



## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by M.M.  
AICAC File No.: AC-03-100**

**PANEL:** The Honourable Mr. Wilfred De Graves, Chairman  
Dr. Patrick Doyle  
Mr. Paul Johnston

**APPEARANCES:** The Appellant, M.M., was represented by Mr. Ralph Neuman;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

**HEARING DATE:** October 27, 28 and 31, 2005

**ISSUE(S):** 1. Entitlement to further Income Replacement Indemnity Benefits after March 10, 2002.  
2. Reimbursement of expenses after February 26, 2002, including personal care assistance benefits, treatment benefits, dental benefits, travel benefits, and medication.

**RELEVANT SECTIONS:** Sections 83(1)(a), 131, 136 and 138 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

M.M. (the 'Appellant'), pursuant to the MPIC Act, appealed on July 8, 2003, the decision of April 17, 2003 of T.R. Strutt, Internal Review Officer of MPIC.

#### Circumstances of the accident and the collision damage

On December 20, 1999, shortly before noon, the Appellant was stopped and seated in the

driver's seat of her [text deleted] at the then icy intersection of Portage Avenue and Westwood Drive, Winnipeg, Manitoba, waiting to turn South onto Westwood Drive. While stopped she was "rear ended" by another vehicle and suffered a whiplash injury. The collision damage to her automobile amounted to \$693.59.

### **Onus and Causation**

Causation must be proved on a balance of probabilities. It is only necessary to prove that the motor vehicle accident of December 20, 1999 materially contributed to the Appellant's medical condition and ensuing inability to resume her former occupation as a long-haul truck driver.

### **Issues and Claims under the MPIC Act**

1. Whether the Appellant's medical condition and resulting occupational disability was attributable to the motor vehicle accident.
2. If so, is she entitled to reimbursement of expenses incurred after February 26, 2002, including personal care assistance benefits, treatment benefits, dental benefits, and medications.
3. If so, is she entitled to further Income Replacement Indemnity ('IRI') benefits after March 10, 2002.

The respective positions of the Appellant and MPIC on these issues are:

- A. Is the Appellant's medical condition characterized as vertigo caused by the motor vehicle accident? The Appellant asserts that she was and is, entitled to reimbursement of expenses after February 26, 2002 and to IRI after March 10, 2002

as provided under the MPIC Act, while MPIC says that if there was and is such a condition, it was not caused by the accident and is not entitled to her claim.

- B. Does her alleged condition prevent her from continuing in her former occupation as a long-haul truck driver? The Appellant says her condition prevents or disables her from resuming or continuing her former occupation while MPIC asserts that she could and can resume her former occupation and, in any event, her disability (if any) was not caused by the accident.

### **Medical and Caregiver Consultations, Medical, Physiotherapy, Diagnoses and Treatment**

Following the accident she did not immediately seek medical treatment. She did, however, some two (2) hours later see Dr. Fletcher (not her regular doctor) of the Assiniboine Clinic. He summarized the visit, examination and treatment as follows:

MVA – rearended approx. 2 hours prior. Lap shoulder belt on. No direct trauma and no past history of neck discomfort. Otherwise well.

EXAM: induration left paraspinal muscles in upper cervical area. Good full ROM and no radicular signs.

I: neck strain.

P: Naprosyn 250 t.i.d. and Flexeril t.i.d. prn x 10 days. Heat, neck care and advised.

C Fletcher/dsc.

Following this initial diagnosis by Dr. Fletcher, the Appellant and MPIC have, from time to time, consulted a variety of medical specialists, physiotherapists, occupational therapists, consultants and a psychologist in an attempt to determine the cause of her alleged continuing inability to function and resume her former occupation.

Shortly after the initial consultations, she underwent the following treatments and reported to

MPIC:

- a) On December 22, 1999 she attended upon her physician, Dr. Mills (then her regular doctor), complaining of the following symptoms (Tab 286):

“painful L side of lower neck region with difficulty raising L arm.”  
Dr. Mills diagnosis was “soft tissue strain left lower neck and interscapular region” . . .

- b) On December 23, 1999 she saw her physiotherapist, Rob Herman, who confirmed that she had been in a minor fender bender and that she was having left neck pain. . . .
- c) On December 30, 1999 M.M. attended upon Mr. Herman complaining of dizziness
- d) On January 29, 2000, Mr. Herman’s notes indicate that M.M. “had increased episodes of dizziness, pain and tightness, left more than right side of neck” after an attempt to return to driving in the truck for a period of four days. . . . unable to do any driving but that she was better if she stood and walked around for a bit.
- e) On January 31, 2000 the claimant reported to Heather Gaskin, case manager for MPIC, that she had become dizzy after attempting to return to work earlier in the week. (Tab 27).
- f) According to Ms. Gaskin’s CARS note of March 25, 2000 . . . Mr. Herman indicated that her complaints of headaches, dizziness, nausea, and pain to her upper back region were so bothersome that she didn’t tolerate any treatment on her last visit.
- g) Ms. Gaskin’s memorandum to file of April 10, 2000, records a conversation she had with Mr. Herman. Mr. Herman indicated he had a meeting with the claimant on March 31, 2000. According to her notes Mr. Herman advised her that:  
“. . . He said objectively there are no findings to support why she cannot maintain driving a truck. . . . He said the claimant is very frustrated, wants to work, and comes across credible in this regard.”

Accordingly there were, from the time of the accident to the present, a variety of opinions, commentaries or diagnoses given by these consultants attempting to identify the cause of her medical conditions and her alleged occupational disability. They relate, in part, to the alleged:

- a) vestibular dysfunction or loss secondary to otosclerosis (a hereditary disease causing progressive conductive hearing loss in adults); and
- b) cervical or neck related vertigo arising from the whiplash injury.

Payments under the MPIC Act were made to the Appellant.

Heather Gasken, from time to time, reviewed the medical and occupational history of the Appellant. Accordingly, Ms Gasken in a letter dated July 17, 2002, requested Dr. Blakley, Otolaryngologist, for a paper review of the Appellant's medical condition and disability. In this letter Ms Gasken sets forth the circumstances of the Appellant's accident, consequential injuries, treatments, return to work program, and medical opinions. Her review may be summarized, in part, as follows:

- a) shortly after the accident the condition was diagnosed by Dr. Mills as soft tissue strain for which the Appellant was prescribed medication,
- b) the Appellant attempted, on two (2) occasions, to return to work as a long-haul truck driver with [text deleted] on a gradual basis. On both occasions the Appellant failed the test and could not return to work because she had “. . . low tolerance for bouncing in the truck cab, headaches, dizziness, nausea and pain in her upper back region with burning.” According to Ms Gasken there was no objective medical evidence to support the complaints,
- c) M.M. participated in a reconditioning program at D'Arcy Bain Therapy,
- d) in May 2000, on being requested to return to work, [text deleted] refused to allow her to return to work “. . . until she was 100% and off certain restrictive medications”,
- e) on September 7, 1999 she was examined by Dr. Frohlich “. . . diagnosed with having early otosclerosis.” On a further exam on October 3, 2000 Dr. Frohlich “. . . could not determine if her subject complaints were due to the original diagnosis or whether they had been caused by the December 20, 1999 motor vehicle accident.” The Appellant continued to experience pain and underwent medical examinations, therapies and occupational testing,

- f) the Appellant took a work hardening program with PAR Health Services and in November 2000 PAR Health discontinued driver assessment due to “lack of progress”,
- g) the Appellant was referred to Dr. El-Khatib, a psychologist,
- h) she was examined on October 30, 2000 by Dr. Gomori, a neurologist. He found there was no objective neurological abnormality. He could not relate her symptoms to vibration movements or walking,
- i) on October 11, 2000, a highway traffic assessment of the Appellant as a passenger was conducted by Michelle Gibb for 50 minutes. The Appellant was able to tolerate the drive but after the drive complained subjectively of increased pain after the drive,
- j) attendances with Dr. El-Khatib, the psychologist, were discontinued by the Appellant as she felt her problem was physical and not psychological,
- k) November 2000 – The Appellant “self discharged” Dr. Mills and saw Dr. Casey. She felt that Dr. Mills was not able to attribute all her symptoms to the collision and the mild deterioration and active level of function reflected primarily her underlying psychological state and adjustment disorder as well as frustration due to lack of progress,
- l) she returned to Dr. El-Khatib for pain management,
- m) following consultation with Dr. Casey, Dr. Werier was then consulted,
- n) between February 26, 2001 and April 2001 she underwent physiotherapy treatments with Doug Christie,
- o) Dr. El-Khatib was discharged but in his report of March 9, 2001 he recommended pain management techniques. He reported that the Appellant was of the view that her ailments were physical and that she complained of “. . . low tolerance sitting in a truck during vibration and fluctuating pain level which required use of medication

- (that is pain killers/sedative/narcotics) that were disallowed by her employer”,
- p) April and May of 2001 Dr. Werier recommended that she return to work and [text deleted] required that she be medically assessed. Doug Christie “. . . on May 7, 2001 gave a functional report outlining that her symptoms involved the left shoulder/neck and dizziness.” He recommended “. . . a gradual return to work program”. [text deleted] (no doubt by this time somewhat impatient with the questionable status of its employee) directed that the Appellant be examined by [text deleted] nominee, Dr. Peter Lim. He examined her on May 16, 2001 and said she was fit to return to work. However, on the same day, the Appellant went to see Dr. Werier “pleading that she felt she was unable to drive because she could not shoulder check due to her vertigo and that she felt she was a danger to drive a semi.” Dr. Werier acceded to her opinion and withdrew his authorization,
- q) on July 22, 2001, the Appellant threw out her lower back as a result of a shower mishap. It was acknowledged that this had no effect on her condition as it related to the accident of December 20, 1999,
- r) Dr. Werier then referred the Appellant to Dr. Janine Johnston, a specialist in neuro-ophthalmology and vestibular function,
- s) Dr. Johnston, in a letter of December 3, 2001, stated she was of the opinion that the Appellant “. . . has right vestibular loss-mild” and that the vestibular loss or disorder predated the accident. She noticed that the Appellant complained of being treated for myofascial pain, accompanying some degree of dizziness.

Following a consideration of the above, Ms Gasken, in her decision of February 26, 2002, terminated payments. More particularly she ordered that as of February 26, 2002 physiotherapy be discontinued, medication claim be denied, dental TMJ treatment be denied, travel claim be

denied, further personal care assistance be denied and that IRI benefits be terminated as of March 10, 2002. In making this decision, Ms Gaskin relied primarily on Dr. Janine Johnston's opinion that the vestibular disorder predated the motor vehicle accident, the report of January 31, 2002 of the physiotherapist, Doug Christie and on Dr. MacKay's opinion of February 2002.

Coverage in respect of expenses for or claims under Section 138 of the MPIC Act, medications Section 136(1) and dental under Section 136(1)(a), travel under Section 136(1)1(a), home assistance under Section 131 and IRI under Section 83(1)(a) were also denied.

This decision was appealed by the Appellant to T.R. Strutt, Internal Review Officer, on the same day. The material part of her appeal is as follows:

. . . I am therefore requesting an appeal take place as I can no longer return to my job as long-haul driver and never had any of these symptoms prior to the accident of Dec. /99. Therefore I do not agree with MPI's decision that this was pre-existing nor is this anything my medical staff believe either. Please set up the appeal a.s.a.p. as this devastates our household financially. I would have at least thought re-training. Please advise / [M.M.]

Following the appeal to Mr. Strutt, Mr. Strutt requested Ms Gaskin to assist him in obtaining further reports on the Appellant's condition.

Dr. Brian W. Blakley responded to Ms Gaskin's question as set forth in her letter of July 17, 2002, at page 2 of his opinion report of August 6, 2002 in these terms:

The central problem relates to dizziness and vestibular dysfunction. The subject has been assessed by Dr. Janine Johnson who is well respected. She has experience and special interest in vestibular problems and I know that she does excellent work. Having said that the problems in this case are difficult and subject to different opinions even among experts.

. . .

In response to your questions in your letter of July 17, 2002:

1. *You asked if [M.M.'s] symptoms result from a pre-existing condition or a condition arising from the motor vehicle accident (MVA).* Based on the objective evidence it is unlikely that symptoms of imbalance noted after Dec. 20, 1999 arose from a pre-existing condition. I see no history of prior vestibular problems and the testing, in my opinion, is inconclusive. It is quite plausible that certain dizziness symptoms could have resulted from the injury without other deficit or objective supporting evidence.
2. *You asked in the medical evidence indicate that the pre-existing condition would be adversely affected by the MVA.* When vestibular pathology occurs and compensation is adequate, there is no reason that a prior deficit would “uncompensated” due to injury. A prior deficit may prolong compensation after injury, but over a matter of months the result should be the same, particularly if vestibular rehabilitation is optimal.
- ...
4. *You asked if she should be able to return to her job as a truck driver.* From dizziness and vestibular viewpoints alone she should be able to drive and function normally in her activities of daily living. Many patients in this situation; however, have other poorly understood conditions which make them tire easily and cause non-specific symptoms such as headaches, malaise and fatigue. (underlining added)

### **Analysis of T.R. Strutt’s decision of April 17, 2003**

Following a review hearing on April 9, 2002 Mr. Strutt asked Ms Gaskin for “a further investigation” in respect to the “vestibular disorder”, including clarification of that diagnosis. Dr. MacKay, on July 12, 2002, also provided a supplementary opinion. Ms Gaskin referred the matter in mid-July of 2002 to Dr. Blakley, Otolaryngologist, of the Health Sciences Centre for a paper review.

He gave a report dated August 6, 2002. Dr. Blakley prefaced his opinion by acknowledging that he had not seen the Appellant and “The picture presented is fairly common and extremely difficult . . . There are few objective signs and many symptoms.” He defines the difficulty in diagnosis as follows:

The central problem relates to dizziness and vestibular dysfunction. The subject has been assessed by Dr. Janine Johnson who is well respected. She has experience and special interest in vestibular problems and I know that she does excellent work. Having said that the problems in this case are difficult and subject to different opinions even among

experts. (underlining added)

Mr. Strutt held a further hearing on December 20, 2002. He requested a further opinion from Dr. Blakley. Dr. Blakley responded on February 4, 2003 confirming his earlier opinion.

In respect to symptoms of dizziness he observed:

. . . The motor vehicle accident, which she was involved in, is unlikely to have caused this deficit. If, on the other hand, the caloric test supports the caloric asymmetry then reliable evidence of a pre-existing vestibular disorder is present. It is unlikely that a collision caused the vestibular injury, however, if [M.M.] had some pre-existing vestibular deficit, it is quite plausible that an injury might result in decompensation and recurrence of symptoms. . . .

The sixth question asks if she can return to her job as a truck driver. I am not comfortable making a definitive recommendation about this with not having seen the patient or a formal electronystagmographic test. It is possible that she might be able to tolerate short drives in a car but that long haul trucking might be unwise. It could also be that psychological factors and anxiety are present which can produce this situation. I do not know if this distinction is of significance legally.

. . .

In the next question you ask if there are any other comments. As you can tell there is some uncertainty about [M.M.'s] situation. Legal needs are also important here. For example if the question is whether or not [M.M.] also experiences dizziness is important, I think this is quite likely. The findings of similar vague symptoms in patients with no legal or financial ramifications is quite common. (underlining added)

Dr. MacKay, following Dr. Blakley's two reports of August 6, 2002 and February 4, 2003, gave a further report on March 25, 2003 confirming his earlier opinion.

There were many competing medical opinions and conclusions considered by Mr. Strutt. One of these causes he considered under the head of vestibular disorder in the terms following:

. . . From the point of view of the relevant facts, I note one constant theme in the medical file is the "vast array of symptoms [M.M.] records as rendering her unable to perform at

her pre-accident level of function” (to use Dr. MacKay’s description from his February 7, 2002 report). As Dr. MacKay points out in his various assessments, it is not only difficult to relate the multiplicity of symptoms to this single automobile accident, but a number of the diagnoses that have been offered clearly cannot be causally related to the motor vehicle accident either. . .

[M.M.’s] vestibular disorder, assuming she, in fact, has a vestibular disorder, is equally incapable of having been caused by this automobile accident. Dr. Janine Johnston’s report of March 6, 2002 acknowledges that she finds “it difficult to believe that [M.M.] has sustained this right peripheral vestibular loss as a result of such a minor impact” as that involved in the December 19, 1999 motor vehicle accident. Dr. Johnston advances the hypothesis (it seems to be no more than that) that [M.M.] had a pre-accident vestibular disorder that has been decompensated by a cervical muscle spasm which is ultimately referable to the car accident. Perhaps, but it is worth noting that the cervical disc pathology mentioned above in itself may account for the neck symptoms and that condition cannot be attributed to the car accident. (See Dr. MacKay’s reports of July 12, 2002 and February 7, 2002 on these points.) These considerations certainly weaken Dr. Johnston’s hypothesis concerning causation.

In his decision of April 17, 2003 Mr. Strutt’s analysis and review do address in part the extensive and varied treatment the Appellant underwent and does acknowledge some doubt about the origins of the neck and back condition. He says in this respect:

. . . Since it is most unlikely at this late date that it will be possible to sort out the services provided for the low back condition and those provided for the neck condition that may possibly be attributable to the car accident, MPI will reimburse [M.M.] for all of the physiotherapy expenses incurred May 7, 2001 to February 26, 2002.

Thus, Mr. Strutt varies Ms Gaskin’s decision of February 26, 2002 by allowing the claims for physiotherapy, dental, travel and medication benefits until February 26, 2002 but confirms the denial of personal care assistance benefits.

Underlying Mr. Strutt’s reasons of April 17, 2003 is his findings concerning the Appellant’s lack of credibility. At page 10 of his reasons he says:

Dr. Blakley comments that he feels [M.M.] does, in fact, experience dizziness because “similar vague symptoms” are “quite common” among “patients with no legal or financial ramifications.” I wish I could feel the same confidence about [M.M.’s]

descriptions of her own condition. Regrettably, I cannot put much weight on [M.M.'s] evidence. I have already made a few comments on the context in which that evidence has to be assessed. I find it very hard to accept that after years of rehabilitation, her symptoms now appear much more pronounced, varied, and debilitating than they were at the beginning of her claim. Then again, there is lots of evidence of a marked improvement in April and May of 2001, but [M.M.] resisted returning to work at that point and apparently did not comply with her home maintenance program. By her account at the second Review Hearing, she is in much worse shape now than she was then. (underlining added)

Mr. Strutt concludes in denying the appeal:

- a) by accepting Dr. MacKay's March 25, 2003 earlier report;
- b) he could not "... put much weight on [M.M.'s] evidence".
- c) the motor vehicle accident did not cause the vestibular disorder.
- d) the reported symptoms of dizziness may arise from a number of causes such as malfunction of an organ or abnormal physiology or for psychological reasons.

The Appellant and her husband testified at the hearing before us and we will consider the question of their credibility later in this decision.

The panel has had the opportunity of reviewing the Appellant's counsel argument on the question of vertigo and have checked it against the voluminous files of MPIC. We are able to confirm the Appellant's counsel's submission that the Appellant did complain of dizziness over the duration of her medical and physiotherapy experience and treatment and more particularly we refer to:

- a) notes of Rob Herman the physiotherapist of December 30, 1999 and January 29, 2000;
- b) notes of Dr. Mills – Tab 263;

c) notes of Heather Gasken – Tabs 27, 245, 263, 265, 268, 270 and 277;

We enumerate the above episodes of complaints of dizziness (and they are not exhaustive) in support of the Appellant’s assertion that she has experienced and continues to experience episodes of dizziness and these were reported and documented on a timely basis.

### **Dr. MacKay’s opinions**

As indicated, MPIC relied in large part on the opinion of Dr. MacKay as set forth in his report of January 9, 2001 to Mrs. Gaskin (Tab 150). Because it is this opinion on which MPIC largely relies, the following is our summary of his opinion with our apposite observations.

Dr. MacKay notes that the collision was “. . . a low velocity collision” and that it should not result in any “cervical dysfunction”.

He then continues his extensive paper review on the basis of Dr. Casey’s opinion that:

- A. The Appellant should undergo a “short term program of manipulative therapy in conjunction with a restrictive training program that would focus on increasing muscular endurance and strength of the spine”.
- B. Psychological assistance.
- C. Her medication should be changed or reduced.

Dr. MacKay agrees with Dr. Casey in respect to A and C.

At page 6 Dr. MacKay delineates the Appellant’s symptoms he gleaned from

- A. Par Health Services record of July 10, 2000

- B. The physiotherapist's, Doug Christie's, records of October 13, 2000
- C. Her personal physician, Dr. Mills' records of November 16, 2000

There is no question that some of the listed symptoms might be subjective but these would, in our respectful view, require a personal physical examination and analysis. In the absence of an assessment following a personal examination, the weight to be given to a professional opinion has to be viewed and qualified by that limitation.

We will consider this finding when we weigh the opinion of Dr. Michael MacKay in juxtaposition to the opinion of Dr. Janine Johnston, Dr. Garber and Dr. Blakely.

We now return to the finding of Mr. Strutt that the Appellant was not a credible witness. Of the utmost importance to any critical assessment is, where possible, to examine firstly the witness or patient. Drs. Johnston and Garber saw the Appellant, Dr. Blakely and Dr. MacKay did not. But, in fairness to Dr. Blakely and Dr. MacKay, they were only engaged by MPIC to do a "paper review".

Heather Gaskin, we must assume, recognized some limitation in Dr. Blakely's review when she, in a note to file dated June 18, 2002, observed "our Health Care Consultant have reviewed this file on numerous occasions but we do not have a consultant with vertigo expertise".

The Appellant, in late 2001 on a referral from Dr. Werier, consulted Dr. Lesley Garber, a specialist in Otolaryngology, about the Appellant's hearing loss. Dr. Garber was called at the hearing before us by the Appellant and gave evidence before the panel. In addition to the hearing loss, Dr. Garber testified, the Appellant complained of vertigo. Dr. Garber saw the

Appellant on November 29, 2001, December 1, 2001 and October 21, 2003. The Appellant went to a vestibular lab on November 18, 2003 and December 23, 2003 to get tested. Dr. Garber's diagnosis was that the Appellant had hereditary otosclerosis.

Dr. Garber gave his opinion after first examining the Appellant that her cervical vertigo was caused by the motor vehicle accident. He says in his letter of opinion of February 26, 2004:

In regard to question a) the cause or causes for her vertigo, the likelihood is that she has a form of cervical vertigo related to her motor vehicle accident. A complicating issue with this is that she also has well documented otosclerosis which is fixation of the bones of hearing. There can be an inflammatory component to otosclerosis, and many patients do complain of intermittent, moderate to severe vertigo with this condition. It is possible that these two issues are complicating each other. The motor vehicle accident in of itself would not have worsened her otosclerosis or caused vertigo to otosclerosis to become worse. (underlining added)

In a further opinion dated November 3, 2004 to Ralph D. Neuman, the Appellant's counsel, Dr. Garber states:

In answer to question b, the interpretation of the E.N.G. results from testing performed November 18, 2003 were read as normal by Dr. Blakley. These test results can be somewhat contradictory. She previously had a similar test under the care of Janine Johnston which was suggestive of a unilateral vestibular loss. However, Dr. Johnston did concur that her diagnosis was an exacerbation of some type of cervical vertigo in her notation. This contradiction in test results is not overly surprising. E.N.G. results can vary in the same patient from day to day. Also, different techniques used can give different results over time.

In answer to question c, there may have been some vestibular loss secondary to otosclerosis which does occur, and I would concur with Dr. Johnston's assessment that she has lost vestibular compensation due to the neck injury. The other possibility is that she has a primary form of cervical vertigo related to her whiplash injury immediately post-MVA. (underlining added)

MPIC relies in large part on the opinion of Dr. MacKay, as set forth in his report of January 9, 2001 to Ms Gaskin (Tab 150). Because it is this opinion on which MPIC largely relies, the

following is my summary with my apposite observations. Dr. MacKay notes that the collision was “. . . a low velocity collision” and that it would or should not result in any “cervical dysfunction”. He then continues an extensive paper review:

The panel has had the benefit of reviewing Dr. MacKay’s opinions of September 22, 2000, January 9, 2001, February 7, 2002, July 6, 2002 and April 14, 2003 and of hearing his viva voce testimony.

Dr. MacKay’s reports are premised on the fact that the claim arose as a soft tissue injury arising from a minor rear end collision. He was of the opinion that this injury was probably not the cause of:

- a) her physical symptoms,
- b) dizziness, and
- c) her continuing disability of driving as a long haul truck driver.

He was asked by MPIC to do a paper review. This was the limitation of his retainer by MPIC to do only paper review and not a personal examination.

On cross-examination he allowed that “time constraints” only permitted a paper review. In his first written report of September 22, 2000 he concluded that:

- a) the claimant “sustained a minor strain to her cervical spine as a result of the collision in question”.
- b) “There is no documentation identifying [M.M.] as developing a medical condition as a result of the collision in question that would account for her symptoms of dizziness and nausea. Dr. Mills did not identify any objective physical findings that would

suggest a musculoskeletal problem is contributing to her symptomatology. Dr. Gomori did not identify any neurologic abnormality that would account for her symptoms. Dr. El-Khatib identified psychological difficulties that might contribute to her symptomatology.”

- c) “From a physical standpoint, there is insufficient objective medical evidence that would indicate [M.M.] is unable to perform her occupation as a semi-truck driver. The functional assessment performed at PAR Health Services identified [M.M.] as being capable of performing her work duties. Based on the results of the pain questionnaires [M.M.] completed, it appears that she perceives herself as being severely disabled even though there is insufficient medical evidence to substantiate this perception.”

Dr. MacKay, on January 9, 2001, gave a further report. He reviewed MPIC’s file containing medical and psychological opinions and reports. He continued of the view that the accident did not cause the vertigo resulting in her inability to continue with her occupation. In response to the question:

3. Is [M.M.] totally disabled from performing the essential duties of a long haul truck driver as a result of the medical conditions arising from the collision in question, and if so, would she benefit from the implementation of a work hardening program?

....

- [M.M.’s] initial clinical findings were in keeping with a mild musculotendinous strain and/or ligamentous sprain, which did not result in a functional impairment.

.....

It is my opinion that a pathophysiologic explanation that would account for the significant change in [M.M.’s] symptom presentation over time does not exist.

.....

2. The medical evidence does support the provision of psychological interventions in

the management of [M.M.'s] various symptoms. The information indicates that her symptom complex is psychologically based and likely stems from the various disorders Dr. El-Khatib identified, which have not been shown to be causally related to the collision in question.

3. From a physical standpoint there is insufficient objective medical evidence identifying a condition arising from the collision in question that would prevent [M.M.] from returning to her pre-collision occupational duties in some capacity.

In a further letter of February 7, 2002 Dr. MacKay was of the same opinion that the Appellant's plight and condition was basically psychological:

. . . It was Dr. Johnston's recommendation that treatment should be directed towards improving myofascial pain, which appears to contribute to her symptom of dizziness.

.....

#### **RESPONSE TO QUESTIONS**

1. *Based on the new information, has the claimant reached pre-accident functional level?*

Based on the information provided by [M.M.], it appears that she has not reached her pre-accident functional level.

The medical evidence does not objectively identify a condition arising from the collision in question that, in turn, would account for the vast array of symptoms [M.M.] reports as rendering her unable to perform at her pre-accident level of function.

.....

3. *Are further therapeutic interventions (i.e. physiotherapy and medications) a medical requirement in the management of the conditions arising from the incident in question?*

[M.M.] has diagnosed as having various conditions that are not causally related to the incident in question (i.e. vestibular disorder, white matter, changes and cervical disc pathology). The information indicates that [M.M.] continues to experience myofascial pain that Dr. Johnston feels contributes to her vestibular symptomatology.

...

In a further letter of July 16, 2002 (Tab 34) Dr. MacKay considered the Appellant's complaints of dizziness as follows:

. . . From an objective standpoint there is very little evidence at this time that identifies an impairment of cervical function that in turn would lead to the inability for her to compensate for her vestibular disorder.

. . . . .

Conclusion

The information presently contained in [M.M.'s] file indicates that [M.M.'s] inability to return to her work as a long-haul truck driver is a result of symptoms. From an objective standpoint, a condition has not been identified that in turn would disable her from her long-haul truck driving duties. It is documented that [M.M.'s] pre-existing vestibular order by itself does not preclude her from performing her occupational duties. The diagnostic tests performed to assess [M.M.'s] symptoms have not identified a condition that can be causally related to the incident in question that in turn would account for her symptoms and substantiate her perceived occupational disability. In other words if [M.M.] did not report any problems with dizziness there would be no reason why a health care professional would not advise her to return to her occupational duties at this time. (underlining added)

. . . . .

The actual cause of [M.M.'s] cervical muscle spasm is not known . . .

. . . . .

. . . Based on the information indicating that [M.M.] is able to safely drive a personal van then this would indicate that she is able to work as a long-haul truck driver.

He was still of the opinion that the Appellant did not and was not suffering from cervical vertigo.

In a further and final letter of April 12, 2005 Dr. MacKay writes:

. . . The first documentation of symptoms of dizziness was noted in a report provided by Dr. Mills dated March 29, 2000. I am uncertain as to whether the symptoms were true vertigo. Prior to this, there is no documentation of [M.M.] reporting symptoms of vertigo. One would expect that if [M.M.] was compensating well for any pre-existing vestibular dysfunction arising from the otosclerosis, then symptoms of vertigo would have developed shortly after the incident in question (at a time when cervical dysfunction would be greatest). This does not appear to be the case. In fact, the symptoms did not develop until a stage after which she had shown improvement with regard to her cervical and shoulder symptomatology. It is not medically plausible [M.M.] lost her ability to compensate for any vestibular problem at a time when she was improving with the treatments provided to her.

CONCLUSION

Based on my reviews of [M.M.'s] file, the following conclusions are made:

1. An underlying cause for [M.M.'s] symptoms has not been identified. The only condition that has been confirmed that might account for her symptoms is that of otosclerosis. It is doubtful that her symptoms are a byproduct of a mild cervical strain she might have developed secondary to the incident in question. It is my opinion [M.M.'s] clinical presentation does not fit the label referred to as cervical vertigo.
2. [M.M.] has not been identified as having a physical impairment of function that precludes her from carrying a Class V (sic) license. If [M.M.] is able to hold a Class I (sic) license, it is my opinion she is safe to drive a vehicle with the symptoms she reports. With this in mind, [M.M.] does not have a physical impairment of function that precludes her from securing a Class V license. The information leads me to conclude that Dr. Garber's opinion as it relates to this issue is based on symptoms [M.M.] reports and her perceived level of dysfunction. [M.M.] has not been identified as having a vestibular abnormality that in turn would preclude driving a Class V vehicle.
3. It is not medically probable [M.M.] will experience further subjective improvement in symptoms with supervised treatment interventions. The information on file does not indicate [M.M.] has been identified as having a specific condition that in turn would require ongoing supervised treatment. It is not medically probable [M.M.'s] neck symptoms are a byproduct of a mild cervical strain that might have developed secondary to the incident in question.

Dr. Garber had the advantage of Dr. Johnson's and Dr. Blakley's earlier reviews and opinions and identified the basic issue of the claimant's complaints of dizziness as it related to the accident. When asked, by counsel for the claimant, as to whether a "chart review" would be adequate for full and proper diagnoses, Dr. Garber said "a chart review would be inadequate" and in cross examination he said "A paper review can not be conclusive".

There is no question that some of the listed symptoms are subjective and it would be in our respectful view require a personal physical examination and analysis by an experienced medical professional to determine if they were invented and/or exaggerated. In the absence of that assessment, the weight to be given to a professional opinion has to be viewed and qualified by that limitation.

In the result, we prefer the opinion of Dr. Garber.

**Appellant's marriage, employment and post-employment history**

The Appellant and her husband, R.M., testified before the panel. The Appellant is [text deleted] and married to R.M. She graduated with a BA in [text deleted] from [text deleted] in Religious Studies and had, at that time, intended to become a Minister in the United Church. This did not turn out. She became a waitress and then had her own business as a maid service from [text deleted]. She got married, had a child and divorced. She met and married her husband, R.M. Menzies, some [text deleted] years ago. It was a second marriage for both.

Her husband was, before becoming a truck driver, a Pastor in the United Church. She with a Class I license, became a long-haul truck driver in April of [text deleted]. She and her husband became a team as long-haul truck drivers for [text deleted] from [text deleted] to the time of the accident. As part of the team he did most of the mechanical work handling dollies, loading and unloading, and in general did the heavy work while she did the log and paper work, public relations, some mechanical work and customs work. The both did their shifts as drivers coordinating sleep and wake schedules. Their work schedule and time off consisted generally of nine (9) to ten (10) days, each driving on the road for five (5) hour shifts and resting for the other five (5), and spending four (4) days at home.

Fatigue on the road was a besetting condition. The truck loaded weighed approximately 80,000 pounds and would be driven on the road at average speeds of 60 mph. There were some "blind spots" and vibrations in the truck during operation contributing to fatigue, thus the driver had to be alert, careful and cautious in all aspects of the operation. Prior to the accident the team's

relationship and operation were harmonious and complementary.

After the accident she was diagnosed with otosclerosis. From a review of the medical reports this is a condition sometimes described as unilateral vestibular loss.

The Appellant acknowledged in her evidence that this condition was hereditary and did not claim that it was the cause of her disability to continue with her job.

Upon reporting the accident to [text deleted], [text deleted] terminated the team operation and R.M. continued his employment without his wife.

Her employer, within one month of the accident, asked her to go back to work. She tried and lasted on the truck a day and a half. Consequently, a planned trip to the [text deleted] had to be aborted.

Then, in mid-March 2000, her employer dispatched the team to Vancouver. Enroute she could not do her five (5) hour shifts and her husband had to do most of the driving. Following Vancouver they were to continue on to Kansas City. On their employer being advised of the Appellant's condition they were directed to return to Winnipeg.

Throughout these times she was undergoing therapy with Robert Herman, a Physiotherapist, and taking pain medication. Her principal complaints shortly after the accident related to vertigo, her swollen back, pain in the left shoulder blades, nausea, inability to sleep, ringing in her ears and tingling.

In June 2000, on the direction of MPIC, PAR Health Service (Michelle Gibbs) was engaged to give the Appellant a road test. Her husband drove the truck (around the Winnipeg Perimeter). The Appellant was in the jump seat. She, during the test, became nauseous and dizzy. It took approximately one-half hour after the ride for the symptoms to subside. She advised Michelle Gibbs by "e-mail" of this condition. The Appellant said she had nausea, lightheadedness, dizziness, watery and blurry eyes and couldn't return to her driving job but she would like to.

She has tried to do more sedentary work. She worked briefly in a dress shop. She had to give it up because her symptoms prevented her from doing the job reliably. She now does volunteer work.

Her husband's evidence as to her condition post-accident confirmed the Appellant's testimony and is summarized as follows:

- A. following the accident she was stiff and uncomfortable,
- B. in showering she was not aware of the heat of the hot water,
- C. she complained of dizziness from mid-January 2000 on,
- D. during her movements she would abruptly come to a halt and had to sit down,
- E. her back was swollen, not balanced and carried her right shoulder higher than the other,
- F. she was unable or did not do housework in contrast to her pre-accident role of being a "clean freak",
- G. she liked to cook but after the accident that changed, and
- H. she was at times nauseous, suffered from severe headache, and had little or no muscle strength.

He said he would be happy to continue the team operation today, if she were well enough.

R.M. and the Appellant gave evidence before the panel in a credible manner.

Dr. Lesley Garber, a specialist in Otolaryngology (ear, nose and throat specialist) was consulted by the Appellant in late 2001 on a referral by Dr. Werier in respect to hearing loss. He diagnosed her hearing loss as clinical or congenital vestibular disorder, confirmatory of Dr. Johnson's earlier opinion. The hearing loss he said was hereditary and was not related to the accident.

The panel prefers the opinion of Dr. Garber that there is a causal relationship of the claimant's dizziness and the accident preventing her from resuming her occupation as a long-haul truck driver and entitlement to related expenses from February 26, 2002 and IRI from March 10, 2002 under the MPIC Act. Thus, the appeal is allowed on the above terms.

### **Decision**

The appeal is allowed and the payments to the Appellant are reinstated from February 26, 2002 and for IRI from March 10, 2002.

Dated at Winnipeg this 22<sup>nd</sup> day of February, 2006.

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**HONORABLE WILFRED DE GRAVES**

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**DR. PATRICK DOYLE**

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**PAUL JOHNSTON**