IN THE MATTER OF AN ARBITRATION brought pursuant to the Ontario *Labour Relations Act, 1995,* as amended
(Grievance of Ms. D. re denial of LTD – #C08-05-8938)

BETWEEN:

CITY OF TORONTO
(the "employer")

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79
(the "union")

AWARD

Sole Arbitrator:	Marilyn A. Nairn
Hearing held:	September 9, 2009, April 7, 12, 27, May 14, 17, June 1, 2010 (Toronto, Ontario)

APPEARANCES

For the union:	Douglas J. Wray
For the employer:	Kerri Kitchura

AWARD

1. This grievance takes issue with the decision of the City of Toronto (the "employer" or the "City") to deny long-term disability ("LTD") benefits to the grievor, Ms. D. (With the agreement of the parties, the grievor will be so referred to in this decision given the nature and extent of the personal medical information reviewed.)

2. There is no dispute that the City is responsible for the payment of eligible benefits under the LTD plan provided pursuant to the terms of the collective agreement. The City retains Manulife to administer this ASO plan on its behalf. There is therefore no dispute that the grievance is arbitrable and that I have the jurisdiction to hear and determine the grievance.

3. There is also no dispute that the onus is on CUPE, Local 79 (the "union") to demonstrate that the grievor was totally disabled as defined by the LTD plan. That definition provides:

> During the Qualifying Period and the succeeding 24 months, an employee is totally disabled when he is wholly and continuously disabled due to illness or bodily injury and, as a result, is not physically or mentally fit to perform the essential duties of his normal occupation.
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> Thereafter, an employee is totally disabled provided he is wholly and continuously disabled due to illness or bodily injury and, as a result, is not physically or mentally fit to perform the essential duties of:
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> 1. his normal occupation:
> and
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> 2. any other occupations, jobs or work:
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> (a) for which he is, or becomes, qualified by his education or training or experience, considered collectively or separately:
> and
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> (b) for which the current monthly earnings are 75% or more of the current monthly earnings for the employee's normal occupation.
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> The availability of such occupations, jobs or work will not be considered in assessing the employee's disability.

4. In colloquial terms, both the "own occ" definition and the "any occ" definition under the LTD plan are in issue in this case. This grievance gives rise to a factual determination as to

whether the grievor's medical condition was such that it met the definition of total disability so as to entitle her to LTD benefits.

5. The grievor commenced working with the City (or its predecessor) in 1990 upon completion of a college diploma program in social work. She was employed as a caseworker in the East York area office of the City's Social Services Division. In or about 1999, and as a result of various pre-existing medical conditions, the grievor opted to work in a pilot project working part-time hours. Several years later that project ended. However, in or about November 2004, the grievor received approval to continue working three days a week as an accommodation of her medical conditions. According to an e-mail dated November 20, 2007, the employer had agreed to this accommodation for a period of one year, to then be re-assessed. No other accommodation was required. In the summer of 2005 the grievor was on vacation and due to return to work on August 9, 2005. She was involved in a motor vehicle accident (MVA) on August 6, 2005 and did not return to work as scheduled for medical reasons. On sixteen days between November 2005 and February 2006 the grievor attempted to return to work. Those attempts were unsuccessful.

6. The grievor was off work during the qualifying period without challenge from the employer. An application for long-term disability benefits was filed in early 2006 and on April 25, 2006 the grievor was approved for LTD benefits retroactively to February 14, 2006. Shortly thereafter she was also approved for Canada Pension Plan disability benefits.

7. Manulife, in its role of administering the LTD plan on behalf of the employer, advised the grievor by letter dated September 14, 2007 that her LTD benefits would cease effective November 30, 2007. The 2-year "own occ" period ran from February 14, 2006 to February 14, 2008. Her benefits therefore ceased within the latter part of the "own occ" period. The grievor appealed the decision to discontinue benefits, which appeal was denied and this grievance was filed. The grievance claims LTD benefits for the balance of the "own occ" period (December 1, 2007 to February 13, 2008) and continuing beyond the change of definition date (the "any occ" period) which took effect on February 14, 2008.

8. The parties entered reports and consultation notes from a variety of medical and other practitioners who have assessed and/or treated the grievor or who have reviewed the medical file. The parties agreed that this written material could be entered as evidence without the need to call the authors. Therefore the only *viva voce* evidence I heard regarding the grievor's medical condition was the grievor's testimony.

9. Loretta Marcoccia, Case Manager, and Jill William, Disability Specialist, are employed by Manulife. Ms. Marcoccia made the initial assessment to approve the grievor's claim for benefits as well as the decision to later terminate her benefits. Ms. William dealt with the grievor's final appeal. Both testified as to the basis of their decision-making. They both agreed that they were not qualified to provide a medical assessment of the grievor's condition.

10. I also heard evidence from Sue Bracken, an ergonomist employed by the City who testified as to the various accommodations that the City is able to provide for persons with musculoskeletal disabilities. Susan Smith, Manager, Employment and Social Services, testified as to the grievor's duties and responsibilities as a caseworker assigned as an intake verification worker. The primary responsibility is to interview clients applying for social assistance by means of completing an online computer program. Ms. Smith appeared to downplay certain demands of the job. She described, for example, that the computer program used prompts the worker as to what questions to ask and does not allow the worker to continue in the interview if entries are not made. The employer did not take issue with the job demands analysis or Manulife's understanding of the cognitive demands of the caseworker position as high.

11. Ms. Smith testified that accommodations that preclude contact with clients were rare but possible. She identified the overpayment unit where the worker would be required to send letters and calculate and produce payment histories. She also identified the special need unit where the worker would deal with third party vendors, for example, where funerals were being arranged for a client, or for the purpose of sourcing a wheelchair or other assistive product. It involved primarily dealing with the paperwork involved in making the necessary arrangements. She had not been advised as to the grievor's restrictions and was unaware as to whether the employer was able to accommodate them. I have no evidence that these positions were identified to the grievor

or the union until Ms. Smith's testimony as the last witness in the hearing. No suggestion was put to the grievor that she would be capable of performing this work and no Functional Abilities Exam ("FAE") in respect of the job demands of this work was requested by Manulife or the employer of any of the grievor's attending physicians.

12. The one accommodation identified by Ms. Bracken for an employee with limitations on prolonged sitting/standing that the grievor had not already received was an adjustable desk allowing for work at both a sitting and standing position. The grievor testified that on her attempts to return to work, she was able to sit or stand as required, but that she was still unable to continue to work. Ms. Bracken was unaware of the grievor's limitations.

13. Prior to the MVA, the grievor had been diagnosed with and treated for interstitial cystitis, irritable bowel syndrome, anxiety and depression, and a Tarlov cyst at her 4th sacral vertebra.

14. The MVA was not considered serious in that the grievor did not lose consciousness and the airbags did not deploy. The grievor was a front seat passenger in a vehicle that was rear-ended while traffic was moving slowly. Although the grievor attended at a hospital Emergency department, she was not seen for nine hours, at which point she left without medical attention. She attended a clinic the next day and saw her family doctor the following day.

15. Following the MVA, the grievor experienced neck, shoulder, and periscapular pain. Ms. Marcoccia's activity note dated March 23, 2006 summarized Dr. Spring's findings (the grievor's family doctor) at that time:

> The physical demands of the clmt's [claimant's] occupation are considered to be sedentary in physical demand. The cognitive demands of a caseworker are considered high as they must perform multiple tasks, communication and reading literacy. They are also subject to some exposure to emotional and confrontational clients.
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> ...
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> ...Dr. Spring reports that the clmt's subjective symptoms include increased in [sic] anxiety symptoms since the accident, pain [in] the neck into interscapular areas, over both scapulae, radiating down into the arms and sometimes reaches the hands. Dr. Spring also notes that the clmt has paraesthesiae intermittently over some areas of pain. Dr. Spring reports that the exacerbation of the bladder symptoms include dysuria, urgency, frequency

> and nocturia- 2-4 times per night. Dr. Spring notes that the clmt's pain and restlessness in the legs has increased since the MVA and sometimes wakes her up at night. Dr. Spring reports that the clmt has had some improvement in terms of the acute pain in the muscles, but the rest of the pain has been severe since the MVA with no improvement. Initial clinical findings reported by Dr. Spring include increased tenderness in right side of neck, shoulder and into right arm. Dr. Spring reports that the clmt has headaches, decreased ROM [range of motion], aching pain, tenderness across low back, increased anxiety and stress causing increased interstitial cystitis (IC) and IBS symptoms. Dr. Spring notes that the MRI done in December 2005 showed central herniated disc with annular tear at C5-6 [base of the neck]. The most recent findings are noted to be tenderness and decreased ROM of neck, shoulders and low back, increased anxiety, and headaches most days.
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> In terms of restrictions and limitations, Dr. Spring reports that the clmt is not able to do repetitive movements–e.g. typing on computer and mousing as these movements are reported to aggravate neck, shoulder and arm pains. Dr. Spring also reports that the clmt [is] not able to do lifting/carrying, prolonged walking or standings, avoid maintenance [sic] in any one position for prolonged period and avoid reaching especially above shoulder level.
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> From a psychological perspective, Dr. Spring reports that R & Ls [restrictions and limitations] include, inability to concentration [sic] on tasks, anxiety increased to chronic pain, unable to tolerate additional stress of working with deadlines... Dr. Spring reports that the clmt's tolerance for any additional stress or challenge is very limited and often gets tearful and frustrated.
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> ...
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> To conclude, Dr. Spring reports that prior to the accident, the clmt had chronic pain, but continues [sic] to work part time. Since the accident and the resultant disc herniation, the clmt has been unable to work at all - and is experiencing the type of injury that can take a long time to heal and rate of healing is variable.

16. Forming part of the Initial Attending Physician's Statement submitted in connection with the application for LTD benefits was a report dated January 9, 2006 from Dr. Julian Lo, a physiatrist. For purposes of this report the grievor had been reviewed in follow-up at an outpatient physiatry rehab clinic. Dr. Lo conducted a physical examination and reviewed the results of an MRI scan performed on December 13, 2005. He concluded:

> [The grievor] continues to experience chronic neck, upper shoulder, and periscapular pain following a motor vehicle accident approximately 4 months ago. The MRI scan does show evidence of a central disc herniation at C5-6. In addition, she has muscular tenderness involvement in the cervical and shoulder girdle region as well. It appears she had quite limited physiotherapy initially, and she should have more directed treatments to her cervical region and shoulder girdle. I have written her a prescription for this, and she will access physiotherapy. She should also not be involved in activities with prolonged static posture in sitting, prolonged flexion or extension of the cervical spine, or repetitive movements of the spinal region and proximal upper extremities. We spent some time

> discussing this with her today, and, certainly, if her work environment is unable to accommodate this, or modify her activities appropriately within these restrictions, then she will likely need to be absent for a period of time.

17. The restrictions identified by Dr. Lo are narrower than those identified by Dr. Spring. However, from a physical perspective, he identified repetitive movements of the spinal region and proximal upper extremities as a limiting restriction. The employer is able to provide accommodation with respect to prolonged static sitting and it appears that the caseworker position involves little if any prolonged flexion or extension of the cervical spine. The job demands analysis speaks to repetitive movement. On page 1 it indicates that repetition of keystrokes, mouse motion and clicks is interrupted by the nature of the interview process. At page 3, it rates computer input demand as high due to the duration, as it is the primary job function. Computer work engages a certain amount of repetitive movement of the proximal upper extremities, regardless of whether the person might be alternately standing or sitting.

18. Dr. Lo did not comment on the psychological concerns identified by Dr. Spring. Ms. Marcoccia next requested an internal medical file review by Dr. Fonberg, who noted that Dr. Lo focused upon the grievor's pain symptoms, and commented "Not taking a wholistic [sic] view of the claimant's condition will result in a less than optimal treatment plan and will delay the recovery process."

19. Dr. Fonberg concluded that the medical information supported the diagnosis of myofascial strain. He noted that the other diagnoses are mentioned prior to the accident. He stated that the medical information did not confirm that the grievor was medically limited to working three days per week, notwithstanding that the grievor had been medically accommodated to a three-day workweek for some months prior to the MVA. He noted that if the pre-existing interstitial cystitis and IBS conditions were deemed worse, he would expect the claimant to be referred back to the treating specialists. Notwithstanding, he concluded that the medical treatment to date had been appropriate while noting that there was a large functional component to the claimant's presentation given the extent to which the family doctor attributed restrictions to anxiety.

20. Ms. Marcoccia then referred the file for an internal review with respect to the psychological issues noted. Dr. Busse concluded that there was no evidence of a limiting

psychiatric disease, noting that it did not appear that a psychiatrist or psychologist had seen the grievor.

21. On April 4, 2006 Dr. Fonberg completed a second file review. Although he disagreed with Dr. Lo that the grievor's symptoms were related to the central disc herniation, attributing the symptoms to myofascial strain, he concluded that the restrictions set out by Dr. Lo were reasonable based on the physical findings.

22. Ms. Marcoccia accepted that the caseworker position involved demands inconsistent with the restrictions identified by Dr. Lo. On April 20, 2006 the grievor was advised that her LTD benefits would be approved based on the medical information supporting restrictions and limitations related to myofascial strain. At that time the grievor informed Ms. Marcoccia that no referral to a specialist had been made in respect of the interstitial cystitis, as that condition was long-standing and all treatment options had been exhausted. The grievor also advised Manulife that she was unable to take certain drugs, including antidepressants and stronger pain medications, because she could not tolerate them due to the interstitial cystitis and IBS. The grievor has been prescribed Ativan both pre-and post-MVA.

23. For a period of time, the grievor received housekeeping assistance through the automobile insurance coverage for heavier housekeeping tasks. A neurological exam conducted by Dr. Tyndel on August 28, 2006, at the request of the automobile insurance company, found no objective neurological impairment preventing the grievor from performing the essential tasks of her pre-accident employment.

24. On September 12, 2006, Dr. Czok, a physiatrist, assessed the grievor at the request of the automobile insurance company. That assessment considered the neck and low back pain complaints. The report (under occupational history) overstates the grievor's success in her return to work attempt at the end of 2005 and in early 2006. Dr. Czok concluded that, based on her examination, the grievor was not substantially unable to perform the essential tasks of her pre-accident employment, as she found it did not demonstrate any significant musculoskeletal or neurological pathology. Dr. Czok recommended that the grievor be provided with the ability to

change her position as frequently as required and that she should avoid being in any long sustained positions. She also recommended that the grievor be encouraged to continue with an active daily exercise program.

25. By letter dated October 6, 2006 Manulife recommended to the grievor that she apply for CPP disability benefits. The grievor did so and was approved for those benefits.

26. On November 9, 2006, Manulife was provided with a copy of a medical report prepared by Dr. Khoury, a physiatrist, dated September 20, 2006. That report set out the material reviewed by Dr. Khoury, the management and course of the medical concerns, the presenting complaints which included neck pain, low back pain, bladder symptoms, and emotional issues. Dr. Khoury reviewed the grievor's vocational and social status and history, her past medical history, the nature and results of her physical examination, a summary of relevant medical investigations and medical reports, and provided her conclusions as follows:

> [The grievor] is a 36-year-old right-handed lady who worked as a social worker for the City of Toronto and who was involved in a motor vehicle accident on August 6, 2005. She presents with symptoms of chronic neck, bilateral shoulder and periscapular pain, low back pain and aggravation of a pre-existing chronic bladder condition, irritable bowel syndrome and anxiety. She appears to suffer from depression and chronic pain syndrome and has features suggestive of fibromyalgia.
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> It is a little over a year now since the motor vehicle accident and given the duration since onset and the lack of improvement to date, it is likely that she will continue to have symptoms for some time yet and perhaps indefinitely. Physiotherapy treatments aggravated her pain and she has been unable to tolerate medications which impact on her chronic bladder condition. Although this chronic bladder condition had predated the accident, the symptoms have been significantly worse following the accident and have been interfering with her day-to-day life. She has been unable to carry on with her activities of normal living at home and remains unable to return to work as a social worker which requires prolonged sitting, extended use of the computer and a great deal of concentration and emotional stability that has been significantly affected by her lack of sleep, ongoing somatic pain and the exacerbation of chronic bladder condition.
>
> Prior to the accident she was able to function at home, look after her two sons and work three full days a week. Since the accident she has been relying on her husband for assistance with the household chores and care giving activities. Her marriage has been stressed and she is currently attending marriage counseling once every two weeks. She did not receive any formal psychological assessment or counseling since the accident which certainly will be of value given the fact that she appears to suffer from depression, anxiety and continues to avoid driving.

> Her chronic bladder condition has been significantly aggravated since the accident. She has not been reassessed from a urological standpoint and should benefit from a comprehensive assessment in a pelvic pain clinic and by a urologist who has special interest in female urology and chronic pelvic pain. It is unlikely that her chronic bladder symptoms will significantly improve however she can be taught techniques to cope with it as this has been affecting several aspects of life.
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> In addition to her chronic pelvic pain, she seems to exhibit symptoms of chronic pain syndrome in general and should also benefit from being assessed and enrolled in a multidisciplinary pain program.
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> Given this lady's widespread pain symptoms, lack of response to treatments since the accident, her pre-existing chronic pain and bladder condition which has been aggravated since the accident and the fact that she exhibits symptoms of chronic depression and anxiety, it is likely that her symptoms will continue and at this stage I feel that her prognosis for recovery is guarded.

27. There were, therefore, conflicting reports from the two physiatrists as to the grievor's capabilities. Dr. Khoury subsequently reviewed both Dr. Czok's and Dr. Tyndel's reports. She noted that a report dated May 4, 2006 from Dr. Sharma, another physiatrist, noted that the grievor was unable to tolerate physiotherapy and medication. Dr. Sharma concluded that grievor was in chronic pain and recommended hydrotherapy. Dr. Khoury noted the restrictions set out in Dr. Lo's earlier report and compared them with the restrictions identified by Dr. Czok. Dr. Khoury noted that the grievor's tolerance for using the computer was a maximum of 10 minutes at a time before aggravation of her neck and back symptoms. In addition, she noted that the grievor had been emotionally labile since the accident, presenting another limiting factor, as her job required her to be emotionally stable. Dr. Khoury stated, "[the grievor] appears to suffer from symptoms suggestive of anxiety, depression and chronic pain syndrome which will certainly interfere with her pre-accident duties of a social worker." With reference to Dr. Tyndel's conclusions, Dr. Khoury stated that the lack of objective neurological findings did not preclude the fact that the grievor presented with symptoms of chronic pain syndrome and features suggestive of fibromyalgia, including low endurance and being easily fatigued, anxiety and possible depression, which prevented her from performing the essential task of her pre-accident employment and housekeeping activities.

28. Dr. Czok responded that Dr. Khoury's report did not provide any additional medical information or identify any discrepancies in the results of the physical examination or medical recommendations.

29. On March 8, 2007, in conversation with Ms. Marcoccia, and notwithstanding Dr. Khoury's recommendation that the grievor be assessed and enrolled in a multidisciplinary pain program, the grievor advised that she had not been referred to any other treatment options to help with her pain. The grievor also advised that she was attending both individual and family counseling. Ms. Marcoccia noted that the grievor indicated that she did not feel she needed to see a psychiatrist because they only prescribed medication and she was already receiving counseling. The grievor was advised that she would be expected to provide updated medical information to respond to the change in definition date, effective on February 14, 2008. The grievor was also advised that Manulife would be requesting additional medical information from Dr. Spring. No other request for medical information was made.

30. On July 3, 2007 Dr. Spring provided a report that stated that the grievor has "ongoing problems with interstitial cystitis, irritable bowel syndrome, fibromyalgia, and anxiety with panic disorder… All of her problems have been aggravated by her car accident. Her anxiety level increased greatly following the accident and she stated that she was having trouble coping. The increased stress aggravated her interstitial cystitis and irritable bowel syndrome. She developed fibromyalgia post-accident… She unfortunately was intolerant of many pain medications tried." Dr. Spring noted that grievor had identified new symptoms over the past few months, including right wrist pain, which was being investigated for carpal tunnel syndrome.

31. Manulife was concerned that Dr. Spring's opinion was largely based on the grievor's self-reported symptoms and, to the extent that new symptoms were reported, there was no indication of appropriate investigations with the exception of the possible carpal tunnel syndrome

32. Dr. Fonberg was asked to again review the medical file. No Independent Medical Exam ("IME") was requested. Dr. Fonberg reviewed the reports of Dr. Khoury, Dr. Czok, and Dr. Tyndel. He concluded that Dr. Czok's and Dr. Tyndel's reports both reflected a thorough assessment. Notwithstanding Dr. Khoury's report of her physical examination of the grievor, including an examination relating to the assessment of possible fibromyalgia, Dr. Fonberg concluded that Dr. Khoury's opinion seemed to be based primarily on the grievor's self- reported symptoms, as opposed to physical findings based on the examination. Dr. Fonberg more than

implies that Dr. Khoury's assessment was less thorough than that done by Dr. Czok or Dr. Tyndel. On a review of those reports, including Dr. Khoury's and Dr. Czok's 'rebuttals', I find that there is no basis for drawing the conclusion that Dr. Khoury's report is any less thorough than the others. To the contrary. Dr. Tyndel's report exclusively references neurological issues. Dr. Czok's report is expressly limited to physical findings. Neither seems to have been provided with the scope of historical material reviewed by Dr. Khoury as part of her assessment. It is only in Dr. Khoury's report that both physical and psychological issues are addressed; a matter seemingly consistent with Dr. Fonberg's earlier admonition on March 26, 2006 that failing to take a holistic view of the grievor's condition would result in less than optimal treatment and would delay the recovery process. Dr. Czok's physical findings include that the grievor suffered residual pain involving the neck, and chronic non-specific low back pain; a conclusion consistent with both Dr. Lo's and Dr. Khoury's findings.

33. Dr. Fonberg appears to have agreed that a diagnosis of fibromyalgia was supported, but concluded that there was a discrepancy between the extent of the symptoms reported and the injuries sustained in the MVA. He also concluded that the treatment plan as recommended was not consistent with the reported severity of the symptoms. Dr. Fonberg's conclusion that the medical information did not confirm that the grievor would have difficulties with prolonged positioning contradicts Dr. Czok's conclusion that the grievor should be provided with the ability to change her position as frequently as required and should avoid being in any long sustained position. Dr. Fonberg did not examine the grievor.

34. Based on Dr. Fonberg's review of the file, Ms. Marcoccia concluded:

> ...while the clmt continues to have some ongoing symptoms associated with pain, there is no clear information to support R & Ls preventing the clmt from being able to perform at sedentary physical demand and therefore perform the essential duties of her own occ. Treatment does not appear to be consistent with reported severity of both physical and psychiatric symptoms.

35. By letter dated September 14, 2007, Manulife advised the grievor that it had concluded that she was not totally disabled by reason of illness or injury from performing the essential duties of her own occupation, and therefore it was denying further liability under the LTD plan effective September 30, 2007. The letter went on to provide that the file was being referred to the

Rehabilitation Department in order to assist with a gradual return to work and therefore two further monthly payments would be offered, ending benefits effective November 30, 2007.

36. In its decision, Manulife gave no weight to Dr. Spring's report as being based on the grievor's self-reported symptoms. Manulife also concluded that, notwithstanding a reported increase in symptoms, there had been no change in pharmacological treatment, nor was there information to show that the grievor had been referred to any specialists for further investigation. Manulife concluded that the grievor's treatment plan was not consistent with the reported severity of symptoms.

37. The grievor appealed this decision. A first appeal review dated November 11, 2007 concluded that further information received did not provide additional medical evidence to support the severity of the grievor's reported symptoms and impairments to a degree to render her totally disabled from performing her pre-disability occupation of three days/week. In reaching that conclusion the Disability Specialist noted that, while there were some discrepancies between the physiatrist's conclusions with respect to the grievor's ability to perform her own occupation, most of the information suggested that the grievor would have problems staying in one position for a prolonged period of time, a matter that could be accommodated. There was no reference to the limitations with respect to repetitive movement. The disability specialist also concluded that, with respect to the psychological symptoms, the information on file, including no report from a psychiatrist or psychologist, suggested that the symptoms were not of such severity so as to support total disability.

38. In e-mails between the employer and Manulife in November 2007, the employer requested that the grievor's condition be assessed based on her full-time hours. The pilot project having been completed, the grievor was approved to continue working three days a week as an accommodation only until approximately the fall of 2005. Therefore, the employer asked whether the grievor was capable of returning to her regular full-time, five day per week position. Assessing the claim based on the grievor's ability to perform her own occupation on a full-time basis, Ms. Marcoccia concluded that Manulife had not been provided with medical evidence/findings supporting total disability from the grievor's own occupation on a full-time or

part-time basis.

39. Following the termination of the grievor's benefits, a lawsuit was filed in January 2008, which was dismissed in February 2008. The grievance was subsequently filed and the parties agreed on September 16, 2008 at the Step Three meeting that the grievor could continue to provide additional medical information for consideration. Prior to that meeting the grievor had been seen by Dr. Kiraly, a psychiatrist, Dr. Leung, a rheumatologist, and Dr. Singal, a urologist. Another report was also prepared by Dr. Khoury dated December 22, 2008, following a further examination of the grievor.

40. Ms. William conducted Manulife's second appeal. In her initial action plan, Ms. William raised a concern that Dr. Khoury's earlier recommendations of psychological assessment and counseling, referral to a multidisciplinary pain program, and a comprehensive assessment by a specialist in female urology had not been implemented.

41. Dr. Kiraly's reports of both April 9, 2008 and March 30, 2009 provide an Axis I diagnosis of the grievor as suffering from Major Depressive Disorder with anxiety (and latterly OCD-type features), and chronic pain syndrome due to both psychological factors and general medical condition. In April, 2008 the grievor's prognosis is identified as fair and her ability to return to work dependent on her response to prescribed therapies, which included medication, massage, and couples counseling. It was also suggested that she attend for psychotherapy in addition to the counseling that she was receiving. On examination, the grievor's cognitive functions were intact and she performed very well in a mini mental status examination and a short-term memory recall test. However, Dr. Kiraly also noted that the grievor's attention, concentration and memory were mildly affected.

42. Dr. Singal has seen the grievor for approximately 10 years with respect to the interstitial cystitis. His letter dated May 14, 2007 noted that the grievor had been very proactive in her own treatment over the years and had received virtually every known treatment over the years. He did not recommend any changes in her treatment.

43. By letter dated June 3, 2008, OMERS advised the grievor that it had completed a disability review and determined that the grievor continued to qualify for disability waiver of contribution. Under the OMERS definition, the grievor was deemed "totally and permanently disabled".

44. Dr. Khoury's report dated December 22, 2008 noted that the grievor was receiving counseling on a monthly basis from her family physician. She further noted that Dr. Leung had diagnosed chronic degenerative disc disease, and fibromyalgia compounded by anxiety.

45. Dr Khoury referred to the following diagnoses as having been made: chronic mechanical neck pain and cervicogenic headaches, chronic upper and middle trapezius sprain, chronic mechanical low back and sacroiliac joint pain, fibromyalgia, chronic pain syndrome, Major Depressive Disorder with anxiety features, and exacerbation of a pre-existing chronic bladder condition. Although Ms. William noted Dr. Khoury's conclusion that the grievor remained disabled from pre-accident activities of daily living including work, she noted that Dr. Khoury did not specify the nature of, or reason for, specific restrictions and limitations.

46. Reviewing Dr. Kiraly's assessment, Ms. William noted his opinion that the grievor had been adhering to treatment regimes, but also noted that Dr. Kiraly had recorded that the grievor had been prescribed cymbalta but had not tried it. Ms. William noted that Dr. Kiraly had written that the grievor could not return to her work responsibilities any time soon, however she concluded that there was no explanation as to why he had drawn that conclusion.

47. Ms. William concluded that certain treatment suggestions had been deemed unacceptable by the grievor for various reasons, implying that the grievor was not appropriately cooperating in treatment; in contradiction to the opinions of Dr. Kiraly, Dr. Khoury, and Dr. Singal. Ms. William did identify her concern that the specialists were not identifying restrictions or limitations and functional impairments. Rather than attempting to seek clarification directly, Ms. William arranged for an IME with a fifth physiatrist, Dr. Chow. As well, she arranged for two days of surveillance in an attempt to determine how the grievor functioned outside the formal assessments.

48. Dr. Chow's report dated July 15, 2009 provided the following conclusions in response to specific questions posed:

> *What is your primary diagnosis/clinical impression? Any additional medical problems complicating the recovery process?*
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> She has chronic neck and back pain with underlying fibromyalgia. She has irritable bowel syndrome and interstitial cystitis. She had no additional medical problems apart from her chronic pain and psychological issues complicating her recovery process.
>
> *Do the subjective complaints correlate with your objective findings? What are the current symptoms? Based upon your examination, describe the clinical evidence that support the claimant's symptoms.*
>
> Her subjective complaints could be correlated with the physical findings. When distracted, she had neck and back pain and she had fibromyalgia tender points without any exaggeration. Her current symptoms included bladder symptoms, irritable bowel symptoms, headache, neck, shoulder girdle pain, low back pain, pelvic girdle pain, anxiety, depression and sleep disturbance.
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> *Based upon your clinical evaluation and review of the medical records, what are the functional restrictions and limitations? Limitation is defined as "something that person cannot do as a result of injury or illness". Restriction is defined as "something a person should not do as it may delay recovery, cause injury or illness to recur, or endanger that person for others".*
>
> From a physiatrist's perspective, in my opinion, her functional limitation is in regard to prolonged static and dynamic neck and trunk activities. She will need to limit activities beyond the frequent industrial rates. She will not be able to perform beyond the sedentary, physical demand level. There are no specific restrictions. There are no contraindications to activities.
>
> *If restrictions and limitations are noted above, is the level of treatment appropriate to expedite the resolution of these restrictions?*
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> She had received appropriate treatment but she had not embarked on the exercise routine which will be important. She would need to start a hydrotherapy program and work within her tolerance and eventually to do cardiovascular retraining and gentle weight training. She will need to be educated regarding the pain concept of hurt versus harm, pacing strategies, workload division strategies, proper body biomechanics and perform activities and exercise within her tolerance. She will need to be guided with regard to the exercise routine.
> (italics in original)

49. In rejecting the appeal, Ms. William relied on Dr. Chow's report to conclude that the medical evidence indicated that the grievor was able to perform sedentary physical demands and that her occupation would allow her to change position as necessary. Therefore, concluded Ms. William, the grievor was not disabled from her own occupation. Ms. William also concluded that

the independent observation of the grievor's activity level indicated the grievor was able to perform activities beyond her reported abilities.

50. Dr. Chow's report makes clear that his conclusions are referable only to physical issues. He makes no comment concerning any psychological factors and whether those have any impact on the grievor's ability to work. He does not appear to address the chronic pain issues associated with the IC and IBS, while at the same time advising that the grievor "perform activities and exercise within her tolerance".

51. I heard evidence from Ms. William with respect to the difficulty she felt she had in arranging the grievor's attendance for the assessment with Dr. Chow. Ms. William agreed in cross-examination that the concerns raised by the grievor with respect to the required driving distance, her opportunity to discuss the request with her union representative, and time required to make child care arrangements were not unreasonable. However, it appears that Ms. William was influenced at the time by a view that the grievor was not being cooperative. She also stated that her observations of the grievor's demeanour in the waiting room prior to the Step Three meeting and her demeanour in the meeting appeared inconsistent; one reason she decided to engage surveillance.

52. Surveillance of the grievor's activities was conducted by an investigator on June 1, 2 and July 2, 3, 2009. From the report and video received, Ms. William concluded that the grievor's observed activities on those days were inconsistent with, and went beyond the grievor's self-reported activities/abilities. The evidence does not support a conclusion that the grievor under-reported her abilities. From the surveillance, the grievor is seen engaged in the following activities: walking for five minutes from her home with a friend in order to have breakfast at a local restaurant for an hour, and then walking home; driving to the grocery store (a ten-minute drive); doing some light grocery shopping (on one occasion leaving carrying one part-full plastic bag of goods and a purse, and on another, two reusable shopping bags and a purse); driving to a medical appointment (an eight-minute drive); been driven to a friend's home for a visit; driving to her shiatsu therapist (thirteen minutes); driving her younger child to and from school (less than a five minute drive each way). On July 3, 2009, the grievor does not leave her home over the

entire period of the surveillance. These activities are consistent with the grievor's report to Dr. Chow of her abilities as recorded at page 5 of his report

53. None of the medical reports suggest that the grievor did not cooperate in the examinations. There was concern raised that she did not undertake certain treatment suggestions. In some instances her attendance and/or participation in certain programs or assessments was delayed for reasons not attributable to the grievor. The grievor has complied with her medical practitioners' recommendations for treatment, with the exception of psychotherapy. There is also concern expressed that the grievor is not engaged in any regular exercise program.

54. During the grievor's "own occ" period, she had attended examinations with four physiatrists (Lo, Khoury, Czok, and Sharma), a neurologist (Tyndel), a urologist (Singal), Dr. Yaser (specialty unidentified) and had been seen and treated by her family physician, an occupational therapist, physiotherapist, chiropractor, and massage/Shiatsu therapist. The grievor had been referred to a rheumatologist but was still awaiting an appointment.

55. By the time of the Step Three meeting, the grievor had also been assessed by a psychiatrist (Kiraly) and, although at that time there had been no referral to a multidisciplinary pain program, the grievor had also been assessed by a rheumatologist (Leung).

56. The grievor has since participated in a pain management program, and has continued to try various medications, including cymbalta, to relieve her symptoms. She has been referred to another urologist and has arrangements for a pelvic MRI, and she continues in psychiatric care, at three-month intervals.

57. The assertion made by the City that, if the grievor's condition was so serious as to be totally disabling, those medical practitioners would have been recommending additional and/or more aggressive treatment, is one on which I can place no weight. In the absence of evidence from those medical practitioners as to why they may have made certain treatment recommendations or abstained from making them, any conclusion would be speculation on my part. At most I am able to conclude that the grievor appears to have been cooperative and, with

the exceptions noted, participated in suggested and/or recommended treatment options.

58. The grievor testified to her medical condition. Her description of increased levels of symptoms, pain, and emotional state post-MVA are consistent with the reporting documented in the medical reports. She testified that she was unable to perform the caseworker job on her attempts to return to work due to the repetitive movement, increased pain and her inability to focus and be attentive to her clients' concerns. She testified that walking was easier than stagnant standing. She described having bouts of exhaustion. She testified that she felt that pre-MVA she was coping quite well with her anxiety and depression, but that post-MVA and the physical concerns arising therefrom, the anxiety and depression were more constant and regardless of the amount of sleep she might have, the 'heaviness' persisted. She testified that certain delays in seeing a rheumatologist resulted from that physician being off sick and that she was therefore then referred to a pain clinic. In response to the surveillance evidence the grievor acknowledged that she was not bedridden and testified that she was trying hard to have some kind of normalcy in her life in circumstances where she could have one day where she would be 'relatively ok' and the next day she would be unable to leave her home. She described the fibromyalgia symptoms as feeling like someone had "beat the crap out of me". In reference to other jobs that she might be able to perform the grievor testified that she has only ever worked as a caseworker and was essentially unaware of what other jobs she might be able to do. The grievor acknowledged that she was able to perform a variety of physical tasks including reaching, light lifting, squatting, and bending but that it caused pain. Much of the grievor's cross-examination was directed at the credibility of her self-reported symptoms and her general credibility. The grievor agreed that Dr. Kiraly did not indicate in his reports that her other symptoms were made worse as a result of taking any anti-depressants.

* * *

59. In summary, it was the position of the union that the grievor had worked with pre-existing medical conditions for a number of years, and for a number of years, had worked less than full-time hours in order to accommodate those medical conditions and the pain associated with them. Following the MVA, argued the union, the grievor attempted to return to work on a number of occasions but was unable to do so as a result of an exacerbation of her medical issues. The

grievor testified that she was unable to tolerate the pain associated with using the computer, that she was unable to concentrate appropriately, was unable to respond to clients in turmoil appropriately given her own mental state, and was exhausted physically and mentally, notwithstanding that she had been unable to complete even one full day's work in her various attempts to return to work.

60. The union further argued that, unlike the grievor in the *Cristiano* case, *infra,* there are several organic bases for the grievor's multifaceted physical problems. In addition, there is a psychiatric/emotional component, argued the union, including anxiety and depression. The union argued that the employer has ignored the psychiatric/emotional component of the disability and has focused exclusively on its physical aspects. The IME from Dr. Chow, a physiatrist, argued the union, speaks only to the grievor's functional limitations arising from his physical findings. It does not, argued the union, speak to the grievor's ability to concentrate, her exhaustion, or the impact of her psychiatric condition.

61. The union argued that little weight could be attributed to the internal file review completed by Dr. Busse, who concluded that there was no evidence of psychiatric illness but who did not suggest a psychiatric IME, notwithstanding repeated reference to psychological issues from as early as the Initial Attending Physician's Statement.

62. There is no evidence, argued the union, that the grievor has been anything other than truthful. The surveillance evidence, argued the union, did not disclose any activities inconsistent with the grievor's reporting of her abilities. The union noted that Dr. Chow concluded that the grievor did not exaggerate her symptoms and was cooperative and appropriate during his examination.

63. Whereas in November 2006, Dr. Khoury had concluded that the grievor was tender on fourteen out of eighteen fibromyalgia points, by December 2008, noted the union, Dr. Khoury had concluded that the grievor was tender on all eighteen points.

64. Neither Ms. Bracken nor Ms. Smith were aware of the specific medical issues facing the

grievor, noted the union, and neither were aware as to whether the grievor could have been accommodated with respect to any and all functional limitations.

65. It was the position of the union that Ms. William, in addressing the grievor's appeal, purported to second-guess the reports of the medical experts looking for a means to justify the denial of benefits. Notwithstanding the clear references to a psychiatric component to the disability, the union noted that Ms. Williams obtained an IMA dealing exclusively with physical limitations. She did not request either a psychiatric assessment or a functional abilities exam, noted the union, but rather had surveillance conducted. The surveillance, argued the union, bore no relation, and was irrelevant to whether the grievor was capable of performing her work as a caseworker or any other job for which she might be suited within the terms of the definition of total disability.

66. In summary, in making its submissions the City noted that it was not challenging or suggesting that the grievor did not testify truthfully, or that there were only two options available in assessing the evidence; that the grievor was truthful and therefore disabled, or that she was exaggerating (or worse) and therefore was not disabled. The employer noted that it seemed apparent that the grievor perceived herself as disabled but that such a perception was not necessarily consistent with actual abilities. The employer pointed to the *Caggiano* case, *infra,* wherein the grievor went off work as a result of a physical injury and subsequently developed a psychiatric disorder, including chronic pain syndrome. The employer argued that it is not sufficient to show that the grievor may experience pain. The employer argued that the reports submitted by the union say little if anything about the grievor's ability to work, or, if they do conclude that the grievor is unable to return to work, they do not explain why. This is a fundamental flaw in the evidence, argued the employer, as it argued that having a diagnosis does not equate to being totally disabled within the meaning of the definition in the plan.

67. Dr. Lo's January 2006 report indicates that the grievor could return to work if she was able to be accommodated. This report is more authoritative, argued the employer, than Dr. Khoury's report, which makes no mention of job demands, and given that Dr. Khoury was not provided with the job demands analysis.

68. The employer argued that in the *Cristiano* case, *infra,* the arbitrator found that there was objective evidence of both the physical and psychiatric concerns, including the manner in which the grievor participated [or failed to participate] in the hearing process and the fact that the grievor had been admitted to a psychiatric institution. The employer also noted that the alternate work proposed by the employer was rejected as not conforming to the grievor's medical restrictions or training and education.

69. The employer noted that the interstitial cystitis, irritable bowel syndrome, anxiety attacks, and chronic pain were all issues that pre-existed the grievor's MVA, and that the City had been able to accommodate the limitations and restrictions arising from those pre-existing conditions. The evidence did not, argued the employer, establish either a deterioration of those conditions or such additional illnesses or injuries that would result in total disability. It was the employer's position that the grievor was not eligible for, and should not have been approved for disability benefits from the outset, given that two of three initial medical reports recommended a return to work with modifications.

* * *

70. The parties referred me to and I have reviewed: *City of Toronto and Canadian Union of Public Employees, Local 79, (Tautt)* (unreported, Tims), May 16, 2008; *City of Toronto and Canadian Union of Public Employees, Local 79, (Rygiel),* (unreported, Tims), March 11, 2010; *City of Toronto and Canadian Union of Public Employees, Local 416, (Doble),* (unreported, Starkman) November 7, 2001; *City of Toronto and TCEU (Cristiano),* (unreported, Kaplan), June 8, 2007; *The Corporation of the City of Toronto and Toronto Civic Employees Union, Local 416, (Theodoris),* (unreported, Schmidt), February 18, 2010; Fleet Industries v. International Assn. of Machinists, Local 171 (Lamoureaux grievance), 92 L.A.C. (4th) 232 (Rayner); Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 414, (1983) 11 L.A.C. (3d) 221 (Picher, M.); *The Corporation of the City of Toronto and Canadian Union of Public Employees, TCEU, Local 416, (Caggiano),* (unreported, Marcotte) September 30, 2002; *Mathers v. Sun Life Assurance Co. of Canada* [1998] B.C.J. No. 544; [1999] B.C.J. No. 1023 (C.A.).

71. The employer relied on the following commentary in *Mathers, supra,* wherein the British Columbia Supreme Court noted (and was upheld by the B.C. Court of Appeal):

> 52 I accept Mr. Mathers' evidence that he is experiencing pain. However, pain does not, by itself, equate with total disability within the meaning of the Policy. If pain is the disabling condition, it must be caused by sickness or injury. As Dr. Hershler agreed during cross-examination, there is a difference between pain and disability and a patient who complains of pain is not necessarily disabled by it. There are no physical contraindications preventing Mr. Mathers' return to work.
>
> ...
>
> 63 it is possible that even where [there] is no objective, measurable evidence of disability, an insured may establish a real and compensable total disability due to subjective pain, depression, fear of work, etc.... Mr. Mathers is totally disabled from his own subjective perspective. However, the legal question is whether Mr. Mathers is totally disabled according to the terms of the Policy description. The Policy specifies that the insured employee's total disability must result from sickness or injury. The onus is on the insured employee to prove that sickness or injury. Here there is insufficient medical evidence to prove that Mr. Mathers' low back pain is the result of sickness or injury and there is no other explanation for his disabling condition. He rejects the suggestion that he is disabled as a result of depression or psychosocial factors and he is adamant that the sole cause of his disabling condition is physical back pain.
>
> 64 While Mr. Mathers genuinely considers himself totally disabled, the test (in reference to an "own occupation clause") is that set out in *Couch on Insurance*...:
>
> > The test of total disability is satisfied when the circumstances are such that a reasonable man would recognize that he should not engage in certain activity even though he literally is not physically unable to do so. In other words, total disability does not mean absolute physical inability to transact any kind of business pertaining to one's occupation, but rather that there is a total disability if the insured's injuries are such that common care and prudence require him to desist from his business or occupation in order to effectuate a cure; hence, if the condition of the insured is such that in order to effect a cure or prolongation of life, common care and prudence will require that he cease all work, he is totally disabled within the meaning of health or accident insurance policies.

72. That discussion may be contrasted with the following excerpt from the *Doble* decision, *supra,* (beginning at page 22), referring to a subsequent British Columbia Court of Appeal decision:

> The union submitted that there was sufficient evidence to demonstrate that the grievor was disabled from performing the essential duties of his job, and argued that there did not have to be objective evidence of disability to meet the test and that the proof could be based entirely on subjective evidence. In this regard reference was made to the decision in D.E. v.

Unum Life Insurance Co. of America [1999] B.C.J. No. 2013 (BCCA). In that matter the British Columbia Court of Appeal was considering an appeal from a trial judge decision concerning the obligation of an insured to provide proof of disability due to sickness where no objective symptoms exist. At para. 37 the Court notes the conclusion of the trial judge with respect to coverage as:

> The fundamental misconception of the defense is that it is necessary to be able to identify the cause of the condition, before benefits under the insurance policy are triggered. One can recognize that insurers may be more comfortable when they have objective evidence of disease. But it is a fact of sickness, not its explanation, which must govern.
>
> I conclude that the meaning of "sickness" in this disability insurance policy includes the condition of a person who genuinely wants to continue in his or her employment but, because of a perception, based on symptom, that something is wrong with his or her body, genuinely and reasonably feels unable to do so. This is a substantially subjective test and depends on the credibility of the claimant.

In refusing to overturn the decision of the trial judge it is noted at para 19:

> ... Moreover Unum's argument that "proof" of an insured's disability cannot as a matter of law be based solely on non-objective evidence is not founded on any term in the policy or any rule of law. It is certainly true that, as stated by Finch JA for the Court in Mathers v. Sun Life Assurance Co.... "Acceptance by the trial judge of objective medical evidence of total disability will usually be required"; however, the term "proof" per se obviously includes testimony and as stated in Maslen, a claimant's own evidence, if consistent with the surrounding circumstances, may suffice to prove an injury-or in this case, a disability.

Similar comments on the sufficiency of subjective evidence consistent with the other facts can be found in the decisions in *Wright v. National Life Assurance Co. ... Parker v. Saskatchewan Hospital Assn....* and *Meyer v. Bright...*(Ont. C.A.)

In this matter however, there is objective evidence that the grievor has had back difficulties over the years. He had a fusion at L4-L5 in 1997 and an MRI in April, 1997 indicated that the grievor had a herniated disc at L3-L4. There is no objective measure of the pain experienced by the grievor following his back injury in December, 1996. In this respect I am left with the grievor's evidence at the hearing recounting the pain, and with the notes and letters from his physicians recording the grievor's comments to them.

73. In *Cristiano, supra*, in finding that the union had established on a balance of probabilities that the grievor was totally disabled, the arbitrator stated:

> The grievor has been seen by many doctors to investigate his complaints of chronic pain. It appears that, without exception, not a single physician has found an organic cause for the complaints. By and large, all of the doctors have concluded that there was a functional or psychological component to the symptoms. However, the absence of an organic cause does not mean there is no chronic pain. As the FAE report indicated, "Chronic pain behavior is present and depression is quite evident." The report also noted that "reported complaints

> appear consistent with his demonstrated abilities." The employer submitted that a distinction had to be drawn between perception and reality. That is correct. However, the FAE report validated the perception. This is not a case where one is asked to rely solely on a grievor's say-so as was the situation in at least one of the authorities submitted by the employer, a case where the self-reporting was, in any event, directly contradicted by surveillance evidence.

74. The grievor's "own occ" benefits were terminated by letter dated September 14, 2007 (effective November 30, 2007). Although Dr. Fonberg took issue with the diagnosis made by Dr. Lo, he agreed that the restrictions identified by him were appropriate. Benefits were granted based on a diagnosis of myofacial strain, without regard to other factors identified by the family physician, Dr. Khoury, and latterly, Dr. Kiraly. I am satisfied that the grievor continued to meet the definition of total disability from her own occupation with the identified restrictions on repetitive movement that existed from the outset of her claim as well as the additional psychological/psychiatric issues identified. There was no evidence to suggest that the grievor's attempts to return to work over sixteen days in late 2005 and early 2006 were anything other than legitimately unsuccessful. The grievor was already being accommodated to three days of work per week as a result of her pre-existing medical conditions. The early evidence of Dr. Spring and Dr. Khoury is that the pre-existing medical conditions had been exacerbated by the MVA, additional pain was being experienced, new physical issues had been identified (herniated disc and annular tear) and the grievor was not sufficiently emotionally stable to deal with the stresses of the caseworker position. These conclusions are supported by objective evidence. Both physicians understood the parameters of the grievor's job. Although Dr. Khoury was not provided with a job demands analysis, he accurately refers at page 9 of his November 9, 2006 report to the nature of the grievor's work and the methods by which it is accomplished. His commentary is slightly more fulsome than that of Dr. Chow who, based on an absence of any reference to it in his report, was also not given a job demands analysis for review. I reject Dr. Fonberg's conclusion that Dr. Tyndel's and Dr. Czok's reports are more comprehensive that Dr. Khoury's for the reasons outlined in paragraph 32 of this decision. I also place little if any weight on Dr. Fonberg's conclusions as he did not examine the grievor and I note that Dr. Chow, who did examine the grievor at Manulife's behest, concluded that the grievor's subjective complaints could be correlated with the physical findings.

75. At the time of terminating the "own occ" benefits, the grievor's overall condition had not

improved. The medical evidence available to Manulife at that time indicated, if anything, that the grievor's condition had deteriorated.

76. I therefore find that the grievor was totally disabled within the "own occ" definition beyond the date on which her benefits were terminated. I am further satisfied that the grievor continued to be totally disabled from her "own occ" as of the change of definition date on February 14, 2008.

77. I therefore direct the employer to pay to the grievor the balance of the LTD benefits to which she was entitled for the period of her "own occ", that is, benefits for the period December 1, 2007 to February 13, 2008.

78. I turn then to the question of whether the union has established, on a balance of probabilities, that the grievor was wholly and continuously disabled by reason of illness or injury, on and after February 14, 2008, and, as a result was not physically or mentally fit to perform the essential duties of her own and any other occupation for which she is qualified by reason of her education or training or experience in accordance with the definition set out at the outset of this decision.

79. I note, firstly, the statement in *Cristiano, supra*, at page 28, a 2007 decision involving this employer:

> ...At a very minimum, before an insured person is cut off from benefits on the basis that there are jobs he or she can perform, genuine and realistic efforts must be made to determine what jobs that person can do. Any such effort would, of course, involving [sic] meeting the grievor, not just inputting some data into a computer program and then depriving an insured person of his disability entitlement based on the results.

80. In addition to the fact that no FAE was requested by Manulife and that Ms. Smith could not speak to whether the work of the two positions identified by her was able to be performed by the grievor, I have no evidence of the wage rates associated with that work. On agreement, the parties provided me only with an excerpt from the collective agreement. Sub-paragraph (b) of the "any occ" definition stipulates that the monthly earnings of any alternate work must be at least

75% of the monthly earnings for the employee's normal occupation before such work may be appropriately considered under the "any occ" definition.

81. Given that Manulife's appeal process and the grievor's response to those appeals was fundamentally directed at the question of whether the grievor was disabled from performing her "own occ", timely medical evidence addressing the broader question of her ability to perform "any occ" is limited.

82. Dr. Chow's assessment in July, 2009 concluded that, with respect to physical limitations, the grievor's functional limitations were in regard to prolonged static and dynamic neck and trunk activities. He concluded that the grievor was unable to perform beyond the sedentary physical demand level and provided no specific restrictions, indicating that there were no contraindications to activities.

83. Dr. Leung's earlier September 9, 2008 assessment diagnoses chronic degenerative disc disease and fibromyalgia, compounded by anxiety. However, while commenting that improvement might be made if the grievor "could get a handle on her pain and anxiety", she does not address the issue of whether the grievor is able to return to work. Dr. Khoury's December 22, 2008 assessment speaks only to the grievor's ability to return to her pre-accident employment as a social worker with the City. It is silent as to whether the grievor is able to perform any other occupation. Dr. Kiraly's prognosis of April 9, 2008 advises that the grievor's return to work depends on the response to recommended therapies. On November 4, 2008 Dr. Kiraly continues to be of the view that the grievor in unable to carry out her occupational responsibilities and should remain off work indefinitely. In his report dated March 30, 2009, Dr. Kiraly's prognosis concludes, "As far as work reentry is concerned, it is highly unlikely that [the grievor] would be able to return to work." In his summary he states; "As far as work reentry is concerned in all likelihood she may not be able to return to her occupational responsibilities any time soon." Taken together, it is not entirely clear whether he is referring to the grievor's pre-accident employment or work more generally.

84. All of these reports are dated beyond the change of definition date. Manulife noted that the

grievor's physicians were stating that the grievor could not work, but took the position that those reports did not provide restrictions or limitations such that functional impairments were not clear. Yet no request for clarification and no request for additional information in respect of the grievor's abilities to perform other work were made.

85. Although these reports are not entirely clear as to whether the grievor could return to work to perform work other than her own occupation, on balance, I am persuaded that they raise a *prima facie* case of total disability under the "any occ" consideration. The employer takes the position that I should disregard the conclusions of those attending practitioners on the basis that a diagnosis does not equate to a disability. I agree that a diagnosis (or multiple diagnoses) does not equate to a disability. Yet, to the extent that at least Dr. Kiraly appears to speak more generically about the grievor's inability to return to work, the employer chose not to challenge those medical conclusions either at the time of and through Manulife's review or as part of this hearing process. The employer agreed that these reports could be relied on without the need to call their authors. I find no persuasive or appropriate basis on which to reject the conclusion that the grievor is unable, medically, to return to work. The only contrary opinion during the relevant time period is that of Dr. Chow whose conclusions speak only to physical limitations while confirming that the grievor's subjective complaints could be correlated with the objective physical findings. He also concludes that the grievor had fibromyalgia tender points without any exaggeration. Those findings speak more to the grievor's credibility in respect of her condition, but also lend credence to Dr. Kiraly's conclusions regarding the grievor's limiting psychiatric diagnoses.

86. The fact that the grievor is able to engage in certain activities of daily living is not evidence from which one may conclude that she is able to function in employment. The employer argued that the grievor was able to attend the hearing and be cross-examined. While the grievor appeared to be able to mostly tolerate the proceedings with some additional breaks, her attendance at the hearing on seven days over a period of about nine months is inconclusive of her ability to function in employment on any regular basis. On the first day of the grievor's testimony, the parties agreed to adjourn early as the grievor felt unable to continue. Her cross-examination concluded on the next day of hearing. The employer also argued that there was no evidence of continuity of disability given that a psychiatric diagnosis was not made until 2008. I

disagree. Dr. Spring speaks of anxiety and depression from the outset of the claim. Dr. Khoury also identifies those concerns well before the grievor is seen by Dr. Kiraly. It is the case that the grievor performed well in cognitive testing conducted by Dr. Kiraly, a finding consistent with Dr. Tyndel's neurological conclusions. Notwithstanding, Dr. Kiraly diagnosed the grievor as set out in paragraph 41 of this decision and concluded that she was unable to work.

87. Like the employer, I have questioned why the grievor has been receiving psychiatric treatment only at three-month intervals. The grievor's early concern that psychiatrists only prescribe medication has apparently been overcome. Whether a recommendation that she engage in psychotherapy to attempt to address her anxiety and depression, particularly if she is unable to rely on medicated relief of symptoms due to other medical conditions, remains valid is unclear. I have no evidence that the grievor has declined to participate in such a treatment plan. I have also, frankly, wondered whether other, more wide-ranging investigations have been considered, for example, whether food intolerances may play any role in the IC and/or IBS. But as noted at paragraph 57 of this decision, absent evidence, I can draw no adverse inference against the grievor based on the fact that her attending psychiatrist or others may not have recommended or made referrals to such assessment and/or treatment plans.

88. On balance, I am persuaded that the grievor, as of February 14, 2008 and continuing, was and is totally disabled as defined in the "any occ" definition of the LTD plan set out at paragraph 3 of this decision. I find therefore that the grievor is entitled to LTD benefits continuing beyond February 14, 2008.

89. Having reached that conclusion, I also adopt the comments of the arbitrator in *Cristiano, supra*, at page 33 of that award that, "The fact that none of the treatment initiatives have been fully pursued to date does not mean that treatment efforts should end merely because LTD has been restored. The challenge faced by all of the workplace parties will be in coordinating a treatment plan to help the grievor return to work." As noted, based on the evidence before me, I am persuaded that the grievor met both definitions of total disability at the relevant times and continuing. However, I would also expect that in time the grievor's ongoing entitlement to LTD benefits will be reviewed and consideration given both to more specific work possibilities and

their attendant job demands and a correspondingly specific and thorough inquiry with respect to the grievor's functional limitations at that time.

90. Having regard to all of the above, this grievance is allowed. In accordance with, and further to paragraphs 76, 77, and 88 of this decision, I find that the grievor was and is totally disabled within both the "own occ" and the "any occ" definition of the LTD plan and is therefore entitled to be paid the benefits under that plan. I hereby direct the employer to pay those benefit amounts to the grievor. I will remain seized should there be any issue with respect to the implementation of this award.

Dated at Toronto, Ontario this 22nd day of July, 2010.

Marilyn A. Nairn, Arbitrator.