Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [text deleted]
AICAC File No.: AC-03-100

PANEL:	**The Honourable Mr. Wilfred De Graves, Chairman** **Dr. Patrick Doyle** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], 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')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

[The Appellant], pursuant to the MPIC Act, appealed on July 8, 2003, the decision of April 17, 2003 of [text deleted], 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 [text deleted], waiting to turn South onto [text deleted]. 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 [Appellant's doctor #1] (not her regular doctor) of the [text deleted] 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.
> [text deleted].

Following this initial diagnosis by [Appellant's doctor #1], 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 [Appellant's doctor #2] (then her regular doctor), complaining of the following symptoms (Tab 286):

> "painful L side of lower neck region with difficulty raising L arm." [Appellant's doctor #2] diagnosis was "soft tissue strain left lower neck and interscapular region". . .

b) On December 23, 1999 she saw [Appellant's physiotherapist #1], who confirmed that she had been in a minor fender bender and that she was having left neck pain. . . .

c) On December 30, 1999 [the Appellant] attended upon [Appellant's physiotherapist #1] complaining of dizziness

d) On January 29, 2000, [Appellant's physiotherapist #1's] notes indicate that [the Appellant] "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 [text deleted], case manager for MPIC, that she had become dizzy after attempting to return to work earlier in the week. (Tab 27).

f) According to [Appellant's case manager's] CARS note of March 25, 2000 . . . [Appellant's physiotherapist #1] 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) [Appellant's case manager's] memorandum to file of April 10, 2000, records a conversation she had with [Appellant's physiotherapist #1]. [Appellant's physiotherapist #1] indicated he had a meeting with the claimant on March 31, 2000. According to her notes [Appellant's physiotherapist #1] 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.

[Appellant's case manager], from time to time, reviewed the medical and occupational history of the Appellant. Accordingly, [Appellant's case manager] in a letter dated July 17, 2002, requested [MPIC's otolaryngologist], for a paper review of the Appellant's medical condition and disability. In this letter [Appellant's case manager] 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 [Appellant's doctor #2] 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 [Appellant's case manager] there was no objective medical evidence to support the complaints,

c) [the Appellant] participated in a reconditioning program at [physiotherapy clinic],

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 [Appellant's otolaryngologist #1] ". . . diagnosed with having early otosclerosis." On a further exam on October 3, 2000 [Appellant's otolaryngologist #1] ". . . 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 [rehab clinic] and in November 2000 [rehab clinic] discontinued driver assessment due to "lack of progress",

g) the Appellant was referred to [Appellant's psychologist],

h) she was examined on October 30, 2000 by [Appellant's 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 [Appellant's occupational therapist] 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 [Appellant's psychologist], were discontinued by the Appellant as she felt her problem was physical and not psychological,

k) November 2000 – The Appellant "self discharged" [Appellant's doctor #2] and saw [Appellant's doctor #3]. She felt that [Appellant's doctor #2] 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 [Appellant's psychologist] for pain management,

m) following consultation with [Appellant's doctor #3], [Appellant's doctor #4] was then consulted,

n) between February 26, 2001 and April 2001 she underwent physiotherapy treatments with [Appellant's physiotherapist #2],

o) [Appellant's psychologist] 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 [Appellant's doctor #4] recommended that she return to work and [text deleted] required that she be medically assessed. [Appellant's physiotherapist #2] ". . . 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, [Appellant's physiotherapist #5]. 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 [Appellant's doctor #4] "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." [Appellant's doctor #4] 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) [Appellant's doctor #4] then referred the Appellant to [Appellant's neuro-opthamologist], a specialist in neuro-ophthalmology and vestibular function,

s) [Appellant's neuro-opthamologist], 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, [Appellant's case manager], 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, [Appellant's case manager] relied primarily on [Appellant's neuro-opthamologist's] opinion that the vestibular disorder predated the motor vehicle accident, the report of January 31, 2002 of the [Appellant's physiotherapist #2] and on [MPIC's doctor'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 [text deleted], 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 / [the Appellant].

Following the appeal to [MPIC's Internal Review Officer], [MPIC's Internal Review Officer] requested [Appellant's case manager] to assist him in obtaining further reports on the Appellant's condition.

[MPIC's otolaryngologist] responded to [Appellant's case manager'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 [Appellant's neuro-opthamologist] 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.
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> . . .
>
> In response to your questions in your letter of July 17, 2002:
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> 1. *You asked if [the Appellant'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.
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> . . .
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> 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 [MPIC's Internal Review Officer's] decision of April 17, 2003

Following a review hearing on April 9, 2002 [MPIC's Internal Review Officer] asked [Appellant's case manager] for "a further investigation" in respect to the "vestibular disorder", including clarification of that diagnosis. [MPIC's doctor], on July 12, 2002, also provided a supplementary opinion. [Appellant's case manager] referred the matter in mid-July of 2002 to [MPIC's otolaryngologist], [text deleted] for a paper review.

He gave a report dated August 6, 2002. [MPIC's otolaryngologist] 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 [Appellant's neuro-opthamologist] 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)

[MPIC's Internal Review Officer] held a further hearing on December 20, 2002. He requested a further opinion from [MPIC's otolaryngologist]. [MPIC's otolaryngologist] 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 [the Appellant] 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 [the Appellant's] situation. Legal needs are also important here. For example if the question is whether or not [the Appellant] 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)

[MPIC's doctor], following [MPIC's otolaryngologist'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 [MPIC's Internal Review Officer]. 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 [the Appellant] records as rendering her unable to perform at her pre-accident level of function" (to use [MPIC's doctor's] description from his February 7, 2002 report). As [MPIC's doctor] 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. . .
>
> [The Appellant's] vestibular disorder, assuming she, in fact, has a vestibular disorder, is equally incapable of having been caused by this automobile accident. [Appellant's neuro-opthamologist's] report of March 6, 2002 acknowledges that she finds "it difficult to believe that [the Appellant] 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. [Appellant's neuro-opthamologist] advances the hypothesis (it seems to be no more than that) that [the Appellant] 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 [MPIC's doctor's] reports of July 12, 2002 and February 7, 2002 on these points.) These considerations certainly weaken [Appellant's neuro-opthamologist's] hypothesis concerning causation.

In his decision of April 17, 2003 [MPIC's Internal Review Officer'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 [the Appellant] for all of

the physiotherapy expenses incurred May 7, 2001 to February 26, 2002.

Thus, [MPIC's Internal Review Officer] varies [Appellant's case manager'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 [MPIC's Internal Review Officer's] reasons of April 17, 2003 is his findings concerning the Appellant's lack of credibility. At page 10 of his reasons he says:

> [MPIC's otolaryngologist] comments that he feels [the Appellant] 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 [the Appellant's] descriptions of her own condition. Regrettably, I cannot put much weight on [the Appellant'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 [the Appellant] 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)

[MPIC's Internal Review Officer] concludes in denying the appeal:

a) by accepting [MPIC's doctor's] March 25, 2003 earlier report;

b) he could not ". . . put much weight on [the Appellant'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 [Appellant's physiotherapist #1] of December 30, 1999 and January 29, 2000;
b) notes of [Appellant's doctor #2] – Tab 263;
c) notes of [Appellant's case manager] – 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.

[MPIC's doctor's] opinions

As indicated, MPIC relied in large part on the opinion of [MPIC's doctor] as set forth in his report of January 9, 2001 to [Appellant's case manager] (Tab 150). Because it is this opinion on which MPIC largely relies, the following is our summary of his opinion with our apposite observations.

[MPIC's doctor] 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 [Appellant's doctor #3'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.

[MPIC's doctor] agrees with [Appellant's doctor #3] in respect to A and C.

At page 6 [MPIC's doctor] delineates the Appellant's symptoms he gleaned from

A. [rehab clinic] record of July 10, 2000
B. The physiotherapist's, [Appellant's physiotherapist #2's], records of October 13, 2000
C. Her personal physician, [Appellant's doctor #2's] 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 [MPIC's doctor] in juxtaposition to the opinion of [Appellant's neuro-opthamologist], [Appellant's otolaryngologist #2] and [MPIC's otolaryngologist].

We now return to the finding of [MPIC's Internal Review Officer] 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. [Appellant's neuro-opthamologist] and [Appellant's otolarygologist #2] saw the Appellant, [MPIC's otolaryngologist] and [MPIC's doctor] did not. But, in fairness to [MPIC's otolaryngologist] and [MPIC's doctor], they were only engaged by MPIC to do a "paper review".

[Appellant's case manager], we must assume, recognized some limitation in MPIC's otolaryngologist'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 [Appellant's doctor #4], consulted [Appellant's otolaryngologist #2], about the Appellant's hearing loss. [Appellant's otolaryngologist #2] was called at the hearing before us by the Appellant and gave evidence before the panel. In addition to the hearing loss, [Appellant's otolaryngologist #2] testified, the Appellant complained of vertigo. [Appellant's otolaryngologist #2] 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. [Appellant's otolaryngologist's] diagnosis was that the Appellant had hereditary otosclerosis.

[Appellant's otolaryngologist] 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) <u>the cause or causes for her vertigo, the likelihood is that she has a</u>

> 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 [text deleted], the Appellant's counsel, [Appellant's otolaryngologist] 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 [MPIC's otolaryngologist]. These test results can be somewhat contradictory. She previously had a similar test under the care of [Appellant's neuro-opthamologist] which was suggestive of a unilateral vestibular loss. However, [Appellant's neuro-opthamologist] 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 [Appellant's neuro-opthamologist'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 [MPIC's doctor], as set forth in his report of January 9, 2001 to [Appellant's case manager] (Tab 150). Because it is this opinion on which MPIC largely relies, the following is my summary with my apposite observations. [MPIC's doctor] 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 [MPIC's doctor]'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.

[MPIC's doctor'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 [the Appellant] as developing a medical condition as a result of the collision in question that would account for her symptoms of dizziness and nausea. [Appellant's doctor #2] did not identify any objective physical findings that would suggest a musculoskeletal problem is contributing to her symptomatology. [Appellant's neurologist] did not identify any neurologic abnormality that would account for her symptoms. [Appellant's psychologist] identified psychological difficulties that might contribute to her symptomatology."

c) "From a physical standpoint, there is insufficient objective medical evidence that would indicate [the Appellant] is unable to perform her occupation as a semi-truck driver. The functional assessment performed at [rehab clinic] identified [the Appellant] as being capable of performing her work duties. Based on the results of

> the pain questionnaires [the Appellant] completed, it appears that she perceives herself as being severely disabled even though there is insufficient medical evidence to substantiate this perception."

[MPIC's doctor], 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 [the Appellant] 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?
>
> . . . .
>
> - [The Appellant's] initial clinical findings were in keeping with a mild musculotendinous strain and/or ligamentous sprain, which did not result in a functional impairment.
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> . . . . .
>
> It is my opinion that a pathophysiologic explanation that would account for the significant change in [the Appellant's] symptom presentation over time does not exist.
>
> . . . . .
>
> 2. The medical evidence does support the provision of psychological interventions in the management of [the Appellant's] various symptoms. The information indicates that her symptom complex is psychologically based and likely stems from the various disorders [Appellant's psychologist] 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 [the Appellant] from returning to her pre-collision occupational duties in some capacity.

In a further letter of February 7, 2002 [MPIC's doctor] was of the same opinion that the Appellant's plight and condition was basically psychological:

> . . . It was [Appellant's neuro-opthamologist's] recommendation that treatment should be directed towards improving myofascial pain, which appears to contribute to her symptom of dizziness.
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> . . . . .
>
> **RESPONSE TO QUESTIONS**
> *1. Based on the new information, has the claimant reached pre-accident functional level?*
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> Based on the information provided by [the Appellant], it appears that she has not reached her pre-accident functional level.
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> 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 [the Appellant] 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?*
>
> [The Appellant] 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 [the Appellant] continues to experience myofascial pain that [Appellant's neuro-opthamologist] feels contributes to her vestibular symptomatology. . . .

In a further letter of July 16, 2002 (Tab 34) [MPIC's doctor] 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 [the Appellant's] file indicates that [the Appellant'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 [the Appellant's] pre-existing vestibular order by itself does not preclude her from performing her occupational duties. The diagnostic tests performed to assess [the Appellant'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 [the Appellant] 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)
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> . . . . .
>
> The actual cause of [the Appellant] cervical muscle spasm is not known . . .
>
> . . . . .
>
> . . . Based on the information indicating that [the Appellant] 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 [MPIC's doctor] writes:

> . . . The first documentation of symptoms of dizziness was noted in a report provided by [Appellant's doctor #2] dated March 29, 2000. I am uncertain as to whether the symptoms were true vertigo. Prior to this, there is no documentation of [the Appellant] reporting symptoms of vertigo. One would expect that if [the Appellant] 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 [the Appellant] 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 [the Appellant's] file, the following conclusions are made:
>
> 1. An underlying cause for [the Appellant'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 [the Appellant's] clinical presentation does not fit the label referred to as cervical vertigo.
> 2. [The Appellant] has not been identified as having a physical impairment of function that precludes her from carrying a Class V (sic) license. If [the Appellant] 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, [the Appellant] does not have a physical impairment of function that precludes her from securing a Class V license. The information leads me to conclude that [Appellant's otolaryngologist #2's] opinion as

it relates to this issue is based on symptoms[the Appellant] reports and her perceived level of dysfunction. [The Appellant] 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 [the Appellant] will experience further subjective improvement in symptoms with supervised treatment interventions. The information on file does not indicate [the Appellant] has been identified as having a specific condition that in turn would require ongoing supervised treatment. It is not medically probable [the Appellant's] neck symptoms are a byproduct of a mild cervical strain that might have developed secondary to the incident in question.

[Appellant's otolaryngologist #2] had the advantage of [Appellant's neuro-opthamologist's] and [MPIC's otolaryngologist] 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, [Appellant's otolaryngologist #2] 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 [Appellant's otolaryngologist #2].

Appellant's marriage, employment and post-employment history

The Appellant and her husband, [text deleted], testified before the panel. The Appellant is [text deleted] and married to [Appellant's husband]. [text deleted] She met and married her husband,

[text deleted], some [text deleted] years ago. It was a second marriage for both.

Her husband was, before becoming a truck driver, [text deleted]. 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 [Appellant's husband] 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 [text deleted]. Enroute she could not do her five (5) hour shifts and her husband had to do most of the driving. Following [text deleted] they were to continue on to [text deleted]. On their employer being advised of the Appellant's condition they were directed to return to [text deleted].

Throughout these times she was undergoing therapy with [Appellant's 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, [rehab clinic] ([Appellant's occupational therapist]) was engaged to give the Appellant a road test. Her husband drove the truck (around the [text deleted]). 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 [Appellant's occupational therapist] 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.

[Appellant's husband] and the Appellant gave evidence before the panel in a credible manner.

[Appellant's otolaryngologist #2], (ear, nose and throat specialist) was consulted by the Appellant in late 2001 on a referral by [Appellant's doctor #4] in respect to hearing loss. He diagnosed her hearing loss as clinical or congenital vestibular disorder, confirmatory of [Appellant's neuro-opthamologist's] earlier opinion. The hearing loss he said was hereditary and

was not related to the accident.

The panel prefers the opinion of [Appellant's otolaryngologist #2] 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 22nd day of February, 2006.

HONORABLE WILFRED DE GRAVES

DR. PATRICK DOYLE

PAUL JOHNSTON