

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-164**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Trevor Anderson
Mr. Guy Joubert

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

HEARING DATE: April 12 and 13, 2010

ISSUE(S):

1. Whether the Appellant's benefits were properly terminated pursuant to Section 160(a) of the MPIC Act.
2. Whether the Appellant's benefits were properly terminated pursuant to Section 110(1)(c) of the MPIC Act.
3. Whether MPIC is entitled to repayment of overpayment.

RELEVANT SECTIONS: Sections 110(1)(c), 160(a) and 189 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

Facts and Background:

The Appellant, [text deleted], was involved in a motor vehicle accident on May 27, 1997. Due to the injuries which the Appellant sustained in this accident, she became entitled to Personal Injury Protection Plan ("PIPP") benefits pursuant to Part 2 of the MPIC Act. At the time of the motor vehicle accident, the Appellant was pregnant [text deleted]. She was not employed outside of the home and was classified as a non-earner for income replacement indemnity ('IRI') purposes.

In accordance with Section 86(1) of the MPIC Act, a non-earner is entitled to IRI benefits as of the 181st day following the accident, if they are not able because of the accident to hold employment. On March 1, 2002, MPIC's case manager issued a decision indicating that the Appellant was not entitled to IRI benefits as of the 181st day following the motor vehicle accident on the basis that the injuries arising from the accident would not have prevented the Appellant from holding employment as an administrative clerk.

The Appellant sought an Internal Review of that decision. The Internal Review Decision dated October 28, 2002 dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the medical evidence on the Appellant's file did not establish that she was unable to be employed as an administrative clerk on account of her physical or psychological injuries resulting from the motor vehicle accident.

The Appellant subsequently appealed that Internal Review Decision to the Commission. In its Reasons for Decision dated February 21, 2005, the Commission found that the Appellant was not capable of holding employment as an administrative clerk on account of psychological problems arising from the motor vehicle accident of May 27, 1997. The Commission found that the Appellant's depression was in part attributable to her symptoms of post-traumatic stress disorder, which was causally related to the motor vehicle accident. Further, the Commission determined that the effects of the post-traumatic stress disorder and the depression rendered the Appellant unemployable as of July 2001. As a result, the Commission found that the Appellant was entitled to IRI benefits as of July 2001 until such time as her entitlement was terminated or suspended in accordance with the provisions of the MPIC Act.

Following the Commission's decision, arrangements were made for the Appellant to attend upon [Independent Psychiatrist], for an independent psychiatric examination on April 22, 2005. In his report of April 30, 2005, [Independent Psychiatrist] described the Appellant's routine day as follows:

She reports a routine day as getting up at 7:30, at which point she will get her kids up, make breakfast for them, help them get their lunch together and get them out the door. She will come back in, have some toast and skim milk, and read the newspaper. She reports that she will then, "Just try to kind of get through the day. I don't feel motivated to do a lot." She reports that she will do some laundry, make the beds and tidy things up. She will go and sit with the lovebirds that her husband bought her. If she feels up to it, she may do some gardening. She reports that a lot of the time she will sleep 2-4 hours in the day and that she will do this several days per week. She does not have lunch. She picks her kids up at school at 3:35, then brings them home and helps them with their homework. She will get supper ready, making various things such as lasagna, burgers, etc. She will ask her husband for help if she needs it. Her appetite for supper is "so-so". She has reported no change in her weight. In the evening, she will spend time with her kids, doing homework or reading. She goes to bed at 11:00 o'clock and falls asleep right away.

Under the **Psychiatric Review Of Symptoms** portion of his report, [Independent Psychiatrist] indicated as follows:

[The Appellant] describes her mood as sad most of the day nearly every day. She states that she wouldn't say she's in a bad or angry mood, and that she's not a grumpy person. She continues to be pleasant. She describes her motivation as being pretty low. She states that she doesn't get anything done, such as working on crafts or her garden ideas. She had numerous hobbies and interests in the past, none of which she currently pursues. She reports that her sleep is bad, in that she will never feel rested when she wakes up. However, she is sleeping quite a few hours per day, as described above. She reports that her appetite is so-so. She states her energy is low.

...

On objective assessment, she was mildly psychomotor retarded. Her affect was mostly flat and quite restricted, although she did laugh on a couple of occasions during the interview. She completed a Beck Depression Inventory with a score of 35, which would be consistent with moderately-severe to severe symptoms of major depression.

Regarding PTSD symptoms, she reports that she doesn't remember her dreams and that she has flashbacks all the time while driving. At other times in the day, she will have frequent memories of the MVA, but these do not have the quality of flashbacks. She describes an emotional numbness that has existed since the MVA. She reports that she is hypervigilant in her vehicle and she startles easily, both in her vehicle and elsewhere.

Under the **Return to Work Issues** portion of the report (at page 5), [Independent Psychiatrist] stated the following:

[The Appellant] reports that, if she was asked to return to work, she “couldn’t cope. Just the day to day stuff would be difficult. Sleeping is my escape – it’s more than for fatigue. If there’s nothing that absolutely needs to be done, I will sleep. I don’t abuse alcohol or drugs. I cope with my kids at home, but my husband is there most of the time. When my husband is away (she gave a big shrug and helpless look)... I will use shortcut suppers and my objective is just to get to 8:00 o’clock.

She describes a very limited life. She did travel to [text deleted] last year and reports that [text deleted] was nice but that the trip was very stressful. She reports that she does not socialize at all. She used to have many friends but currently reports she has none. She will see her family, that is her mother, father, and brother who lives with them, approximately two times per month. She reports that she used to be a very social person. She previously had hobbies such as reupholstering, refinishing antique furniture, doing needlework, and gardening, but that she currently does none of these, her husband may be active in some of these activities, but that her role is very minimal. For example, she will go with him to a garden centre, but he will do all the gardening work. On the computer, she reports that she does “not too much”. Once in a while she will clean up some files. She reports that she does not go for a walk, does not go out for coffee, does not spend time with neighbours as “everyone works”, and does not do anything for recreation except take her kids swimming on occasion.

Her rationale for not being involved in a lot of things in which she used to be involved is due to her reported lack of energy and that she doesn’t organize activities as she is not sure that she will feel like participating once the time to do them comes around.

[Independent Psychiatrist’s] diagnosis outlined on page 11 of his report was as follows:

- Axis I 1. Major Depressive Episode, chronic, currently moderate severity.
 2. Some symptoms of Posttraumatic Stress Disorder.
- Axis II No diagnosis.
- Axis III 1. Patellofemoral Syndrome – by her report.
 2. Other musculoskeletal problems, the diagnosis of which is deferred.
- Axis IV Severe psychosocial stressors, including unemployment, ongoing battle with her insurer, the presence of chronic psychiatric symptoms and the impact of these on her marital and other relationships.
- Axis V 50 – moderately severe to severe impairments in psychosocial and occupational functioning.

[Independent Psychiatrist] concluded that the Appellant was experiencing symptoms of post-traumatic stress disorder, causally related to the motor vehicle accident in question. At page 12 of his report dated April 30, 2005, [Independent Psychiatrist] concluded as follows:

In my opinion there is a causal relationship between the motor vehicle accident and the psychiatric diagnosis provided. The rationale for this is as follows. There is good evidence that there was no pre-existing psychiatric condition and that [the Appellant's] level of psychosocial, emotional, and mental health functioning was very good prior to the MVA. There is strong evidence that [the Appellant's] physical, psychosocial and emotional functioning deteriorated soon after the MVA.

...

Also, at some point during the course of events since the MVA, she developed major depression. The likely factors contributing to her major depression include her ongoing pain complaints (I defer to a more expert opinion whether or not these pain complaints were related to her MVA or other factors), and her symptoms of PTSD. Her PTSD seems to have resulted in a markedly reduced functional status that has significantly impacted on her mood and functioning over the years since the MVA. The development of major depression in the years following posttraumatic stress disorder is quite common. In addition, M.B. has seen her own goals as being inconsistent with those of her insurer and has felt that she has to struggle against MPI for various types of insurance benefits. This struggle with MPI was one of the two most emotionally laden aspects of the psychiatric interview.

In summary, as [the Appellant] had no personal past history, or any family history, of psychiatric disorder. It is, on the balance of medical probability, most likely that her PTSD and her major depression are causally related to the MVA.

[Independent Psychiatrist] indicated that on a balance of probabilities, the Appellant's post-traumatic stress disorder and depression precluded the Appellant from holding full-time sedentary employment as an administrative clerk. Specifically, [Independent Psychiatrist] noted that:

The objective findings are as stated above. In addition, the majority of objective findings in a psychiatric examination come from a consistency of evidence in the subjective and collateral information. In my opinion, [the Appellant's] subjective report of her limitations is consistent with that reported and diagnosed over time by a variety of caregivers and third party assessors.

...

She has significant impairments that would “interfere with the performance of the essential tasks of the occupation”. Because of [the Appellant’s] symptoms of PTSD and major depression, she has minimal coping reserves. She has limited energy, as evidenced by her reported functioning in her normal daytime routine. She has a requirement for significant sleep throughout the day and night, which she finds non-restorative. She functions very little in a social or interpersonal environment. She develops symptoms even in the presence of minor stressors. In a workplace setting, she would have impairment in her ability to persist over a work shift in both her energy level and her concentration. She would have difficulty in interpersonal relationships and would have difficulty adapting to new situations.

In summary, [the Appellant] has very minimal psychosocial and emotional coping resources available to her at this time. It is most likely that she would not be able to function in any type of employment situation.

A return to work at this time could adversely affect her underlying condition by overwhelming her coping resources and causing an increase in symptoms and deterioration in her mental state. A return to work is unlikely to pose a safety risk to the patient or her co-workers, unless there is a significant deterioration into a suicidal state. However, [the Appellant] has no past history of suicide attempt and this would be unlikely to occur in the future unless there was a significant deterioration in her psychiatric condition.

[Independent Psychiatrist] concluded his report by making recommendations with respect to medication and ongoing treatment sessions with [Appellant’s Psychologist]. He also stated in closing that:

My opinions and conclusions regarding this claim are based on the information that was available as of the date of this report. If any further information becomes available that is inconsistent with the previously available information, I reserve the right to revise my opinions and conclusions as required by that information.

Subsequently, arrangements were made by MPIC’s case manager to conduct an investigation into the Appellant’s level of activity. That investigation is documented in four Chase Investigations Inc. reports dated April 29, May 31, June 13 and July 22, 2005. The portion of the activities and surveillance noted therein are also reflected in a series of five videotapes. The surveillance covers the following dates:

April 19, April 20, April 21, April 22, April 23, 2005
May 19, May 20, May 21, 2005

June 3 and June 4, 2005
July 16, 2005

MPIC's case manager forwarded the surveillance reports and videotapes of the Appellant's activity on the above-noted dates to [Independent Psychiatrist] for his review and comment. This resulted in a follow-up report dated June 20, 2005 from [Independent Psychiatrist]. On page two of that report, [Independent Psychiatrist] stated:

I have reviewed the surveillance reports and surveillance videos obtained on [the Appellant] on April 19, 20, 21, 22, and 23, 2005, May 19, 20, and 21, 2005, and June 3 and 4, 2005.

The main finding in my review of these videos is that [the Appellant's] activities as demonstrated on surveillance are significantly different from those reported to me in my interview with her on April 22, 2005.

[Independent Psychiatrist] went on to indicate four specific discrepancies between the Appellant's level of activity on the videotapes and her reported level of function to him, as follows:

1. The Appellant's driving of an Automobile

In that regard, [Independent Psychiatrist] found the following:

She stated that "I see danger all the time in driving..." She did tell me that she drives, but only to the grocery store and home, or to pick up the kids and then home. When they're together, "...my husband does all of the driving." Also of relevance in this regard is that she reported that she would undertake only what was absolutely necessary to get through the day.

I found this description of her driving activity to be inaccurate in that the surveillance demonstrates frequent driving trips by [the Appellant] to numerous shopping venues as well as the ones she described in my initial interview with her. Not only that, but there were many occasions documented on surveillance when both she and her husband were at home, at which time her husband could have undertaken to do the driving, but she drove by herself. It was the case during the surveillance period that whenever they were in the vehicle together, her husband did the driving.

2. The Appellant's Routine Day Indicated Minimal Activity:

In his report of June 20, 2005, [Independent Psychiatrist] noted the following:

[The Appellant] reported that a description of her routine day would include “just try to get through the day. I don’t feel motivated to do a lot.” Elsewhere, she stated that “I feel that I am an observer – not like a participant...” She indicated that she will only undertake what is absolutely essential, stating that “...if there is nothing that absolutely needs to be done, I will sleep.” She reports that she used to be a very social person. She describes her previous hobbies and listed several of them and stated “that she currently does none of these, her husband may be active in some of these activities, but her role is very minimal.” It is very notable that she did not mention to me, despite my many attempts to determine her activities and interests, her interest in birds. This is significant in that she is documented to be spending a significant amount of time in bird-related activities. I cannot account for her neglecting to mention these activities to me.

Her description of her activities would represent someone who was minimally active and minimally participating in the general activities of carrying on a normal life.

In contradiction to this, [the Appellant’s] activities as demonstrated on surveillance appear to be very much in keeping with somebody leading a normal life. She is demonstrated to be active on a large part of many of the days during which she was surveilled. She was transporting her children, shopping, and running errands both for self care and purposes of shopping throughout a significant part of many of the days that she was observed.

3. The Appellant’s Indication That She Was No Longer A Very Social Person:

After viewing the surveillance evidence, [Independent Psychiatrist] indicated:

[The Appellant] described herself as having previously been “a very social person”, and stated that she is no longer that type of person. However, surveillance indicates that she was very social on three of the surveillance days while participating in a bird display at various shopping malls. During these days, she interacted with numerous different people for lengthy periods of time in what appeared on video to be a normal interactive style. These interactions occurred over many hours with a large number of people on the three days during which these bird displays occurred.

4. The Appellant’s Indication That She Was Impaired by Low Energy:

After viewing the surveillance evidence, [Independent Psychiatrist] indicated that:

[The Appellant] cited low energy as being a significant impairment for her. She had told me in the interview that she took a 2 to 4 hour nap most days of the week. As I stated on page 13 of my report “...she has limited energy, as evidenced by her reported functioning in her normal daytime routine. She has a requirement for significant sleep throughout the day and night, which she finds non-restorative. She functions very little in a social or interpersonal

environment.” I noted that “in a workplace setting, she would have impairment in her ability to persist over a work shift in both her energy level and her concentration.” I again note that these opinions I provided were obtained directly from [the Appellant’s] description of her functioning, which I had queried her about in great deal.

Again, surveillance demonstrated a very different picture of [the Appellant’s] functioning. She was so busy on many of the days surveilled that a nap in the range of two to four hours in the afternoon would have been impossible given her documented comings and goings on those day (*sic*). Not only that, but she demonstrated significant energy, motivation and social interaction abilities on the three days on which she participated in [text deleted] shows.

Under the **Impression** portion of his report, [Independent Psychiatrist] concluded as follows:

In summary, in my opinion, the information that [the Appellant] presented to me during our April 22, 2005 interview is inconsistent with her activities as demonstrated on surveillance. As such, I would consider her to be an unreliable reporter of her general functioning. Her description to me and the impression that I was left with was of a person who undertook very little, and undertook activities only because they were absolutely required in the functioning of her life and her household. This was certainly not the picture demonstrated on the surveillance obtained.

I note again that a psychiatrist’s diagnoses and opinions about psychiatric impairments are largely based on a patient’s subjective reporting of their symptoms and their functioning. The validity of the diagnosis and the impairments are generally only as valid as the patient’s subjective report. In situations in which the subjective report is not valid, the psychiatric diagnosis and psychiatric impairments that are reported are also of questionable validity.

This represents the situation regarding [the Appellant’s] assessment. The information provided is not reliable. Therefore, my previous opinions as provided in my April 30, 2005 report would have to be revised. . . .

Therefore, I cannot confirm the diagnosis that I previously provided, that being that [the Appellant] has moderately-severe Major Depression, as this diagnosis was, in large part based on her subjective report of symptoms to me. The same applies for the diagnosis “some symptoms of Posttraumatic Stress disorder.”

Similarly, the GAF of 50, indicating moderately-severe to severe impairments in psychosocial and occupational functioning is no longer considered to be valid. This GAF was based mostly on [the Appellant’s] report of her symptoms and of her day to day functioning. As documented on the surveillance, her functioning is much greater than she reported to me, and therefore I would consider this GAF not to be valid.

As occupational impairments were also based on [the Appellant’s] report of her functioning, I no longer consider her to have significant occupational impairments. Her energy, motivation, ability to travel, ability to focus on conversation and on interactions

with others all appeared to be reasonable based on the surveillance information provided. As no other areas of occupational impairment were described, I do not see any current evidence that she has any significant occupational impairment.

On August 17, 2005, MPIC's case manager wrote to the Appellant to advise her of the termination of her entitlement to PIPP 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. This decision was based upon the inconsistency between the Appellant's reported level of function to [Independent Psychiatrist] and the surveillance videos. [Independent Psychiatrist's] report of June 20, 2005 and his findings that the Appellant's activities as demonstrated on the surveillance were significantly different from those reported to him by the Appellant formed the basis for this decision. Additionally, as [Independent Psychiatrist] no longer considered the Appellant as having significant occupational impairments, the case manager determined that there was no impairment of function preventing the Appellant from returning to her determined employment as an administrative clerk. Accordingly, the Appellant's entitlement to IRI benefits was also terminated in accordance with Section 110(1)(c) of the MPIC Act.

A further case manager's decision dated October 26, 2005 notified the Appellant that she was responsible for reimbursing MPIC for the amount of benefits she had received as a result of her failure to notify and provide MPIC with accurate information in accordance with Section 189(1) of the MPIC Act. That letter further advised that the Appellant had been overpaid IRI benefits in the amount of \$5,591.80 since April 19, 2005.

The Appellant sought an Internal Review of these decisions. The Internal Review Decision of February 1, 2006 dismissed the Appellant's Application for Review and confirmed the case manager's decisions of August 17, 2005 and October 26, 2005. The Internal Review Officer

extensively reviewed the evidence before him, including the video surveillance tapes. At page 16 of his decision, the Internal Review Officer stated the following:

[Independent Psychiatrist] was clearly influenced by the surveillance evidence provided to him for his review. It is apparent from his report of June 20, 2005 that [Independent Psychiatrist] took careful note of the surveillance evidence forming the view that the activities portrayed therein was contradictory to what you reported to him (as expressed or implied) when you attended his office. I have already referred to the specific discrepancies he discussed on pages 9 and 10 of this decision. Although you responded to those items in your letter of November 15, 2005 your comments do not adequately address the serious concerns raised by [Independent Psychiatrist] in my view.

...

[Independent Psychiatrist] has clearly stated that your report to him was inconsistent with the level of activity portrayed in the videotapes and the surveillance reports. This opinion is from a duly qualified psychiatrist. I provided [Independent Psychiatrist] with [Appellant's Psychologist's] report to see if that would have any effect on his opinion of June 20, 2005. Notwithstanding [Appellant's Psychologist's] affirmation of your credibility, [Independent Psychiatrist] remained of the view that you essentially misled him when he interviewed you on April 22, 2005.

As a result of the inconsistencies noted by [Independent Psychiatrist], it was his conclusion that your subjective reporting of complaints and level of activity were not valid and could not be relied upon. He also concluded that you did not have any significant occupational impairments. The opinions of [Independent Psychiatrist] are more objective, in my view, than the reports of [Appellant's Psychologist] which gives the impression of being more advocate oriented. Therefore, I am dismissing your Application for Review and upholding [Case Manager's] decision of August 1, 2005.

Under the circumstances it is my view that [Case Manager's] decision to terminate your benefits is reasonable and justified in view of the developments brought about by the receipt of the surveillance evidence. Having reviewed the totality of the evidence, it is my view that [Independent Psychiatrist] was justified in concluding that your subjective report could not be relied upon and that you had no significant occupational impairments.

With respect to the remaining issue relating to the Corporation's decision to offset your expense claim against the amount owed to the Corporation, this confirms that the Corporation has the right to take that step in accordance with Section 189(3)(b) of The Manitoba Public Insurance Corporation Act which states:

Cancellation or deduction of debt

189(3) Subject to the regulations, the corporation may, in respect of the amount to which it is entitled to be reimbursed,

(b) notwithstanding subsection (2), deduct it from any amount payable to the debtor by the corporation at any time.

The Appellant has appealed that decision to this Commission. The issues which require determination in this appeal are:

1. Whether the Appellant's benefits were properly terminated pursuant to Section 160(a) of the MPIC Act.
2. Whether the Appellant's benefits were properly terminated pursuant to Section 110(1)(c) of the MPIC Act.
3. Whether MPIC is entitled to repayment of overpayment.

Relevant Legislation:

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:

(c) the victim is able to hold an employment determined for the victim under section 106;

Corporation may refuse or terminate compensation

[160](#) The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(a) knowingly provides false or inaccurate information to the corporation;

Corporation to be reimbursed for excess payment

[189\(1\)](#) Subject to sections 153 (payment before decision by corporation), 190 and 191, a person who receives an amount under this Part as an indemnity or a reimbursement of an expense to which the person is not entitled, or which exceeds the amount to which he or she is entitled, shall reimburse the corporation for the amount to which he or she is not entitled.

...

[189\(3\)](#) Subject to the regulations, the corporation may, in respect of the amount to which it is entitled to be reimbursed,

(a) cancel it or any part of it, where the corporation considers it is not recoverable; or

(b) notwithstanding subsection (2), deduct it from any amount payable to the debtor by the corporation at any time.

At the hearing of this matter, the Commission heard testimony from the following individuals:

[Text deleted] - The Appellant:

[The Appellant] testified that the motor vehicle accident of May 27, 1997 has completely changed her life. She indicated that:

- She has nightmares from the motor vehicle accident.
- She has post-traumatic stress disorder since the motor vehicle accident and has anxiety related to driving.
- She no longer has the same level of functioning as before the motor vehicle accident. She does not undertake any of the hobbies which she did prior to the accident.
- Her physical health has deteriorated since the motor vehicle accident:
 - ♦ She has been on anti-depressants since her son was 15 months old as a result of factors related to the motor vehicle accident.
 - ♦ She has had both knees replaced. She relates her knee replacements to the car accident.
 - ♦ She has arthritis in both hands.
- She has very little desire to leave her home; she has lost many of her friends.
- Her husband usually takes the kids to their activities. However, if he's busy, she will take the kids to their appointments, even though she has anxiety related to driving.
- Her husband initially joined the [text deleted] and the birds were his hobby. She attended the [text deleted] displays on the advice of [Appellant's Psychologist], since [Appellant's Psychologist] felt that it was necessary for her treatment to get out, attend events and socialize.
- She found the [text deleted] displays very exhausting; it wasn't something she had initiated on her part. The [text deleted] was not her hobby.
- The outings to the [text deleted] displays were not planned. Rather, she went to the

meetings partially on the advice of [Appellant's Psychologist] and partially on the insistence of her husband. [Appellant's Psychologist] felt that it would be beneficial for her to get out and talk to people. Her husband wanted her to participate in the [text deleted] displays so that the family could participate in an activity together. The activity that was noted on the video surveillance was as a result of her following [Appellant's Psychologist's] orders, trying to do her best to get better and appeasing her husband.

She contends that she didn't mislead [Independent Psychiatrist] or do anything to misinform MPIC. She maintains that she is unable to hold employment as a result of the injuries sustained in the motor vehicle accident and therefore her benefits should be reinstated.

[Text deleted] - The Appellant's husband:

The Appellant's husband testified that the Appellant changed after the motor vehicle accident. She wasn't motivated to do things and her personality changed. He advised that he works from home and so is often occupied when he is at home. However, if he is available, he will drive the children as required. He also confirmed that initially he joined the [text deleted]. He and his oldest son took part in most of the activities. However, on April 23, 2005, the day of the [text deleted] display at [text deleted], he convinced his wife to attend the [text deleted] so that the whole family could be together. He confirmed that initially the Appellant was not an active member of the [text deleted]. He and his children were really the members and participated in the activities.

[Independent Psychiatrist]:

[Independent Psychiatrist] testified that he conducts a practice in general adult psychiatry. He was engaged by MPIC to conduct an independent assessment of the Appellant. He reviewed a package of the Appellant's medical information prior to meeting with the Appellant and met with

the Appellant on April 22, 2005 for approximately two hours. He was asked for his opinion on the Appellant's diagnosis and her level of impairment. [Independent Psychiatrist] testified that initially his impression was that the Appellant was capable of very little and did very little activity. She had minimal motivation, a return to work would not have been possible, as even the activities of daily living were challenging for the Appellant. His opinion was that her objective was just to get through the day. This opinion was expressed in his initial report to MPIC dated April 30, 2005.

However, after reviewing the surveillance video of the Appellant, [Independent Psychiatrist] testified that he noted major discrepancies in four areas:

1. Driving;
2. Activities of daily living;
3. Social interactions; and
4. Energy level.

Specifically, with respect to each of the discrepancies, [Independent Psychiatrist] testified as follows:

1. **Driving:** [Independent Psychiatrist] noted that in April, the Appellant had reported that she had anxiety when driving and that "I see danger all the time in driving". In the video surveillance, [Independent Psychiatrist] noted frequent driving trips over and above what the Appellant had described to him, including to shopping destinations and running errands.
2. **Activities of daily living:** [Independent Psychiatrist] noted that the Appellant had reported to him that she was not able to do very much. However, upon his review of the videotape surveillance he observed that on most days of the video surveillance she was out and about, seeming to participate in the normal activities of daily living, including shopping, running

errands, driving her children to and from school, etc.

3. **Social interaction:** [Independent Psychiatrist] noted that the surveillance video indicated that the Appellant was social and interacted with others during her normal activities.
4. **Energy level:** [Independent Psychiatrist] testified that on the surveillance, he noted that the Appellant demonstrated a significant degree of energy, including attending the [text deleted] displays for a full day. He found that the significant amount of outings in which she engaged was inconsistent with her report to him. His opinion was that the activity level depicted on the surveillance was inconsistent with what she reported to him. He also noted that the activity shown on the surveillance videotape was inconsistent with symptoms of a major depression. He advised that individuals with a major depression have problems with energy, motivation, with maintaining interest throughout most of the day and a marked reduction in activity. However, the Appellant's everyday activities were not consistent with the symptoms of depression and with the information that she had conveyed to him.

Generally, [Independent Psychiatrist] noted that there were inconsistencies between what the Appellant had reported to him and what he observed on the surveillance tapes. As a result of the videotape surveillance, [Independent Psychiatrist] was unable to confirm the diagnosis that he had previously provided, that being that [the Appellant] had moderate-severe major depression, as this diagnosis was in large part based on her subjective reported symptoms to him. He also noted that he was unable to confirm the diagnosis of "some symptoms of post-traumatic stress disorder". He found that the surveillance documented the Appellant's functioning to be much greater than what she had reported to him and therefore he could not consider his diagnosis to be valid. Further, as his opinion of her occupational impairments were based on her report of her functioning, he no longer considered her to have significant occupational impairments. Due to the level of activity and the interaction which he observed on the surveillance, he did not find

any current evidence that the Appellant had any significant occupational impairment.

Appellant's Submission:

The Claimant Adviser, on behalf of the Appellant, submits that a termination of benefits pursuant to Section 160(a) requires that the claimant must *knowingly* provide *false* or *inaccurate* information to the Corporation. He notes that the Commission has previously considered this provision in AC-02-049 [text deleted] issued on September 25, 2002, where the Commission decided that:

The allegation of substantial misconduct by MPIC against the Appellant is extremely serious, and the financial consequences to the Appellant in respect to the termination of his PIPP benefits were catastrophic. Therefore, the quality of the evidence required to satisfy the Commission, on the balance of probabilities, that the Appellant knowingly provided false or inaccurate information to MPIC under Section 160(a) of the Act must be clear and cogent.

The Claimant Adviser maintains that the effects on the Appellant of the allegation of knowingly providing false or inaccurate information have been severe both psychologically and economically. He maintains that the standard set out in AC-02-049 [text deleted] should be applied in this appeal. He maintains that the test before the Commission in this issue should be rendered as follows:

- Is there clear and cogent evidence that the information provided by the claimant to [Independent Psychiatrist] was false?
- Is there clear and cogent evidence that the information provided by the claimant to [Independent Psychiatrist] was inaccurate?
- If there was false or inaccurate information, was there clear and cogent evidence that it was submitted knowingly in the sense of with deliberate and conscious intent to mislead?

The Claimant Adviser submits that if this test is not met in its entirety, then the appeal of the Section 160(a) termination of benefits must be allowed.

The Claimant Adviser argues that the inconsistencies relied upon by the Internal Review Officer to terminate the Appellant's benefits, as noted by [Independent Psychiatrist] are omissions rather than falsehoods. He argues that the Appellant failed to mention that she occasionally took her children to school when they missed the school bus, that she would be attending various caregivers for treatment, that she occasionally took her children to swimming and that she would be attending two [text deleted] exhibits through the summer. The Claimant Adviser contends that these events were occasional and unplanned. The Appellant and her husband testified that the [text deleted] was her husband's hobby and that she had to be convinced at the last minute to attend the [text deleted] exhibits. The Claimant Adviser suggests that such omissions should not be considered sufficient to meet the clear and cogent test as set out previously by the Commission.

The Claimant Adviser submits that the evidence relied upon by the Internal Review Officer to terminate the Appellant's benefits does not meet the requirements of the "knowingly" test. He maintains that the "knowingly" test requires that there be a clear and cogent evidence of intent on the part of the claimant to mislead. The Claimant Adviser argues that there is no evidence of such intent. He maintains that objective tests administered in support of the independent psychiatric examination with [Independent Psychiatrist] endorsed the Appellant's reliability. He refers to the Appellant's testimony that she felt that the questions asked by [Independent Psychiatrist] at the independent psychiatric examination focused on her interests and activities, not on family activities. She was adamant that it was her husband and son who had the interest in [text deleted] and she only attended the [text deleted] activities upon her husband's insistence.

The Claimant Adviser notes that the Appellant explained that the reason she did not mention the [text deleted] activities to [Independent Psychiatrist] was that it was her husband's interest, not hers. She only went as part of a family activity and as part of her therapy. As a result, the Claimant Adviser submits that there is no evidence of any clear and cogent intent to mislead [Independent Psychiatrist] and MPIC.

The Claimant Adviser submits that the evidence suggests that at most the Appellant is guilty of omissions of matters that are in the nature of an emergency or, as in the case of the [text deleted], not of central importance to her. He maintains that the Appellant has never been less than honest and indeed, there is strong support that she is reliable in her reporting. As a result, the Claimant Adviser argues that the termination of the Appellant's benefits pursuant to Section 160(a) should be reversed.

Alternatively, the Claimant Adviser maintains that if the Commission were to uphold the contravention of Section 160(a), the penalty imposed by MPIC in this case was too severe. The Claimant Adviser contends that the penalty is discretionary and the Commission has the power to substitute a more appropriate penalty. The Claimant Adviser argues that the omissions of the Appellant should not have attracted the most severe of possible penalties given that there was no deliberate intent to mislead. The Claimant Adviser submits that the penalty in this case should have been a suspension until the Corporation could reassess the psychological condition of the Appellant. The Claimant Adviser argues that the Appellant attempted to explain the omissions to the case manager on August 18, 2005. The Appellant presented this argument to the Internal Review Officer at the Internal Review Hearing. The Claimant Adviser submits that given the Appellant's immediate attempts to explain her omissions to [Independent Psychiatrist] and to MPIC, a short suspension until a new independent psychiatric examination could have been

ordered would have been appropriate. The Claimant Adviser claims that the maximum suspension warranted would be no longer than six weeks.

With respect to the termination of benefits pursuant to Section 110(1)(c) of the MPIC Act, the Claimant Adviser claims that the majority of the surveillance does not support the conclusion that the Appellant demonstrated the sustained ability to hold employment. The Claimant Adviser argues that [Independent Psychiatrist's] opinion that the Appellant was capable of a return to work was based on a review of the surveillance report and videotapes. The Claimant Adviser submits that [Independent Psychiatrist] has misunderstood that documentation. The Claimant Adviser contends that the intermittent and unsustained activity shown in the surveillance is not sufficient to suggest an ability to perform full-time employment. At most, it might suggest that the Appellant may have been at the threshold of attempting some form of a gradual return to work within the context of continued treatment. He maintains that the Appellant's participation in the [text deleted] exhibits was the only sustained activity documented in the surveillance, which left her exhausted and sleeping most of the following day. As a result, the Claimant Adviser submits that the evidence does not support the conclusion that the Appellant had no occupational impairments and could have held the employment as an administrative clerk pursuant to Section 110(1)(c) of the MPIC Act.

With respect to the issue of recovery of compensation pursuant to Section 189(3), the Claimant Adviser notes that MPIC issued a case manager's decision dated December 20, 2005, withholding \$3,580.91 claimed as reimbursement for medical expenses against monies paid to the Appellant for IRI from the date of the first surveillance, April 19, 2005, to the termination of IRI benefits by the case manager on August 17, 2005. This decision was upheld by the Internal Review Officer in his decision of February 1, 2006. The Claimant Adviser submits that MPIC

may only recover the IRI payments made in this period if the termination pursuant to Section 160(a) is upheld. If the termination of IRI benefits pursuant to Section 110(1)(c) is upheld, there would be no monies to recover as the termination of IRI benefits would only be effective from the date of the case manager's decision of August 17, 2005.

MPIC's Submission:

Counsel for MPIC submits that the Internal Review Decision was appropriate in the circumstances of this case and that it should be confirmed. He maintains that [Independent Psychiatrist] prepared a thorough report based upon his independent psychiatric examination of the Appellant on April 22, 2005. Following [Independent Psychiatrist's] review of the videotape and surveillance, he changed his opinion. Counsel for MPIC argues that the Appellant clearly misled [Independent Psychiatrist] during the independent psychiatric examination and gave him a false impression of what her level of functioning was. Counsel for MPIC contends that if the videotapes and surveillance just showed minor omissions, that would not have lead [Independent Psychiatrist] to have changed his opinion. However, clearly the misrepresentations on the Appellant's part were significant enough to cause [Independent Psychiatrist] to revise his professional opinion concerning the Appellant's diagnosis and her ability to hold employment. Counsel for MPIC maintains that [Independent Psychiatrist's] analysis and his impressions are valid and should be relied upon. Therefore, he submits that the Internal Review Decision is supportable and should be confirmed.

With respect to the application of Section 189 of the MPIC Act, counsel for MPIC argues that repayment is required in the circumstances of this case. Counsel for MPIC maintains that the Appellant received benefits to which she was not entitled and therefore pursuant to ss. 189(1) of the MPIC Act, she is required to reimburse MPIC for the amount to which she is not entitled.

Further, counsel for MPIC maintains that the Corporation's decision to offset the Appellant's expense claim against the amount owed to the Corporation was appropriate and that MPIC has the right to take that step in accordance with Section 189(3)(b).

Decision:

Upon a careful review of all of the oral and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Adviser on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant's PIPP benefits were properly terminated pursuant to Section 160(a) of the MPIC Act as of August 17, 2005.

Reasons for Decision:

The standard of proof required in this case is the civil standard of proof on the balance of probabilities. The Claimant Adviser argued that a more rigorous approach to the assessment of the standard of proof should be undertaken in circumstances where the Appellant is alleged to have engaged in knowingly providing false or inaccurate information to the Corporation. However, the Supreme Court of Canada recently indicated in *F.H. v. McDougall* [2008] 3 S.C.R. 41, all evidence must be scrutinized with the same degree of care:

To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

The Court added "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test".

Section 160(a) of the MPIC Act provides that the Corporation may terminate an indemnity,

where a person knowingly provides false or inaccurate information to the Corporation. The Commission finds that the Appellant did knowingly provide false or inaccurate information to the Corporation by virtue of the information she provided to [Independent Psychiatrist] during the independent psychiatric examination of April 22, 2005.

During the independent psychiatric examination, the Appellant portrayed herself as being largely housebound, with a very limited life. She denied being able to work and claimed that she was not progressing well. She claimed that her activities and interests were limited, that she had very little energy and was too exhausted most of the time to engage in any extra activities. Further, the Appellant indicated that she required a significant amount of sleep throughout the day and night.

In contrast, [Independent Psychiatrist's] report of June 20, 2005 presents significant differences between the Appellant's report and the activity demonstrated during the surveillance. In his report and in his testimony before the Commission, [Independent Psychiatrist] noted four significant areas of discrepancy:

1. Driving – the Appellant had reported to [Independent Psychiatrist] that she would only drive when absolutely necessary to get through the day. [Independent Psychiatrist] found this description of her driving activity to be inaccurate in that the surveillance demonstrated frequent driving trips by the Appellant to numerous shopping venues, to transport her children and to run errands.
2. Routine Day – during the independent psychiatric examination, the Appellant's description of her routine activities would represent someone who was minimally active and minimally participating in the activities of daily life. However, [Independent Psychiatrist] found that the Appellant's activities on the surveillance demonstrated

someone leading a normal life. The Appellant was found to be active on a large part of many of the days during which she was surveilled. She was transporting her children, shopping and running errands both for self-care and for purposes of shopping throughout a significant part of many of the days that she was observed.

3. Social Interactions – in his initial assessment of the Appellant, [Independent Psychiatrist] had noted that the Appellant stated that she was no longer a very social person. However, [Independent Psychiatrist] found that the surveillance indicated that she was very social on three of the surveillance days while participating in the [text deleted] displays at [text deleted]. [Independent Psychiatrist] found that the Appellant interacted with numerous different people for lengthy periods of time in a normal interactive style.
4. Low Energy – the Appellant cited low energy as being a significant impairment for her. However, [Independent Psychiatrist] found that the surveillance demonstrated a very different picture of the Appellant's functioning. She was so busy on many of the days surveilled that a nap in the range of two to four hours in the afternoon would have been impossible given her documented comings and goings on those days. Further she demonstrated significant energy, motivation and social interaction abilities on the days which she participated in the [text deleted] exhibits.

In summary, [Independent Psychiatrist] found that the information that the Appellant presented to him during the independent psychiatric examination was inconsistent with her activities as demonstrated on the surveillance. He therefore considered her to be an unreliable reporter of her general functioning. His opinion was that based upon her description of her activities, he was left with the impression of a person who undertook very little and undertook activities only because they were absolutely required in the functioning of her life and her household. However, this was not the picture demonstrated on the surveillance.

The Commission agrees with [Independent Psychiatrist] that there is a fundamental inconsistency between the Appellant's self-report during the independent psychiatric examination and the observed activities as set out in the surveillance. The observed behavior is fundamentally at odds with the Appellant's report of her symptoms and levels of activity. [Independent Psychiatrist's] general impression was that the Appellant provided inaccurate information that formed the basis of his initial assessment. In light of the videotape surveillance, he could no longer support his previous opinion. We accept [Independent Psychiatrist's] evidence. In these circumstances, the Commission finds that there was false, inaccurate and misleading information provided by the Appellant to [Independent Psychiatrist] during the independent psychiatric examination of April 22, 2005.

Claimants are obligated pursuant to Section 149 of the MPIC Act to be honest and forthright in their dealings with MPIC. Dishonest or misleading statements by claimants in dealing with their insurance claims strike at the heart of the insured-insurer relationship that is necessarily founded upon trust and integrity. The Commission is therefore satisfied that there was false and inaccurate information provided to [Independent Psychiatrist] which was sufficient to warrant the application of Section 160(a) of the MPIC Act in the circumstances of this case.

The Commission finds that there was insufficient evidence presented to it to support a termination of the Appellant's PIPP benefits on the basis of s. 110(1)(c) of the MPIC Act. As a result of the videotape surveillance, [Independent Psychiatrist] was unable to confirm the diagnosis that he had previously provided, that being that [the Appellant] had moderate-severe major depression, as this diagnosis was in large part based on her subjective reported symptoms to him. He also noted that he was unable to confirm the diagnosis of "some symptoms of post-traumatic stress disorder". He found that the surveillance documented the Appellant's

functioning to be much greater than what she had reported to him and therefore he could not consider his diagnosis to be valid.

In its Reasons for Decision dated February 21, 2005, the Commission found that the Appellant was not capable of holding employment as an administrative clerk on account of psychological problems arising from the motor vehicle accident of May 27, 1997. The Commission found that the Appellant's depression was in part attributable to her symptoms of post-traumatic stress disorder, which was causally related to the motor vehicle accident. Further, the Commission determined that the effects of the post-traumatic stress disorder and the depression rendered the Appellant unemployable as of July 2001. As a result of [Independent Psychiatrist's] opinion that his diagnosis is no longer valid, the Commission finds that there is a lack of evidence respecting the Appellant's psychological status at the relevant time in 2005. Therefore, we are unable to conclude that her psychological problems had resolved to an extent that would permit her to return to work. As a result we find that the termination of her benefits pursuant to s.110(1)(c) is not supportable.

The Commission finds that the Appellant received an overpayment of IRI benefits from April 19, 2005 to August 17, 2005 and that the Appellant has received a benefit to which she was not entitled. Accordingly, pursuant to the provisions of Section 189(1) of the MPIC Act, MPIC is entitled to reimbursement from the Appellant for the amount of the IRI overpayment. Pursuant to ss. 189(3)(b) of the MPIC Act, MPIC has the right to offset the Appellant's expense claim against the amount owed by her to the Corporation.

As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated February 1, 2006 is therefore confirmed.

Dated at Winnipeg this 8th day of July, 2010.

YVONNE TAVARES

TREVOR ANDERSON

GUY JOUBERT