Manitoba

Automobile Injury Compensation Appeal Commission

Annual Report 2013-2014

His Honour the Honourable Philip Lee, C.M., O.M.
Lieutenant Governor of Manitoba
Room 235, Legislative Building
Winnipeg, Manitoba
R3C OV8

May it Please Your Honour:

I have the privilege of presenting, for the information of Your Honour, the Annual Report of the Automobile Injury Compensation Appeal Commission for the year ended March 31, 2014.

Respectfully submitted,

"Original Signed By"

Honourable Ron Lemieux
Minister of Tourism, Culture, Heritage, Sport
and Consumer Protection

The Honourable Ron Lemieux
Minister of Tourism, Culture, Heritage, Sport and Consumer Protection
Room 118
Legislative Building
450 Broadway
Winnipeg, MB R3C 0V8

Dear Minister:

Section 180(1) of the *Manitoba Public Insurance Corporation Act* states that within six months after the end of each fiscal year, the Chief Commissioner shall submit an annual report to the Minister respecting the exercise of powers and the performance of duties by the Commission, including the significant decisions of the Commission and the reasons for the decisions.

I am pleased to enclose herewith the Annual Report of this Commission for the fiscal year ending March 31, 2014 which includes a summary of significant decisions.

Yours truly,

"Original Signed By"

MEL MYERS, QC
CHIEF COMMISSIONER

Encl.

ANNUAL REPORT OF THE
AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION
FOR FISCAL YEAR 2013/14

General

The Automobile Injury Compensation Appeal Commission (the "Commission") is an independent, specialist administrative tribunal established under *The Manitoba Public Insurance Corporation Act* (the "*MPIC Act*") to hear appeals of Internal Review Decisions concerning benefits under the Personal Injury Protection Plan ("PIPP") of Manitoba Public Insurance Corporation ("MPIC").

Fiscal year 2013/14, which is April 1, 2013 to March 31, 2014, was the 20th full year of operation of the Commission. The staff complement of the Commission is 11, including a chief commissioner, two deputy chief commissioners, a director of appeals, three appeals officers, a secretary to the chief commissioner, two administrative secretaries and one clerical staff person. In addition, there are 24 part-time commissioners who sit on appeal panels as required.

The Appeal Process

In order to receive PIPP benefits, a claimant must submit an Application for Compensation to MPIC. If a claimant does not agree with their case manager's decision regarding an entitlement to PIPP benefits, the claimant has 60 days to apply for a review of the decision. An Internal Review Officer will review the case manager's decision and issue a written decision with reasons.

If a claimant is not satisfied with the Internal Review Decision, the claimant may appeal the decision to the Commission within 90 days of receipt of the Internal Review Decision. The Commission has the discretion to extend the time by which an appeal must be filed.

In fiscal year 2013/14, 176 appeals of Internal Review Decisions were filed at the Commission, compared to 187 appeals in the fiscal year 2012/13.

The Claimant Adviser Office

The Claimant Adviser Office was created in 2004 by an amendment to Part 2 of the *MPIC Act*. Its role is to assist claimants appearing before the Commission. In the 2013/14 fiscal year, 62 per cent of all appellants were represented by the Claimant Adviser Office, compared to 73 per cent in 2012/13 and 65 per cent in 2011/12.

Pre-hearing procedures & the mediation pilot project

Since February 2012, the Notice of Appeal indicates that appellants have the option to participate in the mediation of their appeal. Established as a pilot project, mediation services are provided by the Automobile Injury Mediation Office (AIM), an independent government agency. A mediation information sheet is also provided with the Notice of Appeal. Of the 176 new appeals that were filed during the 2013/14 fiscal year, 154 appellants requested the option of mediation.

If mediation is requested at the time an appellant files a Notice of Appeal, the Commission is responsible for assembling the package of information containing the significant appeal documents which will be utilized in the mediation process.

Hearing Procedure

Once the mediation process concludes, unresolved or partially resolved appeals are returned for adjudication at a hearing before the Commission. Instead of preparing indexed files for each appeal filed, the Commission's appeals officers now prepare indexed files only for those unresolved appeals returned to the Commission from the AIM Office. If mediation is not requested at the time the Notice of Appeal is filed, an indexed file will be prepared. The indexed file is the compilation of documentary evidence considered relevant to the issues under appeal. It is provided to the appellant or the appellant's representative and to MPIC and will be referred to at the hearing of the appeal. Once the parties have reviewed the indexed file and submitted any further relevant evidence, a date is fixed for hearing the appeal.

Hearing Activity

Fiscal Year	Hearings Held	Case Conference Hearings	Total Hearings
2013/14	66	141	207
2012/13	87	157	244
2011/12	94	102	196
2010/11	81	48	129
2009/10	120	72	192

Case Conference Hearings

Management of appeals by case conference continues to be an important part of the Commission's hearing schedule. Over the last six fiscal years, the Commission's experience has been that many appeals require additional case management by a commissioner. In keeping with past practice, the Commission continued to initiate case conference hearings in 2013/14. The Commission finds that these hearings continue to assist in determining the status of appeals,

identifying sources of delay, resolving parties' impediments to scheduling a hearing date, facilitating mediation, and scheduling hearings.

In fiscal year 2013/14, appellants were successful in whole or in part in 33 per cent of the appeals heard by the Commission.

Hearings

For appeals that are not fully resolved at mediation, or where an appellant does not elect the option of mediation, the Commission will adjudicate appeals by hearings.

Hearings are relatively informal in that the Commission is not strictly bound by the rules of evidence followed by the courts. Appellants and MPIC may call witnesses to testify and may also bring forward new evidence at appeal hearings. The Commission's hearing guidelines require each party to disclose documentary and oral evidence in advance of the hearing. The Commission may also issue subpoenas, which require persons to appear at the hearing to give relevant evidence and to bring documents with them.

If required, the Commission will travel outside of Winnipeg to conduct a hearing or, if it is appropriate and of benefit to an appellant who lives or works elsewhere, a hearing may be conducted by teleconference.

The commissioner(s) hearing an appeal weigh the evidence and the submissions of both the appellant and MPIC. Under the *MPIC Act*, following an appeal hearing the Commission may:

(a) confirm, vary or rescind MPIC's review decision; or
(b) make any decision that MPIC could have made.

The Commission issues written decisions and provides written reasons for the decisions. The decisions and reasons are sent to the appellant and to MPIC. All of the Commission's decisions and reasons are publicly available for review at the Commission's office and on the Commission's web site, http://www.gov.mb.ca/cca/auto/decisions.html. Decisions made available to the public are edited to protect the privacy of the parties, in compliance with privacy legislation in Manitoba. The Commission is committed to providing public access to the evidentiary basis and reasons for its decisions, while ensuring that personal health information and other personal information of the appellants and other individuals are protected and kept private.

Statistics

The Commission hears and decides appeals fairly, accurately and expeditiously. With this in mind, the Commission has established the following service level parameters:

- For those appellants who do not request the option of mediation and request a hearing for the adjudication of the appeal, Commission staff prepares the indexed file of material to be used at the hearing five weeks after receipt of MPIC's file and all other additional material.
- For those appeals that request the option of mediation, Commission staff prepares the indexed file five weeks after the Commission is notified by AIM that mediation is concluded and the appeal will continue to proceed at the Commission to hearing.
- The Commission's expectation is to schedule hearings within six to eight weeks from the time the parties notify the Commission of their readiness to proceed.
- The Commission's expectation for rendering written decisions is six weeks following the hearing and receipt of all required information.

The Commission continues to experience a consistent volume of appeals filed resulting in the following average turnaround times for 2013/14:

- Files were indexed within 15 weeks of receipt of MPIC's file and additional material compared to 11.7 weeks in 2012/13 and 13 weeks in 2011/12.
- Files were indexed within four weeks of receipt of notification by AIM that mediation was concluded but the unresolved or partially resolved issues will proceed to hearing, compared to eight weeks in 2012/13 and 11.1 weeks in 2011/12.
- Hearing dates are scheduled, on average, within 2.13 weeks from the time the parties are ready to proceed to a hearing. This compares to 2.25 weeks in 2012/13, eight weeks in 2011/12 and compared to nine weeks in 2010/11.
- The Commission prepared 44 written decisions in 2013/14. The average time from the date a hearing concluded to the date the Commission issued an appeal decision was 5.14 weeks in 2013/14, compared to 4.95 weeks in 2012/13 and 5.5 weeks in 2011/12.
- The Commission completed 82 indexes in 2013/14, compared to 100 indexes in 2012/13 and 157 indexed files in 2011/12.

While the reduction of the number of indexes prepared was expected as a result of the procedural changes associated with the mediation pilot project, the number of supplementary indexes prepared by the Commission's appeals officers increased to 109 supplementary indexes in 2013/14, compared to 76 supplementary indexes in 2012/13. Supplementary indexes include the preparation of additional indexes for case conference hearings, abandonment hearings and jurisdictional hearing, and preparing additional indexes on existing files where additional material is received.

In addition to providing administrative support to facilitate the Mediation Pilot Project, the Commission's appeals officers continue to provide substantial administrative support to the case management of appeals. Including supplementary indexes, appeals officers prepared a total of 191 indexes in 2013/14, as compared to a total of 176 indexes in 2012/13.

As of March 31, 2014, there were 301 open appeals at the Commission, compared to 366 open appeals as of March 31, 2013 and 467 open appeals as of March 31, 2012.

Appeals to the Manitoba Court of Appeal

A decision of the Commission is binding, subject only to a right of appeal to the Manitoba Court of Appeal on a point of law or a question of jurisdiction, and then only with leave of the court.

Four applications seeking leave to appeal to the Court of Appeal were filed in the 2013/14 fiscal year. Three applications were dismissed. One application for leave to appeal remains pending as of March 31, 2014. Leave to appeal was also dismissed in the 2013/14 fiscal year on an application for leave that was filed in the previous fiscal year.

A motion to dismiss a case where the Court of Appeal previously granted leave to appeal in a previous fiscal year, was heard by a Court of Appeal motions judge but a decision was not issued as of March 31, 2014.

In the Commission's 20 years of operation, as of March 31, 2014, the Court of Appeal has granted leave to appeal in a total of 14 cases from the 1,611 decisions made by the Commission.

Sustainable Development

The Commission is committed to the Province of Manitoba's Sustainable Procurement Practices plan. Commission staff are aware of the benefits of Sustainable Development Procurement. The Commission uses environmentally preferable products whenever possible and takes part in a recycling program for non-confidential waste.

The Public Interest Disclosure (Whistleblower Protection) Act

The Public Interest Disclosure (Whistleblower Protection) Act came into effect in April 2007. This law gives employees a clear process for disclosing concerns about significant and serious matters (wrongdoing) in the Manitoba public service, and strengthens protection from reprisal. The Act builds on protections already in place under other statutes, as well as collective bargaining rights, policies, practices and processes in the Manitoba public service.

Wrongdoing under the Act may be: contravention of federal or provincial legislation; an act or omission that endangers public safety, public health or the environment; gross mismanagement; or, knowingly directing or counselling a person to commit a wrongdoing. The Act is not intended to deal with routine operational or administrative matters.

A disclosure made by an employee in good faith, in accordance with the Act, and with a reasonable belief that wrongdoing has been or is about to be committed is considered to be a disclosure under the Act, whether or not the subject matter constitutes wrongdoing. All disclosures receive careful and thorough review to determine if action is required under the Act, and must be reported in a department's annual report in accordance with Section 18 of the Act. The Automobile Injury Compensation Appeal Commission has received an exemption from the Ombudsman under Section 7 of the Act. As a result, any disclosures received by the Chief Commissioner or a supervisor are referred to the Ombudsman in accordance with the exemption.

The following is a summary of disclosures received by the Automobile Injury Compensation Appeal Commission for the fiscal year 2013/14.

Information Required Annually (per Section 18 of The Act)	Fiscal Year 2013/14
The number of disclosures received, and the number acted on and not acted on. Subsection 18(2)(a)	NIL

Significant Decisions

The following are summaries of significant decisions of the Commission and the reasons for the decisions that were issued in 2013/14.

1. Suspension or Termination of Benefits

Section 160 of the MPIC Act provides for the suspension or termination of benefits in certain circumstances.

a) The following case provides an illustration of the issues faced by the Commission when considering the termination of benefits for knowingly providing MPIC with false or inaccurate information.

The Appellant appealed from an Internal Review decision with respect to whether her benefits were properly terminated pursuant to Section 160(a) of the MPIC Act.

In February 1999, the Appellant was struck by a motor vehicle as she crossed the street. As a result of this accident, the Appellant sustained numerous injuries. She had difficulty walking, standing, pushing, pulling and carrying because of her injuries. Following the accident, the Appellant also developed psychological problems related to the accident, including sleep disturbance, depression, anxiety, difficulty concentrating, suicidal thoughts and feelings of helplessness and dependence.

Throughout the years following the accident, the Appellant's condition continued to remain chronic. The Appellant continued to report the same physical symptoms. She also continued to report feeling depressed and anxious. She avoided people and activities outside her home. She experienced high anxiety, violent nightmares and death dreams. It was her caregivers' opinion that her condition was chronic and that she would be unlikely to return to a functional level where employment was a possibility.

In August 2009, MPIC's case manager called the Appellant to update her file. The case manager questioned the Appellant as to how she was managing her life and what she did to keep busy. The Appellant replied that she had a friend who helped her with her problems and talked to her. The friend came to her house and she went to their family business and this helped to keep her

busy. The Appellant advised the case manager that she sometimes helped her friend with her family business, a pizza restaurant. Sometimes she drank coffee and sometimes she helped at the restaurant. She saw her friend every day whether at the business or at home.

Thereafter, MPIC retained an investigation firm to perform video surveillance of the Appellant to verify her condition. The video surveillance essentially showed the Appellant working at the pizza restaurant – opening up the restaurant, setting out tables and chairs, preparing pizza dough, serving customers and cleaning up. Subsequently, the Appellant filled out a "Claimant's Reported Level of Function" form and a number of Daily Activity Logs. The majority of those logs noted that the Appellant attended at the pizza restaurant to drink coffee and talk with her friends. Occasionally the logs showed that the Appellant helped clean up the pizza restaurant or helped with dishes.

MPIC's case manager wrote to the Appellant to advise her of the termination of her benefits for knowingly providing MPIC with false or inaccurate information with respect to the extent of her injuries in contravention of Section 160(a) of the MPIC Act. The case manager found that the level of activity demonstrated on the videotape surveillance contradicted the advice and information that the Appellant had provided in the Level of Function form and in the Daily Activity Logs. The termination of the Appellant's benefits was upheld by the Internal Review Office.

On appeal to the Commission, the Commission found that the Appellant did knowingly provide false or inaccurate information to MPIC by virtue of the information she provided on the Level of Function form and the information which she provided in the Daily Activity Logs. The Commission found that the videotaped evidence presented significant differences between the Appellant's self-reports and the activity demonstrated during the surveillance. Further, the Commission found that although the Appellant repeatedly stated to MPIC that her activities at the pizza restaurant were limited to simply helping around the restaurant and that if she was not able to help, she simply sat, drank coffee and talked, this was not borne out by the videotaped surveillance. In contrast to the Appellant's reports, the surveillance video clearly showed that the Appellant was carrying out nearly all of the tasks that would be expected of an employee of the restaurant. The Appellant had a set of keys to the restaurant which she used to open the restaurant before anyone else arrived. The Appellant was observed on multiple occasions preparing dough and pizzas, placing pizzas in the oven to cook, removing them and placing the cooked pizzas in a display case. The Appellant also regularly interacted with customers, particularly during the lunch hour. The Appellant was seen buying supplies for the restaurant. She also operated restaurant machines, including the slicer. This range of tasks went far beyond how she described her activities at the restaurant. Additionally, the Appellant was regularly dealing with customers, in terms of taking their order, providing them with their pizza, collecting their money and giving them change. This was in marked contrast to the Appellant's report of fears of crowds and anxiety. In these circumstances, the Commission found that there was false, inaccurate and misleading information provided by the Appellant to MPIC.

b) **In another case, the Commission was required to consider whether the Appellant's benefits were properly suspended and terminated for a failure to participate in and attend her rehabilitation program without valid reason.**

Prior to the motor vehicle accident, the Appellant had in the past suffered from an anxiety disorder, which had been treated and from which she had recovered. At the time of the accident she worked full-time as a health care aid at a hospital.

Following the motor vehicle accident the Appellant suffered from neck and back injuries, as well as tremors. She was treated by her family doctor and by neurologists.

MPIC provided the Appellant with a work hardening rehabilitation program. While participating in this program she had difficulty with tremors, dizziness, balance, stress and cognitive issues. The Appellant testified that although the work hardening rehabilitation program assisted with her back pain, it did not help with her balance and tremors, and sometimes increased her stress levels and tremors. She testified that these problems made it difficult for her to participate in and regularly attend the work hardening rehabilitation program.

The panel also heard evidence from a neurologist with the Movement Disorder Clinic who had assessed and treated the Appellant and diagnosed her as suffering from a functional movement disorder. He described this as an abnormality of movement for which there is no objective finding of a structural problem in the nervous system as determined by standard investigations. He explained the clinical diagnosis of the condition and various treatment approaches, noting that historically the prognosis is generally quite poor. He had not seen any evidence that a work hardening program would be effective in alleviating this disorder, but rather recommended a specialized program for such disorders.

The neurologist (who had additional specialized training in movement disorders) was of the opinion that the Appellant's condition was related to the motor vehicle accident and that the Appellant's impairment from these symptoms would have affected her ability to participate in the work hardening program.

The Commission also heard evidence from a physiatrist with experience in forensic reviews and who had planned and overseen the Appellant's work hardening rehabilitation program. He disagreed with the neurologist's opinion that the Appellant's tremors and cognitive difficulties could endanger her clients at her job. It was also his view that the tremors were not related to the motor vehicle accident but were connected to pre-existing issues.

Based upon the evidence of the Appellant and the expert evidence of the neurologists, the Commission found, on a balance of probabilities, that the Appellant's condition of a functional movement disorder and the symptoms which resulted, including tremors, balance, cognitive difficulties, issues with migraines and psychological difficulties with anxiety and depression were caused by the motor vehicle accident and constituted valid reasons for the Appellant's failure to attend and fully participate in the rehabilitation program.

Further, the Commission found that MPIC had failed in its duty under Section 150 of the MPIC Act to advise and assist claimants and endeavour to ensure that claimants are informed and receive the compensation to which they are entitled. The Appellant suffered from a significant, serious underlying condition resulting from the motor vehicle accident. MPIC, through the case management process and its failure to provide the Appellant with recommended cognitive behavioural therapy, had ignored and failed to properly address the Appellant's injuries.

Although the discharge summary provided by the rehabilitation program indicated that the Appellant was fit to return to modified employment, on the contrary, the evidence before the Commission established that the Appellant was not fit to return to gainful employment.

Accordingly, the Appellant's appeal was allowed and the Appellant's Personal Injury Protection Plan ("PIPP") benefits, including her Income Replacement Indemnity ("IRI") benefits, were reinstated.

2. Determination of Income Replacement Indemnity ("IRI") Benefits

When a claimant is unable, because of injuries sustained in an accident, to hold the employment which he/she would have held prior to the motor vehicle accident, the claimant is entitled to receive IRI benefits. This entitlement will end when the claimant is able to return to the prior held employment.

a) Whether or not the Appellant was capable of returning to his pre-accident employment

In this case, the Commission was required to consider whether the Appellant was capable of returning to his pre-accident employment, ending his entitlement to IRI benefits. The Commission also considered whether the Appellant was entitled to psychological treatment benefits.

The Appellant was injured in multiple motor vehicle accidents and was in receipt of IRI and psychological treatment benefits. After several years, MPIC concluded that the Appellant was back to his psychological pre-motor vehicle accident baseline status, that he met the lifting criteria for his job as a linoleum installer and that he was physically able to work safely in the medium/heavy strength category.

The Appellant gave evidence regarding the history of his psychological condition prior to the motor vehicle accidents and the panel reviewed evidence from several psychologists and psychiatrists in this regard. The evidence established that although the Appellant suffered from some anxiety and depression prior to the motor vehicle accident, after the motor vehicle accident he suffered from psychotic symptoms, paranoid delusions and a panic disorder, which had not occurred prior to the accident. The panel found that, on a balance of probabilities, it was the motor vehicle accident which played the major role in the development of the Appellant's current psychological condition, as the expert evidence established that the trauma inflicted by

the motor vehicle accidents and their consequences caused or materially contributed to the Appellant's deterioration into his current psychological condition.

MPIC provided a reconditioning discharge report indicating that the Appellant met the physical demands of this position. The position was classified at a medium level (exerting up to 50 pounds of force occasionally and 25 pounds frequently). The "baseline assessment" used did not test for crouching, kneeling and crawling, and carrying capacity was restricted to 40 pounds.

The Appellant provided detailed testimony regarding the duties involved in his employment which included kneeling, crouching and crawling positions and carrying between 50 and 70 pounds. The job also required manual dexterity in a neck forward, bent over position. The Commission found the Appellant's description of the job and the restrictions created by his injuries to be straightforward and credible.

The Commission found that the evidence established that the Appellant was not physically capable of performing the essential duties of the position as a result of physical injuries arising out of the motor vehicle accident at that time.

The Commission found, on a balance of probabilities, that the evidence had established that the Appellant was unable to return to his previous employment as a result, not just of physical injuries sustained in the motor vehicle accidents, but also as a result of psychological injuries sustained in those accidents. The Commission found the Appellant was entitled to psychological counselling and treatment benefits as a result of injuries sustained in the motor vehicle accident, as well as to further IRI benefits.

b) Whether the Appellant is entitled to IRI benefits following a work hardening reconditioning program

The Appellant was involved in a motor vehicle accident and complained of soft tissue injuries to his neck and back. At the time of the accident the Appellant was unemployed and was scheduled to start a new job as a warehouse helper/half-ton truck driver. The Appellant was deemed to be a non-earner for the purpose of receiving IRI benefits. MPIC determined that the Appellant was capable of performing his job as a truck driver and terminated his IRI benefits.

The Appellant appealed MPIC's decision and as a result of a Case Conference between the parties, the Commission determined that a Functional Capacity Evaluation ("FCE") was required. The occupational therapist provided a report to the Commission and stated:

> "[The Appellant] demonstrates very good potential to be able to improve his abilities, and demonstrates a keen motivation to be able to work as a Warehouse Worker/Truck Driver. A reconditioning program is recommended which includes core strengthening and trunk stability exercises. It is recommended that the client then be progressed to a work hardening program in order to improve his tolerance for the frequent lifting and carrying that is required for the Medium level strength demand."

MPIC referred the Appellant to a work hardening reconditioning program. At the conclusion of the program, the discharge report stated the Appellant was capable of returning to work as a truck driver. As a result MPIC terminated the Appellant's IRI benefits. On review MPIC's Internal Review Officer confirmed the case manager's decision that the Appellant was capable of carrying out the physical demands of the job as a truck driver.

The Appellant appealed the Internal Review decision and testified before the Commission that due to the pain in his lower back he was unable to physically carry out the duties of his job which required lifting approximately 30 cabinets into a truck. He further testified that the treatment received by the provider of the work hardening program did not resolve his back problems.

The Commission determined that:

1. MPIC's case manager failed to comply with the instructions of the occupational therapist who recommended that the Appellant be subjected to a reconditioning program.
2. The Appellant was a credible witness who did not exaggerate his pain levels in his testimony before the Commission nor in his discussions with his occupational therapist.
3. In these circumstances it could not give any weight to the report from the work hardening program provider.
4. Due to the back injury the Appellant was incapable of returning to work for a period of time.
5. The Appellant was entitled to IRI benefits during that period of time.

c) Whether the two-year determination was proper

When a claimant is unable, because of injuries sustained in an accident, to hold the employment which he/she held prior to the motor vehicle accident, the Corporation may "determine" an appropriate employment for the claimant from the second anniversary date of the accident.

The Appellant was involved in a motor vehicle accident and suffered pain to his neck and back. At the time of this accident he was employed as a butcher. The Appellant was unable to return to work at that time and was in receipt of IRI benefits.

The Appellant was referred by MPIC to Associated Rehabilitation Consultants of Canada ("ARCC") for a work hardening program. At the conclusion of the program, the Appellant was discharged with a recommendation that he was capable of returning to work.

The Appellant's physiatrist, a specialist in physical medicine, concluded the Appellant had the ability to perform the duties of "light strength" and was unable to perform his pre-accident duties which were of "medium strength".

MPIC conducted surveillance of the Appellant for a period of time and during that time the Appellant was in receipt of IRI benefits. MPIC arranged for an examination by a medical

consultant. MPIC's medical consultant #1 concluded that the Appellant no longer had any motor vehicle accident injuries and was capable of returning to work.

At MPIC's request ARCC completed a Functional Abilities Evaluation and ARCC concluded the Appellant had the ability to return to work at a sedentary strength level. At MPIC's request, their medical consultant #2 examined the surveillance conducted by MPIC and concluded that the Appellant did not demonstrate any significant functional deficits which would affect his ability to perform the essential duties of his occupation.

MPIC retained an independent firm to review the Appellant's education, language ability, work history, volunteer experience, social interests and identified a number of employment options the Appellant could be capable of performing. As a result of this information, the case manager found that the Appellant was capable of doing the job of plastic products assembler, finisher and inspector and that he had the physical capacity to perform the duties of the determined employment with "medium level job demands".

The case manager referred the video surveillance to MPIC's medical consultant #1. who suggested that the Appellant's physiatrist be advised specifically about the Appellant's employability. The Appellant's physiatrist indicated that the Appellant would have significant difficulty performing the determined employment of any job level that required repetitive motion, prolonged standing, sitting, bending, reaching/lifting at any level.

The case manager confirmed the Appellant's two year determination and the Appellant made an Application for Review of the case manager's decision. The Internal Review Officer met with the Appellant who relied on the opinion of the Appellant's physiatrist that due to the Appellant's low back pain, he could not work at the determined employment. The Appellant asserted that he could not do repetitive work and that perhaps he could work at a flexible job where he could take breaks and change positions.

The Internal Review Officer forwarded the videotape surveillance to the Appellant's physiatrist and requested that he review the videotapes and determine whether the tapes affected his view about the Appellant's ability to work as a plastic products assembler. The Appellant's physiatrist was also provided with a detailed job description of a plastic products assembler. The Appellant's physiatrist provided a report to the Internal Review Officer stating that his overall impression was that the Appellant appeared to have little restriction on his ability to do a number of physical tasks for at least four hours. He also indicated that there was nothing to preclude the Appellant from trying the determined employment. He recommended a gradual return to the work program to help manage any of the Appellant's increases in pain.

The Internal Review Officer sent the report of the Appellant's physiatrist to MPIC's medical consultant #1 who in reply noted that the Appellant's physiatrist had appeared to change his view to more closely agree with the view of MPIC's medical consultant #2 which supported MPIC's medical consultant #1's earlier conclusions that the Appellant had the ability to return to the determined employment. The Internal Review Officer concluded that the evidence supported

that the two year determination that the Appellant was capable of working as a plastic products assembler or at his previous employment as a butcher.

At the appeal hearing the Appellant was given the opportunity of reviewing a portion of MPIC's video surveillance and testified that:

1. In respect of the discrepancies between his physical ability to walk, stand or bend and the activities shown on the videotapes, he stated that he had good days and he had bad days.
2. He was unable to explain why the Appellant's physiatrist initially assessed him as being unable to carry out the duties of a plastic products assembler but upon reviewing the videotapes, the Appellant's physiatrist stated that the Appellant would be capable of carrying out these activities if provided with a graduated return to work.

A chiropractic consultant, who was previously employed by ARCC, had supervised the Appellant's work hardening program and had provided the assessments and final discharge report testified that on review of the videotapes he concluded that contrary to the Appellant's functional and pain limitations the Appellant was actually quite active and functional to drive, shop, walk, bend and carry items apparently with no signs of pain and contrary to the Appellant's evaluation, he demonstrated no difficulty in lifting heavy items.

The Commission also had an opportunity of reviewing the videotapes which displayed the investigation of the Appellant's functional abilities outside of a clinical setting. The videotapes indicated:

1. The Appellant was quite active and functional.
2. He appeared to drive, shop, walk, bend and carry items with no appearance of pain.
3. He had no difficulties in lifting heavy items. On one occasion he was observed bending into the trunk of a vehicle and lifted out a large toolbox and carrying that box some distance.

The Commission noted that the Appellant's physiatrist who had initially indicated the Appellant was incapable of performing his determined employment due to ongoing pain changed his opinion after reviewing the videotapes and agreed with MPIC's medical consultant #1 and MPIC's medical consultant #2 that the Appellant was capable of carrying out his determined employment. For these reasons, the Commission rejected the Appellant's testimony that as a result of the motor vehicle accident injuries he was incapable of carrying out his determined employment and dismissed his appeal.

3. Assessment of Permanent Impairment Benefits

Section 127 of the MPIC Act provides that a victim who suffers permanent disability or mental impairment because of an accident is entitled to a lump sum indemnity, which is calculated in accordance with Manitoba Regulation 41/94. The following cases provide an illustration of the issues faced by the Commission when adjudicating these types of matters.

a) The Appellant was involved in a motor vehicle accident on January 6, 2005. At the time of this accident, the Appellant was a backseat passenger of a vehicle which was rear-ended. The Appellant hit her left cheek on the seat in front of her due to the impact form the accident.

Prior to this motor vehicle accident, in 2003, the Appellant had sustained an injury to the left side of her face. At that time she had a tremendous amount of local bruising and edema as a result of this injury. She underwent multiple investigations and opinions from several specialists in the neurology, pain clinic and plastic surgery fields regarding that injury. Subsequent to that injury, the Appellant had very prominent pain involving the left malar region, radiating under the left eye and also up to the left temple. The pain was constant and throbbing. It was aggravated by all manner of stimuli, including touching the scalp in a remote area and bending over. She tried a large number of medications, but was generally intolerant to even small doses.

In November of 2006, the Appellant contacted MPIC advising that she was experiencing severe pain in her jaw and that she had developed a facial deformity to her left cheek as her cheek seemed to be caving in.

MPIC's case manager issued a decision advising the Appellant that there was no relation between her current signs/symptoms and the motor vehicle accident of January 6, 2005. As a result, MPIC was unable to approve any entitlement for treatment expenses and/or a permanent impairment benefit. The Internal Review Officer confirmed the case manager's decision.

On appeal, the Commission found that the Appellant did not establish a causal connection between the motor vehicle accident of January 6, 2005 and the injury to her left cheek. The Commission noted that there was a significant lapse in time between the motor vehicle accident and the Appellant's report of the injury to her left cheek. On review of the medical information before it, the Commission noted that the caregiver who saw the Appellant in April, June, August and September, 2006 noted no loss of tissue to the Appellant's left facial area at that time. As a result, based upon a review of all of the evidence before it, the Commission found that the Appellant had not established that the motor vehicle accident of January 6, 2005 was the cause of her left cheek injury which arose in November of 2006. Accordingly, the Appellant was not entitled to reimbursement of treatment expenses or a permanent impairment benefit.

b) Whether the Appellant's permanent impairment entitlement with respect to her facial scar was properly assessed as calculated

The issue for determination by the Commission was whether MPIC had correctly assessed a permanent impairment award to the Appellant is respect of facial scarring.

The Appellant was involved in a motor vehicle accident and as a result sustained facial lacerations which required 13 stitches starting at her left eyebrow, going across the top of her nose and onto her right eyelid. The Appellant required surgery which resulted in a trapdoor scar involving the frontal brow resulting in a 4 mm height discrepancy.

MPIC requested the Appellant's scarring be assessed by an occupational therapist who reported that the Appellant's scar had caused an alteration in form and symmetry to the Appellant's face, i.e. the Appellant's right eyebrow appeared slightly higher than the left eyebrow.

The case manager determined the permanent impairment award for the Appellant's facial scarring resulted in a 7% award. The Appellant applied for a review of this decision to MPIC's Internal Review Office. The Internal Review Officer confirmed that the Class 3 rating for the Appellant's scar was correct and stated that in order to obtain a Class 4 award (which would result in a higher payment) the scar or impairment must be significant and would need to meet the criteria outlined in the Regulation which is a *"conspicuous change that holds one's attention"*. The Appellant appealed the Internal Review decision to the Commission.

Prior to the appeal hearing, MPIC's legal counsel requested that a member of MPIC's Health Care Services review whether a correct permanent impairment assessment had been made in respect of the Appellant's scarring to her face. In a report to MPIC's medical consultant, the occupational therapist stated that the Appellant had reported that the plastic surgeon was able to raise the lateral portion of her left eyebrow; however, he was not able to raise the medial portion of the eyebrow and therefore, the Appellant continues to have an alteration in form and symmetry to the face. The occupational therapist referred the consultant to two photographs taken of the Appellant's face. On review of the photographs, the medical consultant confirmed the appropriate rating would be Class 3 because the Appellant had a conspicuous change including both flat and faulty scars involving no more than two anatomic elements.

An Internal Review Officer reviewed the Appellant's file and concurred with the consultant's opinion that the area of the Appellant's scarring was not significant enough to hold one's attention and as a result upheld the case manager's decision of a Class 3 assessment.

The Appellant appealed this decision to the Commission and in her testimony she stated that as a result of the facial scarring her right eyebrow appeared slightly higher than her left eyebrow and surgery did not correct this problem. She further testified that there was a new scar directly above her left eyebrow and as a result of the combination of the three scars and the difference in height of her two eyebrows, there was not only a conspicuous change to her facial appearance, these changes cause people to stare at her face and make comments about her facial disfigurement.

The Commission noted:

1. That in arriving at their assessments, neither the occupational therapist nor the medical consultant considered the existence of a new scar caused by the surgery when determining the Class 3 rating.
2. The medical consultant did not personally examine the Appellant's face; his assessments were based entirely on the opinion of the occupational therapist and the photographs he obtained from MPIC.

3. The photographs of the Appellant's face did not clearly demonstrate the degree of facial disfigurement caused by the three scars together with the disparity between the height of her eyebrows.

The Commission personally examined the Appellant's face and was satisfied that the disfigurement in her face was caused by a combination of the three facial scars and the disparity in the height of her eyebrows which resulted in a conspicuous change that holds one's attention. The Commission therefore determined:

1. That the occupational therapist and MPIC's medical consultant erred in assessing the Appellant's disfigurements as Class 3.
2. Having regard to the Appellant's testimony and the Commission's visual examination of the Appellant's face, the Commission found the rating should be increased from Class 3 to Class 4.

4. Reimbursement for Prescription Medication

In this case, the issue to be determined by the Commission was whether the Appellant was entitled to reimbursement of certain prescription medications. This case illustrates the important function of the Commission as an objective independent tribunal which is informal and accessible to self-represented individuals.

The Appellant was involved in a motor vehicle accident where she swerved to miss an animal on the road. She lost control of her vehicle, went into the ditch and rolled her car several times. Following the motor vehicle accident, the Appellant developed increased anxiety, sleep disturbance, chronic pain, increased migraines and an opiate addiction. The Appellant represented herself at the hearing before the Commission. She testified in a frank and forthright manner regarding the circumstances which necessitated the use of the medications in issue. The Appellant was able to present her case in a clear and concise manner and provide the necessary evidence regarding her requirement for each of the medications in issue.

The Commission found that the Appellant established that her requirement for the medications was related to the motor vehicle accident. Specifically, with the benefit of the Appellant's testimony at the appeal hearing, the Commission determined that the evidence provided by the Appellant met the onus of proof to establish that the requirement for the medications was related to the Appellant's motor vehicle accident. As a result, the Appellant was successful on her appeal.

RAPPORT ANNUEL DE LA
COMMISSION D'APPEL DES ACCIDENTS DE LA ROUTE
POUR L'EXERCICE 2013-2014

Généralités

La Commission d'appel des accidents de la route (« la Commission ») est un tribunal administratif spécialisé indépendant qui a été constitué en vertu de la *Loi sur la Société d'assurance publique du Manitoba* (« la *Loi* »). Elle est chargée d'instruire les appels interjetés relativement aux révisions internes de décisions sur les indemnités du Régime de protection contre les préjudices personnels (« le Régime ») de la Société d'assurance publique du Manitoba (« la Société »).

L'exercice 2013-2014, qui a débuté le 1er avril 2013 et s'est terminé le 31 mars 2014, marquait la 20e année complète de fonctionnement de la Commission. Celle-ci compte un personnel de 11 personnes : un commissaire en chef, deux commissaires en chef adjointes, une directrice des appels, trois agentes des appels, une secrétaire du commissaire en chef, deux secrétaires administratives et une employée de bureau. En outre, 24 commissaires à temps partiel siègent à des comités d'appel selon les besoins.

Le processus d'appel

Pour recevoir des indemnités du Régime, le demandeur doit présenter une demande d'indemnisation à la Société. Si le demandeur n'est pas d'accord avec la décision du gestionnaire de cas sur son admissibilité à des indemnités du Régime, il a 60 jours pour demander une révision de la décision. Un agent de révision interne de la Société examine la décision du gestionnaire de cas et rend par écrit une décision motivée.

Le demandeur qui n'est pas satisfait des conclusions de l'agent de révision interne peut interjeter appel devant la Commission dans les 90 jours qui suivent la date de réception de la décision interne révisée. La Commission peut, à sa discrétion, accorder une prolongation de délai.

En 2013-2014, 176 appels de décisions internes révisées ont été interjetés devant la Commission, comparativement à 187 en 2012-2013.

Le Bureau des conseillers des demandeurs

Le Bureau des conseillers des demandeurs a été constitué en 2004 par une modification apportée à la partie 2 de la *Loi.* Son rôle est d'aider les appelants qui comparaissent devant la Commission. En 2013-2014, 62 % des appelants ont été représentés par le Bureau des conseillers des demandeurs, comparativement à 73 % en 2012-2013 et à 65 % en 2011-2012.

Procédures préalables à l'audience et projet pilote de médiation

Depuis février 2012, le formulaire d'avis d'appel indique que les appelants ont la possibilité de participer à la médiation de leur appel. Établis dans le cadre d'un projet pilote, les services de médiation sont fournis par le Bureau de médiation relative aux accidents de la route, un organisme gouvernemental indépendant. Une feuille de renseignements sur la médiation est également jointe au formulaire d'avis d'appel. Sur les 176 nouveaux appels interjetés durant l'exercice 2013-2014, 154 appelants ont demandé des services de médiation.

Si des services de médiation sont demandés au moment du dépôt d'un avis d'appel, la Commission est chargée de réunir dans une trousse de renseignements les documents d'appels importants qui seront utilisés pendant la médiation.

Procédure lors des audiences

À la fin du processus de médiation, les questions qui ne sont pas réglées ou qui ne sont réglées que partiellement sont renvoyées à la Commission pour la tenue d'une audience visant à trancher l'appel. Au lieu de préparer un dossier indexé pour chaque appel déposé, les agentes des appels de la Commission n'en préparent désormais que pour les appels non réglés que le Bureau renvoie à la Commission. Si des services de médiation ne sont pas demandés au moment du dépôt de l'avis d'appel, un dossier indexé sera préparé. Le dossier indexé regroupe les preuves documentaires jugées pertinentes pour les questions en litige. Il est fourni à l'appelant ou à son représentant ainsi qu'à la Société. De plus, on s'y reporte à l'audience. Lorsque les parties ont examiné le dossier indexé et présenté tout autre élément de preuve qu'elles jugent pertinent, la date d'audition de l'appel est fixée.

Activités

Exercice	Audiences	Conférences préparatoires	Total
2013-2014	66	141	207
2012-2013	87	157	244
2011-2012	94	102	196
2010-2011	81	48	129
2009-2010	120	72	192

Conférences préparatoires

La gestion des appels au moyen de conférences préparatoires représente toujours une partie importante du calendrier des audiences de la Commission. Au cours des six derniers exercices, celle-ci a constaté que, pour de nombreux appels, un commissaire devait fournir du soutien supplémentaire pour la gestion de cas. Comme par le passé, la Commission a continué de

convoquer des conférences préparatoires en 2013-2014. Elle estime que ces conférences aident à déterminer où en sont les appels, à établir la cause des retards, à résoudre les obstacles qui empêchent de fixer une date d'audience, à faciliter la médiation et à fixer les dates d'audience.

En 2013-2014, les appelants ont eu gain de cause – entièrement ou partiellement – dans 33 % des appels entendus par la Commission.

Audiences

Lorsqu'un appel n'est pas entièrement réglé durant la médiation ou lorsqu'un appelant décide de ne pas recourir à la médiation, la Commission teint une audience afin de se prononcer sur l'appel.

Comme la Commission n'est pas strictement liée par les règles de la preuve applicables aux tribunaux, les audiences sont plutôt dénuées de formalités. Les appelants et la Société peuvent y appeler des témoins et y présenter de nouveaux éléments de preuve. Les lignes directrices de la Commission exigent des parties qu'elles divulguent à l'avance leurs éléments de preuve documentaires ou oraux. La Commission peut aussi délivrer des assignations de témoins, qui obligent des personnes à comparaître à l'audience pour témoigner et à apporter les documents pertinents avec elles.

Au besoin, la Commission se rend à l'extérieur de Winnipeg pour tenir une audience ou, si les circonstances s'y prêtent et si cela est dans l'intérêt d'un appelant qui vit ou travaille ailleurs, une audience peut avoir lieu par téléconférence.

Le commissaire ou les commissaires qui entendent un appel évaluent la preuve et les observations de l'appelant et de la Société. Conformément à la *Loi*, après la tenue de l'audience, la Commission peut, selon le cas :

a) confirmer, modifier ou rescinder la décision de la Société;
b) rendre toute décision que la Société aurait pu rendre.

La Commission rend des décisions écrites et en communique les motifs par écrit. Les décisions et les motifs sont envoyés à l'appelant et à la Société. Les décisions rendues par la Commission ainsi que les motifs les justifiant peuvent être consultées au bureau de la Commission ou dans son site Web, au http://www.gov.mb.ca/cca/auto/decisions.html (décisions en anglais seulement). Les décisions rendues publiques sont modifiées de manière à protéger la vie privée des parties, conformément à la législation manitobaine en matière de protection de la vie privée. La Commission s'est engagée à mettre à la disposition du public la preuve et les motifs de ses décisions tout en veillant à ce que les renseignements personnels concernant les appelants et d'autres personnes, notamment les renseignements sur la santé, soient protégés et demeurent confidentiels.

Statistiques

La Commission entend et tranche des appels de façon équitable, exacte et rapide. C'est dans cette optique qu'elle a établi les paramètres de niveau de service ci-dessous.

- Dans les cas où l'appelant n'a pas recours à la médiation et demande une audience pour le règlement de l'appel, le personnel de la Commission prépare le dossier indexé qui sera utilisé à l'audience cinq semaines après la réception du dossier de la Société et de tout document supplémentaire.
- Pour les appels où l'appelant demande des services de médiation, le personnel de la Commission prépare le dossier indexé cinq semaines après que la Commission a été avisée par le Bureau que la médiation est terminée et que l'appel sera renvoyé à la Commission en vue d'une audience.
- La Commission a l'intention de fixer la date d'audience six à huit semaines après que les parties l'avisent qu'elles sont prêtes à aller de l'avant.
- La Commission a l'intention de remettre la décision écrite six semaines après la tenue de l'audience et la réception de tous les renseignements requis.

La Commission continue d'enregistrer un volume constant d'appels, et ses délais de traitement moyens en 2013-2014 ont été les suivants :

- Les dossiers ont été indexés dans un délai de 15 semaines après la réception du dossier de la Société et des documents supplémentaires, comparativement à 11,7 semaines en 2012-2013 et à 13 semaines en 2011-2012.
- Les dossiers ont été indexés dans un délai de 4 semaines après la réception par le Bureau de l'avis indiquant que la médiation était terminée mais que l'appel non réglé ou partiellement réglé ferait l'objet d'une audience. Le délai était de 8 semaines en 2012-2013 et de 11,1 semaines en 2011-2012.
- Les audiences ont été tenues dans un délai moyen de 2,13 semaines après la date où les parties ont dit être prêtes, comparativement à 2,25 semaines en 2012-2013, à 8 semaines en 2011-2012 et à 9 semaines en 2010-2011.
- La Commission a rédigé 44 décisions en 2013-2014. Le délai moyen entre la date de conclusion d'une audience et la date où la Commission a rendu sa décision était de 5,14 semaines en 2013-2014 à comparer à 4,95 semaines en 2012-2013 et à 5,5 semaines en 2011-2012.
- La Commission a indexé 82 dossiers en 2013-2014, comparativement à 100 en 2012-2013 et à 157 en 2011-2012.

Même si on s'attendait à une réduction du nombre de dossiers indexés en raison des changements de procédure associés au projet pilote de médiation, le nombre de dossiers indexés supplémentaires préparés par les agentes des appels de la Commission a augmenté, passant de 76 en 2012-2013 à 109 en 2013-2014. La préparation de ces dossiers s'est avérée nécessaire notamment pour les conférences préparatoires et les audiences relatives au désistement ou à une question de compétence ainsi que pour les dossiers existants après la réception de documents supplémentaires.

Le rapport peut être obtenu en médias substituts sur demande

En plus du soutien fourni pour le projet pilote de médiation, les agentes des appels de la Commission continuent d'apporter un soutien administratif considérable pour la gestion des appels. Si on tient compte des dossiers indexés supplémentaires, les agentes des appels ont préparé en tout 191 dossiers indexés en 2013-2014, comparativement à 176 en 2012-2013.

Au 31 mars 2014, il y avait 301 dossiers actifs à la Commission, par rapport à 366 au 31 mars 2013 et à 467 au 31 mars 2012.

Appels interjetés devant la Cour d'appel du Manitoba

Les décisions de la Commission sont exécutoires, sous la seule réserve du droit d'interjeter appel devant la Cour d'appel du Manitoba sur une question de droit ou de compétence et, le cas échéant, uniquement avec l'autorisation du tribunal.

En 2013-2014, quatre demandes d'autorisation d'interjeter appel devant la Cour d'appel ont été présentées. Trois demandes ont été rejetées, et une autre était toujours en instance au 31 mars 2014. De plus, une demande d'autorisation d'appel qui avait été déposée durant l'exercice précédent a été rejetée.

Une motion en rejet lié à un dossier pour lequel la Cour d'appel avait accordé une autorisation d'appel au cours d'un exercice antérieur a été entendue par un juge des motions de la Cour d'appel, mais la décision n'avait pas encore été rendue au 31 mars 2014.

Au 31 mars 2014, la Cour d'appel avait accordé une autorisation d'appel dans 14 cas sur les 1 611 décisions rendues par la Commission au cours de ses 20 années d'existence.

Développement durable

La Commission épouse les pratiques d'approvisionnement durable de la Province du Manitoba. Le personnel de la Commission est conscient des avantages associés aux pratiques d'approvisionnement respectueuses du développement durable. La Commission utilise des produits écologiques autant que possible et participe à un programme de recyclage des déchets non confidentiels.

Loi sur les divulgations faites dans l'intérêt public (protection des divulgateurs d'actes répréhensibles)

La *Loi sur les divulgations faites dans l'intérêt public (protection des divulgateurs d'actes répréhensibles)* est entrée en vigueur en avril 2007. Cette loi donne aux employés une marche à suivre claire pour communiquer leurs inquiétudes au sujet d'actes importants et graves (actes répréhensibles) commis dans la fonction publique du Manitoba et les protège davantage contre les représailles. La *Loi* renforce la protection déjà offerte par d'autres lois, ainsi que par les droits, politiques, pratiques et processus de négociation collective en place dans la fonction publique du Manitoba.

Un acte répréhensible aux termes de la *Loi* peut être une infraction à une loi fédérale ou provinciale, un acte ou une omission qui menace la sécurité publique, la santé publique ou l'environnement, un cas grave de mauvaise gestion ou le fait d'ordonner ou de conseiller sciemment à quelqu'un de commettre un acte répréhensible. La *Loi* ne vise pas les questions courantes d'ordre administratif ou opérationnel.

Une divulgation faite de bonne foi et conformément à la *Loi* par un employé qui a des motifs raisonnables de croire qu'un acte répréhensible a été ou est sur le point d'être commis est réputée une divulgation faite en vertu de la *Loi,* que l'acte en cause soit un acte répréhensible ou non. Toutes les divulgations font l'objet d'un examen minutieux et approfondi visant à déterminer si des mesures s'imposent en vertu de la *Loi*. En outre, elles doivent être déclarées dans le rapport annuel du ministère conformément à l'article 18 de la *Loi*. La Commission d'appel des accidents de la route a reçu une exemption de l'ombudsman en vertu de l'article 7 de la *Loi*. En conséquence, toute divulgation reçue par le commissaire en chef ou un supérieur est renvoyée à l'ombudsman, selon l'exemption prévue.

Voici un résumé des divulgations reçues par la Commission d'appel des accidents de la route pendant l'exercice 2013-2014.

Renseignements exigés chaque année (selon l'article 18 de la *Loi)*	Exercice 2013-2014
Nombre de divulgations reçues et nombre de divulgations auxquelles on a donné suite et auxquelles on n'a pas donné suite. Alinéa 18(2)a)	Aucune