bed to replace one purchased for her under her PIPP benefits in 1994. The request was denied in decisions April 22, 2003, August 4, 2003 and September 12, 2003, on the basis that it was not "medically required".

Although the Appellant had not sought review of these decisions, the Internal Review Officer included them in his review of the July 24, July 25, and December 6, 2002 decisions, and his decision of September 26, 2003.

The Internal Review Officer's Decision

In his very thorough and comprehensive decision, the Internal Review Officer rejected the Appellant's review. He decided that:

- while the information submitted by the Appellant could in part have been construed as "new information" within the meaning of s. 171(1) of the Act, it was not sufficient to permit the corporation to make a fresh decision in relation to any of the Appellant's claims;
- while a causal relationship between the Appellant's fibromyalgia and the 1994 accident is possible, it is not probable, and the law requires that a "balance of probabilities" test be met;
- no causal connection exists between the need for the bed and any of the PIPP accidents;
- serious doubts exist as to whether the purchase of the bed can be considered a rehabilitation expense within the requirements of s. 138 of the Act and Section 10(1)(d)(iii) of Manitoba Regulation P215-40/94.

The Internal Review Officer set out the extensive facts he had considered in reaching his decision.

On October 6, 2003, the Appellant wrote to MPIC stating that she was appealing the decision. Following some further correspondence between the Internal Review Officer and the Appellant, the Appellant obtained an Independent Medical Evaluation (IME), dated December 16, 2003, from Dr. Zabrodski, an experienced Occupational Health Consultant from Calgary. Dr. Zabrodski undertook a physical examination of the Appellant and also conducted an extensive review of documentation submitted to him by

the Appellant. His diagnosis noted the Appellant as suffering from fibromyalgia and chronic pain syndrome and he commented:

In my expert opinion, I have seen many cases where Fibromyalgia/chronic pain had been triggered as a result of an (sic) motor vehicle accident. In this case there is overwhelming evidence pointing to the accidents as causation of [the Appellant's] condition. (emphasis added)

On February 10, 2004, the Appellant also submitted to MPIC, excerpts and headnotes from a number of legal decisions in which a causal relationship between fibromyalgia and trauma associated with a motor vehicle accident had been acknowledged by courts.

The Appeal

On February 11, 2004, the Appellant filed a Notice of Appeal with the Commission in which she stated:

Notice of Appeal

I have been constantly told that fm is accepted but whether it was caused by the accidents they refuse to recognize. I have sent medical + have 10 years of reported problems that all point back to the accidents being the cause. I previous (sic) (Feb. 10) faxed legal documents that the court accept (sic) fm as being caused by rear-end accident. Some ruled in MB & paid from MPIC.

The Appellant continued to submit information on fibromyalgia to the Commission and to MPIC up to and including the date of the hearing. The Appeal was heard, November 17, 2005.

Submissions

Ms. Kalinowsky reviewed the history of the Appellant's four motor vehicle accidents noting that, after two years off-work as a result of injuries suffered in the first two, she successfully returned to work in 1996 and continued to work following the third accident

in 1997. Funding for treatment was terminated in the summer of 1999, Ms. Kalinowsky noted, and requests for further treatment were denied in three decisions issued in June, 1999. An Internal Review Decision, September 16, 1999, upheld those decisions. When she again became unable to work in the summer of 2000, Ms. Kalinowsky continued, the Appellant sought IRI and certain medical benefits. These too were denied, she noted, and the denials upheld in an Internal Review Decision, October 3, 2000.

On January 26, 2001, the Commission confirmed those Internal Review Decisions, counsel for MPIC stated, on the basis that no link between the MPIC insured accidents and the Appellant's symptoms had been established.

The Appellant, Ms. Kalinowsky argued, is now trying to reopen her case by suggesting that the diagnosis of fibromyalgia is new information. But, she pointed out, the information on which the diagnosis of fibromyalgia was made is not new and was before the Commission at the time of its decision in January 2001.

In addition, she argued, the legal test for establishing that the information is, in the legal sense, "new", laid down in *Palmer* at the Supreme Court of Canada (see below), has not been met. The test requires that new information should not be admitted if, by due diligence, it could have been admitted earlier. It must also be relevant, credible, and a reasonable expectation must exist that it would have affected the result.

Ms. Kalinowsky argued that the information was not sufficiently credible to meet the test. Considerable doubt has been raised concerning the diagnosis of “post-traumatic fibromyalgia,” she noted, as Dr. Baydock revealed in his memoranda to the case managers and to the Internal Review Officer. And referring to Dr. Zabrodski’s report, she suggested that it too lacks the credibility required by the *Palmer* test in that:

- It is not clear what information was reviewed by Dr. Zabrodski;
- Some documents referred to are not included in the file before the Commission;
- None of the medical reports from MPIC were reviewed;
- Nothing was reviewed from Dr. Kucheravy, the Appellant’s first chiropractor, who approved her return to work in 1996;
- No reference is made to the impact of the accident of May 31, 1998.

The information, she concluded, should not be admitted and the appeal should be dismissed.

The Appellant argued that the symptoms which are preventing her from working are connected to the motor vehicle accidents. The Appellant explained that the first accident was by far the worst in that the speed was higher and it involved her being slammed into the vehicles stopped in front of her. The second and third accidents, she informed the Commission, while serious, did not involve the much greater stresses on her body that she experienced in the first of the accidents. In the fourth accident, she commented, there was no contact and she had only to swerve to avoid the wheel which came off the trailer in front of her.

The diagnosis of “post-traumatic fibromyalgia” and its causal connection to her motor vehicle accidents, she argued, is new information, brought to light by the diagnoses of Dr.

Ryan, June 11, 2001, Dr. Vangoor, July 16, 2001, Dr. Bozyk, May 22, 2002 and Dr. Boucher, July 22, 2002, all of which were made after the decision of the Commission, January 26, 2001. These, together with the IME of Dr. Zabrodski, December 16, 2003, undertaken shortly after the Internal Review decision which is the subject of this appeal, show that the connection is medically probable, and show, she argued finally, what is important here: It is the accidents that have caused her present symptoms and she should receive benefits from MPIC in relation to them.

Discussion

In order for the Appellant to succeed she must show that the diagnosis of fibromyalgia and its alleged causal relationship with her motor vehicle accidents of 1994, 1996, and 1997, is “new information” within the meaning of s. 171(1) of the Act and sufficient to permit MPIC to render a fresh decision in the January 26, 2001 appeal decision, W.W. AC-00-03.

Mr. Justice McIntyre, *R. v. Palmer*, [1980] 1 S.C.R.759, set out the legal standard to be met in order to admit new evidence:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief.
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. (at 775)

This standard has been relaxed somewhat in relation to administrative tribunals.

In *Canada v. Lambie*, (1995) 30 Admin L. R. (2d) 218 (F.C.T.D.) the Federal Court of Canada, reviewing a decision of the Canadian Human Rights Review Tribunal, stated:

[There is] a greater degree of latitude in the application of the due diligence principle than there is with respect to the other three. ... Further, a due diligence determination has been described [by the Federal Court of Appeal] as discretionary in the broadest terms [in that a Court may] even overlook this consideration. (at 223)

In relation to the requirement of credibility, the Federal Court stated:

As a matter of law, I do not think a Review Tribunal errs if it decides to hear new evidence on the basis of unsworn information ... as long as it concludes that the information is credible, in the sense that it is reasonably capable of belief. ... That a Review Tribunal decides to admit evidence on the basis of the *Palmer* principles does not mean that it has finally decided the question of the credibility of that evidence. After hearing the direct evidence and cross-examination, it is open to the Review Tribunal to reject the evidence if, notwithstanding its decision to allow the evidence, it concludes it is not credible in whole or in part. (at 225)

“New Information”

Counsel for MPIC argued that the evidence is not new in that the information on which the diagnosis was made was available to, and was considered by, the Internal Review Officer in his decisions of September 16, 1999 and October 3, 2000, and the Appeal Commission in its decision of January 26, 2001.

The *Concise Oxford English Dictionary* defines “new” and “information” in these terms:

new: (adjective) 1 not existing before; made, introduced, or discovered recently or now for the first time.

information: (noun) 1 facts or knowledge provided or learned as a result of research or study. (OED, 10th ed., (Oxford University Press, Oxford, 1999))

Webster’s New World College Dictionary define those terms in this way:

new: (adjective) 1 never existing before; ... 2 a) existing before but known or discovered for the first time

information: (noun) 3 knowledge acquired in any manner, facts, data, learning. (*Webster's New World College Dictionary*, 4th ed., (IDG Books, Foster City, 2001))

In the sense that the diagnosis of the Appellant's symptoms were, taken together, post-traumatic fibromyalgia, it is clearly new information in the sense that it was a diagnosis not made before. Even if, as MPIC asserts, the symptoms on which the diagnosis is made did exist, and were dealt with before, that they might accumulatively amount to fibromyalgia, is, to paraphrase the New World Dictionary, "knowledge acquired from information existing before, but discovered as a specific syndrome/disorder for the first time". The symptoms, as Ms. Kalinowsky asserted, certainly existed before, but the diagnosis as fibromyalgia, and as post-traumatic fibromyalgia, is medically and in the ordinary language sense, new information.

The Application of *Palmer*

In *Palmer*, Mr. Justice McIntyre of the Supreme Court of Canada, advised caution when admitting new evidence so as not to permit any witness to easily repudiate or change evidence given earlier. The matter at hand is not an instance of a witness or any medical practitioner changing their position. The practitioners who have made the diagnosis of fibromyalgia and who assert a link between the symptoms and the motor vehicle accidents, were not treating the Appellant prior to the decision of the Commission, January 26, 2001.

i Due Diligence

Both the file and the submissions of the Appellant clearly show that she has been consistent in seeking the best possible health care which she can find and that she has persistently argued that the decline in her health since the accident of 1994 is *due* to the accident itself. Her persistence led to Dr. Vangoor and the diagnosis of post-traumatic fibromyalgia by April 2001. She was also diligent in that on May 4, 2001, within days of that diagnosis, she informed her case manager of the new information and its implications. There is no question that the Appellant meets this aspect of the test.

ii Relevant in the sense that it bears upon a decisive issue

The information the Appellant seeks to have considered is relevant and does bear upon a decisive issue in the matter. The information bears upon the diagnosis of her symptoms and whether there is a causal relationship between them and the motor vehicle accidents in which she was injured in 1994, 1995 and 1997.

iii Reasonably Capable of Belief

The diagnosis of fibromyalgia and its connection with the motor vehicle accidents has been made by a number of qualified professionals including, Dr. Vangoor a family physician, Dr. Ryan, a specialist in rheumatic disease, Dr. Bozyk, a family physician, Dr. Hagens, a general practitioner and hospitalist, Dr. Boucher, a registered psychiatrist with an appointment at the University of Calgary, and Paul Hunter, a physiotherapist.

Dr. Zabrodski's IME, though not available to the Internal Review Officer at the time of his decision, offers strong support of the earlier diagnoses of the Appellant's other caregivers. Dr. Zabrodski is a specialist in Occupational Health with an impressive list of credentials and impressive experience. In the IME, Dr. Zabrodski summarizes his qualifications in this way:

I have over 20 years experience in various aspect (sic) of medicine including the assessment of occupational fitness to work, impairment and disability for various corporate, government and some cases private clients. I am Clinical Assistant Professor at the University of Calgary medical school in the Departments of Community Health Sciences and Family Medicine. I am a member of the Occupational and Environmental Association of Canada. I am a Transport Canada certified Civil Aviation Medical Examiner. I received my certification in Family Medicine in 1982 and received a certificate of special competency in Emergency Medicine in 1983, both from the Canadian College of Family physicians. I received my associate certification in Occupational Medicine from the Canadian Board of Occupational Medicine in 1997. I am a fellow of the American Academy of Disability Evaluation Physicians and an American Board Certified Independent Medical Examiner. I am duly qualified and licensed to practice in the province of Alberta and across Canada.

I have provided expert testimony in Alberta on behalf of the plaintiff and defense with respect to personal injury, occupational injury, fitness to work issues, alcohol and substance abuse and drug testing in the workplace. My qualifications and experiences allow for a more in depth evaluation. (emphasis added)

In the IME, Dr. Zabrodski states:

Based on the review of medical records and my clinical experience and evaluation, it is my opinion [W.W.] was/is disabled from any occupation regardless of training and/or experience in June 2000 due to her chronic pain syndrome, major mood disorder and anxiety. It also my opinion that these disorders are all a direct cause (emphasis in the original) from the motor vehicle accidents that happened back in Manitoba. She has continued to be disabled since that time. ... In my expert opinion, I have seen many cases where Fibromyalgia/Chronic Pain had been triggered as a result of an (sic) motor vehicle accident. In this case, there is overwhelming evidence pointing to the accidents as causation of [W.W.'s] present condition. (Emphasis added except where otherwise noted)

The Internal Review Officer, who did not have the benefit of Dr. Zabrodski's report, relied on the opinions of Dr. Baydock, Medical Consultant with MPIC's Health Care Services Team. Dr. Baydock, who reviewed the file on at least 6 occasions in the period following the diagnosis of post-traumatic fibromyalgia by Dr. Vangoor, was unwavering in his opinion that "fibromyalgia is not a medically probable effect of a motor vehicle collision." In his November 18, 2002 memorandum to the Internal Review Officer, Dr. Baydock stated:

- 1 The causes of fibromyalgia are unknown.
- 2 Any association between fibromyalgia and trauma is based upon retrospective, non-controlled studies using mainly anecdotal recall of potential associations.
- 3 In 1996, a working group of experts published a consensus statement in the Journal of Rheumatology that recommended abandoning the condition of "post-traumatic" fibromyalgia as the association between trauma and fibromyalgia could not be objectively supported."

The Internal Review Officer also relied on the summary of proceedings from a 2001 Fibromyalgia, Chronic Pain and Trauma Conference, to which he had been alerted by the Appellant and which, he noted, appeared to place some doubt on the credibility of the information submitted by the Appellant. He highlighted, for example:

- The lack of consensus around the diagnosis of fibromyalgia and the implications it might entail, and, the length of time that might elapse between an accident and the onset of fibromyalgia.
- The existence of many of the symptoms of fibromyalgia and other chronic pain symptoms in the general population who have not suffered trauma in a motor vehicle accident.
- The poor quality of the science in much of the literature purporting to establish a link between trauma and fibromyalgia.

The Commission finds that debate around the issue is not sufficient to undermine the credibility of the resources brought to the matter by the Appellant. Indeed, debate among highly qualified professionals from the fields of medicine, physiotherapy and psychology,

evidenced in the conference proceedings, indicates that there is substantial credibility in the alleged link.

The Appellant in her submission referred to court and administrative decisions from British Columbia and this province which show that post-traumatic fibromyalgia has been accepted as the basis for damages awards in automobile accident situations similar to those found in the Appellant's case. See, for example:

1. *Liebrecht v. Egesz* (1999), 135 Man. R. (2d) 206 (Q.B.): A motor vehicle accident case predating the creation of the PIPP program in 1994 in which causation of the plaintiff's fibromyalgia and post-traumatic stress disorder was at issue. The Court held that the plaintiff had proved causation and awarded damages for lost past and future income as well as general damages for non-pecuniary loss.
2. *Brown v. Ryan* (2002), 163 B.C.C.A. 254 (C.A.); *Schellak v. Barr, et. al.* (2003), 176 B.C.C.A. 146 (CA); *Ferguson v. Lush* (2003), 188 B.C.C.A. 118 (CA): The three cases are motor vehicle accident cases in which a diagnosis of fibromyalgia was made and a damages award made.
3. *Lylock v. Phan* (1998), 235 A.R. 12 (Q.B.): A case from the Alberta Court of Queen's Bench in which the plaintiff was recognized as having post-traumatic fibromyalgia resulting from a motor vehicle accident, in which the victim was awarded damages.

Dr. Vangoor, Dr. Zabrodski and the other caregivers who have asserted a link between the Appellant's disability, the fibromyalgia and the motor vehicle accidents, have all had the opportunity to examine the Appellant in person. Dr. Baydock did not have the advantage that a personal examination can bring. This fact too, lends weight to a finding that the alleged link is "reasonably capable of belief".

The Internal Review Officer, in his decision of September 26, 2003, decided the information was not sufficiently credible to be admitted in that a causal link was

“possible, but not probable”. The Commission finds that this is not the appropriate standard to apply. Here, where the focus is whether the information provided is “new information” sufficient to meet the requirements of s. 171(1) of the Act, it is enough for the Appellant to establish, following the rule set down by the Supreme Court of Canada in *Palmer*, that the evidence is “reasonably capable of belief”. That she has very clearly done.

iv Could Reasonably have Affected the Result

It is clear and unquestioned before the Commission, that if the information provided by the Appellant were to be believed, it could reasonably have affected the decision of the Internal Review Officer.

Conclusion on “New Information”

On the following grounds, the Commission finds that the diagnosis of the Appellant’s symptoms as fibromyalgia/chronic pain syndrome resulting from trauma suffered in the motor vehicle accidents of 1994, 1995 and 1997, is “new information” within the meaning of s. 171(1) of the Act and sufficient to permit MPIC to make a fresh decision in relation to her claim:

- 1 The information regarding the diagnosis of fibromyalgia and its alleged causal relationship with the motor vehicle accidents is new information in that it was not available at the time of the previous appeal on January 24, 2001.
- 2 The Appellant has demonstrated due diligence.
- 3 The information is relevant in that, if established as asserted by the Appellant and her caregivers, it will bear upon the decisive issue of causation in relation to the symptoms which are preventing her from returning to work.
- 4 The evidence is credible. The diagnosis and the alleged connection with the motor vehicle accidents have been made independently by a number of different medical practitioners over a period in excess of 3 years from the first

documented diagnosis by Dr. Vangoor, July 16, 2001, through to the most recent report from Paul Hunter, physiotherapist, April 14, 2005.

- 5 It is clear that this evidence, if believed, could reasonably be expected to have affected the decision of the Commission, January 26, 2001.

Decision

The Commission finds that the Internal Review Officer erred when he held that the information put forward by the Appellant, following the diagnosis of her symptoms as fibromyalgia, first presented to the case manager, May 4, 2001, and pursued consistently since that date, was not “new information” within the meaning of s. 171(1) of the MPIC Act. The Commission finds that the Internal Review Officer erred when he declined to consider the new information in order to make a fresh decision.

The Commission rescinds the decision of the Internal Review Officer of September 26, 2003, that the information is not “new information” and orders the corporation to make a fresh decision in light of that information.

The Commission orders the corporation to review all matters at issue in this appeal in light of that fresh decision. These matters are:

- Whether, on the balance of probabilities, there is a causal relationship between the symptoms suffered by the Appellant and the motor vehicle accidents of October 13, 1994, March 31, 1995 and/or March 26, 1997 that would entitle her to reinstatement of her PIPP benefits;
- Whether the Appellant qualifies for IRI benefits in relation to her absence from work in April 2000, and since August 2000; and,

- Whether the Appellant qualifies for PIPP benefits to cover, *inter alia*, reimbursement of the costs of a walker, cane, wrist supports, various kitchen devices and a bed.

Dated at Winnipeg this 18th day of January, 2006.

MEL MYERS, Q.C.

HONOURABLE WILFRED DE GRAVES

DR. PATRICK DOYLE