Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-153

PANEL:	**Ms Laura Diamond, Chairperson** **Dr. Neil Margolis** **Ms Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], was not present at the appeal hearing;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Ashley Korsunsky.**
HEARING DATE:	**December 13, 2018**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity (IRI) benefits.**
RELEVANT SECTIONS:	**Sections 184.1 and 70(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94.**

Reasons For Decision

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.

Background:

On December 23, 2003 the Appellant was a passenger in a motor vehicle when he sustained a gunshot wound to the head. A panel of this Commission issued a decision dated October 25, 2012 which determined, among other things, that the Appellant had been involved in

a motor vehicle accident (MVA) and was eligible to receive Personal Injury Protection Plan (PIPP) benefits, to be determined. Following investigation, the Appellant's case manager issued a decision dated February 12, 2014 indicating that there was insufficient medical information that the Appellant sustained a specific injury as a result of the incident. As the first medical report on file was six years post-incident, there was no medical evidence to support that he had sustained a specific injury that would result in the inability to perform work related duties, personal care requirements or that the MVA had caused a psychological condition.

The Appellant sought an internal review of this decision. An Internal Review Officer (IRO) for MPIC considered the case manager's decision that the medical information did not support a causal relationship between the MVA and the reported injuries. The IRO considered the Appellant's medical records, and evidence regarding psychological treatment for post-traumatic sequelae, his recent work history (including such factors as parental leave) and his reports of anxiety, depression, sleep disturbance and impaired memory. The IRO clarified that the Appellant was seeking benefits for scarring and psychological/cognitive issues, employment shortcomings (IRI benefits) and maximum award amounts.

The IRO concluded that the Appellant should have his scarring assessed for a permanent impairment award (with interest of 3.5% commencing on December 23, 2005).

The IRO also directed the case manager to contact the office of [text deleted] (clinical psychologist) to obtain a psychological report, including clinical notes, which might identify any conditions the Appellant may be experiencing which were causally connected to the incident and, if necessary, to seek an independent psychological examination. Should a causal connection be established between any diagnosed psychological condition and the December 23, 2003

incident, MPI would then pay for any out of pocket and ongoing expenses for psychological treatment and any permanent impairments for a psychological condition which might be identified.

The IRO concluded, however, that she was not prepared to allow an award based upon the current evidence as, post-accident the Appellant was working at a few different employment positions and quit one at the [employment #1] for parental leave. The Appellant had five children under his care and had not looked for employment. Also, low back pain had been the primary reason identified in the Appellant's application for Employment Income Assistance (EIA) disability benefits.

On October 7, 2014, the Appellant's case manager issued a decision entitling him to a permanent impairment award for scarring to his scalp for 3.085%, plus interest.

On October 10, 2014, the Appellant filed a Notice of Appeal (NOA) from the decision of the IRO.

The case manager continued to investigate the Appellant's psychological issues. Clinical notes and reports were obtained from psychological treatment providers and input was sought from MPIC's Health Care Services psychological consultant.

Following receipt of a Health Care Services psychological review dated March 5, 2017, the Appellant's case manager wrote to him on March 13, 2017 to indicate that there was no entitlement to PIPP benefits for psychological conditions, as a causal link between his symptoms and the MVA of December 23, 2012 (sic) could not be established.

The Appellant did not seek a separate internal review of this decision, but has appealed the denial of Income Replacement Indemnity (IRI) benefits to the Commission.

Preliminary Matters:

When the Appellant filed his NOA with the Commission on October 10, 2014, he indicated that he was being represented by the Claimant Advisor Office (CAO). The address noted on the NOA was [address #1], telephone [text deleted].

The Appellant also elected to proceed with the option of mediation with the Automobile Injury Mediation (AIM) office, but the matter was not resolved.

On March 24, 2017, the CAO notified the Commission in writing that they were no longer representing the Appellant. The adviser provided a new address at [address #2], with telephone [text deleted] and [text deleted] for the Appellant.

An Appeals Officer with the Commission then contacted the Appellant by telephone on April 19, 2017 to confirm the issues under appeal and advise him that (as mediation was now concluded) a draft indexed file would be prepared and provided to him. A letter detailing this conversation was sent to the [address #2]. This letter was not returned to the Commission.

On July 10, 2017, the Commission attempted to contact the Appellant at both telephone numbers provided by the CAO office to arrange courier delivery of the draft indexed file. However, both numbers were “Not in Service”.

On August 2, 2017, the draft indexed file was sent to the Appellant via Xpresspost to the [address #2] address, but was returned to the Commission "unclaimed".

On August 9, 2017, the Appeals Officer again attempted to contact the Appellant at the telephone numbers provided by the CAO but both numbers were still out of service.

On September 13, 2017, the Appellant contacted the Commission to advise that he was in custody in [correctional centre] and was unsure where he would be residing when he was released. The Appeals Officer advised the Appellant that it was very important that he contact the Commission upon his release to advise of his address and telephone number.

On November 10, 2017, the Appeals Officer was advised by [courts] that the Appellant's matters had been disposed of. The [text deleted] and [text deleted] confirmed that the Appellant was no longer in custody. Accordingly, on November 14, 2017, the Appeals Officer sent a letter to the Appellant at the [address #2] address requesting that he contact the Commission to arrange courier delivery of the indexed file and confirmed his current contact information. This letter was not returned to the Commission.

A further letter was sent to the Appellant at [address #2] on December 13, 2017, advising that if he did not respond by January 15, 2018, the Commission would schedule a case conference to discuss his appeal. This letter was not returned to the Commission, but the Appellant did not contact the Commission.

On January 11, 2018, the Appeals Officer again attempted to contact the Appellant at the telephone numbers provided by the CAO, but the numbers were still out of service. The Appeals Officer confirmed with the [text deleted] and [text deleted] that the Appellant was not in custody.

A case conference was then scheduled for February 28, 2018. A copy of the Notice of Case Conference was sent to both [address #1] and [address #2], by both regular mail and Xpresspost. The notices sent to both addresses via Xpresspost were returned "unclaimed". The notices sent to both addresses via regular mail were not returned to the Commission.

The Notice of Case Conference indicated that "should either party fail to appear or to be represented at the above time and place, the Commission may proceed to schedule a date for the hearing of this appeal."

A case conference was convened on February 28, 2018. The Appellant did not attend.

A hearing date was set for April 18, 2018.

A copy of the Notice of Hearing (NOH) was sent to the address on the NOA ([address #1]) and the address provided by the CAO in writing ([address #2]). Both notices were sent by regular mail and Xpresspost. The notices sent to both addresses via Xpresspost were returned "unclaimed". The notices sent to both addresses via regular mail were not returned.

The hearing of April 18, 2018, was convened at 9:40 a.m. The Appellant did not attend.

The Commission reviewed the question of the issues before the Commission with counsel for MPIC. It was noted that the Appellant had now received the permanent impairment award for his scalp injury and was no longer appealing that issue before the Commission. The remaining issue on appeal addressed the question of the Appellant's entitlement to IRI benefits regarding his psychological condition. The Commission had further questions regarding the reports provided by MPIC's Health Care Services psychological consultant. As a result, counsel for MPIC undertook to provide a further psychological consultant opinion addressing these matters.

On August 22, 2018, counsel for MPIC provided a further Health Care Services psychological review to the Commission along with a few additional documents for inclusion in the indexed file. This information was sent to the Appellant at [address #2] by regular mail, along with a request that he contact the Commission by September 28, 2018 to advise if he had any further documents to submit for his appeal. If no response was received, the Appeals Officer indicated that the Commission would then proceed to schedule the matter for hearing. The Commission did not receive any response to this letter.

A hearing date for the appeal was scheduled for December 13, 2018.

Service of NOH:

On September 26, 2018, the Commission sent the NOH for the hearing date of December 13, 2018, along with an index and supplemental index to the Appellant at [address #2], via Xpresspost. This package was returned to the Commission as "unclaimed".

A NOH was also sent to [address #1] and [address #2] via regular mail. The letter sent to [address #1] was returned as "moved/unknown". The letter sent to [address #2] was not returned to the Commission.

On November 8, 2018, the Commission again attempted to send the NOH, index and supplemental index to [address #2] and a copy of the NOH to [address #1] via Xpresspost. Both were returned to the Commission as "unclaimed".

On November 15, 2018, the Commission sent a letter to the Appellant providing him, as is the Commission's practice, with the name of the Health Care Services consultant who authored the reviews in the index and supplemental index. This was sent to [address #2] via regular mail. This letter was not returned to the Commission.

On December 6, 2018, the Appeals Officer attempted to contact the Appellant at the telephone numbers provided by the CAO. These numbers were still out of service. The Appeals Officer also contacted the [text deleted] and [text deleted] to confirm that the Appellant was not in custody, and checked the [obituaries] to confirm that there was no listing for the Appellant.

The Commission therefore determined that the Appellant had been properly served with a Notice of Hearing in accordance with the provisions of the MPIC Act and could proceed with the appeal hearing.

The Appeal Hearing:

The appeal hearing was scheduled for December 13, 2018 at 9:30 a.m. The hearing was convened at 9:40 a.m. The Appellant did not attend.

The MPIC Act sets out, in section 184.1(1) and 184.1(2) of the Act, how notices and orders may be given to an Appellant.

> **How notices and orders may be given to appellant**
>
> 184.1(1) Under sections 182 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant
>
> (b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.
>
> **When mailed notice received**
>
> 184.1(2) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

Counsel for MPIC submitted that the Appellant had been properly served with a NOH pursuant to section 184.1(1)(b) and section 184.1(2) of the MPIC Act, noted above.

The panels notes that the Commission's staff has attempted to serve the Appellant by regular mail and Xpresspost at more than one address, contacted various provided telephone numbers which are no longer in service, and attempted to contact him through the [text deleted], courts and [text deleted].

The panel finds that the Commission's staff has taken reasonable steps to try to locate the Appellant.

The Commission agreed that the Notice of Hearing was sent by regular mail to the address provided in writing by the Appellant's representative on March 24, 2017. Therefore, pursuant to

section 184.1 (1) and (2) of the Act that notice is deemed to be received on the 5th day after September 26, 2018 (the date of mailing).

The panel then proceeded to hear submissions from counsel for MPIC, who reviewed the evidence on the Appellant's indexed file and made submissions regarding the Appellant's entitlement to benefits.

Issue:

The issue to be determined on appeal is whether the Appellant is entitled to IRI benefits in regard to a psychological condition caused by the MVA. Upon reviewing the evidence on the Appellant's indexed file and the submission of counsel for MPIC, the Commission determined, that the Appellant has not met the onus upon him of showing, on a balance of probabilities that the IRO was in error and that he should be entitled to PIPP benefits for a psychological condition arising out of the MVA.

Documentary Evidence:

The panel reviewed the following documentary evidence from the Appellant's indexed file.

General Practitioners

A Primary Health Care Report was completed by the Appellant's general practitioner, [text deleted], on August 20, 2009. It noted injury to the Appellant's brain and scalp but made no mention of a psychological condition.

[Appellant's general practitioner] prepared further reports regarding the Appellant's scalp condition.

Along with chart notes, reports from the Appellant's more recent general practitioner, [Appellant's general practitioner #2], were reviewed. A report dated October 9, 2013 indicated that he had only recently started seeing the Appellant on a regular basis and although the Appellant had mentioned suffering from chronic pain, [Appellant's general practitioner #2] was not aware it was due to a vehicle incident. He also noted that besides chronic scalp pain, the Appellant was claiming to have suffered mental stress from being shot in the head.

A subsequent disability assessment report completed by [Appellant's general practitioner #2] in regard to Employment and Income Assistance (EIA) disability, dated March 29, 2016, indicated that the Appellant was not able to work "due to PTSD… daily anxiety, insomnia and depression…"

The panel also reviewed reports prepared by the Appellant regarding a disability assessment for EIA which noted that the Appellant had chronic lower back pain which was preventing him from working.

Psychological and Psychiatric Reports

The Appellant's general practitioner, [text deleted], referred the Appellant for psychological treatment with [text deleted], clinical psychologist. Correspondence from [Appellant's psychologist]'s office indicated that the Appellant had then been referred on for treatment to [Appellant's clinical social worker], her former clinical associate.

The panel reviewed an intake assessment form and notes completed by [Appellant's clinical social worker] between May 27 and July 15, 2014. Under "Current Status", the notes indicated that the Appellant was shot in the head in 2003 and was currently experiencing pervasive anxiety

and depressive based symptoms. The impact of the head injury, and other issues surrounding criminal charges were reviewed. Stress surrounding preparations for hearings with MPIC and a diagnosis of post-traumatic stress disorder (PTSD) were noted.

A narrative report was prepared by [Appellant's clinical social worker] and dated February 2, 2015. She noted demonstrated intense and prolonged symptoms of post-traumatic stress, indicating that the Appellant fit the criteria for PTSD, with symptoms including re-experiencing the traumatic event, avoiding reminders of the trauma, and increased anxiety and emotional arousal.

These symptoms included re-experiencing the accident that occurred in 2003 with flashbacks, nightmares, and feelings of intense distress when reminded of the event. [Appellant's clinical social worker] indicated that the Appellant also fit the criteria for social anxiety, which is related and more appropriately seen as a component of PTSD.

[Appellant's clinical social worker] stated:

> **Pre-existing Conditions:**
>
> I was unaware of any pre-existing conditions that would have contributed to [the Appellant]'s current state or presentation. PTSD is reliant on a traumatic event, which according to my observation and [the Appellant]'s narrative, was the accident in 2003. A traumatic event is something that is experienced as life-threatening to the individual. In my opinion, based on my understanding of the accident that occurred in 2003, this would constitute a traumatic event …
>
> … For example, his triggers and flashbacks are related to this particular event.

A psychiatric report from [hospital], prepared by [text deleted] (resident) and [text deleted] (supervising psychiatrist) was prepared on December 8, 2015. The Appellant had been referred by his family doctor for an assessment of PTSD and anxiety. The history of presenting illness indicated:

> [The Appellant] stated that his problems with anxiety and trauma began after an MVA in 2003…

The psychiatrist indicated that he met the criteria for a diagnosis of PTSD and may as well have a diagnosis of Generalized Anxiety Disorder and a Panic Disorder. These were complicated by substance abuse and drug seeking behavior.

Health Care Services Psychological Reports

The panel reviewed three reports from MPIC's Health Care Services psychological consultant, [text deleted]. The first, dated May 4, 2015 reviewed the Appellant's file and concluded there was insufficient evidence in the file documentation to directly link described post-trauma and social anxiety symptoms to the 2003 MVA. Information in the file raised questions regarding the link between the post-trauma symptoms and the MVA. These included the Appellant's statement at the first AICAC hearing where he acknowledged pre-existing anxiety, suspiciousness and hesitation; prior and subsequent life style; and a notation that the Appellant's attendance to counseling in 2014 was "in the context of already being 'claimed focused'." [MPIC's psychological consultant] recommended attempts to get further information that would shed light on pre-MVA functioning and anticipated a possible need for an Independent Medical Examination.

[MPIC's psychological consultant] reported again on March 5, 2017. She provided an opinion that, based on a review of all documentation available on bodily injury file, the evidence did not provide sufficient data to support a causal connection between the Appellant's symptoms most recently reported or those identified in 2009 and the motor vehicle related incident in 2003. She reviewed the evidence on the Appellant's file, including reports from [Appellant's psychologist], [Appellant's resident psychiatrist and psychiatrist], and Health Care Reports from [Appellant's general practitioner] and [Appellant's general practitioner #2].

[MPIC's psychological consultant], in response to questions from counsel for MPIC, provided a more thorough report dated August 18, 2018. She was asked to provide verification of the issue of causation with respect to the Appellant's psychological condition, as well as to provide her opinion on whether the Appellant's psychological conditions preclude employment. She was asked to specifically address [Appellant's psychologist], [Appellant's clinical social worker] and [Appellant's resident psychiatrist and psychiatrist]'s reports and to comment upon whether the Appellant's psychological condition or symptoms, if causally related to the MVA, would preclude gainful employment between 2004 and 2008 and from 2009 to present.

Following a review of the documentation, [MPIC's psychological consultant] concluded that none of the reports referred to supported a conclusion of causality. [Appellant's psychologist] did not directly assess the Appellant, basing her report primarily on self-reports or observational data communicated to her by [Appellant's clinical social worker], and by a referral which already provided an attribution of causality. [Appellant's clinical social worker]'s notes provided no indication that medical documentation was referred to and, in spite of a notation about the Appellant's "general lifestyle issues related to violence, 'gangster lifestyle', and treatment issues relating to coping" the notes did not reflect a particular analysis of causality. Instead they

reflected a tracking of treatment goals and the treatment process. In spite of her statement that there was no pre-existing condition, there was no evidence that [Appellant's clinical social worker] had access to any information about the claimant's history prior to 2003.

Further, [Appellant's resident psychiatrist and psychiatrist] had been provided with a consultation request which already noted a PTSD diagnosis and they did not make any independent attribution of causality to his symptoms.

[MPIC's psychological consultant] opined that "attribution of causality requires more than self-report information and requires a critical analysis of: a range of data; of temporal relationship between symptoms and events, an accurate diagnosis; and a ruling out of other potential, equally or more plausible causal relationships."

[MPIC's psychological consultant] went on to opine that the Appellant, having denied any psychiatric history in 2011, while complaining of lower back pain and social anxiety, as well as the need to provide parental care to the children living with him, indicated that the Appellant was employed or volunteering between 2004 and 2008. Further, after 2009, his inability to be gainfully employed was a result of his back issues and family matters.

[MPIC's psychological consultant] also noted that "a psychological condition, including PTSD, depressive symptoms, and/or Social Anxiety, does not automatically preclude a person from employment."

Submission for the Appellant:

Application for Review of Injury Claim Decision and Notice of Appeal

The Appellant's Application for Review dated April 16, 2014 set out the following reasons for review:

1. Decision does not include my medical file completely (only PARTS)
2. Consideration was not given to my psychological support needs related to the incident of Dec 23, 2003
3. Decision did not consider my employment shortcomings as a result of the Dec 23, 2003 incident
4. Decision did not consider original police incident report and original MPI CLAIM

The Appellant's NOA dated October 10, 2014 stated:

> Based on the issues that have been noted on the Review Decision, By [text deleted], I need to Appeal some of the Decisions. Thank you.

Submission for MPIC:

Counsel for MPIC submitted that the Appellant had been properly served pursuant to section 184.1(1) of the MPIC Act when the NOH was sent by regular mail to an address he had provided in writing to the Commission. Pursuant to section 184.1(2) of the Act, this notice is deemed to be received by the Appellant on the fifth day after mailing.

Counsel noted that the Appellant had, in spite of this notice, failed to attend at the hearing or to participate in the Appeal process after the withdrawal of the Claimant Advisor. The panel should take note of his failure to present himself for cross-examination or to present oral testimony or submissions at the hearing.

Counsel characterized the issue under appeal as a two-step test. The question for determination was whether the Appellant suffered from a MVA related condition and if so, whether it prevents

him from employment. She noted that a later case management decision which found there was no entitlement for treatment for a psychological condition (on the basis that the Appellant did not sustain a psychological condition as a result of the MVA) was not the subject of an Application for Review by the Appellant and not before the Commission on appeal. The question before the current panel was whether, on a balance of probabilities, there is a MVA related psychological condition that prevents the Appellant from employment.

The onus is on the Appellant to establish the causal connection and the inability to work as a result of the MVA. Counsel submitted that there was a lack of evidence to support any inability to work due to a psychological or physical inability connected to the MVA.

For support in this analysis, counsel relied upon the Health Care Services psychological consultant's reports dated May 4, 2015, March 5, 2017 and August 18, 2018. These examined the temporal relationship between the MVA and the Appellant's reporting of symptoms, as well as inconsistencies in his reporting which influenced later reports by caregivers.

The psychological consultant, [MPIC's psychological consultant], set out the methodology for evaluating psychological injury from a retrospective perspective in which a significant time period has elapsed from the incident in question. She indicated that:

> …A number of factors must be considered. These include: whether the actual disorder is present; whether the timing of presence of symptoms has temporal relationship with incident; and whether there are equally or more plausible explanations for symptoms. In this regard, objective evidence would be required to demonstrate temporal continuity between an event and its impact as well as to be able to rule out competing or more plausible explanations.

Counsel for MPIC then undertook a thorough and, systematic review of the relevant documents on the Appellant's file, which also touched upon his health status and circumstances before and following the MVA.

Temporal:

In highlighting the temporal lag between the MVA and reporting of symptoms, counsel reviewed the Appellant's medical records and chart notes, including a printout of services from Manitoba Health. While he attended at his general practitioner (and even for some physiotherapy treatments) with some regularity, there are no references or notations to psychological issues. The records contain references to headaches, scalp pain, and to lower back pain from a slip at work, but there are no references to psychological concerns.

The Reasons for Decision from the previous AICAC hearing set out the Appellant's testimony that after the MVA he went to [text deleted] and worked as a [text deleted] volunteer and founder of an [text deleted], travelling the province and speaking out against violence, for two years. PTSD and social anxiety were not referenced as interfering with these pursuits. Two years later, at the Internal Review Hearing of April 16, 2014, he told the IRO that when he relocated to [city] shortly after the 2003 incident, he worked at [employment #2] cooking part-time, although the position lasted less than a year due to reports of social anxiety. He then took a full time job in [city] with the [employment #1] as a caretaker but indicated he left that to care for his children. After that parental leave, he indicated that he couldn't begin another community centre position as it caused him to feel paranoia, fear and social anxiety.

Counsel submitted that the Appellant's descriptions of his work history to the Commission and the IRO were not completely consistent, but did show that he had been working between the

MVA and the date he approached MPIC for benefits in June 2009. At that time, he claimed that he had been suffering from headaches since the MVA which were getting worse and he felt were related to the MVA. No mention was made at that time of a psychological injury or inability to work.

A Primary Health Care Report from [Appellant's general practitioner], focused mainly on the Appellant's scalp injuries. He indicated that the Appellant was able to work and was working and did not reference psychological issues and PTSD.

The next group of documentation on the Appellant's file concerned a slip at work in December 2009 and a Workers Compensation (WCB) claim. This referenced lower back pain but said nothing about PTSD or psychological issues.

EIA claim documentation which followed, beginning in September 2011, showed self-reports from the Appellant regarding an inability to work related to lower back pain. Only later documentation mentioned his gunshot injury and PTSD.

[Appellant's general practitioner #2]'s report:

It was against this background, counsel submitted, that [text deleted], the Appellant's new general practitioner, reported on October 9, 2013. He indicated that he had only started seeing the Appellant as recently as 2012. At that time, the Appellant had not referenced the MVA or raised any psychological social anxiety issues. [Appellant's general practitioner #2] noted that this was the first time he was made aware of the MVA. Counsel submitted that this report did not identify a psychological condition related to the MVA and did not say the Appellant was incapable of working.

In a later assessment for EIA by [Appellant's general practitioner #2] dated April 7, 2014, [Appellant's general practitioner #2] noted symptoms of depression combined with symptoms of PTSD, anxiety and agoraphobia. Although his report indicated this condition dated back to January 2004, counsel for MPIC submitted there was nothing on file that would indicate the Appellant saw anyone for such issues in 2004. Although [Appellant's general practitioner #2] then recommended that the Appellant not work for 7 months, due to depression and PTSD, it was submitted that this diagnosis was based on self-reporting. It was not based on a history of visits or any previous diagnosis by other caregivers. The MVA as a causal factor was not referenced.

Further EIA disability summaries which followed noted depression, anxiety and PTSD as reasons for the Appellant not working, but again there was no reference or indication that this was a MVA related condition.

[Appellant's clinical social worker]:

[Appellant's clinical social worker], who holds a Masters in social work, treated the Appellant with 10 sessions for psychological issues. She provided her chart notes between May 17 and July 2014 and provided a report dated February 2, 2015, (prepared without benefit of her notes) which opined that the Appellant's PTSD (and social anxiety) were caused by the MVA.

On reviewing this report, counsel pointed to [MPIC's psychological consultant's] comments that [Appellant's clinical social worker] did not see fit to note other issues of trauma which the Appellant had experienced, such as living a violent lifestyle with criminal activities, etc. These may have contributed to the Appellant's PTSD and anxiety. Although other references were

found in her chart notes to alcohol and drug use, a "gangster lifestyle" and paranoia about the police, no consideration was given to these as possible causative factors.

Counsel noted that the comments of [MPIC's psychological consultant], who is a clinical psychologist, should be given greater weight than [Appellant's clinical social worker]'s (social worker) opinion, particularly given [MPIC's psychological consultant] careful attention to forensic and causative analysis. It is also important to note, that [Appellant's clinical social worker] was working from a prior diagnosis by [Appellant's general practitioner #2] as PTSD and anxiety due to the MVA and that she had not really applied a forensic lens to assess whether this was indeed the correct causal attribution.

[Appellant's psychiatrist]:

Counsel addressed a psychiatric report from [Appellant's psychiatrist] dated December 8, 2015. [Appellant's psychiatrist] was also dealing with a referral from [Appellant's general practitioner #2] for an assessment of PTSD and anxiety. The Appellant stated that his problems with anxiety and trauma began after the MVA in 2003. The psychiatrist reported that the Appellant had coped by drinking heavily everyday for 8 years plus using crack and opioids (counsel noted that this was inconsistent with the Appellant's testimony at the prior AICAC hearing where he described working as volunteer at the [text deleted] and travelling around [text deleted] giving presentations and working). There is discussion by [Appellant's psychiatrist] of other occurrences in the Appellant's life which led to high levels of anxiety.

The Appellant related an incident where an individual came to his house, brandished a knife to his wife and family and held them captive in their house while the Appellant waited outside and eventually had to break into the house.

Discussion of gang affiliations, recrimination, hypervigilance and insomnia were also related.

This, it was submitted by counsel for MPIC could also be a contributing, plausible factor to the Appellant's psychological condition. Further, she noted, there was no opinion in this report suggesting the Appellant's psychological conditions were caused by the MVA.

Counsel pointed to [MPIC's psychological consultant's] report of August 18, 2018, which confirmed that [Appellant's psychiatrist]'s report did not give an opinion with respect to causation following a forensic assessment, but rather relied completely on a self-reporting history.

[Appellant's psychologist]:

[Text deleted] was a clinical psychologist who worked with [Appellant's clinical social worker] at one time. She provided a report dated June 11, 2014 upon referral from [Appellant's general practitioner #2]. This led to treatment for post-traumatic stress disorder from an incident in 2003 when he was shot in the head with a gun. As [MPIC's psychological consultant] pointed out, there was no indication as to why [Appellant's general practitioner #2] concluded the psychological issues were caused by the MVA. He could only have been relying upon the self-reporting of the Appellant. [Appellant's psychologist] then incorporates this pre-existing diagnosis of an attribution of causation into her own report.

[Appellant's psychologist] described secondary anxiety and obsessive based features without being provided with the information given by the Appellant himself at the AICAC hearing, and without commenting or referencing any information regarding the impact of the Appellant's lifestyle, including his alcohol and drug abuse.

Ability to work:

[MPIC's psychological consultant], in her report dated August 18, 2018, also addressed the question of whether there is a psychological condition caused by the MVA that would prevent the Appellant from working. She noted that from 2004-2008 the Appellant was engaged in working and volunteer work.

After 2009, he stopped working, first due to lower back problems and then due to family responsibilities. After April 2014 and continuing to present, the Appellant seems to have been receiving EIA benefits, although there was no information on file that would indicate that the Appellant was prevented from working because of a psychological condition. The Appellant failed to provide any information before the Commission that showed that, on a balance of probabilities, he could not work.

Summary:

MPIC submitted that there was a lack of evidence that the MVA caused psychological injuries which prevented the Appellant from working. He worked after the MVA and his claim that social anxiety prevents him from working is at odds with his testimony at AICAC and to the IRO regarding what he did in [text deleted], at [employment #2] and at the community centre. The documents showed that he had parental issues that resulted in him not working as well as a back injury. The health care professionals who attributed his psychological injuries to the MVA did not consider and reference the other lifestyle issues that may have resulted in anxiety and PTSD.

As [MPIC's psychological consultant] pointed out, questions of the Appellant living a violent lifestyle or a "gangster lifestyle", going about criminal acts and being worried about people coming into his house, paranoia of the police, alcohol abuse, drug abuse and drug seeking

behavior, back pain, parental responsibilities, domestic issues and incarceration all could have a causal contribution to the Appellant's diagnosis of PTSD and anxiety. Therefore, counsel submitted the Commission should find that there was no causal relationship between the MVA and the Appellant's psychological symptoms and further, that there is nothing, on a balance of probabilities, to indicate that this diagnosis would preclude him from working.

Discussion:

The MPIC Act provides:

> **Definitions**
>
> 70(1) In this Part,
>
> **"bodily injury caused by an automobile"** means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, but not including bodily injury caused
>
> (a) by the autonomous act of an animal that is part of the load, or
>
> (b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile; (« dommage corporel causé par une automobile »)

> **Entitlement to I.R.I. after first 180 days**
>
> 84(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

> **Where victim held several employments**
>
> 84(2) If the temporary earner or part-time earner held more than one employment immediately before the accident, the corporation shall determine only one employment under section 106.

Manitoba Regulation 37/94 addresses the meaning of "unable to hold employment" and states:

> **Meaning of unable to hold employment**
> **8** A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to IRI benefits as a result of an inability to work due to a psychological condition caused by the MVA.

The panel has reviewed the documentary evidence on the Appellant's file, as well as his submissions (as set out in the Application for Review and NOA) and the submission of counsel for MPIC. The Commission has concluded that the Appellant has failed to meet the onus upon him of showing, on a balance of probabilities, that he suffered from a psychological condition caused by the MVA.

Counsel for MPIC made extensive submissions regarding the Appellant's failure to meet the onus upon him of showing that he was not able to work as a result of his psychological condition. While the Commission does not take issue with counsel's submissions in this regard, we find, as a result of our conclusions regarding the lack of evidence of a causal relationship between his condition and the MVA, that it not necessary for the panel to decide and provide reasons for decision in regard to the issue of ability to work.

Counsel for MPIC submitted that the gap in the temporal relationship between a MVA and seeking treatment for PTSD shows that there is a lack of causal connection between the two. The Commission does not agree that such a temporal gap always results in a lack of causal connection, particularly where there is a diagnosis of PTSD.

However, in reviewing the evidence and submissions in this appeal, the Commission agrees with counsel for MPIC that the Appellant has failed in his onus to show a causal connection. A review of the documentary evidence on file showed that most of the reports on file supporting the conclusion that the Appellant suffered from PTSD and anxiety as a result of the MVA, lacked any independent analysis regarding causation. Rather, these reports relied upon a referral from the Appellant's general practitioner, [Appellant's general practitioner #2].

[Appellant's general practitioner #2]'s referral advanced a diagnosis of PTSD and general anxiety and attributed causation to the MVA. But [Appellant's general practitioner #2]'s own assessment of causation relied largely upon the Appellant's self-reporting. [Appellant's general practitioner #2] acknowledged that he began seeing the Appellant long after the MVA. His first report dated October 9, 2013, stated that he had only recently begun treating the Appellant and been made aware of the MVA, which had occurred almost ten years earlier.

In the Appellant's case, the Commission is of the view that relying upon the Appellant's self-reporting poses certain difficulties. As counsel for MPIC noted, many inconsistencies arose between the Appellant's reporting of his symptoms and experience to his caregivers, to AICAC, and to the IRO. These variances between the Appellant's story have led the Commission to conclude that the Appellant's reporting is less than reliable.

The Appellant's failure to appear at the hearing and subject himself to cross-examination or to address the various deficiencies, inconsistencies and questions identified by the Health Care Services psychological consultant and counsel for MPIC further leads the panel to give less

weight to the Appellant's position and to the reports on file attributing the Appellant's psychological condition to the MVA.

The Appellant has also failed to address the possible and plausible contribution of other factors in regard to his psychological diagnosis. These factors were addressed by the Health Care Services psychological consultant and counsel for MPIC and include pre and post incident criminal involvement (both as a victim and perpetrator), a self-reported history of pre-incident anxiety and suspiciousness, significant drug and alcohol use, and identified fear and paranoia regarding police and incarceration.

Therefore, the combination of:

i. a lack of temporal relationship between the incident and the reporting of symptoms, without explanation;
ii. a lack of causative analysis beyond a reliance on self-reporting; and
iii. the presence of equally or more plausible explanations for the symptoms

has led the panel to conclude that the Appellant has failed in the onus upon him of showing that his psychological condition was caused by the MVA. His failure to appear at the hearing meant that these questions were not addressed by him through testimony, cross-examination or submission.

As a result, the panel finds the Appellant has failed to meet the onus upon him of establishing, on a balance of probabilities, a causal connection between his psychological condition and the MVA.

Accordingly, the decision of the IRO dated July 17, 2014 is upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 25th day of January, 2019.

LAURA DIAMOND

NEIL MARGOLIS

SANDRA OAKLEY