Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-02-27

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Mr. Wilson MacLennan** **The Honourable Mr. Armand Dureault**
APPEARANCES:	**The Appellant, [text deleted]. was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**September 30, 2002**
ISSUE(S):	**Entitlement to Income Replacement Indemnity Benefits beyond December 4, 2001.**
RELEVANT SECTIONS:	**Subsections 110(1)(a) and 110(2) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act') and Section 8 of Manitoba Regulation 37/94.**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

The Appellant, [text deleted] was involved in a motor vehicle accident ('MVA') on September 9, 2000. At the time of the MVA, the Appellant was employed on a full-time basis with [text deleted] as a wood component picker. As a result of the injuries she sustained in the MVA, the Appellant was unable to return to her position with [text deleted] and became entitled to receive Income Replacement Indemnity ('IRI') benefits in accordance with subsections 83(1) and 84(1) of the MPIC Act. Subsection 83(1) of the MPIC Act provides as follows:

> **Entitlement to I.R.I. for first 180 days**

> **83(1)** A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred.

Subsection 84(1) of the MPIC Act provides as follows:

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

On September 5, 2001, MPIC's case manager wrote to the Appellant to advise her of MPIC's decision regarding her 180-day determination and to notify her of their decision to terminate IRI benefits. In the letter, the case manager advised her as follows:

> The 180 day determination process has resulted in no change in your Income Replacement Indemnity (IRI).
>
> This process determines an employment that you could have held prior to the accident and provides you with an IRI based on the job that yields you the greatest income. We take into consideration the jobs you held in the 5 years before the accident, education, training, physical and intellectual abilities. I have determined your employment to be the job held at the time of the accident, which is a **parts picker** with [text deleted]. This would have resulted in the greatest IRI for you.
> …
>
> We have received reports from [Appellant's athletic therapist] of [text deleted] and [Appellant's doctor #1] addressing your physical ability to perform your occupational duties. It is their consensus that you have regained the functional capacity to do your job duties. As you no longer hold the job you did at the time of the accident, you will be entitled to a temporary continuation of Income Replacement Indemnity for a further 90 days, commencing September 6, 2001. Your entitlement to Income Replacement Indemnity will end on December 4, 2001.

The Appellant sought an internal review of that decision. In her decision dated February 5, 2002, the Internal Review Officer confirmed the case manager's decision and dismissed the Application for Review. After a thorough review of the medical and paramedical reports on the file, the Internal Review Officer concluded that the Appellant was capable of returning to work as of September 5, 2001. Accordingly, it was her decision that the Appellant was not entitled to IRI benefits beyond December 4, 2001.

The Appellant has now appealed the decision of the Internal Review Officer, dated February 5, 2002, to this Commission, regarding her entitlement to Income Replacement Indemnity benefits beyond December 4, 2001.

The relevant sections of the MPIC Act and Regulations are as follows:

Section 110(1)(a) of the MPIC Act:

> **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:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident.

Section 110(2) of the MPIC Act:

> **Temporary continuation of I.R.I. after victim regains capacity**
> **110(2)** Notwithstanding causes 1(a) to (c), a full-time earner or a part-time earner who lost his or her employment because of the accident is entitled to continue to receive the income replacement indemnity from the day the victim regains the ability to hold the employment, for the following period of time:
>
> (b) 90 days, if entitlement to an income replacement indemnity lasted for more than 180 days but not more than one year.

Section 8 of Manitoba Regulation 37/94:

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

The issue which arises on this appeal is whether or not the Appellant was able to hold the employment that she held at the time of the accident, as at September 5, 2001, when MPIC terminated her IRI benefits in accordance with subsection 110(1)(a) of the MPIC Act.

Counsel for the Appellant submits that the Appellant was not capable of returning to her employment with [text deleted] as a wood component picker on September 5, 2001, and has not regained the capacity to return to work since the motor vehicle accident. He maintains that since the MVA, the Appellant has continued to suffer with persistent pain, weakness and burning in her left shoulder and upper arm, in addition to experiencing frequent headaches. These ongoing complaints, particularly with respect to her left upper arm, prevent her from returning to her previous employment.

Counsel for the Appellant submits that the Appellant's ongoing complaints are causally connected to the MVA of September 9, 2000. In support of that position, he relies on the report of [Appellant's doctor #2] dated October 10, 2000, wherein [Appellant's doctor #2] notes that, "*It is my opinion that the injuries she sustained are the result of her MVA, and not this previous injury which I feel had likely improved*." Since there has been no other intervening injury since the MVA, which would account for her ongoing symptomatology, he relates the Appellant's ongoing complaints to the MVA.

Counsel for the Appellant also relies on the Appellant's oral testimony given at the hearing of this matter, wherein she explained that the pain in her left arm prevents her from being able to grip items and that any continued movement with her left arm will bring about pain. She also described debilitating headaches which have occurred since the motor vehicle accident. Based on her ongoing symptoms, the Appellant testified that she was not capable of performing the job tasks required of her previous position as a wood component picker at [text deleted].

In support of the Appellant's testimony, counsel for the Appellant refers us to the numerous medical reports from the Appellant's various caregivers which document her ongoing problems since the motor vehicle accident and thereby establish her inability to return to her previous employment. He notes the report of [Appellant's doctor #3] dated March 15, 2001, wherein [Appellant's doctor #3] comments that:

> In summary with the treatment prescribed to her, her mechanical neck and shoulder girdle muscle pain has improved and trigger points of the trapezius, infraspinatus, supraspinatus and sternocleidomastoid muscles have resolved. The movements of the neck and shoulder joints have improved. Tension myalgia including headaches have also reduced. She is sleeping much better with Alprazolam and with the general principles of muscle relaxation exercise program. Unfortunately she is not coping well with her residual pain dysfunction and has developed anxiety. Hopefully with the present therapy, her anxiety will be relieved and functional level will improve.

Counsel for the Appellant also cites the report dated August 7, 2001, from [Appellant's athletic therapist], the athletic therapist who had been working with the Appellant. In that report, [Appellant's athletic therapist] noted that:

> As of May 09, 2001 [text deleted] had approved a medical reconditioning program to be started for [the Appellant], with emphasis to her LEFT Brachial region. As part of [the Appellant's] initial injuries sustained in September 2000, she suffered a penetrating wound to her LEFT tricep and bicipital regions. This is still evident as seen with residual scarring at those anatomical locations.

> [The Appellant's] re-assessment identified some muscle atrophy at these locations, as well as some decreased range of motion at the LEFT elbow joint (due to muscle shortening and muscle scarring). At that time, it was clearly evident that [the Appellant] would benefit from a more structured physical reconditioning program.
> …
> [The Appellant] has been very determined and has worked very hard to improve her physical dysfunction and should now be ready to return to the workforce.

Counsel for the Appellant argues that this report establishes that the Appellant had not been using her left arm, as evidenced by the muscle atrophy, despite the fact that she was very determined to improve her condition.

Additionally, counsel for the Appellant refers to [Appellant's doctor #4's] report of October 1, 2001, wherein [Appellant's doctor #4] notes the following with respect to the Appellant's ongoing pain complaints:

> Then in a motor vehicle accident of September 2000 she had multiple contusions and abrasions, as well as a deep, penetrating puncture on the mid level of her left arm posteriorly, treated with irrigation. She has had ongoing weakness, pain, and burning in the left upper extremity.
>
> There is deep local tenderness in this area, and mild posterior arm atrophy. Distally, there is mild weakness of radial innervated muscles at hand and wrist, and mild grip weakness.

Her chiropractor, [Appellant's chiropractor] also noted that there was a marked limitation in the Appellant's range of motion and weakness.

Counsel for the Appellant contends that the Appellant's subjective reports of pain are credible and that all of her caregivers have found her to be sincere and reliable. Particularly, he refers to [Appellant's doctor #5's] report of March 5, 2002, wherein he comments that:

> On the balance, I find no evidence of any persisting neuromuscular pathology of substance. This in no fashion gainsays the credibility of the symptoms that the patient reports, which are likely attributable directly to the soft tissue injury and associated scarring in the left upper extremity, as well as potentially to

> traumatization of small cutaneous sensory nerves in the area of the left upper arm perforation injury.

Lastly, counsel for the Appellant relies on the report of [Appellant's doctor #6] dated June 15, 2002, wherein [Appellant's doctor #6] notes that:

> [The Appellant] has suffered from pain in her arm since the time of the accident and this was an acute exacerbation aggravated by a new job which involves lifting heavy objects.
> This new exacerbation is caused by work but the underlining abnormality causing this response is in my mind directly related to her MVA.

In conclusion, counsel for the Appellant submits that the Appellant's ongoing complaints of pain are credible, as relayed by her physicians. Given her credibility, and her inability to return to the workplace, he urges the Commission to overturn the termination of IRI benefits and reinstate IRI benefits for the Appellant from December 5, 2001.

Counsel for MPIC submits that there was ample evidence of the Appellant's ability to return to work as of September 5, 2001, and that this evidence is uncontroverted by the reports referred to by the Appellant's counsel. Accordingly, counsel for MPIC submits that the Appellant has not met the onus of proof required in the circumstances, and accordingly the decision of the Internal Review Officer, dated February 5, 2002, should be upheld.

After a careful review of all of the evidence, both oral and documentary, we are unable to conclude, on a balance of probabilities, that the injuries sustained by [the Appellant] in the motor vehicle accident of September 9, 2000, prevented her from holding employment as a component wood picker at [text deleted] from September 5, 2001 and thereafter.

There was sufficient evidence, as at September 5, 2001, to support the conclusion that the Appellant was capable of holding the employment which she held at the time of the accident. This supporting evidence included:

1. the report from [Appellant's athletic therapist], dated August 7, 2001,wherein he notes that:

> Conclusion - After visiting [the Appellant's] former jobsite and being formally educated by a senior supervising official about the physical demands of that former job, I believe that [the Appellant] possesses the physical characteristics necessary to perform her job at a competent level.
>
> [The Appellant] has been very determined and has worked very hard to improve her physical dysfunction and should now be ready to return to the workforce.

2. [Appellant's doctor #1's] report dated August 16, 2001 where he provided his opinion that the Appellant could return to work. In his report, [Appellant's doctor #1] noted that:

> Further to my letter of August 3, 2001, I have since reviewed the report from [Appellant's athletic therapist], and I am in agreement with his findings. From the description of her work duties at [text deleted], I see no reason why she would not be physically able to return to her previous job there.

Although the subsequent medical reports referred to by counsel for the Appellant, including those of [Appellant's doctor #4], [Appellant's doctor #5] and [Appellant's doctor #6], document that the Appellant continues to suffer from pain, none of those reports provide an opinion as to whether or not the Appellant was capable of returning to her employment as of September 5, 2001. As a result, we find that the Appellant has failed to establish, on a balance of probabilities, that the decision of the Internal Review Officer was incorrect.

We are mindful of the Appellant's argument that her subjective complaints of pain were real and credible and that her caregivers felt that she had genuine issues regarding pain. We also note that

there were references in [Appellant's doctor #3's] medical reports to a potential anxiety disorder. It may be that since September 5, 2001, the Appellant has developed a chronic pain disorder which prevents her from returning to the workforce. However we note, that no psychological evidence was submitted by the Appellant to support such a conclusion. Without a diagnosis by a qualified professional, which would substantiate that the Appellant was unable to hold employment by reason of a mental injury caused by the accident, we have no basis upon which to make such a finding and are obliged to accept the position advanced on behalf of MPIC.

As a result, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer bearing date February 5, 2002.

Dated at Winnipeg this 31st day of October, 2002.

YVONNE TAVARES

WILSON MACLENNAN

HONORABLE ARMAND DUREAULT