



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-02-151**

PANEL: Ms. Yvonne Tavares, Chairperson
Dr. Patrick Doyle
Mr. Bill Joyce

APPEARANCES: The Appellant, [text deleted], was represented by
[Appellant's representative];
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Jim Shaw.

HEARING DATE: May 14, 2003

ISSUE(S): Whether the Appellant entitled to additional Income
Replacement Indemnity and Treatment Benefits.

RELEVANT SECTIONS: Sections 110(1)(a) and 136(1)(a) of The Manitoba Public
Insurance Corporation Act (the 'MPIC Act') and Section
5(a) of Manitoba Regulation 40/94.

**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 on November 28, 2001. She was the seat-belted back seat passenger in a car which slid through a stop sign on an icy street and collided with another vehicle. As a result of the accident, the Appellant complained of pain in her shoulders, neck and lower back.

At the time of the motor vehicle accident, the Appellant was employed as a sewing machine operator on a full-time basis. Due to the injuries which she sustained in the motor vehicle accident, the Appellant was unable to continue with her job duties, and became entitled to receive Income Replacement Indemnity ('IRI') benefits, pursuant to the MPIC Act.

The Appellant consulted her family physician, [text deleted] on December 3, 2001, who diagnosed the Appellant with a whiplash injury and a muscular and skeletal sprain in the lower back. [Appellant's doctor] referred the Appellant for physiotherapy treatment and referred her to [text deleted], a physical medicine and rehabilitation specialist (physiatrist).

[Appellant's physiatrist] saw the Appellant on January 10, 2002. In his report dated February 11, 2002, [Appellant's physiatrist] commented as follows with regards to the Appellant's condition:

1. Diagnosis.

In the motor vehicle accident of November 28th, 2001 she suffered flexion extension and possible rotational injury to her cervical and lumbar spines complicated by musculoligamentous strain, regional myofascial trigger points, soft tissue pain, restriction of movements of the cervical spine, left shoulder joint and lumbosacral strain with exacerbation of her pre-existing spondylosis of lumbosacral spines.

.....

3. Functional deficits, if any.

She is a sewing machine operator and due to the injuries, her functional level has deteriorated. She has significantly reduced, sitting, standing and walking tolerance. At present she cannot sit for longer periods and will not be able to return to her pre-injury occupation as a sewing machine operator. I would like to know the details of her job description to make further recommendations regarding return to work.

4. Given your findings, in your opinion, would [the Appellant] be functionally capable of holding employment as a sewing machine operator.

At present she is not fit to return to her job as a sewing machine operator.

5. If she is still demonstrating a disability, please identify the measurable impairment of function, which would preclude her from performing her occupational duties.

Restriction of movements of the spine, left shoulder with weakness and pain. She has reduced sitting, standing and working tolerance. She still has persistent pain with weakness of the neck, shoulder girdle, back and hip girdle muscles.

6. Prognosis.

Prognosis for recovery is good.

7. Any further information that can assist us in [the Appellant's] rehabilitation.

She will require aggressive therapy in the rehab program to relieve her soft tissue and mechanical spinal pain syndrome and restore her function. I would like to receive the updated assessment and response to the treatment from her physiotherapist.

In his report dated April 9, 2000, [Appellant's physiatrist] noted that the Appellant's neck and shoulder condition had improved significantly. It was his opinion that the Appellant would benefit from a reconditioning exercise program for a couple of weeks followed by work hardening to restore her function.

The Appellant was assessed at the [rehab clinic] with regard to the implementation of a work hardening program. In the Initial Assessment Report dated April 2, 2002, the occupational therapist noted that the Appellant had decreased range of motion in the trunk, cervical spine, shoulders and hips. She also noted that the Appellant was quite deconditioned, with specific weakness to the right upper extremity and hips bilaterally. Based on the assessment findings, the occupational therapist concluded that the Appellant had potential for a return to work in her pre-injury capacity as a sewing machine operator, if she progressed well through the work hardening program.

As part of the intake assessment, the Appellant was also seen by [text deleted], clinical psychologist, for a psychological intake interview. In his report dated April 17, 2002, [Appellant's psychologist] concluded that:

[The Appellant] is a [text deleted]-year-old, [text deleted] individual who participated in a psychological intake interview as part of intake at the Work Hardening Program at the [rehab clinic]. [The Appellant] presented as an individual with current mild to moderate

symptoms of anxiety both in terms of specific phobic-like anxiety associated with driving, as well as some symptoms of Post-Traumatic Stress Disorder with symptoms of re-experiencing, avoidance and re-activity noted. She would not meet formal criteria for PTSD based on the information that I have available to me at this time, but, nonetheless her anxiety symptomatology should be followed and further assessment and intervention is recommended. As is the case for her husband, relatively limited information and education has taken place with respect to the meaning and purpose of her pain. [The Appellant's] language status may reduce her benefit from attending group education but this will be trialed. My current plan is to meet with [Appellant's husband] and [the Appellant] together with an interpreter for extended sessions during their program stay at the [rehab clinic].

The Appellant attended the work hardening program at the [rehab clinic] and progressed through the program with some improvement in her condition. She was discharged from the work hardening program to a gradual return to work program with her previous employer. She commenced the gradual return to work program on May 27, 2002, but encountered problems with increased pain as she attempted to increase the number of hours worked per day. The increase in her symptoms prevented her from following the gradual return to work program, as initially planned, and she was unable to progress to full-time hours due to her complaints of pain.

At MPIC's request, the Appellant underwent an independent medical examination with [independent doctor] on June 7, 2002. In his report dated June 10, 2002, [independent doctor] noted that the Appellant had pre-existing degenerative changes in her cervical and lumbosacral spine and had degenerative disc disease in her cervical and lumbar spine. [Independent doctor] was of the opinion that the Appellant did not sustain any permanent impairment or other sequelae from the effects of the motor vehicle accident and was fit and able to perform all of her regular job duties on a full-time basis. It was also his opinion that she did not require any further treatment interventions or therapies relating to her accident. Although, he opined that she might require treatment for her pre-existing conditions.

Relying upon [independent doctor's] report, MPIC's case manager wrote to the Appellant by letter dated June 12, 2002, to advise her that:

This letter will serve as formal notice of our discussion concerning further entitlements to Income Replacement Indemnity (IRI) benefits and for any further coverage for any treatment modalities or medications or manipulations or therapies pertaining to this accident.

As the medical information confirms that there is no impairment of physical function that would preclude you from performing your pre-accident employment on a full time basis, this will confirm that your entitlement to Income Replacement Indemnity (IRI) benefits concludes on June 11, 2002 (the date of our telephone conversation).

....

In light of my conversation with your husband, wherein he disputed your ability to perform your employment, in order to provide you with a further notice of an end date to your Income Replacement Indemnity benefits, this will confirm that IRI benefits will continue for a further two week period, concluding on **June 24, 2002**.

The medical report received from [text deleted] an [text deleted] also confirms your ability to return to your employment on June 24, 2002.

Based on the totality of the available medical information, this will also confirm that there will be no further entitlements for funding for any treatment, medications, or manipulations or therapies pertaining to this accident, as there is no objective evidence to support that same is medical required.

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To provide you with a further notice of an end date of entitlement this will confirm funding for any further treatment, medications, or manipulations or therapies will conclude on June 24, 2002. Should you choose to continue to attend for treatment beyond June 24, 2002, all expenses incurred will be your responsibility.

The Appellant sought an internal review of the case manager's decision on the basis that she had not regained the physical capacity necessary to return to her pre-accident employment as a sewing machine operator on a full-time basis. In support of her position, the Appellant submitted a report from [Appellant's physiatrist], dated November 14, 2002, wherein he commented that:

In summary, [the Appellant] has a significant degree of soft tissue pain syndrome affecting her left shoulder girdle muscles, she had pre-existing but asymptomatic cervical spondylosis with osteophyte formation and in my opinion, the flexion, extension and rotational injury caused possible disc herniation and osteophyte displacements causing compression of the left C6 nerve root leading to left C6 radiculitis and sensitized C6 spinal segment leading to persistent muscle spasm, taut bands, weakness of the muscles supplied by the C6 nerve root, persistent pain and reduced functional capabilities. She has not recovered from the injuries she sustained in the motor vehicle accident of November 28, 2001.

Future Treatment and Recommendations: I referred her to the [text deleted] for epidural corticosteroid injection with the purpose of reducing the inflammation of the nerve root. This will control or relieve the pain so she can participate in cervical stabilization exercise program to restore the function of the neck and shoulder girdle muscles. She was encouraged to take Ibuprofen or other non-steroidal anti-inflammatory medication for control of the nerve root pain, discogenic and osteogenic pain as well as soft tissue pain of the neck and shoulder.

Prognosis for Improvement: Prognosis for improvement with appropriate treatment is good and hopefully after she receives epidural corticosteroid injection and cervical stabilization including conditioning exercise program, she should be able to return to her pre-injury occupation. She will be reviewed in the clinic after she receives the epidural corticosteroid injection.

The Appellant also submitted a report from her chiropractor, [text deleted], to the Internal Review Office, in support of her Application for Review. In his report dated November 14, 2002, [Appellant's chiropractor] commented that:

The patient was last examined in our office on November 8, 2002 for such injuries. She continues to experience low back pain consistent disc lesion, likely herniation at L3 – 4 and L4 – 5, which results in sciatica of the left leg.

Lumbar spine range of motion is limited and painful in forward flexion, bilateral rotation, bilateral lateral flexion, and extension both actively and passively.

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With continued treatment as described above and reduction of aggravating factors which may effect progress, this patient should resolve these injuries by the spring of 2003. Occupational demands should be limited to activities that avoid direct loading to the low back and injures areas. Sedentary occupations will be discomfoting, but appliances can be provided to control and limit such discomfort.

In his decision dated December 12, 2002, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer relied on [MPIC's doctor's] review of the Appellant's file and on [MPIC's doctor's] conclusion that the available medical evidence failed to support the position that the Appellant had an impairment of physical function precluding her from performing her duties as a sewing machine operator. The Internal Review Officer also determined that the Appellant had received a sufficient amount of treatment for her soft tissue injuries sustained in the motor vehicle accident. He found that her ongoing problems related to her pre-existing conditions which could not be related to the motor vehicle accident and therefore did not qualify for treatment benefits pursuant to the MPIC Act.

The Appellant has now appealed the Internal Review decision dated December 12, 2002 to this Commission. The issues which require determination in this appeal are whether the Appellant is entitled to additional IRI benefits and additional treatment benefits.

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

Section 110(1)(a) of the MPIC Act which provides as follows:

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 136(1)(a) of the MPIC Act which provides as follows:

Reimbursement of victim for various expenses

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

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

Section 5(a) of Manitoba Regulation 40/94 which provides as follows:

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician.

At the appeal hearing, the Appellant's representative submitted that since the motor vehicle accident of November 28, 2001, the Appellant has not attained a level of physical functioning which would enable her to return to her employment as a sewing machine operator. He notes that the Appellant has continued to suffer persistent low back, shoulder and neck problems, which he relates to the motor vehicle accident of November 28, 2001. He maintains that despite her motivation to earn a living to financially support her family, she simply is not able to manage a return to work. He contends that despite the financial consequences, the Appellant has not returned to work because she cannot handle the demands of a position as a sewing machine operator.

The Appellant's representative referred to the various medical reports which document functional deficits on behalf of the Appellant, as evidence of her continuing disability. He also

relies on the medical report of [Appellant's physiatrist] dated March 19, 2003, where [Appellant's physiatrist] commented that:

I have reviewed [MPIC's doctor's] report thoroughly and on the basis of his comments, review of my file regarding the management of [the Appellant's] neck, shoulder and back problems, and on the basis of my experience and review of the literature my comments are as follows:

1. It is not uncommon in patients who suffer neck and back injuries related to a motor vehicle accident to develop post traumatic stress syndrome and this leads to anxiety, muscle spasm, tension myalgia and inability to relax and restore the function of the affected muscles. I don't think she made a complete recovery from the post traumatic stress syndrome when she returned to work and mechanical and psychological stress of the work caused exacerbation of her neck, shoulder and back symptoms.
2. In my opinion her cervical spondylolysis with the osteophyte formation causing left C6 nerve root compression, mild L3-4, L4-5 disc herniation and lateral recess narrowing bilaterally at the L4-5 level. The accident of November 28, 2001 caused flexion, extension and rotational injury leading to possible disc herniation and osteophyte displacement causing compression of the left C6 nerve root leading to left C6 radiculitis, sensitized C6 spinal segments and further leading to persistent muscle spasm, taut bands and weakness of the muscles supplied by the C6 nerve root with persistent pain and reduced functional capabilities. This is further supported by the literature review that combined bending and compression during whiplash injury can cause disc prolapse. Excessive compression can also damage to the vertebral end plates and exacerbation of the spondylosis. Bending of the spine causes further damages to the peripheral structures including intervertebral ligament. Rapid extension of the neck can cause different type of injuries and experiment of anesthetic on pigs showed that a shock wave developed within CS fluid which could possibly damage nerve cell membranes.
3. Disc prolapse by sudden loading – in a study by Adams, M.A. Hutton, in which lumbar motion segments were positioned in anterolateral flexion or hyperflexion then compressed rapidly to failure. Approximately half of them failed by posterior prolapse of the intervertebral disc.

On the basis of the above mentioned studies and references there is sufficient evidence that any sudden loading and bending and compression of the spine can cause disc herniation and can aggravate the spondylosis of the spine.

....

In my opinion she was asked to return to work on a graduated basis prematurely and she did not recovery (*sic*) completely from the soft tissue pain syndrome of the neck and shoulder girdle muscles, left rotator cuff tendonitis, impingement syndrome and left C6 radiculitis. When she returned to work on May 27, 2002 she worked three hours a day and on May 28, 2002 she again worked three hours a day and this work aggravated her neck and shoulder pain and on the third day she could not return to work. After this she was only able to work two hours.

The Appellant's representative submits that [Appellant's physiatrist's] opinion should be preferred to that of [MPIC's doctor's], since [Appellant's physiatrist] had the benefit of examining and consulting directly with the Appellant. Relying upon [Appellant's physiatrist's] opinion, the Appellant's representative concludes that the Appellant is entitled to ongoing receipt of IRI benefits since her injuries, which he maintains are causally connected to the motor vehicle accident of November 28, 2001, continue to prevent her from holding employment. The Appellant's representative also seeks continuing sessions with [text deleted], clinical psychologist, to assist the Appellant with pain coping strategies.

Counsel for MPIC submits that the objective evidence on the Appellant's file demonstrates that the Appellant was capable of returning to work as of June 24, 2002, and accordingly her IRI benefits were properly terminated. Counsel for MPIC submits that the medical evidence on the Appellant's file does not provide objective evidence of an impairment of physical function related to the motor vehicle accident. Rather he argues that any ongoing difficulties which the Appellant experiences are related to pre-existing conditions and degenerative changes, which are not related to the motor vehicle accident.

Counsel for MPIC also submits that ongoing treatment is not required as a result of the motor vehicle accident of November 28, 2001. He notes that the Appellant has had adequate psychological counselling through [Appellant's psychologist], and there is no indication for ongoing psychological counselling. Accordingly, counsel for MPIC submits that the decision of the Internal Review Officer dated December 12, 2002, should be upheld and the Appellant's appeal dismissed.

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 November 28, 2001, prevented her from holding employment as a sewing machine operator from June 24, 2002 and thereafter.

Although we accept that the Appellant continues to suffer with neck pain, shoulder pain and low back pain, there is a lack of evidence to causally connect these complaints to the motor vehicle accident of November 28, 2001. The medical evidence before the Commission established that the Appellant had serious low back and neck conditions which pre-dated this motor vehicle accident. Despite [Appellant's physiatrist's] opinion that, "*The accident of November 28, 2001 caused flexion, extension and rotational injury leading to possible disc herniation and osteophyte displacement causing compression of the left C6 nerve root leading to left C6 radiculitis, sensitized C6 spinal segments and further leading to persistent muscle spasm, taut bands and weakness of the muscles supplied by the C6 nerve root with persistent pain and reduced functional capabilities.*", there is no probable evidence before the Commission to establish what type of forces the Appellant was subjected to at the time of the accident. Furthermore, [Appellant's physiatrist's] opinion that this was a possible consequence of the motor vehicle accident fails to meet the standard of proof required in the present appeal. Although certain outcomes may have been possible as a result of the motor vehicle accident, the medical evidence before us fails to establish, on a balance of probabilities, that the Appellant's ongoing impairment of physical function is related to the injuries sustained from the motor vehicle accident of November 28, 2001. We conclude, therefore, that the physical injuries which she sustained as a result of the motor vehicle accident did not prevent her from returning to work as of June 24, 2002.

The Commission also finds that there is a lack of medical evidence which establishes that the Appellant requires ongoing psychological counselling as a result of the motor vehicle accident of November 28, 2001. None of the evidence presented to the Commission recommended ongoing psychological counselling for the Appellant, beyond the sessions she already underwent with [Appellant's psychologist], in conjunction with her work hardening program at the [rehab clinic].

Despite the arguments of the Appellant's representative and the testimony of the Appellant, for the foregoing reasons we accept the position advanced on behalf of MPIC and must dismiss this appeal.

Dated at Winnipeg this 13th day of August, 2003.

YVONNE TAVARES

DR. PATRICK DOYLE

BILL JOYCE