



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-20

PANEL: Ms. Yvonne Tavares, Chairperson
Ms. Diane Beresford
Mr. Wilson MacLennan

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf, assisted by [text deleted]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

HEARING DATE: December 16, 2003

ISSUE(S): Reinstatement of Income Replacement Indemnity Benefits.

RELEVANT SECTIONS: Sections 117, 118 and 171(1) 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 January 14, 1996, wherein he sustained an injury to his left knee. At the time of the motor vehicle accident, the Appellant was self-employed, operating an excavating business. In addition to his duties as a heavy equipment operator, he was responsible for all of the management and administrative functions of the business, training new hires and filling in on a job site when an employee was absent, or as otherwise required.

The Appellant is appealing the Internal Review decision dated October 21, 2002, with regards to reinstatement of his income replacement indemnity ('IRI') benefits. The Internal Review decision determined that the totality of the evidence demonstrated that the Appellant had not suffered a relapse and that he remained able to do his determined employment as a technical sales representative. The Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review.

In March 2001, MPIC had determined an employment for the Appellant pursuant to Section 107 of the MPIC Act, based upon his residual capacity to hold employment. Taking into account the Appellant's work history, education, work experience and transferable skills, the case manager determined that the Appellant had the ability to hold employment as a technical sales representative, heavy equipment. According to the Transferable Skills Analysis conducted by the [vocational rehab consulting company], a technical sales representative, heavy equipment would require the following physical demands/activities:

- Outside sales positions require an individual to travel by car around the [text deleted], and also to rural areas in the Province of Manitoba. Out of Province travel is only required occasionally with these companies and would involve flying to a destination and then a car rental to get around.
- For the outside sales position, once at a customer's business, this position requires walking from the car to the office, which may occasionally be on rough ground depending if it is at a construction site. Once at the office, the negotiations are done in a sedentary position. There is occasional climbing in and out of equipment, but in most cases employers reported this can be avoided.
- Indoor sales positions require an individual to walk around the sales floor to assist walk-in customers, and sitting at a desk to do the negotiations and paperwork. Employers report that alternating standing and sitting will depend on how busy a day it is. Climbing in and out of equipment, for the sales rep, is reported as occasional by employers.

- The position can involve 40 hours per week or more, with the hours often being irregular especially in the outdoor sales position.

Since the net income from the determined employment was greater than the net bi-weekly IRI entitlement, the Appellant's entitlement to IRI benefits ceased on March 19, 2002 (one year from the date the Appellant was able to hold the determined employment, in accordance with ss. 110(1)(d) of the MPIC Act).

The Appellant has continued to operate his excavating business since the motor vehicle accident, albeit in a different capacity, hiring staff to perform duties that he is unable to perform due to the injuries sustained to his left knee in the automobile accident.

At the appeal hearing, the Appellant submitted that he was not able to work as a technical sales representative due to a deterioration of his knee condition since the determination of employment. The Appellant maintains that his knee condition has continued to deteriorate and has affected his ability to work. He argues that his symptoms fall within the definition of a relapse. The Appellant maintains that he has chronic pain in his knee, which has caused the muscles surrounding the knee to weaken. He submits that these weakened muscles directly affect his ability to work and perform activities, such as bending or climbing.

The Appellant insisted that although he continued to operate his excavating business and to perform some physical labour when required, he was doing so at his own risk. The Appellant maintained that he would undertake these physical tasks when he had to, in order to keep his business operating. He noted that if someone failed to show up for work, he might be required to step in, in order to get a job done. However, the Appellant maintains that when he undertakes

physical labour, he continues to put his physical well-being in jeopardy. Although he may perform the physical tasks required, he only does so with a great deal of pain to himself.

In support of his position, the Appellant relies upon the medical opinion of his treating physician, [text deleted]. [Appellant's doctor], opined in his report dated April 8, 2002, that:

4. At the present time, [the Appellant] is capable of his managerial work at [text deleted]. He can do some physical work. He, however, cannot do some of the more demanding physical work such as climbing into holes and doing manual digging with pivoting and squatting for any kind of prolonged period.
5. With regard to the technical sales representative job, [the Appellant] may have some difficulty walking on rough ground at a construction site. He may have difficulty climbing in and out of equipment. These limitations would bear a direct cause effect relationship to the collision in question. These limitations are particularly important given the wasting of [the Appellant's] left quadriceps, and his major size. He weighs roughly [text deleted] pounds, and it is difficult for him to climb up and down equipment with his painful, mechanical knee difficulties.

In his report dated April 20, 2002, [Appellant's doctor] concluded that:

[The Appellant] is a large man, weighing approximately [text deleted] pounds. He has had recurring difficulties with his left knee. He currently has difficulties with mechanical symptoms in the left knee, with sensations of catching and buckling. Clearly with the potential for a buckling episode, the patient will be restricted to physical activities, which do not put him at risk. The position you have described from an outside sales perspective in your November 13, 2000 correspondence, notes that the patient will occasionally need to be on rough ground at a construction site. He will require occasional episodes climbing in and out of equipment. The climbing in and out of vehicles would again be described as occasional. Therefore, in my opinion, the patient will not be capable of performing the provided job description of an indoor or outside sales representative at the current time. If the climbing in and out of equipment and walking on rough ground on construction sites can be removed, it would be my opinion that the patient would meet these job requirements.

As a result, the Appellant submits that he is unable to perform the determined employment and accordingly, his IRI benefits should be reinstated.

Counsel for MPIC submits that although the new medical reports from [Appellant's doctor] may constitute "new information" on the Appellant's file since the determination of employment, he argues that these reports provide no basis for issuing a fresh decision reinstating the Appellant's IRI benefits. Additionally, counsel for MPIC submits that the Appellant maintains his capacity to hold the determined employment as evidenced by the surveillance video, which demonstrates the Appellant's capabilities to perform the job requirements of a technical sales representative. As a result, counsel for MPIC submits that the appeal should be dismissed and the Internal Review decision dated October 21, 2002 confirmed.

Discussion

As noted by the Internal Review Officer in his decision dated October 21, 2002, the Appellant's IRI benefits may be reinstated where there has been a "relapse" of the Appellant's condition, as provided for in Sections 117 and 118 of the MPIC Act; or, where there is new information available in respect of the Appellant's claim as provided for in Section 171(1) of the MPIC Act. Specifically, these sections provide as follows:

Entitlement to I.R.I. after relapse

117(1) If a victim suffers a relapse of the bodily injury within two years

(a) after the end of the last period for which the victim received an income replacement indemnity, other than an income replacement indemnity under section 115 or 116; or

(b) if he or she was not entitled to an income replacement indemnity before the relapse, after the day of the accident;

the victim is entitled to an income replacement indemnity from the day of the relapse as though the victim had been entitled to an income replacement indemnity from the day of the accident to the day of the relapse.

Victim entitled to greater I.R.I.

117(2) The victim is entitled to an income replacement indemnity computed on the basis of the greater of

(a) the gross income used by the corporation immediately before the end of the period referred to in clause (1)(a); and

(b) the gross income of the victim at the time of the relapse.

Relapse after more than two years

117(3) A victim who suffers a relapse more than two years after the times referred to in clauses (1)(a) and (b) is entitled to compensation as if the relapse were a second accident.

Victim entitled to greater I.R.I. after relapse or second accident

118 A victim who is receiving an income replacement indemnity under provisions of this Part other than under subsection 110(2) (temporary continuation of I.R.I. after victim regains capacity), or section 115 (I.R.I. for reduced income from determined employment) or 116 (I.R.I. reduction if victim earns reduced income) and who becomes entitled to an income replacement indemnity in respect of a relapse or second accident is entitled to whichever income replacement indemnity is the greater.

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

[Appellant's doctor's] reports of March 9, 2002, April 20, 2002 and August 25, 2002 constitute new information respecting the Appellant's claim. [Appellant's doctor] advises that the Appellant continues to have recurring left knee problems and that his condition "is consistent with recurring loose bodies as well as degenerative arthrosis of the left knee". [Appellant's doctor] relates the Appellant's left knee problems to the motor vehicle accident of January 14, 1996. The continuing deterioration of the Appellant's knee appears to be related to the ongoing degeneration of his left knee.

The *Concise Oxford Dictionary, Tenth Edition* defines a relapse as "a deterioration in health after a temporary improvement". From the medical evidence on the Appellant's file, it is not clear whether there has ever been a period of improvement of the Appellant's left knee problems, so as to come within the definition of a relapse. In his report dated July 13, 2003, [Appellant's doctor] notes that "Since my involvement with him, his left knee has never completely improved. He

has had a continuum of difficulty associated with the left knee and required three surgical procedures to deal with recurring loose bodies and meniscal problems to the left knee”.

Irregardless of whether the deterioration of the Appellant’s left knee qualifies as new information within the meaning of ss. 171(1) of the MPIC Act, or whether the ongoing degenerative process qualifies as a relapse pursuant to Sections 117 and 118, the essential question to be answered in this appeal is whether the Appellant is incapable of performing the determined employment.

Upon a careful review of all of the evidence made available to us, the Commission finds that the Appellant has not established, on a balance of probabilities, that he was unable to perform the determined occupation beyond March 19, 2002. Despite the medical reports from [Appellant’s doctor] supporting the Appellant’s position, we find that, to date, the Appellant has exhibited the physical capability to perform the job requirements of a technical sales representative.

The evidence on the Appellant’s file demonstrates his capacity for physical labour, far beyond the physical demands of the technical sales representative position, which is described in the NOC career handbook as sedentary in nature. Additionally, he has demonstrated his ability to climb in and out of equipment, as he has continued to operate his excavating business. Although the Appellant argued that he has no choice but to continue to fill in as required in order to maintain his excavating business and does so knowing that he will experience pain and likely do more damage to his left knee, we find that this argument is not consistent with the physical demands required of the position of an indoor technical sales representative. The job requirements of an indoor technical sales representative are significantly lighter in comparison to the duties that the Appellant currently handles. We find that, even with the deterioration of his

left knee in the past two years, the Appellant has demonstrated the ability to hold employment as an indoor technical sales representative.

As a result, the Appellant's appeal is dismissed and the Internal Review decision dated October 21, 2002 is confirmed.

Dated at Winnipeg this 16th day of March, 2004.

YVONNE TAVARES

DIANE BERESFORD

WILSON MACLENNAN