



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]

AICAC File No.: AC-03-38

PANEL: Mr. Mel Myers, Q.C., Chairman
The Honourable Armand Dureault
Mr. Paul Johnston

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

HEARING DATE: March 18, 2004

ISSUE(S): Entitlement to Income Replacement Indemnity benefits beyond June 2003

RELEVANT SECTIONS: Sections 107 & 110(1)(d) of The Manitoba Public Insurance Corporation Act ('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], was involved in a motor vehicle accident on May 12, 2000 when she was rear-ended by a second vehicle.

Subsequent to the motor vehicle accident the Appellant was seen by various health care professionals. The material filed at the appeal hearing indicates that the Appellant received a

course of chiropractic care in conjunction with physiotherapy interventions to deal with the injuries she sustained in the motor vehicle accident.

The Appellant was examined by [text deleted], General Medical Advisor, Workers Compensation Board of Manitoba, on July 5, 2000. [WCB's doctor] was of the opinion that the Appellant demonstrated an excessive number of non-organic complaints, that there was a definite Waddell's rating of 5/5 and that there was no clear evidence of physical injury other than a mild shoulder discomfort and a small degree of evidence of mechanical low back discomfort.

[Text deleted], MPIC's medical consultant, in an Inter-Departmental Memorandum dated January 7, 2003, comments on [WCB's doctor's] report and states that as of July 2000 the Appellant did not have any objective physical findings indicative of a serious injury involving the shoulder joints, cervical spine and lumbosacral spine and she did not have any clinical evidence indicative of radiculopathy.

MPIC arranged for [text deleted], a physiatrist, to independently examine the Appellant and the examination took place on March 12, 2001. [Independent physiatrist] in his report to MPIC dated April 3, 2001, notes the Appellant was employed as a Health Care Aide worker, and the Appellant's pre-existing medical condition included depression, fibromyalgia, chronic low back pain and post-traumatic stress disorder. [Independent physiatrist], upon review of the medical file and doctor's notes, at the time of the motor vehicle accident compared to the prior medical file stated that:

1. a mild to moderate aggravation of symptoms with the motor vehicle accident of May 12, 2000;

2. these symptoms were primarily related to possible irritation of some myofascial pain syndrome activity of the right neck and top of the shoulder and trunk on the right;
3. a file review suggested some aggravation of the degree of depression;
4. *“I would expect that any acute injuries related to the motor vehicle accident should have healed to date”*

In reply to specific questions put to him by MPIC, [independent physiatrist] stated as follows:

1. *What diagnosis do you consider to be primarily responsible for the claimant's complaints?*

The claimant's current complaints appear to be primarily related to the fibromyalgia symptomatology with potentially some superimposed soft tissue related involvement in the right side of the neck, top of the shoulder, and trunk.

2. *What objective findings support this diagnosis?*

There are no objective findings to support this diagnosis. The diagnosis is entirely subjective with all the attendant difficulties of a subjective diagnosis. Specific acupuncture type needling treatment could be potentially diagnostic as if there is a significant improvement in this symptomatology this would support regional myofascial pain syndrome activity present in this quadrant.

3. *Can this diagnosis be attributed to the MVA of May 12, 2000, taking into consideration past WCB injuries?*

I would suspect that only a portion of symptomatology may be potentially attributed to the motor vehicle accident of May 12, 2000 this possibly related to the soft tissue involvement of the right side of the neck, top of the shoulder, and trunk. These did not appear to have been significantly symptomatic on review of the file and according to review of the symptomatology on interview, just prior to the MVA.

.....

7. *What is the present degree of permanent or temporary impairment?*

There are a number of medical conditions present that may produce impairment, however specifically related to residuals of the most recent motor vehicle accident. I would not feel there was a permanent impairment related to this and the impairment that I would feel potentially relates to this would be temporary.

8. *Is the claimant capable of performing the essential duties of her usual occupation (the claimant is a health care aide, a NOC description has been enclosed for your review)? If no, what are the limiting factors and are they related to the MVA?*

It would be my opinion on a balance of medical probabilities that the claimant is not capable of performing the essential duties of her usual occupation as a Health Care Aide currently. There may be a limiting factor contributing to this related to the motor vehicle accident from the right side of the neck and top of the shoulder, but I would expect that this should improve and resolve with the directed treatment, this in a limited period of time. That is for her to reach base line.

9. *Is the claimant capable of performing modified duties of her usual occupation?*

On review of her usual duties, modified duties specifically light duties, if available, would be reasonable. As well it would be reasonable to gradually progress her into these particular duties once she has had some directed needling treatment to the soft tissues. (underlining added)

It was [independent psychiatrist's] opinion the Appellant was not capable of performing the essential duties of her usual occupation as a Health Care Aide but she was able to perform light duties.

[Text deleted], a psychiatrist, at the request of MPIC, conducted an independent assessment of the Appellant on April 11, 2001. [Independent psychiatrist], in his medical report dated April 12, 2001, indicated that the Appellant had findings in keeping with a major depressive episode of mild to moderate severity as well as symptoms consistent with post-traumatic stress disorder. However, he found little or no evidence indicating that the Appellant's depression was a result of the May 12, 2000 motor vehicle collision. [Independent psychiatrist] further indicated there was no evidence of any ongoing psychological issues that related to the motor vehicle accident in question that would have prevented the Appellant from making progress in rehabilitation.

[Independent psychiatrist] in his report stated:

3. **In your opinion is [the Appellant] substantially disabled from performing the essential tasks of her pre-accident employment/ADL based on your psychiatric assessment?** [The Appellant] has an ongoing mild to moderate major depression. She also has some complaints of pain about which I am not sure if there is physiological explanation or not. Her symptoms of depression are such that they would partially impair her from performing her regular occupational duties. The level of impairment is not entirely clear. She is at least partially disabled but may not be fully disabled based on the findings of today. It is my opinion that the degree of impairment she experiences is not related to the motor vehicle accident of May 2000.

Case Manager's Decision

On June 24, 2002 MPIC's case manager wrote to the Appellant confirming a meeting that the case manager held with the Appellant and [text deleted] and [text deleted from [vocational rehab consulting company]]. In her letter, the case manager stated that:

1. as a result of the injuries the Appellant sustained in the motor vehicle accident she was prevented from returning to her pre-accident employment as a Health Care Aide;
2. after a period of two years from the date of the motor vehicle accident, MPIC is entitled, pursuant to Section 107 of the MPIC Act, to conduct a two year determination of the Appellant's Income Replacement Indemnity ('IRI') benefits based on her residual capacity to hold alternative employment;
3. the determination of alternative employment must be done in accordance with Sections 107 and 110(1)(d) of the MPIC Act;
4. the Appellant was advised that a Transferable Skills Analysis Report was completed by [text deleted, of [vocational rehab consulting company]];
5. in completing this analysis, the Appellant's work history, education and transferable skills were identified to determine suitable alternative employment;
6. "Based upon the transferable skills analysis and given your level of function, skills and abilities your employment has been determined as a "Receptionists and

Information Clerks”. In accordance with Schedule C of the Manitoba Public Insurance Regulations 39/94, the determined employment is classified in the category of “Customer Service Information and related Clerks”. Schedule C is a table of classes of employment wherein gross employment income by occupation is listed based on average earning levels supplied by Human Resources Development Canada. The category of employment stated has the potential annual income of \$18,606 (2001 Schedule C).

Based upon the medical information, you have the physical capacity to perform the duties of the determined occupation, given your present physical restrictions.

As of the date of the two-year determination, June 24, 2002, (date of this correspondence), you have one year to secure the employment, in accordance with Section 110(1)(d) of the Manitoba Public Insurance Corporation Act (attached).

.....

In accordance with Section 110(e) of the Manitoba Public Insurance Corporation Act (attached), June 24, 2003, your Income Replacement Indemnity (IRI) benefits will cease as the net income from the determined employment will exceed your current IRI entitlement, which is presently based on a Gross Yearly Employment income of \$17,145.93.”

The Appellant made application to an Internal Review Officer to review this decision.

Internal Review Officer’s Decision

The Internal Review Officer wrote to the Appellant by letter dated October 2, 2002. The

Internal Review Officer, in his reasons for the review decision stated:

The June 24, 2002 decision determines an employment for you within the category of “Receptionists and Information Clerks”. This was a “two-year” determination of employment done pursuant to Section 107 of *The Manitoba Public Insurance Corporation Act*. You do not object to this determination on the basis that the occupation chosen for you was an inappropriate one. Rather, you take the position that you are physically unable to do work of any sort. You take this position notwithstanding the fact that you are currently enrolled in a 4 year degree program in nursing at the [text deleted].

The Internal Review Officer indicates that the decision of the case manager is supported by a Transferable Skills Analysis Report completed by [vocational rehab consulting company] on May 21, 2002, which concludes:

. . . that you have the skills needed for a range of occupations, a number of which clearly fall within the chosen category. The decision is also supported by an Objective Physical Assessment completed by [rehab clinic] on May 14, 2002. Much of what is contained in this report is relevant to the present decision, but there is no need to quote more than the conclusion stated on page 7, namely that you “demonstrated the strength ability to work within the sedentary strength classification *without restrictions*.” That is consistent with the conclusion stated at page 9 of [independent physiatrist’s] report of March 12, 2001 (sic), that you had then “at least a sedentary work capacity”.

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The decision is well supported. This Review has failed to persuade me that there is any reason to interfere with the decision. In fact, the Review leads rather to the conclusion that the handling of your claim throughout has given you the benefit of every doubt. There were strong grounds for denying your claim for IRI from the outset, for instance. The medical material makes clear that you had a lengthy history of fibromyalgia (and/or chronic fatigue syndrome) as well as chronic depression prior to the motor vehicle accident. You had also been involved in a series of Workers Compensation Board (“WCB”) claims, some of which had resulted in lengthy periods off work. You were, in fact, off work on a WCB claim when you had your motor vehicle accident on May 12, 2000.

The Internal Review Officer also refers to the psychiatric report of [independent psychiatrist]:

. . . . [independent psychiatrist’s] report of April 12, 2001, however, rejects the suggestions that your “major depression” was anything but chronic prior to the car accident, and that the car accident worsened your condition. I accept [independent psychiatrist’s] assessment.

The Internal Review Officer further stated:

You also contend that the motor vehicle accident had a significant effect on your physical well-being. I am aware that your chiropractor’s assessment lends some support to that view, as does even the [rehab clinic] assessment, to a limited extent. Nevertheless, [independent physiatrist’s] report of March 12, 2001 (sic) attributes your symptoms primarily to fibromyalgia with “potentially” some superimposed “soft tissue” or “myofascial” irritation that could possibly relate to the motor vehicle accident. He is clear, however, that the fibromyalgia is an old complaint and that “the acute injuries that may have resulted from the accident [are] now healed. There is no evidence of ongoing

acute or chronic ‘inflammation’ of bony or soft tissues to account for ongoing ‘disability’”. [Independent physiatrist] says, in fact, that there were “no objective findings”. (See pages 8 through 13 of the report.)

In summary then, you have been receiving IRI benefits since May 2000. The decision under review extends those benefits to June 2003. There is substantial doubt about whether you were ever entitled to IRI benefits, because it is far from clear that this motor vehicle accident ever incapacitated you from working. The Transferable Skills Analysis and the Functional Capacity Evaluation done by [rehab clinic] support the view that you are able to function in a sedentary job, such as those found in the category of “Receptionists and Information Clerks”. If, as you claim, you are unable to do so, that would appear to be for reasons having little or nothing to do with your automobile accident in May 2000. You have certainly not shown any good reason why we should interfere with the decision of June 24, 2002 on this Review. Accordingly, that decision should be confirmed.

Subsequent to the Internal Review Officer’s decision, the Appellant filed a Notice of Appeal to this Commission. A number of medical reports and submissions were received by the Commission subsequent to the Internal Review Officer’s decision.

MPIC requested their medical consultant, [text deleted], to review the medical file. [MPIC’s doctor] provided an Inter-Departmental Memorandum to MPIC dated January 7, 2003. [MPIC’s doctor] states that the reason for review is based on the following:

[The Appellant’s] file was reviewed to determine the following:

1. What medical condition(s) did [the Appellant] develop as a direct result of the incident in question?
2. Does the medical evidence establish a cause/effect relationship between [the Appellant’s] current symptoms and the May 12, 2000 motor vehicle incident?
3. Does the medical evidence indicate that further therapeutic interventions are medically required in the management of the medical condition(s) [the Appellant] developed secondary to the incident in question?

[MPIC’s doctor] reviewed the medical reports relating to the Appellant’s pre-existing medical condition, the reports of [WCB’s doctor], [independent physiatrist], [independent psychiatrist], [text deleted] and in response to the questions put to him, stated:

1. Based on my review of [the Appellant's] file, it is my opinion that she developed the following medical conditions as a result of the May 12, 2000 motor vehicle incident:
 - ❑ Possible mild cervical strain (i.e. Whiplash-Associated Disorder Type II)
 - ❑ Mild exacerbation of pre-existing chronic pain condition

The file does not contain documentation indicating [the Appellant] sustained a bony injury as a result of the incident in question. The file does not contain medical evidence indicating [the Appellant] developed a neurological problem as a result of the incident. The file does not contain medical evidence identifying a specific pathophysiological process that would account for [the Appellant's] symptomatology.

It is my opinion that the medical evidence presently contained in [the Appellant's] file does not indicate that her pre-existing medical conditions were enhanced by the incident in question.

2. Based on the circumstances surrounding the incident in question (i.e. a rearend collision resulting in no damage to either vehicle), the history of pre-existing chronic pain condition, the medical evidence obtained from the health care professionals that assessed [the Appellant] following the incident in question and the natural history of the conditions she might have developed as a result of the incident in question, it is my opinion that symptoms that [the Appellant] still reports are not causally related to the May 12, 2000 motor vehicle incident.

It is my opinion that based on the balance of medical probabilities; the symptoms she still reports are likely a byproduct of her pre-existing medical conditions.

3. The medical evidence does not diagnose [the Appellant] as having a medical condition that required supervised therapeutic interventions. The medical evidence indicates that [the Appellant] was prescribed various medications to help minimize her symptoms (i.e. physical and psychological) but it is my opinion that the evidence does not support a cause/effect relationship between her symptoms and the incident in question.

The appeal hearing took place on March 18, 2004. The Appellant attended the hearing without legal representation.

Appeal

The relevant provisions of the MPIC Act governing this appeal are set out in Sections 107 and 110(1)(d) of the MPIC Act:

New determination after second anniversary of accident

107 From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

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:

(d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;

The Appellant submitted that the two year determination of her employment, pursuant to Section 107 of the MPIC Act, as a “Receptionists and Information Clerks” was an occupation that she could not do. In her written submission to the Commission the Appellant indicated that:

1. the job in question required computer skills and that she was computer illiterate;
2. the job in question required mostly sitting and that mentally she could not handle the duties of the position because of medical problems;
3. she had memory problems which affected her ability to converse and to write down messages;
4. she was unable to sit for extended periods of time and that the job required that she do so;
5. sitting for long period of time affected the Appellant’s neck, shoulders and lower back greatly and her neck muscles tensed and caused her excruciating headaches.

In conclusion the Appellant submitted, having regard to the injuries she sustained in the motor vehicle accident, she was unable to carry out the position of a “Receptionist and Information Clerk” and, as a result, MPIC were not justified in terminating her IRI benefits.

MPIC's legal counsel submitted that the Appellant was able to do the work of a "Receptionist and Information Clerk" on June 24, 2002, the date of the case manager's decision. MPIC's legal counsel further submitted that any motor vehicle accident injuries have been resolved at the time of the two-year determination and if the Appellant was unable to carry out the duties then this was due to emotional problems which pre-existed the motor vehicle accident.

MPIC's legal counsel submitted that the Transferable Skills Analysis and Functional Capacity Evaluation performed by [rehab clinic] indicated that the Appellant was able to function in a sedentary job such as those found in the categories of "Receptionists and Information Clerks".

The Commission accepts the submission of MPIC's legal counsel and rejects the submission of the Appellant. The Commission finds that the medical opinions of [independent physiatrist], [independent psychiatrist] and [MPIC's doctor] clearly support MPIC's legal counsel's submission and finds that this medical evidence is not contradicted by any evidence submitted by the Appellant. The Commission, after a careful review of all of the oral and written evidence, and having regard to the verbal and written submissions of the Appellant and submissions by MPIC's legal counsel, determines that the Appellant has not established, on the balance of probabilities, that she was unable to carry out the duties within the category of "Receptionists and Information Clerks" as of June 24, 2002, the date of the two-year determination of the Appellant's IRI benefits pursuant to Section 107 of the MPIC Act.

The Commission finds that in accordance with Section 110(1)(d) of the MPIC Act, MPIC was correct in terminating the Appellant's IRI benefits on June 24, 2003, being the date one year from the day the Appellant was able to hold employment in accordance with Section 107 of the MPIC Act.

Accordingly, for these reasons, the Appellant's appeal is dismissed and the Internal Review decision dated October 2, 2002, is confirmed.

Dated at Winnipeg this 20th day of April, 2004.

MEL MYERS, Q.C.

HONOURABLE ARMAND DUREAULT

PAUL JOHNSTON