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## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by D.H.**  
**AICAC File No.: AC-04-104**

**PANEL:** Mr. Mel Myers, Q.C., Chairperson  
The Honourable Mr. Wilfred De Graves  
Mr. Paul Johnston

**APPEARANCES:** The Appellant, D.H., was represented by Mr. Bob Tyre of the  
Claimant Adviser Office;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Mr. Dean Scaletta.

**HEARING DATE:** September 14, 2004 (Pre-Hearing Meeting), February 6,  
2006, May 5, 2006 and June 8, 2006

**ISSUE(S):** Discontinuance of Appeal

**RELEVANT SECTIONS:** Section 174 of The Manitoba Public Insurance Corporation  
Act (the '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

D.H. (hereinafter referred to as the 'Appellant') was involved in a motor vehicle accident on November 26, 1994. As a result of this motor vehicle accident she suffered injuries, including a forehead laceration, fracture of left hand, concussion, fractured rib, multiple strains and contusions. Due to these injuries the Appellant was unable to continue her employment as an Estate Counselor with the [text deleted] and commenced receiving Income Replacement Indemnity ('IRI') benefits.

### **Case Manager's Decision**

On February 17, 2003 the Appellant received a letter from MPIC's case manager informing her that effective March 2, 2003 the Appellant's IRI benefits would be terminated.

### **Internal Review Decision**

The Appellant filed an Application for Review of the case manager's decision on March 11, 2003. The Internal Review Officer conducted an Internal Review hearing by telephone on April 16, 2003 and on May 27, 2003. On May 30, 2003 the Internal Review Officer issued a decision confirming the case manager's decision and rejecting the Appellant's Application for Review pursuant to Section 160 of the Act. Section 160 of the Act states:

#### **Corporation may refuse or terminate compensation**

**160** The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person (a) knowingly provides false or inaccurate information to the corporation;

The Internal Review Officer based his decision to confirm the case manager's decision and reject the Appellant's Application for Review on the videotape surveillance conducted by MPIC and the medical opinion of Dr. Craton, the Medical Director of MPIC's Health Care Services.

In his decision the Internal Review Officer noted:

1. . . . There are numerous reports contained in the medical report section of your claim file confirming that you have continued to complain of chronic neck and back pain, as well as psychological deficits including anxiety and agoraphobia which you say have prevented you from returning to any form of gainful employment.
2. that at various times MPIC had undertaken an investigation into the Appellant's level of activity, confirmed by a series of eleven (11) surveillance videotapes during the period June 1998 and February 2002 and MPIC noted a discrepancy between the

- activity level of the Appellant on the videotapes as compared to the information provided by her to MPIC directly or through the Appellant's caregivers.
3. that the medical opinion of Dr. Craton, who pointed out that the Appellant had a significant "tumultuous psychosocial and psychodynamic" pre-accident history which includes a diagnosis of borderline personality disorder and depression with suicidal attempts, none of which are connected to the motor vehicle accident injuries.
  4. that the validity and accuracy of the Appellant's representations to MPIC had been disproven by the investigation justifying the invoking of Section 160 of the Act and for these reasons dismissed the Appellant's Application for Review and confirmed the case manager's decision.

**Appellant's Application to appeal the Internal Review Officer's Decision**

On July 21, 2003 the Appellant wrote to the Commission setting out the grounds of her appeal and stated:

I am appealing the decision of May 30, 2003, by Mr T.B. Kumka.

This appeal was received by the Commission on July 24, 2003. The Commission's secretary wrote to the Appellant, who at that time was residing in [text deleted], on August 5, 2003 enclosing a Notice of Appeal form, a copy of the Commission's Guidelines for Hearings, and a pamphlet providing information about the operations of the Commission. In this letter the Commission's secretary:

1. requested the Appellant to complete the Notice of Appeal form, attach a copy of the MPIC Internal Review Office decision that the Appellant was appealing and return them to this office.
2. advised the Appellant:

After we receive your completed Notice of Appeal, we will advise MPI of your appeal and obtain from it a copy of your complete file. Shortly thereafter, we shall send you copies of all portions of your file that are relevant to your appeal.

We are anxious to fix a date for the hearing of your appeal as soon as we possibly can. We cannot do this until all the evidence you wish to use in support of your appeal has been submitted to this office. After you receive your file from us, please contact me as soon as you are sure that there is no further medical evidence or other material you wish the Commission to see. As soon as I know that both you and MPI are ready to proceed, we can fix a date for your hearing.

Please do not hesitate to call me if you have any questions.

The Appellant did not complete the Notice of Appeal as requested by the Commission's secretary but wrote to the Commission on September 2, 2003 from Winnipeg and stated:

**RE Notice of Appeal (sic) of MPIC Decision**

I received your information package and have reviewed carefully. I feel I will not be able to continue with the Appeal. I have no one that can assist me in doing the appeal nor can I afford to continue. I do not have the ability to do what is asked of me and since I lived in [text deleted] for the last three years I can (sic) afford to bring witnesses to Winnipeg to speak on my behalf. This is very difficult for me to understand everything that is expected of me to go any further and I cannot afford a lawyer nor other expenses. Although I feel I was right and deserve to continue receiving benefits, I must withdraw my appeal.

Thank you for your time. If you need to contact me I can be reached at 204-832-0783 any time after the 10<sup>th</sup> of September.

On September 12, 2003 the Commission's Director of Appeals, Ms Laura Gowerluk, wrote to the Appellant and stated:

This will confirm our telephone conversation today wherein you stated that you do not intend to file a Notice of Appeal. I will therefore close our file.

Please do not hesitate to call me if you have any questions.

The Commission then proceeded to close its file in respect of this appeal.

**Appellant's Notice of Appeal – June 3, 2004**

On June 3, 2004 the Appellant wrote to the Commission and enclosed a Notice of Appeal dated June 3, 2004. In her letter she stated:

In March of 2003 I was living in [text deleted] with my common law. 2 weeks after I was notified by MPIC, my boyfriend decided to end relationship. I was dealing with a lot and had no support to Appeal.

Now that I am back in Winnipeg and feel strong enough to follow through with Appeal I am asking for assistance to complete Appeal. I have difficulty reading and understanding forms documents and legal terms.

I do have a new Dr. B Lavellee who has referred me to a social worker and Psychiatrist (sic) by mid July. I also have two letters from friends who have witnessed bad events; such as falling, blackouts, forgetfulness and getting loss (sic).

I am gathering information but would like to know what I need for appeal.

I am therefore requesting the Appeal Commission reopen the file.

In her Notice of Appeal she stated:

I am not able to function on daytoday. Confusion & frustration & perception is a constant problem, as well as being lost. I am not able to function in crowded (sic) areas or stressful situation. I am insecure in unfamiliar. I find it difficult to manage on my own bill payment, finances house hold chores. Things are not better if anything they have gotten worst. My forgetfulness (sic) has caused a fire in kitchen, attend appointments anything in day day living can be a challenge.

The Notice of Appeal was received by the Commission on June 7, 2004, which was beyond the 90-day period as provided in Section 174 of the Act in order for an Application to Appeal MPIC's decision to be considered by the Commission.

Section 174 of the Act states:

**Application to appeal from review**

**174** A claimant may, within 90 days after receiving notice of a review decision by the corporation or within such further time as the commission may allow, appeal the review decision to the commission.

As a result, the Commission's Director of Appeals wrote to MPIC on June 21, 2004 and stated:

I enclose a copy of a letter dated June 3, 2004, received from [D.H.]. [D.H.] is requesting that the Commission allow additional time for filing a Notice of Appeal with the Commission in connection with MPIC's Internal Review Office decision dated March, 2003.

The Commission is considering [D.H.'s] request and would appreciate receiving any written comments that you may have to offer. If I do not hear from you by July 15, 2004, I will assume that you have no objections or comments to offer with respect to the Commission allowing the additional time.

In reply the MPIC's Director of Legal Services wrote to the Commission's Director of Appeals in a letter dated June 30, 2004 and stated:

In response to your letter of June 21, 2004, the Corporation is opposed to [D.H.] being allowed additional time to file a Notice of Appeal for the following reasons:

Firstly, the request by her for such consideration comes approximately one year after the date of the Internal Review Decision;

Secondly, [D.H.] does not offer cogent reasons for the delay. She is obviously able to read and write. If she had sought assistance from the Commission to complete the necessary forms, we know that such help would have been provided to her;

Thirdly, the Corporation has been prejudiced by the delay in that it lost the opportunity to monitor the claim during the past year;

Lastly, without delving into the merits of the claim, suffice it to say, the questionable validity and accuracy of representations made by [D.H.] to the Corporation were not insignificant factors in the decision to terminate her benefits.

The Commission decided that a Pre-Hearing should be conducted for the purpose of determining whether the Appellant had provided a reasonable explanation for failing to file her appeal within

the ninety (90) day limit in order to permit the Commission to determine whether or not it should allow further time for the filing of the appeal pursuant to Section 174 of the Act.

#### **Pre-Hearing September 14, 2004**

This Pre-Hearing convened on September 14, 2004 and the Appellant attended, together with her friend S.L., who acted as her representative. At that commencement of the hearing MPIC's counsel requested an adjournment in order to review the entire file and this adjournment was granted.

During the adjournment, the Commission discovered, on a review of it's files, that the Appellant had previously discontinued her appeal in this matter by letter to the Commission dated September 2, 2003. The Commission's Director of Appeals wrote to both the Appellant's representative, S.L., and MPIC's legal counsel, informing them of these matters.

The Commission set a new date for the hearing for February 6, 2006.

#### **Hearing February 6, 2006**

At the commencement of this hearing the Appellant's representative, S.L., requested an adjournment in order to obtain a medical report from Dr. Khani. Mr. Scaletta, representing MPIC, objected to a further adjournment and wished to proceed with the hearing on February 6, 2006.

After hearing submissions from both parties the Commission determined that Dr. Khani's report may be arguably relevant in respect of the Appellant's Application for an Extension of Time. The Commission reluctantly granted the Appellant an extension of time and set a new date for

the hearing pre-emptorily for May 5, 2006.

The Commission was subsequently informed that the Appellant arranged for the Claimant Adviser Office to represent her in these proceedings.

### **Hearing May 5, 2006**

The hearing commenced on May 5, 2006 and Mr. Bob Tyre, of the Claimant Adviser Office, represented the Appellant, while Mr. Dean Scaletta represented MPIC.

The Commission advised both parties that, having regard to the Appellant's initial decision to discontinue her appeal in this matter, the issue for determination by the Commission before dealing with the merits of the appeal was not whether the Appellant had provided a reasonable explanation for the delay in filing the Notice of Appeal, but whether the Appellant's letter of September 2, 2003, received by the Commission on September 4, 2003, amounted to a withdrawal and an abandonment of the Appellant's appeal filed July 24, 2003.

At this hearing the Appellant testified that:

1. prior to the motor vehicle accident she had an excellent job with the [text deleted], was making a good salary, and was supporting her family on her own.
2. as a result of the motor vehicle accident her life was destroyed, she was unable to continue to work due to a number of psychological problems including depression, loss of memory, blackouts, anxiety attacks and, as well, she was unable to maintain a relationship with her own family.
3. while living in Winnipeg she established a relationship with a male person and moved with him to [text deleted] to live with him there.

4. two (2) weeks after MPIC terminated her IRI benefits on March 2, 2003 the Appellant's male partner decided to unilaterally end their relationship and demanded that the Appellant leave his premises where she had been living with him.

The Appellant further testified that:

1. she returned to Winnipeg in the month of June 2003 without any financial assistance;
2. was forced to live in her daughter and son-in-law's basement premises, together with a number of unpacked boxes containing her personal possessions;
3. these events had an adverse affect on her life;
4. this was an exacerbation of her psychological problems which rendered her unable to cope with the demands of daily living.

This testimony confirmed in substance her written comments that she had set out in her Notice of Appeal dated June 3, 2004 which stated:

I am not able to function on daytoday. Confusion & frustration & perception is a constant problem, as well as being lost. I am not able to function in crowed (sic) areas or stressful situation. I am insecure in unfamiliar. I find it difficult to manage on my own bill payment, finances house hold chores. Things are not better if anything they have gotten worst. My foregetfullnes (sic) has caused a fire in kitchen, attend appointments anything in day day living can be a challenge.

The Appellant further testified that, having regard to these circumstances and her psychological problems, she felt overwhelmed and, as a result, she was unable to continue with her appeal.

The Appellant's daughter, in her testimony, described her mother's psychological condition both before and after the motor vehicle accident and stated that:

1. before the motor vehicle accident her mother was a competent, independent person

who functioned effectively in her daily life both at home and at work.

2. after the motor vehicle accident her mother was a totally changed person who became extremely anxious and depressed, unable to work or cope with her daily life, and unable to continue satisfactory relationships with members of her family.
3. when her mother returned to Winnipeg in June of 2003 her mother had no financial resources, was compelled to live in the basement of her premises, was dysfunctional, and needed a great deal of support and assistance in order to carry out her daily activities.

S.L., a family friend and neighbour, who knew the Appellant before the motor vehicle accident, also testified as to the psychological condition of the Appellant before and after the motor vehicle accident. S.L. testified that:

1. prior to the motor vehicle accident the Appellant was an independent, resourceful, strong person who was able to simultaneously work, look after her family and cope with the activities of every day life.
2. after the motor vehicle accident the Appellant was depressed, anxious, forgetful, and had difficulty functioning independently.
3. upon her return to Winnipeg in the Spring of 2003 the Appellant was dysfunctional and was unable, without assistance, to carry out her routine daily activities.

MPIC did not call any witnesses during the proceedings.

### **Submissions**

At the conclusion of the hearing on May 5, 2006 the Commission heard submissions from both parties.

MPIC's legal counsel submitted that:

1. the Appellant had abandoned her appeal by not completing and returning the Commission's Notice of Appeal form which was forwarded to her by the Commission on August 5, 2003.
2. the Notice of Appeal, dated June 3, 2004, wherein the Appellant had appealed the decision of the Internal Review Officer, was filed approximately nine (9) months later and was a period one (1) year after the Internal Review decision was issued.
3. the only issue to be dealt with at this appeal was whether the Appellant had a "reasonable excuse" for the late filing of her Notice of Appeal and, as a result, was entitled to an extension of time pursuant to Section 174 of the Act.
4. a review of the evidence demonstrates that the Appellant had not established a reasonable excuse for the late filing of her Notice of Appeal and, therefore, an extension of time should not be granted to the Appellant pursuant to Section 174 of the Act.

The Claimant Adviser, on the other hand, submitted that upon review of the evidence, having regard to the Appellant's traumatic experiences on her return to Winnipeg and her psychological problems, the Appellant had established, on a balance of probabilities, that she had a reasonable excuse for a late filing of her appeal. As a result, the Commission should exercise its discretion and permit the Appellant to obtain an extension of time to proceed with her appeal pursuant to Section 174 of the Act.

At the conclusion of the submissions by both parties, the Commission panel recessed the appeal proceedings for a short period of time. Upon reconvening the proceedings the Commission advised both parties that the Commission was rejecting MPIC's position that the Appellant had commenced her appeal on June 3, 2004 and determined that the Appellant's appeal had commenced on July 21, 2003 when she forwarded a letter to the Commission which stated:

I am appealing the decision of May 30, 2003, by Mr T.B. Kumka.

The Commission determined that:

1. the Appellant's letter of July 21, 2003 initiated the Appellant's appeal with the Commission.
2. the Appellant's Notice of Appeal dated June 3, 2004, which the Appellant subsequently forwarded to the Commission, did not initiate the appeal proceedings and was merely a procedural step in the process of having the Commission hear the merits of the appeal.

### **Abandonment or Discontinuance of Appeal**

As well, the Commission rejected MPIC's submission that the Appellant had abandoned the appeal when she wrote the Commission on September 2, 2003. The Commission determined that the Appellant's actions in writing to the Commission on September 2, 2003 did not constitute an abandonment of the appeal, but constituted a discontinuance of the appeal. The Commission advised both parties that:

1. there is a significant difference between an abandonment of an appeal and a discontinuance of an appeal.
2. an abandonment of an appeal occurs where there is a total inaction by the Appellant in processing the appeal.

3. a discontinuance of the appeal occurs when there has been a unilateral act of withdrawal by the Appellant.
4. the burden of proof upon an Appellant is greater in respect of a discontinuance of an appeal than in respect of an abandonment of an appeal.

The Commission noted that both the Claimant Adviser and MPIC's legal counsel framed their submissions on the basis that there was an abandonment of the appeal rather than a discontinuance. The Commission further noted that during the course of MPIC's legal counsel's submission he referred to a number of legal authorities, including a decision by Mr. Justice Esson in *Pacific Centre Ltd. v. Micro Base Development Corp.*, [1990] B.C.J. No. 2042 (B.C. C.A. [In Chambers]).

After the submissions of both parties the hearing adjourned and, on May 9, 2006, the Commission wrote to both parties confirming the Commission's decision that the Appellant's actions constituted a discontinuance rather than abandonment of the appeal and stated:

Mr. Scaletta, during the course of his submission, provided the Commission panel with several legal authorities for our consideration, including the case of *Warford v Zyweck*, a decision of Mr. Justice Esson of the British Columbia Court of Appeal [In Chambers]. In his Judgment Mr. Justice Esson referred to *Pacific Centre Ltd. v. Micro Base Development Corp.*, [1990] B.C.J. No. 2042 (B.C. C.A. [In Chambers]), as follows:

. . . In that case the notice was called a "notice of discontinuance". The facts were that, a few days after it was filed, the appellant had a change of heart and instructed his counsel to seek to withdraw it. Hinds J.A. considered a number of authorities, mostly from other jurisdictions but including the decision of this Court in *Adam v. Insurance Corp. of British Columbia (1985)*, 66 B.C.L.R. 164 (B.C. C.A.) which deals with the analogous issue of withdrawal of a notice of discontinuance in the Supreme Court of British Columbia. Hinds J.A. concluded his reasons by saying:

The filing of the notice of discontinuance was a deliberate act done with commendable dispatch following the receipt of instructions from the appellant. It appears that shortly thereafter the appellant had a "change of heart". Nothing in the material reveals the reason for the change in instructions. In the absence of the establishment of any reason for the

filing of the notice of discontinuance, such as – inadvertence, mistake or misapprehension, or of “other grounds” which would be of a compelling nature, it would be inappropriate to exercise my discretion and grant leave to set aside the notice of discontinuance.

The filing of a notice of discontinuance of an appeal is a serious matter. Except in exceptional circumstances, there should be an expectation of finality resulting therefrom. Exceptional circumstances of the kind above referred to are not present on this application. I therefore decline to exercise my discretion and set aside the notice of discontinuance.

Mr. Justice Esson concluded:

I would state the principle as follows. Because there should be an expectation of finality flowing from the filing of a notice of discontinuance or abandonment, such a step is a serious matter from which, in the absence of exceptional circumstances of a compelling nature, the court will not relieve the appellant.

The Commission panel, before determining whether these legal principles apply to this appeal, requests the parties to advise us if they wish to submit any further evidence or argument in respect of this issue. If either party makes such a request the Commission will reconvene the hearing at a time convenient to both parties.

We would request a reply within one week of the date of your receipt of this letter.

In response, MPIC’s legal counsel wrote to the Commission on May 10, 2006 and stated:

I have reviewed your letter dated May 9, 2006. In my view, the legal principles to be distilled from the two British Columbia Court of Appeal decisions are:

1. The filing of a document analogous to a notice of discontinuance is a deliberate act.
2. The filing of such a document is a serious matter.
3. In the absence of evidence of that the document was filed inadvertently, or by mistake, it is inappropriate to set the document aside in the absence of exceptional circumstances of a compelling nature.
4. Absent exceptional circumstances of a compelling nature, there is a clear expectation of finality flowing from the filing of such a document.
5. A “change of heart” does not constitute an exceptional circumstance of a compelling nature.

I believe these principles apply to the specific issue being considered by the panel.

The Claimant Adviser, in response to the Commission's letter, wrote to the Commission on May 15, 2006 and indicated that:

1. the May 5, 2006 hearing had only dealt with a time period between July 21<sup>st</sup> and September 2<sup>nd</sup>, 2003.
2. he wished the opportunity of submitting further evidence and argument on the Appellant's physical and psychological condition at the relevant times before July and after September 2003.
3. he wished to call Dr. Lavallee in support of the Appellant's position.
4. he disagreed with MPIC's submission, dated May 10, 2006, that it was incorrect to suggest that the Appellant simply had a change of heart.

#### **Hearing June 8, 2006**

As a result of the Claimant Adviser's request, the Commission reconvened the appeal hearing on June 8, 2006 and Dr. Lavallee was called by the Claimant Adviser to testify. Dr. Lavallee testified that:

1. he saw the Appellant in the month of October 2003.
2. he subsequently became her personal physician and provided medical services to the Appellant on several occasions since that time.
3. he had a great deal of experience in dealing with persons who were in crisis situations having worked as an emergency room doctor and at the Aboriginal Health & Wellness Centre.
4. his diagnosis, after examining the Appellant in the month of October 2003, was that she was suffering from a post-traumatic stress disorder.
5. he described this condition as a condition where the Appellant was extremely depressed, dysfunctional, unable to concentrate, confused, was suffering from panic

attacks, loss of memory, blackouts and, as a result, had lost all self-confidence.

6. at that time he placed her on a number of medications including anti-depressants.

Dr. Lavallee further testified that:

1. in his experience the condition of a post-traumatic stress disorder was caused when a person such as the Appellant suffered from a number of stressors over a long period of time and was not the result of a sudden onset.
2. in response to a question from the Commission, he stated that in his view the Appellant was suffering from this condition in the month of September 2003 and for several months prior to that time.
3. having regard to the Appellant's condition of a post-traumatic stress disorder in the month of September 2003, and having regard to the traumatic events that had occurred in the Appellant's life, she was overwhelmed by both her personal circumstances and her psychological problems and found herself incapable of carrying out her routine daily activities.
4. due to this disorder she was unable to continue with her appeal before the Commission and, as a result, she discontinued this appeal. [text deleted]
5. the medical treatment she received subsequent to his initial visit with her in the month of October 2003, stabilized her condition over the next six (6) months and thereafter she was in a position to proceed with her appeal.

MPIC did not call any witnesses to rebut the testimony of Dr. Lavallee.

### **Submissions**

In his submission MPIC's legal counsel submitted that:

1. having regard to Mr. Justice Esson's comments in *Pacific Centre Ltd. v. Micro Base Development Corp.* (supra) there was an absence of exceptional circumstance of a compelling nature which would permit the Commission to relieve the Appellant and permit her to proceed with the appeal on the merits.
2. notwithstanding the Appellant's emotional and physical problems and her personal circumstances, she was capable of writing a coherent letter to the Commission on July 21, 2003 appealing the decision of the Internal Review Officer.
3. in this letter the Appellant demonstrated her ability to analyze the Internal Review Officer's decision and set out the basis of her appeal.
4. the Appellant had acknowledged in her letter to the Commission, dated September 2, 2003, that she had received the information package from the Commission and she had reviewed it carefully.
5. this letter clearly set out the reasons why the Appellant did not wish to proceed with her appeal.
6. this letter clearly demonstrated that the Appellant was competent and fully understood the consequences of her action and, as a result, made a conscious decision to discontinue the appeal.
7. the Appellant, in her telephone discussion with the Commission's Director of Appeals on September 12, 2003, confirmed that she did not intend to pursue her appeal.
8. this conversation again demonstrated the Appellant's capacity to make an informed decision and is inconsistent with her allegation that she was overwhelmed at this time by her personal circumstances and her psychological condition.
9. as a result, the Appellant's testimony, wherein she alleged that she was overwhelmed and could not proceed with the appeal due to her personal circumstances and psychological condition, should be rejected by the Commission because it was

inconsistent with the manner in which she communicated with the Commission on several occasions.

10. Dr. N. Craton, the Director of Health Care Services for MPIC, had previously conducted an exhaustive review of the investigative and medical material and referred to reports of several medical doctors who indicated the Appellant was either malingering or to a lesser extent magnifying her impairments and that this conduct was consistent with the observed videotape which did not demonstrate the Appellant was suffering from any psychological impediments.

MPIC's legal counsel further submitted that:

1. there was a lack of medical evidence to support the Appellant's submission that due to the psychological problems she faced in September of 2003 she was so overwhelmed by her psychological problems and her circumstances that she was unable to continue with the appeal.
2. there would be enormous prejudice to MPIC if the Commission permitted the appeal to proceed on its merits since MPIC has not had an opportunity of case managing the Appellant's claim for the past three (3) years.
3. the decision to terminate the Appellant's benefits had been upheld on Internal Review, the appeal period had expired, the Appellant had a change of heart and MPIC justifiably assumed that the matter had been concluded.

MPIC's legal counsel therefore submitted, having regard to the totality of the evidence, that the Appellant's application to have the Commission hear the appeal on the merits should be dismissed.

Not surprisingly, the Claimant Adviser submitted that:

1. the Appellant had testified that once MPIC had terminated her IRI benefits her common-law partner ended their relationship. As a result the Appellant was left destitute, without any financial resources, and having regard to significant psychological problems she had been overwhelmed and was incapable of proceeding with the appeal.
2. the testimony of the Appellant's daughter, and her neighbour, S.L., corroborated the Appellant's testimony that in the month of September 2003 the Appellant was depressed, confused, extremely anxious, forgetful, dysfunctional and incapable of coping with the demands of her daily life.
3. Dr. Lavallee saw the Appellant in the month of October 2003 and determined the Appellant was suffering from a post-traumatic stress disorder and this diagnosis corroborated the testimony of the Appellant, her daughter and her neighbour as to the Appellant's psychological condition at that time.
4. the decision of the Appellant to discontinue her appeal was not due to change of heart but due to the following factors:
  - i. the existing psychological problems of the Appellant;
  - ii. the traumatic experience the Appellant suffered when separating from her male partner;
  - iii. the personal circumstances the Appellant found herself in when she returned to Winnipeg in the Spring of 2003.

The Claimant Adviser further submitted that:

- a. all of these factors exacerbated the Appellant's psychological condition resulting in the development of the post-traumatic stress disorder she was

suffering from in the month of September 2003;

- b. this disorder rendered the Appellant dysfunctional and resulted in her discontinuing her appeal in the month of September 2003.

### **Discussion**

The relevant provision of the Act in respect of this appeal is Section 174, which provides:

#### **Application to appeal from review**

**174** A claimant may, within 90 days after receiving notice of a review decision by the corporation or within such further time as the commission may allow, appeal the review decision to the commission.

Having regard to the decision in *Pacific Centre Ltd. v. Micro Base Development Corp.*, (supra), the Commission finds that the Appellant has established, on a balance of probabilities, that there are grounds of a compelling nature where it would be appropriate for the Commission to exercise its discretion and grant leave to set aside the Notice of Discontinuance, and pursuant to Section 174 to extend the time in order to allow the Appellant to appeal the Internal Review decision dated May 30, 2003 to the Commission.

In making this determination the Commission is dealing only with the exercise of its discretion under Section 174 and is not deciding whether the Internal Review Officer, in terminating the Appellant's entitlement to IRI, was or was not justified. That issue will be determined by the Commission, in the future, when it hears the appeal on the merits.

### **MPIC's Position**

MPIC's legal counsel asserted that the Appellant's allegations of her inability to pursue her

appeal due to her personal circumstances, which exacerbated her psychological condition, was totally inconsistent with the following evidence:

1. the surveillance video tapes produced between the period June 1998 and February 2002;
2. the medical opinion of Dr. Craton dated November 25, 2002;
3. the communications between the Appellant and the Commission's Director of Appeal during the month of September 2003.

MPIC's legal counsel further submitted that this evidence destroyed the Appellant's credibility in respect of her allegations relating to her personal circumstances and her psychological condition in the fall of 2003 and, as a result, the Commission should reject the Appellant's application for an extension of time.

The Commission has determined that central to the issue in these proceedings is the psychological condition of the Appellant in the month of September 2003 when the Appellant discontinued her appeal. The Commission notes that:

1. MPIC relied on the surveillance video tape evidence and the medical opinion of Dr. Craton in attacking the Appellant's credibility.
2. the surveillance videotapes were produced between the period June 1998 and February 2002, a period of one (1) to five (5) years prior to the critical period in the month of September 2003 when the Appellant discontinued her appeal.
3. Dr. Craton's medical report, dated November 25, 2002, was produced approximately eight (8) months prior to September 2003 and this report refers to events which occurred prior to the date of his report.

On the other hand, the evidence of the Appellant, her daughter and her neighbour, together with the medical report of Dr. Rousseau, and the medical report and testimony of Dr. Lavallee, is more timely and relevant in respect of the critical period in the month of September 2003 than the surveillance videotapes or Dr. Craton's medical report. MPIC's evidence in this respect does not address the psychological condition and circumstances of the Appellant in the month of September 2003 when she discontinued her appeal, while the evidence in support of the Appellant deals directly with this issue. For these reasons, in respect of the Appellant's credibility, the Commission gives greater weight to the evidence in support of the Appellant than it does to the evidence in support of MPIC.

The Commission notes, however, that a more timely and relevant submission made by MPIC is their argument that the Appellant's allegation that her post-traumatic stress disorder rendered her incapable of pursuing her appeal, is inconsistent with the communications between the Appellant and the Commission's Director of Appeals in the month of September 2003. The Commission, in considering the submission in the light of Dr. Lavallee's testimony relating to the Appellant's post-traumatic stress disorder (which testimony will be discussed later in this decision), rejects MPIC's submission. The Commission finds that there is a large difference in the capacity of the Appellant to have written two (2) letters and conducted a brief telephone discussion with the Director of Appeals in the month of September 2003 than in her ability to pursue an appeal before the Commission. The energy, effort and concentration required by the Appellant in order to prepare and conduct an appeal is significantly greater than that which was required to write her two (2) letters and conduct her brief telephone discussion with the Director of Appeals. However, in preparing for an appeal before the Commission, the Appellant, without any assistance, would be required to analyze numerous complicated medical reports, obtain the evidence of several witnesses, obtain a medical report from Dr. Lavallee, prepare herself and her

witnesses to testify and, as well, be able to conduct the appeal before the Commission. For these reasons the Commission concludes that, having regard to matters that the Appellant would have to carry out to conduct the appeal, the Appellant would not have been able to do so due to her post-traumatic stress disorder. The Commission further finds that notwithstanding this disorder the Appellant would have been able to have communicated with the Director of Appeals both in writing and over the telephone.

### **Appellant's Position**

The Commission notes that prior to the Appellant's accident on November 26, 1994 she had suffered from psychological problems. In respect of the physical and mental condition of the Appellant, the Internal Review Officer in his decision dated May 30, 2003 stated:

The accident giving rise to the within claim occurred on November 26, 1994. At the time of the accident you were employed as an estate counselor with the [text deleted]. There are numerous reports contained in the medical report section of your claim file confirming that you have continued to complain of chronic neck and back pain, as well as psychological deficits including anxiety and agoraphobia which you say have prevented you from returning to any form of gainful employment.

At page 3 the Internal Review Officer states:

In discussing "Conditions Unrelated to the Collision in Question" Dr. Craton points out that you had a significant "tumultuous psychosocial and psychodynamic" pre-accident history which includes the diagnosis of borderline personality disorder and depression with suicidal attempts. As to the lack of relationship to the motor vehicle accident, Dr. Craton's analysis was as follows (at page 8):

"One can conclude that on the balance of probability, the patient's tumultuous psychosocial and psychodynamic milieu prompted the borderline personality trait or disorder, the anxiety, and the depression in her life, which has been associated with suicidal attempts. . . .

The Commission finds that the Appellant has established, on a balance of probabilities, that in the month of September 2003 when the Appellant discontinued her appeal she had been suffering

from significant psychological problems which had been aggravated by her personal circumstances. The testimony of the Appellant in respect of the events surrounding the forced separation from her male partner, together with the circumstances she found herself in when she returned to Winnipeg, were significant factors that exacerbated her psychological condition. The Appellant's testimony, in this respect, is corroborated by the testimony of her daughter and her neighbour and is consistent with the medical report of Dr. Claude Rousseau.

Dr. Claude Rousseau's description in his medical report dated August 7, 2003, in respect of the Appellant's psychological condition between November 4, 2002 and August 4, 2003 is not very different from the description of the Appellant's psychological condition as described by the Appellant's daughter and her neighbour in the month of September 2003 and by Dr. Lavallee in the month of October 2003.

Dr. Claude Rousseau provided MPIC with a medical report dated August 7, 2003 with respect to the Appellant (referring to her by her maiden name of Ash) wherein he stated:

The following is written at the request of Ms. Ash who has seen me here in [text deleted] on four office visits: November 4<sup>th</sup> 2002, March 14<sup>th</sup> 2003, July 3, 2003 and August 4<sup>th</sup> 2003.

Specifically, she feels chronically depressed, fatigued with hypersomnia. She continues to suffer blackouts which I understand to be associates (sic) with foaming at the mouth despite normal neurological findings documented on several occasions by specialists and normal CT head scans and EEG. Also, she always suffers of (sic) her chronic myofascial pain syndrome.

The medication she receive is the following:

- Trazodone 50 mg HS
- Triazolam 0.5mg I.D
- Demerol 50mg 2 co B.I.D.
- Losec 20mg I.D
- Paxil 60mg I.D
- Risperdal 1mg HS

Dr. Claude Rousseau saw the Appellant on four (4) occasions commencing on November 4, 2002, and the last time on August 4, 2003, which is one (1) month prior to the time the Appellant discontinued her appeal. Although Dr. Claude Rousseau in this letter is reporting the Appellant's complaints, he was in a position to assess her psychological condition as a result of four (4) office visits between November 2002 and August 4, 2003. The Commission notes that Dr. Claude Rousseau does not comment negatively on the Appellant's credibility by suggesting she was exaggerating her symptoms or malingering.

Dr. Lavallee, in his letter to the Claimant Adviser, dated April 3, 2006, and in his testimony, corroborates the testimony of the Appellant, her daughter and her neighbour in respect to the Appellant's psychological condition in the month of September 2003 and stated:

[D.H.] has suffered from a number of symptoms since attending our clinic in October 2003. She saw Dr. Paula Flattery, Dr. Moe Lerner and myself during this time period. She has been entertained with a number of diagnoses during that time. It is my professional opinion that [D.H.] was not able to undergo any formal appeal process from October 2003 (sic) up until the last six or so months. She was placed on a number of medications including Oxeze, **Lorazepan**, cough syrup, Ventolin, Zithromax, **Paxil**, **Dilantin**, Arthrotec, **Tegretol**, Losec and Flovent and Seroquel (2005). A number of these medications could cause side effects.

Dr. Agha-Khani investigated the black outs and I do not have any updates since September of 2005.

The Commission finds that Dr. Lavallee was an impressive witness who testified in a very thoughtful and careful manner and that his testimony was clear and unequivocal on the issues in dispute between the Appellant and MPIC. The Commission further finds that on all issues in dispute between MPIC and the Appellant, it accepts Dr. Lavallee's evidence as to the status of the Appellant in the month of September 2003 when she discontinued her appeal.

Dr. Lavallee testified that:

1. he worked as an emergency room doctor and at the Aboriginal Health and Wellness Centre and, as a result, had a great deal of exposure to patients who were in a crisis situation.
2. he first saw the Appellant in the month of October 2003, which is approximately one (1) month after the Appellant discontinued her appeal.
3. Dr. Lavallee diagnosed the Appellant's condition at that time as a post-traumatic stress disorder and that this condition had probably developed over a long period of time. He described this condition as one where the Appellant was chronically depressed, suffered from anxiety attacks, blackouts, fatigue, memory loss and an inability to concentrate and a lack of self-confidence.

Dr. Lavallee was asked by the Commission whether in his opinion the Appellant was suffering from post-traumatic stress disorder in the month of September 2003 when she discontinued her appeal. In response, Dr. Lavallee testified that:

1. in his view this disorder would have developed over a period of time and existed in the month of September 2003.
2. having regard to the psychological problems that the Appellant was suffering from, that the Appellant's condition in the month of September 2003 was identical to her condition in the month of October 2003 and that in September 2003 she was suffering from the same disorder.
3. after treating the Appellant he was able to stabilize her condition and by the spring of 2004 the Appellant had the capacity to pursue her appeal.

The Commission notes that MPIC did not seek to call rebuttal medical evidence to challenge the testimony of Dr. Lavallee.

The Commission finds that Dr. Claude Rousseau's description in his letter dated August 7, 2003 in respect of the psychological complaints of the Appellant, which was written one (1) month before she discontinued her appeal, is totally consistent with Dr. Lavallee's description of the Appellant as set out in his medical report dated April 3, 2006 and in his testimony in respect of the Appellant's psychological condition in the month of October 2003. Dr. Claude Rousseau's comments lend support to Dr. Lavallee's opinion that the Appellant suffered from a post-traumatic stress disorder in the month of September 2003.

### **Decision**

The Commission finds that the Appellant has established, on the balance of probabilities, that:

1. when she discontinued her appeal in the month of September 2003 this was not due to a change of heart, but due to a post-traumatic stress disorder.
2. in this condition she was chronically depressed, confused, emotionally distraught, suffering from blackouts, memory loss, anxiety, a loss of self-confidence and had become dysfunctional and unable to cope with life and, as a result, discontinued her appeal.

For these reasons the Commission finds that there were exceptional circumstances of a compelling nature which renders it appropriate for the Commission to exercise its discretion, and

pursuant to Section 174 of the MPIC Act, to extend the time to permit the Appellant to appeal the Internal Review decision dated May 30, 2003 to the Commission.

Dated at Winnipeg this 14<sup>th</sup> day of July, 2006.

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**MEL MYERS**

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**HONOURABLE WILFRED DE GRAVES**

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**PAUL JOHNSTON**