Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-19-016, AC-20-070

PANEL:	**Laura Diamond, Chairperson** **Janet Frohlich** **Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**February 1, 2022 and February 3, 2022**
ISSUE(S):	**1. a. Whether the Appellant has the residual capacity to hold alternate part-time employment as a Data Entry Clerk (as of March 1, 2019); and** **b. If so, whether the IRI paid to the Appellant as a result of the determined employment was correctly calculated.** **2. Whether the medical information on file supports entitlement to treatment through the Functional Neurology Center for injuries sustained in the accident of April 13, 2008;** **3. Additional (Charter) Issues:** **Whether sections 11 (b) and 15 of the Canadian Charter of Rights and Freedoms were violated by MPIC's decisions and processes or by delays before MPIC or the Commission.**
RELEVANT SECTIONS:	**Section 107, 109, 110(1)(d), 115, 116(1), 136, 157 and 183(7) of The Manitoba Public Insurance Corporation Act ('MPIC Act'); Schedule C of Manitoba Regulation 39/94 and Section 5(a) of Manitoba Regulation 40/94 and** **Section 11(b) and 15 of the Canadian Charter of Rights and Freedoms.**

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 was injured in a motor vehicle accident (MVA) on April 13, 2008. She sustained injuries, including a soft tissue injury to her neck, back and shoulders, dental injuries and a concussion.

At the time of the MVA, the Appellant was about to start employment with [text deleted] but was unable to work as a result of her MVA related injuries. She initially received income replacement indemnity (IRI) benefits based on a classification as a non-earner, which was changed pursuant to an earlier decision of this Commission in *AC-08-117*, to reflect her status as a temporary earner, as a [text deleted].

Previous Appeals before the Commission

The Appellant filed several additional appeals with the Commission resulting from the MPIC case management and internal review decisions (IRD) in her claim. These issues were resolved by decisions of previous panels of the Commission in:

- *AC-09-111* regarding IRI entitlement;
- *AC-09-148* regarding chiropractic treatment and the Appellant's 180-day determination of employment;
- *AC-09-148* and *AC-11-049* regarding Permanent Impairment (PI) awards for nerve damage, range of motion restrictions, temporomandibular joint (TMJ) dysfunction and herniated disc;

- *AC-11-077* regarding IRI benefit calculation from April 21, 2008 to April 15, 2009, from April 16, 2009 to September 30, 2010, and whether IRI benefits were correctly calculated pursuant to Section 84(1) of the MPIC Act;

- *AC-11-010* and *AC-11-077* regarding calculation of IRI benefits;

- *AC-11-159* regarding a PI benefit for dental injuries (central incisor);

- *AC-09-148* regarding entitlement to a further PI award for TMJ;

- *AC 11-010, AC-11-077* and *AC-15-011* regarding entitlement to further PI awards for concussion, fine hand motor coordination, nystagmus, benign paroxysmal positional vertigo, torticollis , tinnitus and visual impairment;

- *AC-14-030* regarding entitlement to funding for Zoplicone;

- *AC-14-194* regarding entitlement to funding for acupuncture treatments;

- *AC-15-020* regarding entitlement to further IRI benefits and an extension of IRI benefits under s. 110(2) of the MPIC Act.

Determination of Employment/IRI

Following the process for determining temporary earner employment, the Appellant was determined into employment in the category of [employment category]. Her entitlement to IRI then became based upon her ability to hold this category of employment in the future.

Following a job demands analysis (JDA) and functional capacity evaluation (FCE) obtained by MPIC through testing and assessment by occupational therapists (OTs), it was reported that the Appellant met the criteria for being able to perform light/sedentary work, recommended to start on a part-time basis. Although her injuries precluded her from performing her determined employment in the motion picture support classification, alternate suitable occupations were identified. MPIC agreed that the first employment it had identified "Customer Service,

Information and Related Clerk" was not suitable for the Appellant, as her history of confrontational behaviors, sleep disturbances, behavioural outbursts and "emotional baggage" was not consistent with selecting a customer service occupation as a best-fit occupation for the Appellant.

Following further analysis of the Appellant's abilities, work history, transferable skills analysis (TSA), functional capacity evaluation (FCE) and labour market surveys (LMS), MPIC determined that the Appellant was able to work as a part-time Data Entry Clerk, effective March 1, 2019 and that she would be provided with a year long job search period, after which the potential earnings from that occupation would be deducted from her ongoing IRI benefits.

This decision was upheld by an Internal Review Officer (IRO) for MPIC on September 18, 2019.

[Neurology centre]

In addition, the Appellant sought MPIC funding for treatment of her injuries at the [neurology centre] in [text deleted]. MPIC denied funding for this treatment indicating that it was not medically required as a result of injuries arising out of the MVA. An IRO for MPIC upheld this decision on April 30, 2020, indicating that there was a lack of information regarding what the treatment was, what it was for, or from any health care provider recommending the treatment. There was no indication that the treatment is not available in [home province] or Canada. The IRO further found that according to the medical information on file the Appellant's current psychological and neuropsychological difficulties (for which this treatment was sought) were not a result of the MVA. Funding for the treatment was denied.

It is from these decisions of the IRO that the Appellant has now appealed.

Issues

Residual Employment/IRI Benefits

The issues before the panel were whether the Appellant has the residual capacity to hold alternate part-time employment and whether Data Entry Clerk is the appropriate classification for her abilities.

The calculation of her IRI benefits flowing from these decisions was also in issue.

Functional Neurology Treatment

In addition, the other issue before the panel was whether the medical information on file supports entitlement to treatment though the [neurology centre] for injuries arising out of the MVA.

Additional Issues

Section 157 of the MPIC Act

Through the case management process at the Commission, the Appellant also raised an additional issue under s. 157 of the MPIC Act.

S. 157 provides:

> **Payment not suspended by review or appeal**
> 157 An appeal or application for review in respect of an indemnity does not suspend the payment of the indemnity.

The Appellant took the position that the reduction of her ongoing IRI benefits at the end of her job search year by the amount calculated to represent her potential earnings as a part-time data entry clerk constituted a suspension of her indemnity payment, contrary to s. 157 of the Act. She submitted that this section could be interpreted to provide that an appeal or application for

review will cause a benefit or indemnity that has been reduced (or partially suspended) to be increased or reinstated.

Constitutional/Charter Issues Raised by the Appellant

During the Commission's case management of the appeal file, the Appellant advised that she wished to challenge MPIC's decisions on the basis that they violated sections 11(b) and 15 of the Canadian Charter of Rights and Freedoms (the Charter) and the "Jordan rule".

With the assistance of Commission staff, the Appellant submitted a Notice of Constitutional Question in this regard, which was served upon MPIC and the Attorneys-General for Canada and the Province of Manitoba. The Attorneys-General declined to intervene or participate in the appeal proceedings.

The Appellant and counsel for MPIC addressed these issues in their submissions at the appeal hearing, and the panel was asked to determine whether the Appellant has been discriminated against as a consequence of her physical injuries, contrary to s. 15(1) of the Charter.

The Appellant also submitted that as a result of delays by MPIC and at the Commission, the length of time which passed between the filing of the Appellant's first Notice of Appeal with AICAC and the hearing of this matter exceeded 18 months, which is the timeframe set out by the Supreme Court of Canada, known as the "Jordan Rule". The Appellant therefore asked the Commission to determine whether she was denied the right to have her case heard within a reasonable time contrary to s. 11(b) of the Charter.

Disposition

Following careful review of the documentary evidence, testimony of the Appellant and submissions of the parties, including their submissions regarding the MPIC Act and Regulations, the Canadian Charter of Rights and Freedoms and relevant case law, the panel finds that the Appellant has not met the onus upon her to show, on a balance of probabilities, that MPIC erred in concluding that she has the residual capacity to work as a part-time data entry clerk.

We find that MPIC properly calculated the deductions from her IRI benefits which flow from this determination.

The panel also finds that the Appellant has failed to show that treatment at the [neurology centre] is medically required for injuries arising out of the MVA or that she should be entitled to funding from MPIC for this treatment.

Finally, in conjunction with these appeals, the panel finds that MPIC has not failed to properly apply s. 157 of the MPIC Act, that the Appellant has not been discriminated against and that her rights under the Charter have not been violated.

Hearing

Due to pandemic restrictions and safety concerns, the hearing was held remotely and both parties appeared by videoconference. During planning for the hearing, the Appellant objected to this process, but at the relevant time, the Commission's policy in respect of restrictions and safety considerations, was to hold its hearings remotely and to offer parties technological accommodations and assistance. The Appellant was provided with this assistance and the hearing proceeded remotely by video-conference.

Written documentation, including case law and written versions of some submission, were provided by the parties in advance of their final submissions before the panel at the hearing, and the Commission appreciated this consideration from both parties.

In spite of her numerous prior appeal hearings, at the outset of the hearing the Commission reviewed the procedures and order of proceedings for the parties, including direct evidence, cross-examination, and submissions.

Documentary Evidence

The parties and panel were provided with and reviewed the indexed file of documents, along with a Supplemental Index of later filed documents, (the Index) prior to the hearing. Many of these documents (along with prior decisions of the Commission regarding this Appellant, and MPIC's case management and internal review decisions (IRD)) were referenced during the hearing, including:

- X-ray, emergency hospital, primary health care, chiropractic, dental and therapy reports from the period in April 2008 following the MVA. These described the Appellant's soft tissue injuries to her neck, back and shoulders, as well as dental injuries and a concussion.
- Vestibular assessment report from physiotherapist [text deleted] and medical report from [text deleted], describing the Appellant's cervicogenic difficulties and issues with short-term memory, dizziness, nausea and fatigue following the MVA, which impacted her ability to work.
- [Rehabilitation centre] [text deleted] multi-disciplinary assessment reports, work hardening program progress and discharge reports, and reports from [text deleted].

- Dental treatment reports and chart notes regarding dental injuries and temporomandibular (TMJ) syndrome, from physiotherapists, dentists and a prosthodontist.
- Specialist reports from Drs. [text deleted] (sports medicine), [text deleted] (neurology), [text deleted] (family medicine) and [text deleted] (neurology), reporting on the Appellant's myofascial neck pain, headaches, balance problems and dizziness, as well as her continuing pain and inability to return to work in 2008 and 2009.
- Continuing reports for chiropractic and physiotherapy (PT) assessments and treatment.
- MPIC's Health Care Services (HCS) chiropractic reports from Drs. [text deleted] approving funding for the extension of the Appellant's chiropractic care in February 2009, but finding that it was no longer medically required by November 2010.
- Psychological report from [text deleted] noting the importance of obtaining collateral data for neuropsychological assessments and the Appellant's reluctance to consent to this.
- Neuropsychological reports from [Appellant's neuropsychologist], confirming the Appellant's cognitive symptoms, with a DSM diagnosis of Cognitive Disorder, and recommending further investigation and follow-up for her vestibular symptoms.
- MPIC's HCS psychological reports from [text deleted]. [MPIC's HCS psychologist] reviewed [Appellant's neuropsychologist]'s reports in 2010 and concluded that there were no cognitive or psychological barriers to the Appellant performing the essential duties of her determined employment. He recommended further medical investigation into the Appellant's physical complaints surrounding dizziness, imbalance, nausea and fatigue.
- MPIC's HCS medical reports from [MPIC's HCS medical consultant]. After reviewing the Appellant's medical file in 2010, and noting the Appellant had declined to consent to the release of her pre-MVA medical file for review, he opined that he could not determine whether any of her symptoms were caused by the MVA. After further

documents were obtained for review, he concluded that the reports on file failed to indicate that she was diagnosed with a condition that accounted for her symptoms and was a by-product of the MVA.

- Ophthalmology reports from [text deleted] regarding the Appellant's diagnosis of post-concussive syndrome and its effects on her headaches and other symptoms.
- Medical reviews by HCS's [MPIC's HCS medical consultant], noting a lack of evidence showing permanent nerve damage as a result of the MVA, and opining that there was no disc herniation, permanent loss of cervical function or permanent nerve dysfunction as a result of the MVA. He also reported noting findings of full cervical range of motion without permanent impairment of neurological function, concluding that it was not medically probable that she would develop permanent torticollis or fine hand motor coordination dysfunction as a result of the MVA.
- Reports from [text deleted], physiatrist, regarding the Appellant's lack of cooperation with him during a scheduled third party medical examination and his reasons after that for his refusal to assess the Appellant.

  [Physiatrist]'s subsequent review of the Appellant's medical file noted a whiplash injury but indicated that a diagnosis of concussion had not been established, suggesting that many of the Appellant's symptoms could be attributed to a possible anxiety disorder, consistent with her behavior and presentation in his office, and pointed to an underlying mental health disorder.
- Reviews from MPIC's HCS psychological consultant, [text deleted]. [MPIC's HCS psychological consultant] reviewed the reports from Drs. [text deleted]. He recommended that in spite of the Appellant's trouble participating in examinations by health care providers, a further neuropsychological evaluation would be beneficial.

- Reports from psychologists Drs. [text deleted], each declining to proceed with neuropsychological assessments of the Appellant due to interactions with her which might impair or bias their assessment and reporting.
- Chiropractic reports from [pain specialist] of the [pain centre], describing her symptoms and indicating that the Appellant suffered from centrally maintained vestibulopathy consequent to her head injury. He set out his treatment objectives goals, which included improving her gaze stabilization. He continued to report on treatment progress and improvement. She continued to show disability from her head injury with regard to quick head motion, eye movements and light sensitivity, particularly in busy settings, causing her significant disability. A subsequent report noted downbeat nystagmus.
- Neuropsychological reports from [Appellant's neuropsychologist], who interviewed the Appellant on November 4 and 13, 2013 for follow-up neuropsychological assessment to evaluate her cognitive and psychological functioning and review the documentation on her file. [Appellant's neuropsychologist] found questionable performance on effort testing, rendering cognitive measures invalid. Citing evidence from the literature on mild traumatic brain injury (TBI) (i.e. concussion) that injury-related symptoms normally resolve very quickly with typically few, if any, symptoms 3 months post-injury, [Appellant's neuropsychologist] noted that residual symptoms (post-concussion syndrome) are largely due to comorbidities or non-injury factors. In the doctor's opinion it was highly improbable that the Appellant's current reported symptoms were linked to her MVA of April 2008, and it was much more likely that there are other explanations for her difficulties.

  The doctor also opined that while some areas of the Appellant's cognitive functioning were in the low average to borderline range, it was not likely this reduced performance in these domains was related to a concussion over 5 years ago.

With respect to psychological functioning, the doctor stated that the Appellant's long-standing preoccupation with her MVA and cognitive and physical concerns appeared to be hampering her ability to move forward in her life. Psychological counseling and vocational rehabilitation were recommended if the Appellant is willing, but a later report confirmed that as her difficulties were not causally related to the MVA, and it was not suggested that MPIC was responsible for providing these treatment options.

- Written response from the Appellant to [Appellant's neuropsychologist]'s reports, setting out her complaints about the assessment process and the reports. She indicated that the process had not been in line with her expectations, that there were issues with testing instructions to her and her misunderstanding of them, that the scale was biased and the doctor's attitude from the outset distracted and angered her such that it was difficult to concentrate, leaving her tired and distrustful. In her view, the accounts of what occurred were dramatically false as a result.
- HCS psychological report from [MPIC's HCS psychological consultant] denying further psychological treatment coverage based upon [Appellant's neuropsychologist]'s report that the Appellant's difficulties were not caused by the MVA.
- HCS physiotherapy review by PT [text deleted] finding that there was no physical or functional limitation which would preclude the Appellant from working.
- HCS medical review by [MPIC's HCS medical consultant] indicating that the Appellant had long since recovered from her MVA related injuries, and was not left with physical impairments from the MVA which would prevent her from returning to work at her determined employment. A further medial review found that she was not entitled to a PI benefit for visual acuity or ocular mobility as a result of the MVA.

- Neurology reports from [Appellant's neurologist] in response to a review by [MPIC's HCS medical consultant], who had questioned the Appellant's fitness to drive, after reviewing a previous AICAC decision regarding PI for concussion and her vestibular function and tinnitus. [Appellant's neurologist] reviewed the history of her injuries, treatment and rehabilitation, indicating that in spite of her headaches, her driving did not need to be curtailed. He confirmed that the Appellant's vestibular symptoms since the MVA had slowly and progressively improved, with some mild dizziness in her rehabilitation therapy but that she was fit to work on a part-time basis.

  A subsequent report confirmed that she would not have any problem doing basic computer duties, measurements, driving or shopping, but that due to her vestibular symptoms he was not sure that she could work long hours or do physical activity such as hanging drapes or pictures.

- Optometry reports from [optometrist], diagnosing the Appellant's convergence insufficiency and ocular motor dysfunction due to the MVA, which resulted in headaches, strain and/or double vision at near. He recommended vision therapy treatment noting that the convergence insufficiency was severe and her ocular motor dysfunction prohibited her from reading clearly, comfortably and binocularly. He opined that both would be treatable over a period of 2-7 months.

- Occupational therapy reports from OT [text deleted]. He met with and assessed the Appellant to conduct an FCE (with Addendum) which concluded that the Appellant had the ability to work at a medium strength level but was not ready for full-time work, due to her misbeliefs regarding her condition. He recommended psychological counselling as well as consultation regarding post-concussion exercise, conditioning and rest. The subsequent Addendum concluded that the Appellant met the criteria for light/sedentary work, with no cognitive deficits and recommended further physiotherapy.

- HCS medical report from [MPIC's HCS medical consultant] following his review of the FCE, recommending a return to light to moderate work, on a full-time basis.
- Transferable Skills Analysis and Labour Market Survey by vocational rehabilitation consultant [text deleted], identifying possible sedentary/light strength employment for the Appellant such as shuttle driver, customer service, retail salesperson, etc.
- Labour Market Research report by [vocational rehabilitation consultant] identifying work from home options for the Appellant such as web search or content evaluator, data entry clerk and transcriptionist.
- IRI Calculator File Note calculating IRI for a part-time data entry clerk.
- Residual Capacity Determination Calculation setting out the calculation of biweekly reduction from the Appellant's IRI benefits.
- Video link to a YouTube video by [functional neurologist] "Understanding Dysautonomia". The Appellant was advised that in accordance with the Commission's procedures, the panel would not be independently reviewing a video link prior to the hearing, and the Appellant did not show or refer to this video during the appeal hearing.
- Explanation of guaranteed yearly employment income (GYEI) /IRI calculations.

Testimony and Submission of the Appellant

The Appellant testified as the only witness at the hearing of her appeal. In her testimony, as well as her closing submission, she referred extensively to many of the documents in the Index described above. She was also cross-examined by counsel for MPIC.

She began by referring to previous decisions in her appeals before the Commission, noting that in contrast, this case had taken far too long for the IRDs and appeals to be heard. She indicated

that this was her 14th appeal, so she knows how long these matters should take and this process had taken too long.

She pointed to reports by Drs. [text deleted], indicating that they showed that [MPIC's HCS medical consultant]'s HCS opinions were wrong. Her symptoms were still the same as described in those reports, so she did not understand why she had to go through the assessment process with [Appellant's OT]. Every report other than [Appellant's neurologist], [doctors] said she could lift weight and this was outdated information. None of what [Appellant's OT] reported was new information.

Any indication by [Appellant's neurologist] that she could drive and work was a procedural error as he did not do an assessment as to her employability.

She was upset that MPIC had tried to take away her driver's license and very angry that MPIC had "told [physiatrist] to call the police".

The Appellant explained that she had not wanted to go over her psychological report with [Appellant's neuropsychologist] and that MPIC should have just gone with [neuropsychologist] for her psychological assessment, since they failed to conduct the independent medical examination in a fair manner.

She questioned what the reason for an FCE was. Data entry clerk may be light duties but it is the worst thing that could happen to her vestibular condition. According to [chiropractor]'s reports, she is not even good for sedentary work, she cannot work consistently at anything for 24 hours a week, or even 19 hours. Earlier decisions had already determined that she could not work and

now, in a post-pandemic world, she questioned who would take her on when she keeps taking sick days. She stated that she has an impairment that prevents her from doing this work. It requires a lot of visual concentration. She has a brain injury that was never treated properly, causing a strain on her nervous system and heart. Her life is spent in bed and going to the chiropractor when she doesn't feel well, so that she doesn't vomit everyday. Her eyes do not adjust to the dark and she has brutal headaches. Her blood pressure goes up and she has balance issues. The worst thing is to have a brain injury and to be in bed with an ice pack on your head feeling like you are going to vomit. Mental stimulation is an issue and she can't even watch TV. She has not recovered, has to limit screen time and cannot have a job where she has to enter data and watch a screen. This is ridiculous and who is going to hire her for 4 or 8 hours per month?

The Appellant referred to the tests and documents regarding the [text deleted] functional neurology clinic and said that these are the tests that should have been done all along, as recommended in previous decisions of the Commission. The testing she did with [Appellant's OT] in the FCE made her sick and made her heart rate go up. She should not have been doing these things, when she was so out of breath and fatigued. This is just crazy. Going back to the reports of Drs. [text deleted] shows that her problems are vestibular and central in nature. Then [Appellant's OT] made the determination that she could work and she is not sure that he is qualified to do so. These medical professionals had misquoted or misinterpreted her, and what they said was "ridiculous". She does not need cardiac conditioning and rehabilitation. That is enough to make somebody go crazy as it puts stress on the central nervous system, which is not good for people.

She stated that she does not need to see a doctor to tell her what is wrong and what the stressors are resulting from her brain injury or the cardiovascular complications of brain injuries. The

medical professionals were financially inspired by their own agenda, and were as corrupt and malicious as “prostitutes”. Their opinions “violated her rights”.

The Appellant was concerned that [vocational rehabilitation consultant] had identified data entry jobs for her in [text deleted], when the Act says that the employment is supposed to be in the province where the MVA occurred. Further, she has impairments of a permanent nature which have not improved and they did not test this capacity. There is a stigma with brain injuries and a suspicion that one is malingering, while MPIC focuses not upon what she is feeling but on what she is capable of doing. The insurance that she buys is supposed to go towards rehabilitation and MPIC has failed in their duty and obligation towards her.

The Appellant emphasized that there is no new information to show that she can perform part time sedentary work. She can’t do any part-time work on a consistent basis, without flare-ups and a multitude of symptoms that come along with post-concussion. She has never done data entry and does not have the experience to do data entry, noting that all data entry jobs in Manitoba require full time heavy lifting. She can’t work part time consistently and she is not finished her rehabilitation. She criticized [Appellant’s OT]’s reports and wanted the case manager and [MPIC’s HCS medical consultant] removed from her medical files.

The Appellant said that she wants to go to [text deleted] for treatment and that [text deleted] is a functional neurologist with a different way of approaching brain injury. She has not seen him and noted that to think that after 13 years her issues will be resolved and that she will be healthy is ridiculous. She was also not sure where the centre was and was concerned that she would not be able to go to [text deleted] alone for 2 weeks for treatment.

The Appellant explained that the entire process of pursuing her claims and appeals has been stressful and exhausting for her as she had to spend 17 hours per week working on her appeals, going over the many documents and researching the cases, MPIC Act and the Charter.

Cross-Examination of the Appellant

On cross-examination, the Appellant was asked about [Appellant's OT]'s testing and reporting of her abilities including handling, fingering and visual analogue scales. She did not recall much of that, but thinks that she filled out some parts of the forms and he filled out others. She agreed with his conclusion that she could not perform work at a moderate physical strength demand, but disagreed that she could handle a light or sedentary job. She agreed that she was not ready to return to work in a full-time capacity but disagreed that she could do part-time work, since she could not do it consistently.

While the Appellant recalled self-reporting that working with a small font was problematic for her (to [vocational rehabilitation consultant] while working on the TSA), when asked about her indication that she could work with a 12 point font, she said that she never mentioned a 12 point font. She agreed that taking breaks helps and that she could work for an hour and a half most days before needing a break and coming back to do more work after a break, but that would depend on how long the break was. She might need 15 minutes on some days and 2 hours on others. Working at a desk and sitting upright were fatiguing for her neck and shoulders. She usually uses her laptop in bed. She has computer skills, uses the internet and email, but is not familiar with Word.

The Appellant denied that a position which allowed her to work from home would help her do a data entry job, and did not agree that being allowed to choose when she wanted to work or how

much she wanted to take on at a time would help either. Her limits would be pretty low and inconsistent.

When asked about the expertise of the neurologist, [text deleted], the Appellant agreed that he is a neurologist, and familiar with her symptoms, but stated that she herself is an expert on brain injury and she is the only person in a good position to opine on her ability to work. No doctor is qualified to do that and she did not agree with his comment that she could do some work. She agreed with his comment that she had some computer skills but she cannot do that 20 hours per week consistently. The amount of time she can work on a computer varies.

She agreed that she told [Appellant's neuropsychologist] that her typical day consists of going for a walk, taking a nap and using the computer. At that time, she was spending time doing research on neurology issues, as she wanted to be able to challenge [Appellant's neuropsychologist], who was trying to make her feel stupid.

The Appellant also recalled telling her case manager that she could work 20 hours per week, as there might be some weeks she could do that, but not consistently.

When asked about the [neurology centre], the Appellant agreed that she had not been referred there by a doctor. [Pain specialist] had mentioned it, but not written a referral letter, so she contacted the person who runs the clinic. She did not recall if [pain specialist] told her that the treatment was not available in [home province] and she did not know whether it is available in Canada. She had some conversations with the office manager of the centre, but had not received a treatment plan.

She said that would be premature. Her interest is in the girostem and tilt table and even that is "part hope and part snake oil" and she doesn't even know if she is psychologically able to endure this. She didn't even know how she would be able to leave the province at this point due to family responsibilities.

Submissions

Submission for the Appellant

The Appellant provided written submissions in support of her appeals on December 4, 2016 and March 29, 2021, in addition to the submission she put forward with her direct testimony at the hearing.

Her comments regarding the merits of her appeals, the MPIC Act and the Charter of Rights and Freedoms were addressed in her written submissions, during her direct testimony (set out above) and in final comments at the end of the hearing.

The Appellant provided copies of case law which included prior decisions of the Commission and Supreme Court of Canada cases applying the Charter. Some of these cases were not addressed by the Appellant in either her written submissions or comments at the hearing. However, she did refer to several of the Commission's decisions in her own previous appeals and to the decision of the Supreme Court of Canada in *R. v Jordan* [2016]1 SCR 631.

At one point, the Appellant also argued that she had been discriminated against in accordance with section 24 of the Charter, which applied to every single medical report in her file, so that all should be subject to the exclusion of evidence. This argument was not set out in her Notice of Constitutional Question and she did not elaborate further upon this point at the hearing, so this

was not addressed further by counsel for MPIC and was not addressed by the panel in its deliberations.

Residual Employment/IRI Benefits

The Appellant submitted that she had sustained a brain injury including vestibular issues that were complicated and prolonged her attempts to return to work and work hardening programs. These included rapid postures, visual tracking and long days of mental exertion, with lack of treatment. Her injuries stemmed from her diagnosis of post-concussion syndrome.

The rehabilitation team was not qualified to rehab or treat a brain injury and she submitted that Drs. [text deleted] felt she was justified in withdrawing from the program. The behaviour of her case manager and the rehab team towards her was disgraceful, negligent and abusive. [Appellant's neurologist] reported regarding her driving fitness and then her case manager contacted him posing many other questions but there was no information that MPIC could use to make a fresh decision about her ability to work. Her symptoms have not improved since her permanent impairments were found and recognized by the Commission in her prior appeals in *AC-09-111*, *AC-11-010, AC-11-077 and AC-15-011*. These impairments have continued. She cannot exert herself with rapid postural changes and extended durations of weight bearing exercises and mental activities. She should not put stress on her central nervous system. Her convergence insufficiency treatment was not sufficiently funded by MPIC.

The Appellant submitted that the testing leading up to the decision that she was able to work was invalid, as she was forced to complete exercises of cardio endurance, pushing and pulling weight, climbing, bicep curls, repetitive leg presses, squats and abdominal crunches. MPIC and

the rehab team treated her as a difficult and pain-focussed malingerer with a somatoform disorder. Instead, they should have tailored the assessments to her specific issues.

Functional Neurology Treatment

The Appellant's written submissions and closing arguments at the hearing did not refer to her claim for funding for functional neurology treatment.

The Appellant relied instead upon her comments made in this regard during her direct testimony and cross-examination. She indicated that her problems are vestibular and central in nature and that the [neurology centre] does the kind of testing that should have been done all along. Even though it would be difficult, she was interested in going to [text deleted] for this treatment. She was particularly interested in the equipment they offered there, such as a girostem and tilt table.

Issues Under the Charter of Rights and Freedoms

Section 11(b) - Delay

The Appellant took the position that due to significant delays, the hearing of her appeal had taken more than 18 months, which exceeded the time frames set out in the *Jordan* case and violated her rights under s. 11(b) of the Charter to be tried within a reasonable time when charged with an offence.

The Appellant filed a Notice of Constitutional Question which submitted that the delay in MPIC providing IRDs and the Commission's scheduling of hearings violated s. 11(b) of the Charter, arguing that there were significant delays in both the review process (where it took MPIC 8 months to issue an IRD) and at the Commission (where her first appeal was filed on January 21, 2019) which took 18 months to finalize the Index.

The Notice of Constitutional Question took the position that:

> The length of time which has passed since the filing of the Appellant's first Notice of Appeal with AICAC up to the hearing of this matter exceeds 18 months, which is the timeframe set out in the Supreme Court of Canada case, now known as the "Jordan Rule". The Appellant was denied the right to have her case heard within a reasonable time contrary to s. 11(b) of the Charter.

In support of this position, the Appellant filed the Supreme Court of Canada decision in *R. v Jordan*. Aside from her brief initial reference to this case and to s. 11 in her opening statements, the Appellant did not refer to s. 11 or to the *Jordan* decision in her submissions at the appeal hearing.

Section 15- Equality

The Appellant's Notice of Constitutional Question took the position that:

> The Appellant's IRI was reduced without properly taking into account her permanent impairments, thus offending s. 15 of the Charter.
> …
> The Appellant has been discriminated against as a consequence of her physical injuries, contrary to s. 15(1) of the Charter.

In her written submissions, the Appellant argued that s. 15 of the Charter makes it clear that every individual in Canada, including those with physical and mental disabilities, is to be treated with the same respect, dignity and consideration and that the purpose of s. 15 is to protect those groups who suffer social, political and legal disadvantage in society. Discrimination occurs when a person, because of a personal characteristic, suffers disadvantage or is denied opportunities available to other members of society.

In her final remarks, the Appellant relied upon the decision of the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504.

She submitted that this case established that chronic pain is subjective and that given the stigma around brain injuries, one does not need objective findings. This means, she submitted, that a doctor cannot objectify what her pain scale and perception are. As a result, she submitted that a physician is not able to determine her pain levels and that she has no interest in seeing any more physicians. The Court in *Martin* found discrimination for these types of cases both in compensation and in rehabilitation and this should apply to her appeals as well.

Section 157 of the MPIC Act

In discussions during the case management process at the Commission, the Appellant indicated that she wished to argue that MPIC violated s. 157 of the Act by applying a reduction to her IRI benefits during the time she was applying for internal review and appealing its decisions in this regard.

The Appellant took the position that s. 157 should be interpreted to provide that an appeal or application for review will cause a benefit or indemnity that has been reduced (or partially suspended) to be increased or reinstated.

She reiterated this position in her submission to the panel at the hearing.

Submission for MPIC

Residual Employment/IRI Benefits

In reviewing the residual capacity determination provisions of the MPIC Act, counsel for MPIC noted that this is not a process by which MPIC retrains a claimant to take on a new job. The process instead looks at their residual capacity to hold employment, based not just upon the injuries caused by the MVA, but also upon their whole capacity to hold employment. This

includes education, training, physical and intellectual abilities. It must be employment they can hold which is reasonably available in their region.

For the Appellant, this process included an FCE with Addendum by an OT, along with TSA and LMS analysis.

Following extensive testing and analysis, the OT concluded that the Appellant was not ready to work full time, but although she could not work at her previously determined job in [text deleted], [text deleted], she met the criteria for sedentary/light work on a part-time basis. Counsel submitted that these conclusions were consistent with reports from caregivers who considered the Appellant's ability to work including [Appellant's neuropsychologist] (who had advised that she avoid power tools and be limited to 4 hours daily with no strenuous activity) and [neurologist] (who noted she would not have trouble with basic computer duties, measurements, driving or shopping, and should cope with her vestibular symptoms by taking breaks and reducing physical demands while symptomatic).

Counsel submitted that the OT was a qualified professional who prepared his report in the manner he saw fit, and that the Appellant's criticisms of his report were not borne out by her testimony, which failed to identify or support any particular relevant errors made. Nor was there any evidence to support the Appellant's allegations that the OT presented false or misleading information in the FCE to obtain a financial benefit with a view to provide treatment to the Appellant.

The FCE report was then provided to [vocational rehabilitation consultant] for the purpose of preparing the TSA and LSM reports. Her goal was to identify occupations that would be suitable

and available to an individual possessing the Appellant's work experience, education, training, restrictions and abilities. After reviewing the injuries of the Appellant (including her post-concussion syndrome, PI awards for tinnitus, vestibular function, minor cerebral concussion and alterations of higher cognitive or integrative mental functions) she noted her limitations. These included a convergence insufficiency with reading, difficulty with reading small print but an ability to read well at font size 12 for 1.5 hours. She also reviewed doctor's reports from the Appellant's history.

Following a listing of the Appellant's transferable skills, [vocational rehabilitation consultant] noted that the Appellant had stated she needed to control her environment and take on jobs with flexible time frames, preferably part time.

When the original determined alternate employment (customer service representative) was overturned by an IRO, [vocational rehabilitation consultant] prepared an additional LMS which identified several positions appropriate for the Appellant. In particular, she considered the position of data entry clerk. Requirements met by the Appellant included the ability to work online with current Internet skills, experience with software, keyboarding, email and proficiency in Word, as well as strong language skills, ability to take on responsibility and work independently. The position was also sedentary, working on a computer.

Potential accommodations within this position were identified, such as working from home with the employee able to choose when they work to maximize their best possible times and with the ability to take breaks. The Appellant would be able to set up a home system as best needed to accommodate her limitations, including font size. It was submitted that these accommodations would assist the Appellant's ability and allow her to perform the data entry clerk position.

Counsel also submitted that doctors who considered the Appellant's condition had by and large either said she could do computer work or not listed it among her limitations. In discussing her convergence insufficiency, computer work was not listed among the specific disabilities resulting (quick head motion and eye movements in a busy setting with a lot of motion and noise). These were all issues noted and addressed by [vocational rehabilitation consultant] in her suggested accommodations.

Counsel noted that the Appellant has consistently stated that she will not do any work other than what she wants and that no one else can tell her whether she can work. In her cross-examination, she stated that she was the only one who was able to opine on her ability to work. Counsel suggested that these comments show the Appellant is entrenched in her own subjective opinions regarding her inability to work and is unwilling to consider evidence or advice to the contrary from medical and other practitioners. In this regard, counsel questioned the Appellant's submission that the *Martin* decision stated that there do not need to be any objective findings because pain is subjective. He submitted that the decision did not stand for this point and that further, the issue is not quantifying the Appellant's pain levels, but rather identifying what her function is and what she can do.

Counsel also noted that the Appellant's responses upon cross-examination and to questions from the panel were often defensive, evasive, combative or outright hostile, particularly when her beliefs about her ability to work were questioned. In many cases, when presented with notes from professionals or MPIC staff which contradicted her testimony, she responded that she had not said these things or that they were "ridiculous". She also accused the medical professionals who have assessed her as being corrupt, malicious, and in one instance labelled them as "prostitutes".

Therefore, counsel submitted that when considering the Appellant's testimony the panel should note that it lacked credibility. More objective assessments should be preferred to the Appellant's own opinions regarding her capacity.

Although the Appellant submitted that MPIC departed from the Commission's previous decisions regarding her inability to work at her previous job and her permanent impairments, counsel submitted that there is no such departure, as neither of these decisions concerned the Appellant's ability to work as a part-time data entry clerk. The fact that she was found to be entitled to various permanent impairments in 2015 does not mean that the residual capacity decision was incorrect. The Commission must look at the effect of the impairments on the Appellant's ability to perform the determined employment. Further, although the Appellant argued that there was no new information leading to MPIC's request for the FCE, TSA and LMS, it is clear that these reports were sought as a result of [neurologist]'s reports which suggested an improvement in the Appellant's ability to do work, particularly computer work.

Counsel submitted that the evidence, taken as a whole, supports a finding that the Appellant is able to perform the employment of data entry clerk on a part-time basis and that, on a balance of probabilities, the IRD should be upheld.

Calculation of IRI

Counsel addressed the Appellant's criticism of the calculations done by MPIC in reducing her IRI payments based on the residual capacity determination. The basis of these calculations was set out in emails from MPIC staff. In accordance with the regulations, the correct level of income levels listed in Schedule C for each National Occupation Classification (NOC) is calculated based on the years of experience in that class of employment. The Appellant, (with less than 36

months of experience as a data entry clerk) was found to be at level I for the position. The applicable income for that level was reduced by 50% to account for the fact that she was determined as a part-time earner. This was reduced by deductions for taxes, CPP, etc. equating to a biweekly amount. The Appellant's IRI entitlement was then reduced by this amount. The calculations, indexation and worksheets were reviewed as being in accordance with the scheme. It was submitted that the correct adjusted gross yearly employment income for the data entry clerk position was $35,653 and that the Appellant's appeal on the grounds of the IRI calculation should be dismissed.

Functional Neurology Treatment

Counsel for MPIC submitted that this treatment has not been shown to be medically necessary to address an MVA related condition and that the Appellant has not shown that the IRD was incorrect.

Little information has been provided regarding this treatment aside from a short series of emails between the Appellant and a staff member at the treatment centre which simply state that the Appellant can attend for a week intensive program, three visits each day, for customized care neuro-therapy. Counsel submitted that this is not sufficient detail for a request for treatment and there is no indication what the treatment to be administered will consist of. No treatment plan was provided explaining exactly what treatments would be provided to the Appellant so there is no way that the care requested can be considered medically required. Attendance at a particular facility is not in and of itself a treatment which can be assessed on that basis.

Counsel noted that even the Appellant, in her testimony, was not sure that this treatment would help her, stating that the treatment could be "part hope and part snake oil". This is not sufficient

evidence to demonstrate that this treatment is medically required. Nor is there indication in the file material regarding which of the Appellant's symptoms or what condition the proposed therapy would address. There was no evidence that the Appellant was referred to this proposed treatment by any caregivers, or any medical professional.

Further, the regulations provide that MPIC will pay for medically required care dispensed outside the province only where the cost of the care would be reimbursed under The Health Services Insurance Act if the care were dispensed in Manitoba. Counsel relied upon previous decisions of the Commission in *AC-15-092* and *AC-15-147*, along with the Manitoba Court of Appeal decision in [text deleted] *v. Manitoba Public Insurance Corporation et al*. 2012 MBCA 101, which confirmed that Manitoba Health has the primary obligation to cover insured medical expense and that a person seeking treatment outside of Manitoba must show that the proposed treatment is not available in Manitoba.

There was no indication or evidence that the proposed therapy is not available in Manitoba and, in fact no evidence about its availability at all. In the absence of such evidence regarding the availability of the treatment within the province, the request for extra-provincial treatment must be denied.

It was submitted that this appeal should therefore be dismissed.

<u>The Charter of Rights and Freedoms</u>

<u>Section 11(b) - Delay</u>

Counsel for MPIC submitted that *Jordan* and s. 11(b) have no application to either the internal review process or the Commission's hearing process. S. 11(b) is concerned only with criminal matters in which charges are brought against an accused individual, with potential deprivation of liberty or property as a consequence.

In administrative law proceedings outside of the criminal context there is no constitutional right to be "tried" within a reasonable time. As neither the IRD or appeal process under the MPIC Act are in the criminal context, the Appellant's challenge to them on the grounds that delay resulted in a violation of her rights under s. 11(b) must fail. Counsel relied upon *Blencoe v. British Columbia (Human Rights Commission*) [2000] SCC 44.

Even non-constitutional remedies for delay in the administrative context are based upon a finding of abuse of process, where the fairness of the hearing has been compromised or the delay was unacceptable to the point of being so oppressive as to taint the proceedings.

Counsel submitted that the timelines in this appeal did not constitute inordinate delay to the extent that the proceedings became oppressive. This is particularly so when much of the time was taken up with necessary pre-hearing steps such as case conferences, discussion of additions to the Index and an adjournment to address the later filing of the Notice of Constitutional Question.

Section 15 - Equality

Counsel for MPIC submitted that this was not an issue of discrimination to be challenged under s. 15, but rather a factual disagreement as to what the Appellant's capacity to hold employment is.

A s. 15 analysis applies to a law that creates a distinction on the basis of an enumerated ground which fails to respond to the actual capacities and needs of the group in question, instead imposing a burden or denying a benefit in the manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. Counsel referred to the *Kahkewistahaw First Nation v. Taypotat* [2015] SCC 30 in support of this submission.

In contrast, the question of the Appellant's employment capacity and level of IRI benefits is an individualized analysis which must be determined through the appeal process.

Counsel distinguished the *Martin* case, which challenged a policy that affected all claimant's who suffered from a particular condition. The MPIC Act and Regulations do not create distinctions in this way, but rather allow for each individual to be assessed based on their own circumstances.

Section 157 of the MPIC Act

Counsel for MPIC submitted that s. 157 does not operate to hold case management decisions in abeyance pending the outcome or a review or appeal. Rather, the provision suggests that the claim should continue to be handled normally, which may include increases or decreases to an indemnity pursuant to the legislation.

The interpretation suggested by the Appellant would lead to the unreasonable result where MPIC would be paying benefits to a claimant to which it had decided the claimant was not entitled, with limited ability to recover those funds if the decision is upheld.

He noted that the Act, which provides that interest shall be paid to a successful appellant, allows an appellant in that situation to be made whole, in addition to the re-instatement of the benefit by the Commission.

Appellant's Reply

In reply, the Appellant reiterated her objection to the length of time it took for the IRO to provide her with decisions, submitting that it is unfair to hold her to time limits in filing Applications for Review and Notices of Appeal without requiring MPIC to provide timely decisions. She also objected to the amount of time it had taken to prepare her Index, noting that in prior appeals before the Commission, this process had been faster.

She also noted that if she were to work 4 hours per day, stretched out with breaks as needed, once her need for sleep is considered, she would not be able to do a part-time job and that labour laws should protect her. She said that there were no examples of data entry jobs which did not require heavy lifting.

Finally, the Appellant expressed her frustration with MPIC after dealing with them for 14 years. She described their approach, with its independent assessments and evaluations, as psychological warfare and noted that when combined with the pandemic, she finds the anger, agitation and hostility exhausting.

Legislation

The MPIC Act provides:

New determination after second anniversary of accident

107 From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106

Considerations under section 107 or 108

109(1) In determining an employment under section 107 or 108, the corporation shall consider the following:

(a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;

(b) any knowledge or skill acquired by the victim in a rehabilitation program approved under this Part;

(c) the regulations.

Type of employment

109(2) An employment determined by the corporation must be

(a) normally available in the region in which the victim resides; and

(b) employment that the victim is able to hold on a regular and full time basis or, where that is not possible, on a part-time basis.

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;

I.R.I. for reduced income from determined employment

115 If a victim becomes able to hold employment determined for him or her under section 107 or 108 but, because of bodily injury caused by the accident, earns from the employment a gross income that is less than the gross income used by the corporation to compute the income replacement indemnity that the victim was receiving before the employment was determined, the victim is entitled, after the end of the year referred to in clause 110(1)(d), to an income replacement indemnity equal to the difference between the income replacement indemnity the victim was receiving at the time the employment was determined and the net income the victim earns or could earn from the employment.

I.R.I. reduction if victim earns reduced income

116(1) Where a victim who is entitled to an income replacement indemnity holds employment from which the victim earns a gross income that is less than the gross income used by the corporation to compute his or her income replacement indemnity, the income replacement indemnity shall be reduced by 75% of the net income that the victim earns from the employment.

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

(a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

Payment not suspended by review or appeal

157 An appeal or application for review in respect of an indemnity does not suspend the payment of the indemnity.

Effect of lack of formality in proceedings

183(7) No proceeding before the commission is invalid by reason only of a defect in form, a technical irregularity or a lack of formality.

Regulations

Schedule C of Manitoba Regulation 39/94

Table B — Classes of Employment
Income by Occupational Classification - Accidents on or after March 1, 2006

National Occupation Classification	2005		
	Level 1	Level 2	Level 3
Office Equipment Operators			
Data Entry Clerks	23,474	29,102	35,986

Reimbursement of Expenses (Universal Bodily Injury Compensation) Regulation 40/94

Medical or paramedical care
5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under The

Health Services Insurance Act or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

(a) when care is medically required and is dispensed in the province by a physician, nurse practitioner, clinical assistant, physician assistant, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician, nurse practitioner, clinical assistant, or physician assistant;

***CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, PART I of the *CONSTITUTION ACT*, 1982**

LEGAL RIGHTS

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

…

LEGAL RIGHTS

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Discussion

The onus is on the Appellant to show, on a balance of probabilities, that MPIC erred in the IRD which concluded that the Appellant was able to return to work as a part-time data entry clerk, and erred in calculating and reducing her IRI benefits accordingly.

The onus is also on the Appellant to show that MPIC erred in finding that she was not entitled to funding for treatment through the [neurology centre].

Additional Issues

Before turning to the factual and legal issues presented by the appeals from the IRDs before the Commission, the panel has addressed the additional legal arguments presented by counsel under the Charter of Rights and Freedoms and s. 157 of the MPIC Act.

The Charter of Rights and Freedoms

Section 11(b) - Delay

The panel agrees with the submissions of counsel for MPIC that s. 11(b) is not applicable in the context of a claim or an appeal under the MPIC Act.

S. 11(b) generally applies in the criminal context.

The cases cited *(*See *Blencoe;* and *Forum National Investments Ltd. v. British Columbia (Securities Commission), 2019 BCCA 402)* establish that s. 11(b) only applies to individuals who have been charged with an offence. The Appellant has not been charged with any offence in this case. S. 11(b) has been found to apply primarily in the criminal context. In the administrative law context, it has not been applied to guard against delay in situations where an individual has not been charged with an offense under statute.

We also find that the Appellant has failed to establish that there has been unreasonable delay in this case, through the review process, the combining of her two appeals, the gathering and indexing of documentation and additions in a supplemental index, Commission case management, additional issues raised by the Appellant and her later filing of a Notice of

Constitutional Question, with attendant adjournments to allow the parties to address that. The panel finds that the timing of this review and case management process through to the scheduling of this appeal hearing, which accommodated the Appellant's request to hold the hearing on non-consecutive days, did not result in an abuse of process or oppressive, unacceptable delay which would taint the proceedings.

Accordingly, the Commission finds that there has not been a violation of the Appellant's constitutional or procedural rights due to delay.

Section 15 - Equality

The Appellant submitted that her rights under s. 15 of the Charter were violated when MPIC discriminated against her by failing to recognize the subjective aspect of her chronic pain disability. She relied upon the *Martin* case to support her arguments regarding chronic pain as a physical disability which should be treated the same as other physical disabilities.

Counsel for MPIC argued that this appeal did not involve a discriminatory policy but rather a factual disagreement as to the Appellant's capacity to hold employment and that s. 15 of the Charter and the *Martin* case did not apply. Under the legislative scheme, each individual's entitlement is assessed according to their own individual needs and a distinction based upon enumerated grounds is not created.

The Commission agrees with counsel for MPIC that the Appellant has failed to establish a violation of s. 15 in her claim. The Act and Regulations call for each individual to be assessed on their unique, personal ability to hold employment. They do not create a distinction based upon an

enumerated ground and do not fail to respond to the actual capacities and needs of a particular group in a manner that reinforces, perpetuates or exacerbates their disadvantage. (See *Taypotat*)

The Commission therefore finds that there has been no violation of s. 15 and the Appellant's challenge on this basis is dismissed.

Section 157 of the MPIC Act

The Appellant submitted that MPIC had violated s. 157 of the Act when it applied a reduction in her IRI benefits while her claim was under review and appeal and that s. 157 should be interpreted to prevent this reduction.

Counsel for MPIC submitted that s. 157 does not operate to hold a case management decision in abeyance pending the outcome of a review or appeal, but rather, suggests that the claim must continue to be handled normally pursuant to the legislation.

The panel finds that MPIC s. 157 does not apply to hold case management decisions in abeyance pending the results of a review or appeal. In our view, this is not a reasonable interpretation of the statue.

The Commission's remedial powers, combined with the interest provisions set out in the Act, operate to fully compensate the Appellant if a benefit is found by the Commission to have been reduced in error.

S. 157 operates to protect an appellant and prevent MPIC from suspending a payment or indemnity to which an appellant continues to be entitled, simply because they have filed an application for review or appeal. It ensures that the case management of the appellant does not change because of the filing of a review or an appeal, but does not operate to impose a stay of proceedings preventing MPIC from implementing the case management decision which has been appealed, in the interim.

Therefore, the panel finds that MPIC has not violated s. 157 of the Act by continuing to implement its case management decisions after the Appellant filed her applications for review and appeals.

Residual Employment/IRI

In spite of the Appellant's submission that she would be unable to focus consistently enough to perform part-time data entry work, the panel notes that over the course of preparing for and representing herself over two days of hearing, we found the Appellant to be engaged, focused and competent. She testified that she spent 17 hours a week working on her appeals, using the computer to communicate, do research and prepare.

In the face of complex issues and arguments, including constitutional, Charter and legislative issues, the Appellant provided cogent direct testimony and submissions, was responsive to targeted cross-examination, and presented as engaged, focused, intelligent, argumentative and energetic. She participated consistently without asking for additional breaks beyond brief recesses and a lunch break that was less than an hour, although additional break time was offered. She was prepared, with specific notes addressing the 346 documents in her Index, with which she seemed comfortable and familiar. This stamina continued throughout the two days of

hearing (which were separated by a one-day break to allow her to rest). She was also able, during the day off in between hearing days, to research and provide the panel with an additional case on the issue of s. 15 of the Charter.

However, the panel does agree with counsel for MPIC's comments regarding the Appellant's demeanour while giving evidence and particularly, on cross-examination and in response to questions from the panel. We agree, as he has noted, that her answers were often defensive, evasive, combative or hostile. She often took the position that medical professionals had misquoted or misinterpreted her, claiming that what they had said was "ridiculous". She accused the medical professionals of being financially inspired by their own agenda, claiming that they were corrupt and malicious, and referring to them as "prostitutes". In her view, "every single medical opinion has violated my rights".

For example, although she agreed he had treated her and was familiar with her case, the Appellant asserted that the neurologist, [text deleted], was not in a position to opine regarding her ability to work, and that no doctor was so qualified. She submitted that she is the only expert, the one with the brain injury who lives with it every single day. She later submitted that she is the only one who can decide what job she can do. She stated the doctors do not have a clue what goes on in the real world and she feels "assaulted" by the medical professionals, who have approached her in a passive-aggressive manner, participating in MPIC's psychological warfare against her.

She went on to say that as a result she will not see any more doctors for testing, go for more treatment, or work as a data entry clerk. It is she who decides what job she can do.

The Appellant's answers on cross-examination can be characterized as oppositional rather than responsive and it is difficult for the panel to give them the weight that would be required to establish, without more evidence in support, that the Appellant cannot do a job that allows her to work from home, choose when she wants to work and how much work to take on at a time.

It is worth noting that many of the Appellant's submission centered around the PI benefits which had been awarded to her for MVA related injuries. In her view, this meant she could not work. However, the assessment of a residual capacity to work is not the same as an assessment of permanent injuries and MVA victims may suffer permanent impairment while still able to maintain some level of employment.

While we understand that her appeals created anxiety for the Appellant, the panel finds that her approach detracted from the reliability and credibility of her evidence. We agree with counsel for MPIC that the opinions of the qualified practitioners should be given more weight than the allegations and beliefs of the Appellant.

The panel finds that in spite of the Appellant's assertions that many of the medical reports should be ignored and that the caregivers quoted were not qualified or that some are not doctors, the panel finds that she has failed to establish that the doctors, specialists and OTs involved were not qualified to prepare the assessments and reports they provided, or that the testing and reporting was inadequate.

While her doctors and caregivers recognized, documented and treated the Appellant's symptoms, overall, the more recent medical reports established that in spite of her symptoms and impairments, she was able (with accommodations in scheduling and technology) to work

part time on a computer and do data entry work. As noted above, the Appellant's demonstrated abilities throughout the appeal and hearing process supported and corroborated the opinions of the health care providers and medical experts in this regard.

Accordingly, based upon a review of the documents on file, the testimony of the Appellant and submissions of the parties, the panel has given greater weight to the expert medical reports on file which support the Appellant's ability to work part time as a data entry clerk. Reports from various caregivers and experts opined that the Appellant was not prevented from working at this occupation by her MVA-related injuries. Specialists, therapists and consultants such as psychologist [text deleted], HCS psychological consultant [text deleted], and physiatrist [text deleted], took this view.

The most recent reports, from neurologist [text deleted] (March 3, 2016, August 10, 2016), HCS physiotherapy consultant [text deleted] (October 15, 2015), HCS medical consultant [text deleted] (October 26, 2016, September 13, 2017, October 28, 2017), OT [text deleted] (August 10, 2017, August 23, 2017), and vocational rehabilitation consultant [text deleted] (January 21, 2018, January 29, 2019) , supported MPIC's position that the Appellant was able to work part-time as a data entry clerk.

Her chiropractor [text deleted], and optometrist [text deleted] also provided opinions around this time.

The chiropractor, [text deleted], reported regularly regarding the Appellant's vestibular symptoms and impairments, treatment and progress. While these are well documented, the reports did not address their impact on her ability to work.

The optometrist, [text deleted] provided a brief report regarding the Appellant's convergence insufficiency and ocular motor dysfunction, describing this as treatable with therapy over the course of several months. This report did not address the Appellant's ability to work.

The other practitioners referred to were of the opinion that the Appellant was not prevented from working by physical, psychological or functional limitations arising out of the MVA. They agreed that she could not return to her pre-MVA employment and that she should be restricted to light/sedentary work. They also agreed that she could not work full time but that she could do part-time work. Their opinions regarding her capacity and abilities, when analysed in view of the TSA and the results of the research set out in the LSMs, led MPIC to conclude that the Appellant could work as a part-time data entry clerk. The panel finds that the weight of the evidence supports the findings of the IRO in determining the Appellant's residual capacity as a part-time data entry clerk.

Accordingly, the panel finds that the Appellant has failed to establish, on the evidence and on a balance of probabilities, that the IRD erred in upholding the residual capacity determination as a part-time data entry clerk.

Her appeal on this issue is hereby dismissed.

In regard to the calculation of her IRI benefits, MPIC provided the Appellant (in accordance with the legislation) with a one year job search period where no deductions for the determined employment were made from her regular IRI payments, which continued.

The evidence established that after this one-year period, the determination of residual employment was then applied to the Appellant's IRI payments. MPIC's IRI calculators applied the relevant legislation and regulations to arrive at the appropriate GYEI for the classification of data entry clerk and prorated it to reflect her restriction to part-time employment. The level of pay appropriate for an individual with no experience in the job was selected. A biweekly amount attributable to this occupational level was calculated.

These calculations were clearly set out in the documents from MPIC's IRI calculators, who then went on to deduct the biweekly payments that a data-entry clerk would have earned from the Appellant's ongoing biweekly IRI benefit payments.

The panel finds that the evidence and calculations reviewed in the Index are in line with the legislative scheme. The Appellant was critical of MPIC's calculations and deductions, but did not provide cogent evidence, either in her testimony or documentation, to meet the onus upon her of showing that the IRI calculations were wrong.

Accordingly, the Commission finds that the Appellant has failed to establish that the IRD was in error in finding that the calculation of her IRI benefits were correct.

The Appellant's appeal from the IRD on that basis is dismissed.

Functional Neurology Treatment

The Commission agrees with the analysis of the requirements needed to support funding by MPIC for extra provincial treatment. The Appellant must show, on a balance of probabilities,

that the treatment is medically required, and primarily one which would be an insured medical expenses covered by Manitoba Health and not available in Manitoba or in Canada.

The Appellant has failed to meet the onus upon her to show, on the evidence, that these requirements have been met in this appeal. The evidence about the treatment lacks detail and does not establish that the proposed treatment, which has not been the subject of a specific referral from her caregivers, is medically required. This lack of information and detail also extends to the question of whether this treatment is available in Manitoba or in Canada.

Accordingly, the Commission finds that the Appellant has failed to meet the onus upon her to show, on a balance of probabilities, that the medical information on file supports entitlement to treatment through the [neurology centre] for injuries sustained in the MVA.

The Appellant's appeal in this regard is dismissed and the decision of the IRD is upheld by the Commission.

The Appellant's appeals are hereby dismissed and the Internal Review Decisions from which she has appealed are upheld by the Commission.

Dated at Winnipeg this 25th day of April, 2022.

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LAURA DIAMOND

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JANET FROHLICH

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SANDRA OAKLEY