

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by H.P.**  
**AICAC File No.: AC-02-21**

**PANEL:** Ms Yvonne Tavares, Chairperson  
Ms Sandra Oakley  
Ms Deborah Stewart

**APPEARANCES:** The Appellant, H.P., appeared on her own behalf;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Ms Dianne Pemkowski.

**HEARING DATE:** April 1, 2009

- ISSUE(S):**
- 1. Whether the Appellant's benefits were properly terminated for providing false or inaccurate information to MPIC.**
  - 2. Whether the Appellant is responsible for reimbursing MPIC for the overpayment of Income Replacement Indemnity benefits.**

**RELEVANT SECTIONS:** Sections 160(a) and 189(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act').

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

**Reasons For Decision**

The Appellant, H.P., was involved in a motor vehicle accident on February 16, 1996. She was a passenger in a vehicle driven by her husband. They were eastbound on McIvor Avenue and were struck by a third party vehicle westbound. The Appellant did not require treatment at the scene, an ambulance did not attend and nor did she attend a hospital. H.P. attended upon her family physician, Dr. Starzecki, the day after the accident. He diagnosed "post-traumatic headaches, strain to lower back, neck and both shoulders, contusion to both knees, nervous

shock”. On February 22, 1996, the Appellant filed an application for compensation with MPIC and indicated that she had been off work since the collision and that she could not do housework. At the time of the motor vehicle accident the Appellant was employed at [text deleted] in the housekeeping department working full-time. Due to the injuries which the Appellant sustained in the motor vehicle accident she was unable to return to her employment and became entitled to income replacement indemnity (“IRI”) benefits. From the time of the motor vehicle accident until 1999 she also received a dependent care benefit for the cost associated with looking after her elderly mother.

The Appellant was diagnosed as having a WAD 3 soft tissue injury to her neck, shoulders and lower back. The medical reports indicated that the Appellant had a mild stenosis of the spine. She had two CT scans on her back and an independent medical examination by Dr. Balageorge in January 1997. Dr. Balageorge noted the mild stenosis at L4-5 and a central disc herniation which he did not conclusively link to the motor vehicle accident.

In 1999 MPIC attempted to arrange a graduated return to work program for the Appellant with her former employer. However this plan was unsuccessful as the Appellant refused to participate in any graduated return to work at [text deleted], even though that program was intended to help restore her functional capabilities. She was of the view that the work at [text deleted] was simply too hard for her, despite the views expressed by Dr. Balageorge.

Subsequently MPIC determined that the Appellant had had ample opportunity to recover from the effects of the motor vehicle accident and that she should be able to return to her former employment and that any physical or psychological factors preventing that return must have had some cause other than the motor vehicle accident. MPIC therefore concluded that, by virtue of

Section 110(1)(a) of the MPIC Act, the Appellant could resume her former employment and was no longer entitled to IRI benefits. That decision was communicated to her by letter dated October 22, 1999.

The Appellant sought an Internal Review of that decision, which was confirmed by the Internal Review Officer on March 27, 2000. On appeal to this Commission, the decision of the Internal Review Officer was rescinded and the Appellant's IRI benefits were reinstated. In the Commission's decision dated October 16, 2000, the Appellant's claim was referred back to MPIC for a determination of employment pursuant to Section 107.

In May 2003, the Appellant forwarded personal care activity sheets to MPIC totalling \$25,160. At that time, the Appellant's mother resided with her and her husband and due to the injuries which the Appellant sustained in the accident, she was unable to care for her mother. These sheets advised that from October 1999 until that time, the Appellant had paid various individuals to provide her with assistance in lifting, dressing, bathing and changing the diapers on her very elderly mother suffering from Alzheimer's disease. MPIC had also commenced the two year determination process in order to determine a suitable alternate employment for the Appellant.

On August 12, 2003, the Appellant's case manager contacted her and noted the Appellant's functions and abilities as reported by the Appellant, as follows:

- she would leave her home only to go to church, for a walk, doctor's appointments, and grocery shopping (for light things by herself, otherwise she would go grocery shopping with her husband).

- if she was shopping alone and the items were heavy, she would ask a clerk to assist in loading the groceries into her car.
- She doesn't go anywhere else because she is not comfortable not being able to stay in one position for very long.
- she needed help washing her hair because she could not hold her arms up, could not look up at the ceiling or move her head to the side to rinse.
- she could not bend down at all and her husband helped her with her shoes unless she wore slip-on shoes.
- for meals, her husband would help her a little and she would simply heat things up and they would mostly eat ready made frozen food.
- if she was moving around she could stand for maybe 10 to 15 minutes; she could sit uninterrupted for approximately 20 minutes and then she would have to get up and walk around; she could walk for approximately 15 minutes and she could not bend over at all.

On August 27, 2003, the Appellant met with Mavis Menzies an employment specialist hired by MPIC to discuss further vocational options. The Appellant reported to Mavis Menzies that she could only sit for 15 minutes then had to walk, could only sleep two to three hours at night, could not bend, carry any items that were heavy, do any household duties or raise her hands up to her neck. The Appellant and Ms Menzies discussed employment options, but the Appellant was again of the view that the jobs presented were not appropriate given her physical limitations and aptitudes.

On September 22 and 23, 2003, the Appellant underwent a Functional Abilities Evaluation at Associated Rehabilitation Consultants of Canada ("ARCC"). The Functional Evaluation is an

independent assessment designed to objectively document an individual's functional status. The purpose of the evaluation was to determine if the Appellant was capable of working at a sedentary, part-time job. During the evaluation, the Appellant was not able to perform most of the tests at all. There were also inconsistencies in the results with her being able to perform in a certain way in one test and then not being able to do virtually the same thing in another test. After conducting the functional evaluation of the Appellant, Dr. Eugene Capitano of ARCC concluded that "The observed findings of her clinical presentation and testing process are not consistent with each other. . . . In conclusion, the FCE did not demonstrate that she was able to perform sedentary, part-time work. However, there were many inconsistencies. H.P. self-limited her ability due to pain and thus performed submaximally. I feel that if she wanted to, she probably could perform part time sedentary work".

Surveillance of the Appellant was undertaken by MPIC on September 8, 9, 29 and 30 and October 9, 10 and 11, 2003. On September 8, 2003, the Appellant was videotaped gardening for about three minutes, bending freely and frequently at the waist to pick weeds from her garden. She then went for a walk for a period of an hour and a quarter. In the videotaped evidence, the Appellant was observed walking briskly and without any pain behaviours. The Appellant was not videotaped throughout the duration of her walk, only at certain intervals. In the Supplementary Report prepared by MPIC's Special Investigation Unit filed in evidence before the Commission, the Appellant is reported to have walked the entire duration without breaks. The Appellant however, testified that she took breaks throughout her walk.

On September 9, 2003, the Appellant was followed to the grocery store where she was reported to bend known to lift 10 kg bags of flour and sugar into her cart (but not videotaped). In her testimony before the Commission, the Appellant denied lifting these bags and says that she asked

a store employee to do it for her. During the videotaping in October, once again of the Appellant grocery shopping, the Appellant is observed turning her head easily and lifting four-litre containers. Again in her testimony before the Commission, the Appellant testified that she had taken extra pain medication before she went shopping and this accounts for her performance on those days.

On November 13, 2003, MPIC's case manager wrote to the Appellant to advise that her entitlement to all benefits would cease effective November 13, 2003 pursuant to Section 160(a) of the MPIC Act. MPIC's case manager advised the Appellant that despite her ongoing assertions that she remained injured and unable to return to her pre-accident employment, subsequent investigation had revealed that she had misrepresented her injuries and knowingly provided MPIC with false information. Additionally, the case manager found that the medical information on the Appellant's file did not support an impairment in function which developed secondary to the incident in question that in turn would account for her reported symptoms and perceived level of dysfunction or a return to work. This was further supported by the results of the investigation. MPIC's case manager advised the Appellant that had her benefits not been terminated pursuant to Section 160(a), her entitlement to IRI benefits would have ended in accordance with Section 110(1)(a) of the MPIC Act as she was able to hold the employment that she held at the time of the accident. Lastly, MPIC's case manager advised the Appellant that she was responsible for reimbursing MPIC the amount of benefits she had received as a result of her failure to notify and provide MPIC with accurate information, in accordance with Section 189(1) of the MPIC Act.

The Appellant sought an Internal Review of that decision. The internal review was put on hold pending the outcome of criminal charges facing the Appellant, which related to circumstances dealt with in the decision under review.

The Appellant was charged with forgery, uttering a forged document and two counts of fraud. In a decision dated April 28, 2006, Simonsen J. found H.P. guilty of defrauding MPIC of an amount not exceeding \$5,000 in respect of the claim for dependent care benefits.

Subsequent to judgment being delivered in the criminal trial, the internal review proceeded. In a decision dated July 28, 2006, the Internal Review Officer upheld the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer determined that the Appellant did knowingly provide false or inaccurate information, contrary to Section 160(a) of the MPIC Act and as a result the Appellant was no longer entitled to receive IRI benefits. Further, the Internal Review Officer found that had the Appellant's benefits not been terminated under Section 160 of the MPIC Act, she found that the Appellant was physically capable of returning to work as of November 13, 2003 and her benefits were therefore properly terminated pursuant to Section 110(1)(a) of the MPIC Act. The Internal Review Officer went on to note that the Appellant failed to advise MPIC of changes in her circumstances, contrary to Section 149 of the MPIC Act and as a result, she was responsible for reimbursing MPIC for the amount of benefits she received, in accordance with Section 189(1) of the MPIC Act.

The Appellant has now appealed from that decision to this Commission. The issues which require determination in this appeal are:

1. Whether the Appellant's Personal Injury Protection Plan ("PIPP") benefits were properly terminated pursuant to Section 160(a) of the MPIC Act;

2. Whether the Appellant is responsible for reimbursing MPIC for the overpayment of IRI benefits.

At the outset of the appeal hearing, the Appellant confirmed that there were no outstanding issues relating to her appeal of a previous Internal Review decision dated January 14, 2002 and she withdrew her appeal respecting that Internal Review decision.

### **Relevant Legislation:**

#### **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;

#### **Corporation to be reimbursed for excess payment**

[189\(1\)](#) Subject to sections 153 (payment before decision by corporation), 190 and 191, a person who receives an amount under this Part as an indemnity or a reimbursement of an expense to which the person is not entitled, or which exceeds the amount to which he or she is entitled, shall reimburse the corporation for the amount to which he or she is not entitled.

### **Appellant's Submission:**

At the hearing of her appeal, the Appellant submitted that she did not provide false or inaccurate information about her abilities to MPIC. She claims that she never told her case manager that she could not work. However, she wanted MPIC to find her a suitable alternate employment because she could not return to the employment she held at the time of the accident. The Appellant also maintains that she did not mislead MPIC with respect to her functional abilities. She reiterated that she cannot sit, stand, or walk for any significant amount of time. She maintains that she could do a sedentary job, so long as she could change positions frequently.

She also relies on the reports of her medical caregivers; she submits that none of her medical caregivers say that she can return to work.

The Appellant also submits that the fact that she was found guilty in her criminal trial of fraud with regard to the dependant care benefit should not affect her entitlement to IRI benefits. She maintains that she was found guilty because of the false testimony of her ex-daughter-in-law. In summary, she claims that she could not have worked from September 8, 2003 to November 13, 2003 and so she should be entitled to IRI benefits for that period and ongoing as she still cannot return to work due to the injuries sustained in the motor vehicle accident. As a result, she requests that her appeal be allowed and her PIPP benefits be reinstated.

**MPIC's Submission:**

Counsel for MPIC submits that the Appellant's PIPP benefits were properly terminated pursuant to Section 160(a) of the MPIC Act. Counsel for MPIC argues that the Appellant was found guilty of fraud in the Court of Queen's Bench of Manitoba and therefore MPIC can refuse to pay any compensation to the Appellant based upon that conviction. Counsel for MPIC maintains that the fraud conviction is a determination that the Appellant committed a falsehood upon MPIC and consequently section 160 may be invoked by MPIC.

Counsel for MPIC also submits that the Appellant did provide false or inaccurate information to MPIC with respect to her functional abilities. Counsel for MPIC argues that the functional abilities which the Appellant was reporting to her case manager conflicted with the video surveillance conducted on the Appellant. Counsel for MPIC submits that the Appellant's reporting of her functional abilities was inconsistent with the observed abilities on the videotape, to such a degree that the Appellant was obviously misrepresenting her injuries to MPIC.

Counsel for MPIC further maintains that the complete termination of the Appellant's PIPP benefits is not too severe a consequence in this case. She maintains that the Appellant's story was so inconsistent with her observed abilities that it is not too harsh a penalty to terminate all of her PIPP benefits with all of the evidence before the Commission. In summary, counsel for MPIC submits that the Appellant did wilfully provide false and inaccurate information to MPIC about her functional abilities and therefore this negates the entitlement to all benefits under the MPIC Act. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review Decision of July 28, 2006 should be confirmed.

**Decision:**

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical, and other reports and documentary and videotape evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that the Appellant's PIPP benefits were properly terminated pursuant to Section 160(a) of the MPIC Act as of November 13, 2003.

**Reasons for Decision:**

Section 160(a) of the MPIC Act entitles MPIC to terminate an indemnity, where a claimant has knowingly provided false or inaccurate information to the Corporation. The Commission finds that by virtue of the conviction of fraud in the Court of Queen's Bench with respect to the claim for dependent care benefits, MPIC was entitled to terminate the Appellant's PIPP benefits. The conviction of fraud is a finding that the Appellant committed a falsehood upon MPIC and consequently section 160 may be invoked by MPIC.

Additionally, the Commission finds that the Appellant did, on a balance of probabilities, knowingly provide false or inaccurate information with respect to her functional abilities to MPIC. On August 12, 2003, the Appellant advised her case manager that she went out of her home only to go to church, for a walk, to doctor's appointments and to grocery shop (for light things by herself). She further advised that she needed help washing her hair because she couldn't hold her arms up, she couldn't look up to the ceiling or move her head to the side to rinse. She could not bend down at all, and her husband helped her with her shoes. She could stand for 10 - 15 minutes, she could sit for approximately 20 minutes, walk for 15 minutes and she could not bend over at all. On August 27, 2003, the Appellant reported to Ms Menzies that she could only sit for 15 minutes then had to walk, could only sleep two to three hours at night, could not bend, carry any items that were heavy, do any household chores or raise her hands above her neck.

The videotape surveillance undertaken of the Appellant in September and October 2003 clearly conflicts with the Appellant's reported abilities and depicts a strikingly different picture of the Appellant's condition. On the videotape surveillance, the Appellant demonstrated a great deal of bending with no apparent difficulty; during grocery shopping she was able to look up and lift her hands over her head; she had no difficulty walking and lifting items (including four litre drink containers) throughout her grocery trips. She was also able to walk at a brisk pace for a period of an hour and a quarter, without a break. The videotapes show a person of significant capability, which clearly conflicts with the Appellant's reported tolerances to her case manager and to Ms Menzies.

Moreover, the Commission does not accept the Appellant's evidence that she had taken an increase in pain medication on the dates of the surveillance. We simply find the Appellant's

testimony on this point unbelievable that she would begin taking such an increased dosage of medication so many years after the accident and coincidentally on the days of the video surveillance. In addition, there were no records filed by the Appellant relating to the prescription or purchase of Tylenol 3 around the dates of the surveillance. Accordingly, based upon the videotape evidence which clearly shows that her functional abilities are inconsistent with her reports to her case manager and to Ms Menzies, we find that the Appellant did, on a balance of probabilities, provide false and inaccurate information to MPIC with regard to her condition.

As a result of the deliberate and wilful act of the fraud perpetrated upon MPIC, the Commission finds that the outright termination of the Appellant's PIPP benefits is appropriate in the circumstances of this case. Additionally, we find that pursuant to Section 189(1) of the MPIC Act, MPIC is entitled to repayment of the IRI payments to which the Appellant was not entitled.

As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated July 28, 2006 is hereby confirmed.

Dated at Winnipeg this 23<sup>rd</sup> day of June, 2009.

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**YVONNE TAVARES**

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**SANDRA OAKLEY**

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**DEBORAH STEWART**