Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-02-16

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Ms. Deborah Stewart** **Mr. Bill Joyce**
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:	**June 17, 2004**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits beyond August 15, 2001.**
RELEVANT SECTIONS:	**Section 110(1)(a) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act').**

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 July 11, 1994, when the truck that he was driving fell into an unbarricaded sink hole on [text deleted]. As a result of this accident, the Appellant sustained a compression fracture of his third lumbar vertebra. Due to the motor vehicle accident-related injuries, the Appellant became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act.

The Appellant was also involved in two subsequent motor vehicle accidents. On March 30, 1996, the Appellant's vehicle was hit by an oncoming vehicle. The Appellant sustained a sore back in this motor vehicle accident. On June 22, 1998, the Appellant's car was hit in the left front by another vehicle. As a result of this accident, the Appellant sustained neck pain with radiation to the left shoulder and aggravation of his back pain.

Throughout this time, the Appellant has been self-employed as a milkman, operating a milk delivery franchise from [text deleted] (and its successor [text deleted]). Due to the injuries which he sustained in the July 11, 1994 accident, he was unable to carry out his employment duties and he therefore became entitled to Income Replacement Indemnity ('IRI') benefits in accordance with ss. 81(1)(a) of the MPIC Act.

As a result of the cumulative effects of the subsequent accidents, the Appellant continued to complain of chronic low back pain and was unable to carry out the heavy lifting duties required of his job. He therefore continued to enlist the services of a helper on his milk route. MPIC paid him a portion of his IRI entitlement, to reflect that he was not capable of completing all of the duties of his job. The Appellant used his IRI benefit to fund the cost of hiring a helper to assist him with his delivery route.

These ongoing arrangements were reflected in various case managers' decisions throughout the Appellant's claim. In a decision dated April 13, 1999, MPIC's case manager advised the Appellant that:

> As a result of ongoing limitations documented by your care providers ([Appellant's doctor #1] and [Appellant's chiropractor #1]), an occupational therapist [text deleted] of [text deleted] was hired to provide an assessment and recommendations with respect to your occupation. [Appellant's occupational therapist] concludes in her report based on assessment dates of February 22 and 24, 1999; "*the client's functional capacities would*

meet job demands with recommended work modifications. Employment of a helper would then no longer be necessary." In follow up discussions with [Appellant's occupational therapist] and as confirmed in our recent meeting, the work modifications have been put in place to allow you to perform your occupation without the assistance of a helper. In the event that you have incurred any costs in relation to providing work modifications, please submit your expenses to my attention at your earliest convenience.

Based on the medical information provided to date, we are in a position to consider Income Replacement up to and including March 26, 1999. As indicated, we will be unable to consider any further benefits for Income Replacement beyond March 26, 1999. This decision is based on Section 110(1)(a) of the Manitoba Public Insurance Act, which reads 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 employment that he or she held at the time of the accident;

You indicated in our meeting that you would be attending for a follow-up appointment with [Appellant's physical medicine specialist] on March 31, 1999. Accordingly, please contact me to discuss the results of [Appellant's physical medicine specialist's] assessment.

A case manager's decision dated July 2, 1999 advised as follows:

As indicated in our decision letter to you of April 13, 1999, Income Replacement Indemnity was considered up to March 26, 1999.

Based on recent information provided by [text deleted] (Physical Medicine Specialist) and [Appellant's occupational therapist] this will confirm that we are now in a position to re-instate your entitlement to Income Replacement Indemnity until such time as the recommendations outlined by [Appellant's physical medicine specialist] and [Appellant's occupational therapist] have been followed through with.

A subsequent case manager's decision dated July 22, 1999, notified the Appellant that:

This letter will also confirm our position with respect to your request for ongoing Income Replacement Indemnity as it relates to hiring a helper. Based on current information provided by [text deleted] (Physical Medicine and Rehabilitation Specialist) and [Appellant's occupational therapist] (Occupational Therapist) this will confirm that we are in a position to consider Income Replacement Indemnity to fund the service of a replacement worker one day per week at a rate of $60.00 per day.

In a decision dated August 15, 2001, MPIC's case manager advised the Appellant that:

> There are no provisions in the Manitoba Public Insurance Corporation Act or Regulations that allow us to pay, directly, for replacement help. Rather, any consideration is based on your entitlement to an Income Replacement Indemnity (IRI), or as the case may be with your particular circumstances, a top-up IRI. It is entirely up to yourself to arrange for replacement help and to fund the cost of this help from any IRI entitlement.
>
> With this having been said, it was necessary to have a Physical Demands Analysis, Musculoskeletal Assessment and Functional Abilities Assessment completed to establish your entitlement to an IRI, based on any physical limitations as a result of injuries in this motor vehicle accident. These assessments were completed on April 2, 2001, June 14, 2001 and July 17, 2001, respectively by the [rehab consulting company].
>
> Based on the results of these various test, it has been determined that you are functionally able to meet the significant job demands of your occupation on a fulltime basis. As such, you are no longer entitled to an IRI, as of the date of this correspondence.
>
> At the time of this re-assessment, reimbursement for the cost of hired help was being paid to you on the basis of your father assisting you one (1) day per week. Reimbursement for this hired help has been paid to you up to and including January 31, 2001. Should you have any other receipts for the cost of hired help from then until the date of this correspondence, kindly submit them to my attention for consideration.

The Appellant sought an internal review of this decision. The Internal Review decision dated December 19, 2001 confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found that the Appellant's entitlement to IRI benefits was properly terminated pursuant to ss. 110(1)(a) of the MPIC Act, since the evidence available on the file indicated that the Appellant was capable of performing his pre-accident job.

The Appellant has now appealed from the Internal Review decision dated December 19, 2001 to this Commission. The issue which requires determination in this appeal is whether the Appellant's IRI benefits were properly terminated as of August 15, 2001.

At the appeal hearing, counsel for the Appellant argued that the Internal Review Officer did not consider all of the relevant factors when arriving at his decision. Counsel for the Appellant submits that the Internal Review Officer erred by:

1. relying solely on the reports from [rehab consulting company];
2. not attributing any weight to the report dated September 13, 2001 of [Appellant's doctor #1]; and
3. dismissing [Appellant's chiropractor #2's] report dated November 21, 2001.

Counsel for the Appellant submits that the Functional Abilities Assessment conducted by [rehab consulting company] was insufficient in that it did not accurately reflect the requirements of the Appellant's work duties over a full day. Therefore, she claims that the conclusions that the Appellant demonstrated the functional ability to meet the significant job demands of his pre-accident position on a full-time basis were flawed.

Counsel for the Appellant maintains that [Appellant's doctor #1's] report of September 13, 2001 should be taken into account when considering the Appellant's status. She insists that the Appellant's family physician was familiar with the Appellant's condition, and he would have only provided his opinion that the Appellant required assistance if it was supportable.

Counsel for the Appellant also relies on [Appellant's chiropractor #2's] report of November 21, 2001, wherein [Appellant's chiropractor #2] indicates that:

> **PROGNOSIS:**
> Due to the degenerative processes in [the Appellant's] lumbar spine and the compression fracture of L3 supportive care is indicated. Prognosis is poor and full recovery is not probable due to the fracture. Chiropractic care to maintain mobility and reduce pain is required.

Counsel for the Appellant also notes an Inter-Departmental Memorandum dated January 9, 2002, where [text deleted], a Chiropractic Consultant to MPIC's Health Care Services Team, advises that:

> In a discussion with [Appellant's chiropractor #2], he indicated to me that until recently, there had not been a cause/effect relationship determination between the claimant's accident and his current necessity for care because [Appellant's chiropractor #2] had not had an opportunity to review the claimant's x-ray and CT reports. Upon reviewing this report and film, [Appellant's chiropractor #2] became convinced that there is significant mechanical dysfunction in the claimant's spine as a result of the injured plate between the fracture and the congenital stenosis. It is [Appellant's chiropractor #2's] opinion that there is a probable cause/effect relationship between the claimant's current symptoms and the motor vehicle collision in question.

Accordingly, counsel for the Appellant insists that the Appellant continues to experience symptoms and pain as a result of the injuries which he sustained in the motor vehicle accidents. She concludes that the Appellant cannot continue with his current occupation because of his pain, and that as a result, he is entitled to ongoing receipt of IRI benefits.

Counsel for MPIC submits that the medical evidence on the Appellant's file suggests that the Appellant is capable of performing his employment duties. Counsel for MPIC relies on the report dated February 6, 2002 of [Appellant's doctor #2], wherein [Appellant's doctor #2] reported that:

> **<u>Disability</u>**
>
> [The Appellant] is capable of performing his job as a milkman. The occupational requirements placed upon him during the day require him to sit, left and walk. He is capable of all of these activities. He is able to pace himself, with the amount of heavy lifting involved. He is able to frequently change positions as he changes tasks. This

> frequent changing of postures allowed by his job will help in decreasing his fatigue and pain level. [The Appellant] suffered with discomfort in his back prior to the accident as a result of his compromised lumbar spine. He was receiving treatment for that condition. The further deterioration caused by the spinal fracture, will serve to increase the need for ongoing care. I expect that he will likely require one additional treatment every three or four weeks for as long as [the Appellant] remains employed. This treatment will be for symptom reduction only as it is unlikely that [the Appellant] will return to his pre-accident state as his injuries have shown signs of deterioration.

Additionally, counsel for MPIC maintains that the Appellant has been given the opportunity through various suggested modifications, to reduce the strain caused by the loads which he is required to carry. He insists that if the Appellant implemented these modifications, he could increase his endurance. In summary, counsel for MPIC submits that the evidence on the Appellant's file supports that he is capable of performing his duties as a self-employed milkman. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review decision dated December 19, 2001 confirmed.

Upon a review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant was capable, from August 15, 2001 and thereafter, of holding the employment he held at the time of the motor vehicle accidents, that is as a self-employed milkman.

The objective assessments conducted by [rehab consulting company], consisting of the Physical Demands Analysis, the Musculoskeletal Assessment and the Functional Abilities Assessment, concluded that the Appellant was capable of meeting "the significant job demands of his pre-accident position on a full-time basis". As indicated by the Internal Review Officer, the [rehab consulting company] conclusions are the best evidence available and the objective analysis

provided by these reports must be preferred to the note of [Appellant's doctor #1] and the report of [Appellant's chiropractor #2], which do not address the Appellant's functional capacity.

We also find that, despite the Appellant's subjective complaints of pain, which he maintains prevent him from performing his employment duties on a full-time basis, the objective medical evidence on the file demonstrates that the Appellant is capable of performing the duties of his pre-accident employment on a full-time basis. Additionally, we note that the Appellant does have modifications available to his employment environment, such as a power tail gate and the use of a two wheel hand truck, which could substantially decrease the heavy lifting component required in his occupation and thereby reduce his pain and increase his stamina. As a result, we find that the evidence on the file simply fails to establish, on a balance of probabilities, that the Appellant was unable to hold the employment which he held at the time of the motor vehicle accidents from August 15, 2001 and thereafter.

As a result, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer dated December 19, 2001.

Dated at Winnipeg this 4th day of October, 2004.

YVONNE TAVARES

DEBORAH STEWART

BILL JOYCE