

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-126, AC-13-086

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms Jacqueline Freedman
Mr. Les Marks

APPEARANCES: The Appellant, [text deleted], was represented by Ms Darlene Hnatyshyn of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATES: October 30, 2013 and August 5, 2015

ISSUE(S): Whether the Appellant's entitlement to PIPP benefits should be terminated as of February 1, 2010, pursuant to paragraph 160(a) of the MPIC Act.

RELEVANT SECTIONS: Paragraph 160(a) and subsection 184(1) 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

Background:

The Appellant, [text deleted], was injured in a motor vehicle accident on August 25, 2009 (the "MVA"), in which she suffered various injuries. She was in receipt of Personal Injury Protection Plan ("PIPP") benefits, and she consulted with several health care practitioners and underwent a variety of treatments. One such treatment included a rehabilitation program, which MPIC had arranged for her to attend, at [rehab clinic]. The Appellant missed some scheduled attendances

at [rehab clinic]. The case manager, by decision letter dated April 28, 2010, advised the Appellant as follows:

“On April 16, 2010, it was agreed that you would return and participate in the program at [rehab clinic] on April 19, 2010. It was agreed that should you choose not to attend on April 19, 2010 that your PIPP benefits (including Income Replacement Indemnity) would be terminated immediately.

As you have chosen not to attend the program as outlined and have not provided a valid reason for not attending the program, your PIPP benefits are terminated as of April 18, 2010 pursuant to Section 160(e)(f)(g) of the Manitoba Public Insurance Act. ...

Enclosed is a copy of [rehab clinic doctor’s] report which includes your attendance record. In addition, [rehab clinic doctor’s] report states that you are “fit for immediate, unmodified return to pre-injury employment”. As such, there is no impairment of function preventing you from returning to pre-accident employment on a full-time basis. Had your entitlement to Income Replacement Indemnity (IRI) not ended under Section 160 (e, f & g), your entitlement to Income Replacement Indemnity would end as of April 18, 2010, in accordance with Section 110(1)(c) ...”

The Appellant filed an Application for Review from the case manager’s decision. The Internal Review Officer considered this application and provided his decision by letter dated August 27, 2010. In that letter, he upheld the decision of the case manager (although the Internal Review Officer found that the Appellant had the ability to hold her pre-accident employment under paragraph (110)(1)(a) rather than under paragraph 110(1)(c)). The Appellant filed a Notice of Appeal of the Internal Review decision to the Commission, on September 21, 2010.

Subsequent to the filing of that Notice of Appeal, the Appellant received another decision letter from her case manager, dated May 27, 2013. That decision letter provided as follows:

“I have been advised that through the appeal process you and the Commission have been provided with investigation material related to your claim. I have also been advised that initially the investigation was discontinued prior to its completion because the April 28, 2010 decision letter terminated your benefits. The investigation focused on whether you provided false or inaccurate information to the corporation. If you did provide false or inaccurate information this could potentially result in the termination of your entitlement to benefits for reasons that are in addition to the Internal Review decision letter. In order to ensure that the Commission can consider, at one time, all issues related to the termination of your benefits, I have been asked to consider all the

investigative material and decide whether there are reasons in addition to those specified in the Internal Review decision that justify terminating your benefits.

For the reasons specified below, I conclude that your benefits should be terminated pursuant to section 160(a) of *The Manitoba Public Insurance Corporation Act* as of February 1, 2010, because you knowingly provided false or inaccurate information to the corporation.”

The Appellant waived her right to an Internal Review decision regarding her disagreement with the case manager’s decision and MPIC consented to that waiver. Accordingly, the Appellant filed a Notice of Appeal with the Commission directly from the case manager’s decision, on July 3, 2013.

At the outset of the hearing of this appeal, the parties agreed that the only matter to be determined at this hearing would be whether the Commission would confirm, vary or rescind the case manager’s decision to terminate the Appellant’s entitlement to PIPP benefits as of February 1, 2010, pursuant to paragraph 160(a) of the MPIC Act. The remaining two issues, being whether the Appellant had a valid reason not to follow or participate in the rehabilitation program at [rehab clinic], and whether the Appellant is able to perform her pre-accident employment under paragraph 110(1)(a) of the MPIC Act, would be determined at a separate hearing, if necessary, depending on the outcome of the decision in this hearing.

Procedural Matters:

This hearing took place over the course of two days. After the hearing of the Appellant’s testimony in direct examination and cross-examination on October 30, 2013, and the initial submissions of the parties, the panel determined that it would like to have the benefit of additional expert evidence. Accordingly, the report of a neuropsychologist was sought and ultimately received. An expert report in response and a follow-up report were subsequently

received. The hearing subsequently reconvened on August 5, 2015, for further submissions based on the additional documentary evidence.

Decision:

For the reasons set out below, the panel finds that the Appellant has met the onus of establishing, on a balance of probabilities, that the decision of the case manager to terminate her PIPP benefits pursuant to paragraph 160(a) of the MPIC Act should be varied, and that the Appellant's PIPP benefits should be suspended rather than terminated.

Evidence for the Appellant:

The Appellant testified regarding the MVA, which occurred on August 25, 2009. The Appellant was injured when she and her son were riding on a Winnipeg Transit bus. They were at the rear exit to the bus and when the bus accelerated, she fell backward and hit her head and her son fell on her. As a consequence of her injuries, she had severe migraines, tinnitus, vision problems, dizziness and right-sided weakness. The Appellant indicated that she still suffers from migraines and dizziness. She saw a doctor on September 15, 2009 and a neurologist on November 5, 2009. MPIC eventually sent her to [rehab clinic]. She was initially excited about [rehab clinic] but then felt that she was getting worse there. When she was finally referred to a chiropractor, [Appellant's chiropractor], she felt that she was making progress. The Appellant indicated that she had a good relationship with [Appellant's chiropractor] and she told him that she was trying to work.

The Appellant testified that prior to the MVA, in May 2009, she had separated from her husband. Her ex-husband had cheated on her and assaulted her. The separation was very difficult for her. In addition, the period of time after the MVA was a very difficult time for her. The Appellant

indicated that she suffered from financial stress. She had to sell numerous items in order to provide for her children. She had to borrow a car because her leased car was repossessed. She borrowed from her mother and to date still owes her \$10,000. The Appellant was worried that she would lose the house and her ex-husband ended up buying the house from her. The Appellant eventually ended up moving in with her common-law boyfriend. Further, her daughter had mental health issues which added to her difficulties.

The Appellant testified that prior to the MVA, she was working a lot as a massage therapist. She worked at home and in addition did massages at client's (sic) houses. The Appellant was also working part-time as a homecare aid and training for [text deleted].

The Appellant acknowledged that she worked to some extent after the MVA, while she was receiving IRI. She indicated that the reason she continued to work even though she was still suffering symptoms was because she needed the money. At the time, her son, [text deleted], was [text deleted] and her daughter, [text deleted], was [text deleted]. The Appellant said that she had to feed the kids and put bread on the table. As well, her children were involved in [activity #1] and [activity #2] and had to have haircuts and go to birthday parties. The Appellant only received \$168 per month from her ex-husband. She never sought more because she didn't have money for a lawyer. The Appellant said she even went on social assistance for three months.

The Appellant testified that she had been "begging" clients to let her massage them. She had provided clients with receipts for those massages. She had given the receipts to her accountant in order to get her taxes done. She indicated that prior to the MVA she would see between 20 to 25 clients per week and spend 35 to 40 hours on tasks related to her massage business, including things such as paperwork and laundry. Prior to the MVA when working as a homecare aid she

was involved in tasks such as patient transfers. After the MVA, the Appellant wasn't able to do patient transfers. In addition, her ability to work as a masseuse after the MVA was greatly reduced. The Appellant said she was not able to massage deeply. Some weeks she gave a few massages and some weeks she did not give any massages. She had to cancel a lot of appointments. She indicated she lost a lot of clients.

The Appellant testified that she was previously a member of the massage therapy association. However, she can't currently afford the fee. Therefore, although she gives clients a receipt for the massages, most likely people would not be able to claim the expense because she is not a registered massage therapist.

When counsel for the Appellant asked the Appellant her understanding of the phrase "ability to work", the Appellant testified that she understood that phrase to mean her ability to work in the way that she did prior to the MVA. The Appellant indicated that all she wanted was to get back to the way she was prior to the MVA. The Appellant stated that the importance and the purpose of the MPIC daily activity logs were not explained to her and she didn't understand that she was to complete them with clarity. What the Appellant did recall was having many issues with her case manager. She indicated that she and the case manager had trouble from the very beginning. The Appellant indicated that she asked to switch case managers several times but this was never done, even though she did speak to supervisors at MPIC. The Appellant said she understands now that she should have told MPIC that she was working, but she didn't consider it to be working in the way that she used to work.

Evidence for MPIC:

Counsel for MPIC did not call any witnesses but did cross-examine the Appellant.

Counsel for MPIC confirmed with the Appellant that she did provide some massages to clients after the MVA. Counsel for MPIC also confirmed that there were receipts in the indexed file for the period 2011 to 2013 for 225 massages totalling \$15,000.

Counsel for MPIC pointed out to the Appellant that her Application for Compensation contained a provision which stated that “I agree to notify of any return to work”, and he indicated to the Appellant that she had failed to comply with this obligation. The Appellant acknowledged that she had learned a hard lesson, being that she really needs to read and pay attention. The Appellant further indicated that to her, “unable to work” meant unable to do the same work as she was doing prior to the MVA. However, the Appellant acknowledged that perhaps she should have advised MPIC that she had been working part-time, but previously she didn’t see it that way. She had been getting clients to try massages to see what her capabilities were. She indicated that she had her own interpretation of the question.

Counsel for MPIC referred the Appellant to the MPIC daily activity log forms. In these forms, the Appellant gave a cursory description of her activities, indicating that she is substantially inactive, and not indicating that she is giving any massages, whereas video surveillance conducted on the same date evidences more activity and a client massage. The Appellant indicated that she didn’t take the MPIC daily activity logs seriously. She indicated that she thought the logs were just paperwork and their significance wasn’t properly explained to her. The Appellant said that she filled them all out at once. However, the Appellant said that she does now take responsibility for the way in which she completed them. Counsel for MPIC noted that there were at least three instances where the case manager asked the Appellant to return these forms and that this might suggest their importance. The Appellant acknowledged that this could be the case. The Appellant stated that she didn’t feel well enough at the time to fill them

out properly. She indicated that she felt that the case manager didn't respect her and so she probably didn't respect the case manager. There was poor communication between them.

Submission for the Appellant:

Counsel for the Appellant indicated that the Appellant does not dispute that she provided false information to MPIC; however, it is the Appellant's position that there were mitigating circumstances which should be considered by the Commission. Accordingly, the Appellant submits that the penalty for the provision of false information should be changed from termination of the Appellant's PIPP benefits to a suspension of those benefits, with the term of the suspension to be decided by the Commission, and after the end of the suspension the Appellant's PIPP benefits should be reinstated.

Counsel for the Appellant noted that at the time of the MVA, the Appellant was suffering from serious personal stressors, including a bitter marital break-up, which included physical assault from her ex-husband, child custody battles and financial stress due to the break-up, and support payment issues. She also had concerns over her daughter's psychological health involving an obsessive compulsive disorder and she had concerns over being able to provide for her children and hold on to the family home. Counsel for the Appellant referred the panel to chart notes dated April 15, 2009, from a visit to her family doctor, [Appellant's doctor #1], where it is noted that the Appellant would like a prescription for Prozac (an anti-depressant) and that they discussed a trial of Celexa for anxiety.

Counsel for the Appellant noted that the Appellant testified that prior to the MVA, the Appellant had led a full and active life as a massage therapist doing deep tissue massage, as a homecare attendant and as the primary caregiver to her two children. She also had plans to become a

member of [text deleted]. However, the MVA changed her life, when she was injured when she fell back in a transit bus and hit her head and her son fell on her. Since the MVA, the Appellant has suffered from severe migraines, tinnitus, blurred vision, dizziness, light-headedness and right sided weakness. Those conditions became her new normal state. This added a new dimension to an already stressful situation, caring for her [text deleted] and [text deleted] year old children, trying to hold onto the family home and maintain her status as a registered massage therapist, which she was ultimately unable to maintain.

Counsel for the Appellant referred the panel to numerous documents in the indexed file which she submitted were indications of the difficulties the Appellant was having. For example, an initial therapy report from physiotherapist [text deleted], dated September 15, 2009, indicates that the Appellant suffered from vertigo which would preclude driving. This would have had a serious impact on her ability to do house calls to provide massage therapy, which was an important part of her job and would have impacted her ability to maintain her professional life.

Counsel for the Appellant also referred the panel to chart notes of [Appellant's doctor #1] from October 1, 2009. These related to a visit where the Appellant was describing the MVA, and complaining of "having headaches daily". [Appellant's doctor #1] did a mini memory exam on the Appellant and noticed that she "missed recollection of 3 items on mmse; book ct head, refer to neurology". The Appellant was consequently referred to a neurologist, [Appellant's neurologist], who provided a report dated January 7, 2010, in which he stated as follows:

"[The Appellant] appears to have suffered from a grade 1 level concussion. It is somewhat concerning that her symptoms have not resolved by the time of her appointment. She seemed to be quite overwhelmed and emotionally stressed with the situation. ..."

Counsel for the Appellant noted that the Appellant's emotional distress and physical symptoms continued, and persisted through her time at [rehab clinic]. Counsel referred to a report dated July 13, 2010, from [Appellant's doctor #1], which stated as follows:

“... [The Appellant] continues to suffer with ongoing issues arising from the accident of August 25, 2009. She continues to have daily headaches, muscle aches, fatigue and tinnitus. She also has difficulty with her memory. She has been discharged from the rehab program set up for her but on looking at the attendance record she only attended 12 out of 25 session (sic) and only 2 of these sessions lasted the full 6 hours and so it is difficult to conclude on whether her status improved at all. ...”

Counsel for the Appellant referred the panel to another report from [Appellant's doctor #1], dated February 16, 2012, in which [Appellant's doctor #1] stated as follows:

“At this time, with new evidence occurring regarding possible long term effects of concussions, it is highly probable that [the Appellant] is suffering from symptoms of a post concussion syndrome which do markedly interfere with her ability to work as a massage therapist. ...”

In his initial chiropractic report, dated February 21, 2012, [Appellant's chiropractor] diagnosed the Appellant with post concussion migraine and traumatic brain injury. [Appellant's doctor #1] noted on April 19, 2012 that the Appellant “continues to have symptoms of vertigo, headaches, memory issues which significantly impact on her ability to work.” Counsel for the Appellant submitted that all of the foregoing reports show that the Appellant's physical symptoms were continuing, persisting and having a deleterious effect on the Appellant.

Counsel for the Appellant submitted that in addition to her physical symptoms, the Appellant was suffering stress due to the nature of her relationship with MPIC. The Appellant testified that she had problems with her case manager from the beginning in that the case manager didn't treat her respectfully and when the Appellant asked for a new case manager, she was refused. Counsel for the Appellant referred the panel to various file notes in the indexed file created by

employees of MPIC which are records of their interactions with the Appellant. For the example, a note created by the case manager dated February 10, 2010 states in part as follows:

“Claimant called back and advised that she got my message. She asked me how she can survive with \$400 and she has 2 kids to support. Advised claimant that I understand what she’s saying and has (sic) been trying my best to assist her that’s why I was trying to spread out her IRI. Advised that I was doing this to avoid any hardship on her and to catch up with the advance IRI that we provided for her furnace but she’s still not happy. Advised that it’s not a common practice to process IRI advance all the time but I’m trying to work with her and this is still not good enough for her.

Claimant asked if she should hire a lawyer and I told her that this is her option. She stated that she’s very frustrated about this and that how can I expect her to survive with \$400.

She continued to say that she’s not happy because I don’t return her calls. ...”

Counsel for the Appellant noted that the Appellant often called the case manager or the supervisor and notes of such a phone call were made by the supervisor relating to a voicemail left on February 16 or 17, 2010, as follows:

“Hello this is [the Appellant]; yes I left you a message. I am not very pleased the way that I have been treated. I have such a low income and my memory is really bad after the bus accident and I’m suffering from memory loss and ringing in my ears constantly. I was also doing work for homecare to support my kids to bring my income up a lot and I forgot about that until I got my T4 slip so I am like majorly struggling from what I’ve been getting from you guys. I did not have a penny for gas to go any further I did not have any money to pay for parking and I did not have any money to pay for a babysitter for my son after school so I had to reschedule my appointment. I left a message with [text deleted] and I guess if she doesn’t get back to them then I don’t know what else I can do. I am not pleased getting \$400 tomorrow that is so unfair I have kids to feed, I have a load restriction on my hydro, I’m gonna get my water disconnected. I already asked you if you can just take a little off at a time. I am not pleased at the way I’m being treated. I am gonna phone customer service to find out who I can talk to that is even higher than you because my kids are suffering even this morning when my daughter left for school she said mom you used to cook so well for us and do so many things well now my income is cut in half. I have headaches that I live with every single day, ringing in my ears constantly, nauseous every day because of a bus driver. My kids are suffering, I am suffering and I do not like the way that I have been treated and I couldn’t make it to that appointment because I don’t have any money to get there with gas and parking (cut off)”

Another message which was recorded by the case manager on April 7, 2010, is as follows:

“[Text deleted] I asked you about going to [rehab clinic] and starting tomorrow so I am totally cooperating here so could you please call me back at [text deleted]. I mean what more can I do I want to get there I’ve wanted to go all week and not this past Friday but the Friday before when I was there and trying to get a hold of you when I had a sick [text deleted] year old at home left on his own where Child & Family Services could have stepped in take him away from me I couldn’t get anyone to help. I left him alone in the morning and I went there and I was trying to get someone to come to the house and did not have success so I had to leave because it was a choice of do I leave a [text deleted] yr old alone or do I get home because he’s a sick kid and I do not want Child & Family Services stepping in and taking him away. I tried to phone you I couldn’t get a hold of you; the person at [rehab clinic] was right there when I’ve been trying to phone so I am cooperating and I did ask like couple times about going back to [rehab clinic] like yesterday and today’s already so I would like to start tomorrow morning could you call me at [text deleted]. Thank you”

Counsel for the Appellant submitted that it is apparent from these messages that the Appellant was having some difficulty with the MPIC case manager and supervisor.

Counsel for the Appellant referred to the neuropsychological report that had been requested by the Commission from [Appellant’s neuropsychologist #1]. In that report, which is dated September 26, 2014, [Appellant’s neuropsychologist #1] noted that he had reviewed numerous medical reports on the file, as well as met with the Appellant and administered various tests to her. [Appellant’s neuropsychologist #1] stated as follows, at page 21 of his report:

“... the current assessment indicating some worsening of her measured functioning and, variability in skill that I would attribute to her psychosocial situation, dealing with the reportedly experienced stress in her interactions with MPI, her report of residual symptoms in the face of looking normalized in the video surveillance material, and her psychological reaction with significant Adjustment-related disturbance associated with her relationship with MPI and the contextual stressors associated with her partner’s serious and life-threatening medical illness.”

[Appellant’s neuropsychologist #1] continued further at page 22:

“The matters raised as indicated above regarding her tenure at [rehab clinic], her reported conflict with MPI Case Managers, issues with her ex-husband regarding child custody and financial support, her financial struggle to provide for herself and her

children, and the distress and desperation she had as indicated in the MPI File Notes, appear to have contributed in part to her providing false and/or inaccurate information.

Given the stressful circumstance she was in at the time of the assessment that I had conducted, I did find her ideation unusual in that she was somewhat impulsive, circumstantial, at times tangential, sometimes disjoint, and overinclusive in her statements, and that combined with her psychosocial stressors following the accident, in the context of her separated status, she had been in a distressed psychological state where she did overstate her situation and then rationalized why this occurred.”

Counsel for the Appellant noted that MPIC referred [Appellant’s neuropsychologist’s] report to their Health Care Services consultant, [MPIC’s psychologist], who provided a report dated April 29, 2015. Counsel for the Appellant noted that while [MPIC’s psychologist] is an expert in her field, she did not have the opportunity to assess the Appellant personally and relied only on a paper review. She was also bound by the two questions that were asked of her, which were whether the Appellant’s state of mind was dysfunctional and whether the stress factors in the Appellant’s situation affect whether she is responsible for providing false information. In contrast, [Appellant’s neuropsychologist #1] conducted not only a thorough review of the reports on file but also personally reviewed and assessed the Appellant on three days and had a further opportunity to provide a report in response to the Health Care Services review. In addition, he responded directly to the questions that the Commission had posed. Therefore, counsel for the Appellant submitted that greater weight should be given to the reports provided by [Appellant’s neuropsychologist #1] over the report provided by [MPIC’s psychologist].

Counsel for the Appellant referred the panel to a decision of the Commission in case AC-07-06. In that case, the Appellant argued that MPIC’s termination of her benefits in relation to false statements was an inappropriate penalty. The Commission found as follows:

“While we find that the Appellant was exaggerating and embellishing her difficulties during her reports to her case manager, we find that she was still undergoing substantial difficulties related to her motor vehicle accident at that time. In these circumstances, it would have been more appropriate for this Appellant’s rehabilitation for the case

manager to have enrolled the Appellant in a formal rehabilitation program rather than instituting an outright termination of her PIPP benefits. Pursuant to Section 150 of the MPIC Act, MPIC has an obligation to advise and assist claimants. Instead of terminating the Appellant's PIPP benefits, the case manager should have assisted the Appellant. Upon learning that the Appellant was indeed attending a gym, the case manager could have enrolled the Appellant in a formal rehabilitation program in order to support the Appellant's reintegration into society. The Commission therefore finds that a suspension of benefits would have been a more appropriate consequence in the circumstances of this case."

Counsel for the Appellant submitted that had MPIC provided the Appellant with appropriate case management as required by section 150 of the MPIC Act, the Appellant would have had a better understanding of her obligations and would likely still be receiving treatments from [Appellant's chiropractor] and could potentially have been receiving IRI top-up until she was ready to resume her full-time pre-MVA employment. The Appellant had problems with her case manager and felt disrespected. She didn't get the appropriate advice and assistance as was required from MPIC. She was not aware of the availability of IRI top-up and thought it was all or nothing; the [rehab clinic] report and the case manager's decision letter said she was to make an immediate, unmodified return to her pre-MVA full-time employment.

In summary, counsel for the Appellant submitted that the Appellant testified as to her circumstances, her persistent ongoing symptoms, her discouragement with the [rehab clinic] program, her failure to improve, her communication problems with the case manager, her marital break-up, her child custody issues, her loss of home and car, her financial problems including her struggle to support herself, difficulties caring for her children, with the result being the need to go on social assistance and emotional turmoil. These were significant factors in her providing false and inaccurate information to MPIC. The Appellant may have exaggerated her statements relating to her abilities. However, the evidence clearly demonstrates that she continues to suffer symptoms from her MVA. At the request of the Commission, [Appellant's neuropsychologist

#1] has clearly opined that her state of mind and contextual factors were contributing in part to her providing false or inaccurate information. Counsel for the Appellant submitted that the Appellant has accepted responsibility for these statements but there were extenuating and mitigating personal circumstances. Counsel for the Appellant asked that the Commission take all these factors into consideration and requested that the case manager's decision dated May 27, 2013, be varied and changed from a termination to a suspension and that the Appellant's PIPP benefits be reinstated once the suspension ends.

Submission for MPIC:

Counsel for MPIC provided a written submission, which was appreciated.

Counsel for MPIC noted that the Appellant had conceded that she did provide false and inaccurate information to MPIC by not advising that she was doing some massage work. Counsel noted that the Appellant had advised many people, including her case manager, MPIC supervisors, her occupational therapist, staff at [rehab clinic] and the Internal Review Office, that she had not worked since the MVA. In addition, counsel for MPIC noted that the Appellant had told [Appellant's doctor #1], [Appellant's doctor #2], and [Appellant's neuropsychologist #2] that she had not been able to work since the MVA.

Counsel for MPIC pointed out to the Appellant in cross-examination that there was an obligation imposed by the MPIC forms that required her to inform MPIC when she returned to work or earned income and that she did not do so. Counsel noted the Appellant's explanation that to her, work meant working at her pre-MVA level. Counsel for MPIC submitted that this was not a reasonable explanation. Counsel submitted that the Appellant is an intelligent woman and that any reasonable person ought to know that the obligation is to tell MPIC when they are working,

whether it is full-time or part-time. Counsel for MPIC submitted that the obligation to report and to be honest is a continuing one, particularly since the Appellant was trying to get her benefits reinstated after they were terminated in April, 2010. Counsel noted that the Appellant did receive further benefits as MPIC paid for the neuropsychological assessment by [Appellant's neuropsychologist #2] in September 2012 and chiropractic treatments from [Appellant's chiropractor] in 2012.

Counsel for MPIC submitted that the panel should not accept the Appellant's explanation that she did not understand the question being asked of her, and that it is reasonable to expect someone to report to MPIC when they are working. Counsel further submitted that the Appellant's false statements, or failure to report her work, should not be considered to be mitigated by her personal circumstances.

Counsel for MPIC referred the panel to the neuropsychological reports that were received from [Appellant's neuropsychologist #1] and [MPIC's psychologist]. Counsel for MPIC, in his written submission, stated as follows regarding those reports:

“[MPIC's psychologist] says that the claimant did not have a neurological, cognitive dysfunction that results in her inability to understand things. She has no psychological condition or mental illness associated with deception. She is not delusional. She has no personality disorder. She is not a pathologic liar. She does not have amnesia or factitious disorder. She is not a malingerer. [Appellant's neuropsychologist #1] agrees with [MPIC's psychologist] on these points.

According to [MPIC's psychologist], what the claimant had was something nearly all adults have, to some degree - stress. ...

According to [MPIC's psychologist], there is no research to support the notion that stress itself results in the removal of choice to provide false information. [Appellant's neuropsychologist #1] agrees.”

Counsel for MPIC submitted that if everyone who provided false information could use stress as an excuse, then arguably section 160 of the MPIC Act would not have much effect. Counsel submitted that this is a slippery slope that the panel should not go down. Counsel for MPIC acknowledged that [Appellant's neuropsychologist #1's] report indicated that the Appellant's life circumstances contributed in part to her providing false information to MPIC. However, counsel submitted that this does not absolve the Appellant of responsibility.

Counsel for MPIC further submitted that the facts of this case did not reflect a one-time situation, where someone may have "snapped". The Appellant's provision of false information was ongoing, over a long period of time. The material in the indexed file consists of numerous invoices and several interviews with the Appellant's clients. Counsel for MPIC submitted that the Appellant misled numerous people on a consistent basis by giving the impression that she was not able to work at all. Moreover, she was doing the same kind of work that she had done prior to the MVA.

Counsel for MPIC submitted that it was not wrong for the Appellant to want to earn some money, but she had to report it to MPIC. Counsel noted that the case manager had made several efforts to assist the Appellant, by advancing her IRI and by giving her extensions for missed appointments. Counsel for MPIC submitted that although it may have been a difficult time for the Appellant, she can read and is well-spoken, and she should have understood and complied with her obligations.

Counsel for MPIC submitted that there isn't enough in the Appellant's personal circumstances to warrant changing the termination to a suspension; there are not enough extenuating circumstances to mitigate the penalty. Counsel submitted that the proper interpretation of the

report from [MPIC's psychologist] is that stress does not excuse the conduct of the Appellant. Counsel submitted that stress is not an excuse in the context of criminal law and it should not be an excuse in the administrative or civil context. There was a consistent pattern to the Appellant's conduct over a long period of time. As [MPIC's psychologist] noted, on a balance of probabilities, the Appellant was aware that the information that she provided was false and/or inaccurate, and despite the stress, her state of mind was not dysfunctional to the degree that she could not be held responsible for her choice in providing that false or inaccurate information. [Appellant's neuropsychologist #1] did not disagree with this conclusion. Counsel for MPIC submitted that accordingly, there is no basis to mitigate or excuse the Appellant's conduct in knowingly providing the false or inaccurate information. Therefore, the case manager's decision of May 27, 2013 should be confirmed. Counsel submitted that the Appellant has not met the onus of establishing that the decision was in error.

Reasons for Decision:

The issue to be determined on this appeal is whether the Commission should confirm, vary or rescind the case manager's decision to terminate Appellant's entitlement to PIPP benefits as of February 1, 2010, pursuant to paragraph 160(a) of the MPIC Act.

The relevant legislation is as follows:

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;

...

Powers of commission on appeal

- 184(1) After conducting a hearing, the commission may
- (a) confirm, vary or rescind the review decision of the corporation; or
 - (b) make any decision that the corporation could have made.

The onus is on the Appellant to show, on a balance of probabilities, that the case manager erred in terminating her PIPP benefits for knowingly providing false or inaccurate information to the corporation.

The panel has heard the testimony of the Appellant, and carefully reviewed all the reports and documentary evidence filed in connection with this appeal. We have also considered the submissions of counsel for the Appellant and counsel for MPIC as well as the provisions of the relevant legislation.

The Appellant has acknowledged that she provided false or inaccurate information to MPIC, but has submitted that rather than the termination of her PIPP benefits, the Corporation ought to have suspended her PIPP benefits for a period of time, and she asks that the Commission now substitute that penalty, with the length of the suspension to be determined by the Commission. Counsel for MPIC has submitted that the case manager's decision was correct. Given that the Appellant has acknowledged the provision of false information, the only determination required to be made by the Commission is the appropriate penalty.

Counsel for the Appellant has submitted that there were extenuating or mitigating personal circumstances which led to the Appellant's provision of false information to MPIC. The panel finds that it has the ability to consider these circumstances in determining the appropriate penalty under paragraph 160(a) of the MPIC Act. The Commission has previously considered paragraph

160(a) in its decision in case AC-05-96. In that case, the Commission stated as follows at pages 15 to 17:

“In our view it is well within the Commission’s authority to take into account an Appellant’s reasons or explanations, before the Commission comes to a final decision as to whether a refusal, reduction, suspension or cancellation of benefits under Section 160 should be upheld.

Section 160 (a) through (h) establishes a series of circumstances under which a claimant’s entitlement may be affected. If any of those circumstances apply, the claimant’s entitlement may be refused, reduced, suspended or terminated.

...

If the Commission finds that either of the factual circumstances under Section 160(a) or (b) has been met, then it may go on to consider whether, on the whole, the Commission is satisfied that the overall circumstances warrant a refusal, reduction, suspension or termination of benefits. If the Commission finds that the Appellant has provided a valid reason for the conduct complained of, this is one of the circumstances which the Commission may take into consideration in its deliberations regarding the Appellant’s entitlement to benefits.” [emphasis in original]

In considering the mitigating circumstances submitted by the Appellant, the panel has carefully reviewed the testimony of the Appellant as well as the objective medical and other documentary evidence on the Appellant’s file. The Appellant testified that since the time of the accident, she suffered from headaches and dizziness, which persist to date, and the panel accepts her evidence on this point. As previously noted, [Appellant’s doctor #1], in her report dated April 19, 2012, stated that the Appellant “continues to have symptoms of vertigo, headaches, memory issues ...”. As well, [Appellant’s chiropractor], in his report dated March 11, 2013, identifies “[the Appellant’s] primary somatic complaints, which are: constant headaches, sense of imbalance, tinnitus, lightheadedness upon physical exertion ...”. The panel accepts that the Appellant was suffering from ongoing physical stressors after the MVA.

In addition, the panel accepts that the Appellant was suffering from ongoing emotional stressors after the MVA. She testified, and the panel accepts her evidence, that she was having difficulties

due to the breakdown of her marriage, difficulties caring for her children as well as financial problems. It appears clear that the Appellant's actions, in providing some massages after the MVA, were driven by a dire financial situation, as reflected in the phone messages left for the MPIC employees. For example, on February 16 or 17, 2010, the Appellant left a message, which stated in part as follows:

“... so I am like majorly struggling from what I've been getting from you guys. I did not have a penny for gas to go any further I did not have any money to pay for parking and I did not have any money to pay for a babysitter ...”

It is apparent that the Appellant was suffering from significant emotional distress both related to her dealings with MPIC and also due to her personal circumstances. As [Appellant's neuropsychologist #1] pointed out in his report dated September 26, 2014:

“Given her report, supported by the MPI File Notes from her multiple phone calls with the Corporation, she clearly was distressed about her circumstances, particularly her financial state, and there was clearly a sense of desperation here given what was reported.

...

... combined with her psychosocial stressors following the accident, in the context of her separated status, she had been in a distressed psychological state ...”

[Appellant's neuropsychologist #1] concluded in his September 26, 2014, report that:

“The matters raised as indicated above regarding her tenure at [rehab clinic], her reported conflict with MPI Case Managers, issues with her ex-husband regarding child custody and financial support, her financial struggle to provide for herself and her children, and the distress and desperation she had as indicated in the MPI File Notes, appear to have contributed in part to her providing false and/or inaccurate information.”
[emphasis in original]

The panel accepts the report of [Appellant's neuropsychologist #1] and prefers his report to that of [MPIC's psychologist]. [Appellant's neuropsychologist #1] had the benefit of meeting with the Appellant and assessing her over three days, whereas [MPIC's psychologist] did not. As well, [Appellant's neuropsychologist #1] directly addressed the questions posed by the Commission, being the Appellant's state of mind at the time that she provided the false

information and whether the factors raised by the Appellant as extenuating circumstances contributed to her providing false information.

The panel finds that the weight of the evidence establishes that the Appellant suffered from extenuating personal circumstances such as to mitigate her behaviour in the provision of false or inaccurate information to MPIC. Accordingly, the Commission finds that the Appellant has met the onus of showing, on a balance of probabilities, that the case manager's decision should be varied and we find that her PIPP benefits should be suspended, rather than terminated.

The panel next has to determine the appropriate length of the suspension. This issue has been considered before by the Commission. In AC-07-06, referred to earlier, the Appellant exaggerated and embellished her difficulties. The Commission found that the Appellant knowingly provided false or inaccurate information to MPIC by virtue of the information that she provided to her case managers on the Level of Function forms and in her statements to her case managers. The activity level reported by the Appellant to MPIC in that case was inconsistent with her activity level in certain surveillance videos. The Commission held as follows at pages 12-13:

“Despite the Commission's finding that there was a contravention of s.160(a) of the MPIC Act, upon a careful consideration of all of the information before it, the Commission finds that a suspension of PIPP benefits for a period of three months, from July 13, 2007 to October 12, 2007, should be substituted for the outright termination of the Appellant's PIPP benefits. The medical documentation confirms that, as a result of the motor vehicle accident the Appellant still has substantial disabilities ...”

The Commission had occasion to consider paragraph 160(a) of the MPIC Act again in AC-09-134. In that case, the Appellant had previously been found to have contravened paragraph 160(a) by not advising MPIC of his return to work. His PIPP benefits were suspended for 4 months and he was required to repay IRI benefits. He subsequently had surgery and applied for further PIPP

benefits. MPIC denied his request and argued that his earlier false statements should result in a permanent termination of PIPP benefits. The Commission found as follows at page 8:

“In this case, upon a careful consideration of all of the facts and circumstances before it, the Commission finds that the suspension of the Appellant’s PIPP benefits for the period from December 14, 2005 until April 2006 was an appropriate penalty for the Appellant’s contravention of Section 160(a) of the MPIC Act in December 2005. The Commission finds that a suspension of benefits is a suitable outcome in the circumstances of this case, as opposed to an outright termination of all entitlements to ongoing PIPP benefits. The Appellant sustained significant injuries and permanent impairments as a result of the August 9, 2005 motor vehicle accident which have lifelong implications for him. The seriousness of his breach must be considered in terms of the ongoing impact of his injuries. While the Commission determined that the Appellant was indeed providing false or inaccurate information with respect to his return to work, in the circumstances of this case, the short duration of that breach does not warrant a definite termination of the Appellant’s ongoing entitlement to all future PIPP benefits arising from the motor vehicle accident of August 9, 2005.”

Here, when considering the appropriate length of the suspension, the panel has taken in account the seriousness of the Appellant’s breach. In particular, the panel has noted the fact that false or inaccurate information was provided by the Appellant to MPIC and others over a period of time. This was not an isolated incident. Accordingly, in exercising our discretion and in considering the penalty to be given to the Appellant under paragraph 160(a), the panel considers that a lengthy suspension of benefits would be appropriate. Accordingly, the panel finds that the Appellant’s PIPP benefits should be suspended for a period of two years from the date that the case manager first determined that the false or inaccurate statements were made, being February 1, 2010.

Disposition:

Based on the foregoing, the decision of the case manager dated May 27, 2013, is varied and the Appellant’s PIPP benefits are not terminated under paragraph 160(a) but are instead suspended for a period of two years from February 1, 2010 to February 1, 2012. The Appellant’s PIPP benefits could be reinstated on February 2, 2012, subject to the matters set out below. The

Appellant shall be entitled to interest upon any monies due to her by reason of the foregoing decision, in accordance with section 163 of the MPIC Act.

As noted at the outset of this decision, there remain two issues outstanding pursuant to the Internal Review decision of August 27, 2010. Pursuant to that Internal Review decision, the Appellant's PIPP benefits were terminated pursuant to paragraphs 160(e), (f) and (g) and paragraph 110(1)(a) of the MPIC Act as of April 18, 2010. As noted above, the appeal respecting that Internal Review decision was held in abeyance pending the outcome of this appeal. Accordingly, although the termination of the Appellant's benefits pursuant to paragraph 160(a) was varied to be a suspension, the reinstatement of her benefits effective February 2, 2012, will be held in abeyance pending the outcome of the appeal relating to the Internal Review decision dated August 27, 2010.

The Commission will retain jurisdiction in the event that the parties are unable to agree upon the quantum of benefits which are owing to the Appellant.

Dated at Winnipeg this 5th day of October, 2015.

MEL MYERS, Q.C.

JACQUELINE FREEDMAN

LES MARKS