Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-77

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Ms. Barbara Miller** **Mr. Wilson MacLennan**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's legal counsel];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**November 19, 2003**
ISSUE(S):	**Entitlement to Income Replacement Indemnity Benefits beyond December 9, 1998.**
RELEVANT SECTIONS:	**Sections 110(1)(a) and 110(2) 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], [text deleted] years of age at the time, was involved in a motor vehicle accident on July 5, 1996, when her vehicle was rear-ended while at a complete stop. She felt immediate pressure through the back of her head as well as radiating pain in the posterior neck region. She attended upon her chiropractor, [text deleted] that same day for treatment. She continued to see her chiropractor three times a week for the next six months for treatment of her

injuries. [Appellant's chiropractor #1] also referred the Appellant to massage therapy for weekly treatments.

Following the accident, the Appellant also attended upon [text deleted], her family physician. In the Initial Health Care Report provided by [Appellant's doctor], she indicated that the Appellant had sustained an "aggravation of neck and upper back strain sustained in 1992". In the Application for Compensation, the Appellant indicated that she sustained a sore neck, shoulders, entire back, right arm, headaches, dizziness and nausea as a result of the motor vehicle accident.

At the time of the motor vehicle accident, the Appellant was employed as a data entry clerk and receptionist [text deleted]. Her duties included receptionist duties, data entry, photocopying, ordering of supplies, responsibility for accounts receivable, general clerical work and e-mailing tax returns.

Due to the injuries which the Appellant sustained in the motor vehicle accident, she was unable to return to her employment duties. As a result, she became entitled to income replacement indemnity ("IRI") benefits in accordance with subsection 81(1) of the MPIC Act, which provides that:

> **Entitlement to I.R.I.**
> **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the full-time employment.

Throughout the ensuing months, the Appellant attended upon various caregivers for a range of treatments for her injuries. Reports on her condition from her caregivers included:

- [Appellant's chiropractor #1's] Health Care Provider Progress Report dated November 4, 1996 wherein he describes the Appellant's current clinical status as:

> Still experiences recurrent right cervicodorsal and right arm pain and paresthesia. Symptoms are aggravated by light activity such as typing or ironing. Still has significant right cervicodorsal tenderness and spasm. Also recurrent lumbosacral dysfunction, likely due to the effects of the seatbelt.

[Appellant's chiropractor #1] reported that the Appellant had a significant limitation in function and was unable to work at her occupation or household chores for an indefinite time frame.

- In a report dated February 4, 1997, [Appellant's pain management specialist] of [text deleted] reported that:

> . . . As you know she has symptoms which she dates back to motor vehicle accidents in 1992 and July of 1996. She has had persistent worsening pain in numerous areas since then. She describes pain in the right shoulder, neck, interscapular region, low back, right hip, right leg, both hands as well as headaches. The worst problem among these is low back pain which is aggravated particularly by long periods of sitting, driving and other activities. She does not describe any symptoms suggestive of radicular pain.
> . . .
>
> Physical examination reveals that the back range of motion is fairly well preserved as is the range of motion of the cervical spine. She has some tenderness in the paravertebral musculature in the lumbar area as well as throughout the cervical spine particularly at the occipital attachment of the cervical extensor muscles. There are no sensory, motor or reflex changes in the arms or legs that I could determine. Straight leg raising was 80 degrees bilaterally and limited by hamstring tightness.

[Appellant's pain management specialist] prescribed Amitriptyline to deal with the Appellant's night time pain and sleeplessness. He also encouraged her to lose weight to assist with her low back pain, prescribed a trial of TENS therapy and referred her to a clinical psychologist.

- [Appellant's doctor's] Health Care Provider Progress Report, dated February 24, 1997 describes the Appellant's current clinical status as:

> Her neck, upper back and right arm pain are about the same. Depending on activity, her muscles tighten up and then the ROM of C-spine & arm are restricted. Since the last visit, [the Appellant] developed more pain in her low back, R hip & R leg. She suffers from insomnia due to the constant pain & discomfort & stiffness in her neck, upper back & now in lower back also.

[Appellant's doctor] reported that the Appellant was unable to work at any job although she had full function with symptoms.

- [Appellant's chiropractor #2's] report dated March 11, 1996 (should be 1997) commented on the Appellant's progress with her reconditioning program after she had undergone approximately six weeks of a supervised rehabilitation and back stabilization program. In that report, [Appellant's chiropractor #2] comments that:

> Upon questioning [the Appellant] related that she does not feel like she has improved, in fact some days she feels worse. She related that the pain in her back in *(sic)* constant, and described it as "achy", with some radiation to the right posterior thigh. [The Appellant] also complains that her cervical spine pain has not improved, in that she continues to get tingling into her arm. [The Appellant] went on to say that she continues to have problems with activities of daily living, and needs to take frequent rest breaks to carry on.
> . . .
>
> When compared to the initial presentation to this clinic there is clearly an improvement in most of these measures. However, lumbar paraspinal conditioning continues to be of concern.
>
> <u>Impressions and Recommendations</u>
> Although [the Appellant] continues to have subjective discomfort and feels that she is not getting better, the results of this evaluation show objective improvement in many areas. Most notably, [the Appellant] has improved with respect to her quadriceps endurance, her iliopsoas length, her abdominal endurance, and quadriceps length. The areas that continue to be of particular concern are the strength and endurance of her lumbar paraspinal musculature.
>
> At this point it is important to recognize that there may be some non organic barriers to the successful outcome of this file.

> Specifically [the Appellant] has developed some pain behaviour as evidenced by the discrepancy between her objective improvement an *(sic)* the subjective lack thereof. One of the primary goals of the ongoing reconditioning will be to help [the Appellant] understand the difference between pain and function, and to help her realize that the same amount of pain with increased function is progress.

Due to the Appellant's apparent lack of progress and the ongoing nature of her problems, arrangements were made to have her commence a multi-disciplinary rehabilitation program through the [rehab clinic] in July 1997. The program included:

- physiotherapy, with an intensive home-based exercise program;
- psychological sessions to develop skills and stress management and cognitive pain management strategies; and
- occupational therapy, initially for education, developing into a work hardening component.

The Appellant progressed through the rehabilitation program with the [rehab clinic] and commenced a work hardening program on November 17, 1997. However, the Appellant was unable to progress with the scheduled increase in hours due to exacerbation of pain symptoms and failed to meet the expectations of the work hardening program.

Arrangements were then made to have the Appellant undergo an independent physical examination with [text deleted], physiotherapist, on February 3, 1998. In his report, dated February 11, 1998, [independent physiotherapist] concluded that:

> <u>Impressions and Recommendations:</u>
>
> 1. There were minimal objective findings in regards to the cervical and lumbar examinations. Neurological testing was normal. Range of motion was essentially full in both the extremities and spine. Examination findings in my opinion, would

> not functionally limit [the Appellant] from performing sedentary work. The main limiting factor at this time is complaints of back pain when sitting. There are no contraindications to [the Appellant] increasing her time at work hardening. As this may increase her discomfort, she should be reassured that 19 months post injury she would not likely be causing any structural damage. The only way that she will progress in my opinion is to increase her work hardening hours in order to build tolerance. I suggest [the Appellant] increase to 3 hours a day – three times a week allowing for standing and stretching breaks as needed. This should increase an hour a week until she is working 7 hours – three days a week. At this time hours should be introduced on Tuesdays and Thursdays. [The Appellant] commented that her involvement with [Appellant's psychologist] has helped her to cope. These sessions should continue during her increase in hours to provide support.

At about this same time, a referral to [text deleted], a physical medicine and rehabilitation specialist, initiated in the summer of 1997 by [Appellant's doctor], resulted in an assessment of the Appellant by [Appellant's physical medicine and rehabilitation specialist] on January 22, 1998. [Appellant's physical medicine and rehabilitation specialist's] diagnosis was multiple muscle myofascial pain syndrome with multiple trigger points. [Appellant's physical medicine and rehabilitation specialist] recommended a trigger point directed treatment program with emphasis on eradicating trigger points, spray and stretch and medication to address the Appellant's sleeping disorder. [Appellant's physical medicine and rehabilitation specialist] felt that once the major trigger points had been eliminated with restoration of improved function, a graduated return to work program could be initiated. He recommended that the Appellant discontinue her current work hardening program, since this had caused exacerbation of her symptoms and increased muscle dysfunction and that return to work activities could be initiated following completion of his treatment program.

Based upon [Appellant's physical medicine and rehabilitation specialist's] recommendations, the Appellant was discharged from the [rehab clinic], with the exception of some follow up sessions with [text deleted], clinical psychologist. The Appellant commenced the treatment sessions with

[Appellant's physical medicine and rehabilitation specialist] on March 11, 1998 and her condition progressively improved throughout the treatment regime. With [Appellant's physical medicine and rehabilitation specialist's] input, a graduated return to work hardening program was finalized on or about April 22, 1998. On April 24, 1998, the Appellant was involved in a further motor vehicle accident, wherein she sustained some mild exacerbation of her physical symptoms, but not a persistent increase in symptoms. Despite this latest motor vehicle accident, the Appellant was able to commence her graduated return to work program on May 4, 1998, and progressed with the scheduled program to completion on June 12, 1998. By the end of this placement, she was working up to 7 hours per day, 5 days per week at a clerical position.

On June 10, 1998, MPIC's case manager wrote to the Appellant to advise her as follows:

> This will confirm that on June 12, 1998 you will have completed your work hardening program at which time you are considered to be functionally able to hold the employment which you held at the time of the motor vehicle accident.
>
> Under Section 110(1) of the Manitoba Public Insurance Corporation Act, the victim ceases to be entitled to an Income Replacement Indemnity when the victim is able to hold the employment that he or she held at the time of the accident. As the employment you held at the time of the motor vehicle accident has been lost because of the accident, you are entitled to further Income Replacement Indemnity (IRI) benefits for a further 180 days. …

The Appellant sought an Internal Review of that decision. In his decision dated May 27, 1999, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision of June 10, 1998. In arriving at his decision, the Internal Review Officer noted the following:

> When [Appellant's case manager] arrived at his decision of June 10, 1998, he did not have the benefits of having your pre-accident medical records, the Inter-Departmental Memorandum of [MPIC's doctor] or the subsequent report of [Appellant's physical medicine and rehabilitation specialist] dated February 6, 1999. Notwithstanding the unavailability of this material to [Appellant's case manager], I am unable to conclude that

there was any error made in his decision of June 10, 1998 in considering the nature of the evidence available to [Appellant's case manager] at the time, it is evident that your condition had progressed to the point where a return to work was in order. The work-hardening program and the scheduled return to work thereafter were strongly supported by [Appellant's physical medicine and rehabilitation specialist]. As pointed out by [Appellant's physical medicine and rehabilitation specialist] in his report of February 6, 1999, he signed a letter of July 16, 1998 indicating that you were likely capable or working in a sedentary to light occupational setting. The contents of [Appellant's physical medicine and rehabilitation specialist's] report of May 25, 1998 are very positive in their outlook. As indicated in the [text deleted] letter of July 16, 1998, [text deleted], [text deleted] and [text deleted] were also of the view that you were capable of working in a sedentary to light occupational setting. [text deleted] indicates in the Rehabilitation Assessment Progress Report of October 30, 1998 that you had performed well in the work-hardening program. When I assess your condition as at the completion of the work-hardening program, it is my view that [Appellant's case manager's] decision to have been reasonable under the circumstances. The medical evidence in existence at that time, coupled with the nature of the accident, the amount of benefits paid and the nature of your job would all lead me to believe that [Appellant's case manager's] decision that you were capable of resuming your employment was correctly made.

I am of the view that the receipt of the pre-accident medical records and the consulting opinion of [MPIC's doctor] only reaffirm the reasonableness and appropriateness of [Appellant's case manager's] decision of June 10, 1998. The information contained in your pre-accident records are particularly significant in the face of [Appellant's physical medicine and rehabilitation specialist's] diagnosis of fibromyalgia.

[MPIC's doctor's] review of your file indicates countless examples of your present symptoms existing prior to the motor vehicle accidents of 1996 and 1998. I am struck not only by the extent of your pre-accident problems but also by the extent to which they resemble your present symptomology. His summary of Pre-Accident Status is:

> **"SUMMARY OF PRE-ACCIDENT STATUS**
>
> Up until March 1996, some four months before the motor vehicle collision in question, this patient had widespread muscular aching described in all four quadrants of the body, spinal complaints, headaches, neck pain, abdominal discomfort, nausea and vomiting and had received chiropractic therapy, physical therapy, massage therapy, pharmacologic therapy, and had been seen by two specialists regarding chronic musculoskeletal pain of some two to three years duration. There is insufficient description of recovery from these problems to the motor vehicle collision of 1996. There is description, however, that the patient had discomfort with doing data entry for two to three hours, and had headaches while in the workplace. Restrictions or limitations in activities of daily living such as vacuuming or lifting the arm were described".

In my view, [MPIC's doctor's] detailed analysis of your file raises some very serious questions with respect to the diagnosis and prognosis offered by [Appellant's physical

> medicine and rehabilitation specialist]. [MPIC's doctor's] report points out the extent to which the medical evidence has failed to establish any substantial inability to perform the essential duties of your employment on account of injuries arising out of the accidents in question. In accordance with the opinions expressed by [MPIC's doctor] I am dismissing your Application for Review and in the process, upholding [Appellant's case manager]' decision of June 10, 1998.

The Appellant has now appealed the decision of the Internal Review Officer dated May 27, 1999, to this Commission. The issue which requires determination in the Appellant's appeal is whether the termination of IRI benefits by the case manager on June 10, 1998, pursuant to subsection 110(1)(a) of the MPIC Act was appropriate.

The relevant sections of the MPIC Act to the present appeal are as follows:

> **Entitlement to I.R.I.**
> **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the full-time employment;
>
> **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;
>
> **Temporary continuation of I.R.I. after victim regains capacity**
> **110(2)** Notwithstanding clauses (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:
>
> (c) 180 days, if entitlement to an income replacement indemnity lasted for more than one year but not more than two years.

Discussion

At the hearing of this matter, counsel for the Appellant argued that the Appellant was not capable of returning to her previous employment on June 12, 1998, when MPIC determined that she

could. Counsel for the Appellant submits that since the 1996 motor vehicle accident, the Appellant has developed myofascial pain syndrome, which has persisted to date and has prevented her from attaining her pre-accident status. Since having her IRI benefits terminated on December 9, 1998, the Appellant has managed a return to part-time work in a clerical position as of January 1999, but has not been able to progress to full-time employment as before the 1996 accident.

Counsel for the Appellant connects her ongoing complaints to the motor vehicle accident of July 5, 1996. He maintains that at the time of the 1996 accident, the Appellant had essentially fully recovered from the effects of her previous motor vehicle accident in 1992, and she was capable of working on a full-time basis. He notes that the Appellant developed severe headaches and significant low back pain following the July 1996 accident, and had not been bothered with these particular complaints prior to this accident.

Counsel for the Appellant also claims that [Appellant's physical medicine and rehabilitation specialist's] treatments were not as successful as the Appellant initially thought. Despite attaining some improvement with his treatments, she did not return to her pre-accident status. Counsel for the Appellant notes that the Appellant feels that she still has not completely recovered from the effects of the motor vehicle accident of July 5, 1996, and certainly was not recovered in June 1998, when MPIC terminated her IRI benefits. Counsel for the Appellant refers to [Appellant's physical medicine and rehabilitation specialist's] medical report of September 16, 2002, wherein [Appellant's physical medicine and rehabilitation specialist] concludes that:

> In conclusion, on the balance of probabilities, it is my opinion that she can not safely or effectively return to her pre-MVA occupation as a data entry operator. It is also my opinion that on the balance of probability, the 1996 motor vehicle accident was the cause

> of her more persistent pain symptoms, physical impairment and disability preventing her from returning to her previous occupation. My opinions are based on my independent medical evaluation, review of submitted reports, ongoing reassessment during the time I treated her as well as most recently October 25, 2001 and May 7, 2002. It is also based on my expertise in the diagnosis and treatment of myofascial pain syndromes as well as fibromyalgia. I also emphasize that it is very common to develop sleep disorder and mood disorder as well as excessive fatigue with chronic persistent myofascial pain syndrome as the secondary effect of chronic pain per se and effect on quality of life as well as the stress of not being able to work and the financial consequences. Once she was able to return to a level of work that she could accomplish, she has performed reasonably well at a lighter level of work avoiding the type of exertion that leads to exacerbation of her symptoms and dysfunction. As a result, sleep disorder as well as mood disorder resolved adding to her improved ability to function.

Counsel for the Appellant also submits that the Internal Review Officer incorrectly based his decision on the reports of [MPIC's doctor]. He argues that [MPIC's doctor's] assessment of the treating practitioner's notes were likely flawed, in that he could have easily misunderstood or misinterpreted their clinical notes. Counsel for the Appellant insists that the medical reports and opinions of [Appellant's physical medicine and rehabilitation specialist] should be preferred to those of [MPIC's doctor]. He notes that [Appellant's physical medicine and rehabilitation specialist] had the opportunity of treating the Appellant and examining her personally and was therefore in the best position to opine on the Appellant's condition. In support of his position, counsel for the Appellant relies on [Appellant's physical medicine and rehabilitation specialist's] medical report of November 5, 2003, wherein [Appellant's physical medicine and rehabilitation specialist] comments that:

> I did review causality in the text of my report based on temporal relationship of symptoms and reported functional difficulties pre and post 1996 MVA. I did not have all the previous reports reviewed by [MPIC's doctor]. However, the fact remains that despite the fact that she did have residual pre-existing pain symptoms, as described by health care practitioners involved in her care, she was still able to work as a data entry clerk, carrying out 80% or more data entry work and some modification to include 20% of lighter general duties. She was able to do this up to and including the 1996 MVA in question. Following the 1996 MVA she was off work for a period of 2 ½ years despite various treatments by health care practitioners. Subsequently, she failed in graduated return to work programs following multidisciplinary approach to treatment. I felt that rather than returning to work full time she would achieve more if she could return

> initially half time at lighter duties that did not include prolonged and regular data processing. Activities such as work hardening commonly exacerbate myofascial trigger points with more acute pain symptoms rather than leading to major improvement in preparation for a return to work. Not withstanding the fact that she did have a history of difficulties with neck pain, right shoulder and arm pain, numbness and weakness as well as low back pain prior to the 1996 MVA, these were intermittent allowing her to cope and remain at work full time. She did seek treatment at the times of flare up but did not have long absences from work. I have no doubt that she had myofascial pain syndrome prior to the 1996 MVA. However, it is my opinion that the 1996 MVA led to exacerbation with more severe and persistent pain symptoms and associated dysfunction. Myofascial pain is not purely a pain problem. When flare ups of pain occur, there is always associated muscle shortening or reduced stretch range and dysfunction.

As a result, counsel for the Appellant concludes that the Appellant is entitled to ongoing receipt of Income Replacement Indemnity benefits since her injuries, which are causally connected to the motor vehicle accident of July 5, 1996, have prevented her from attaining her pre-accident status of full-time employment.

Counsel for MPIC submits that the Appellant was capable of returning to her previous employment in June 1998. He maintains that the objective evidence as relayed by [text delted], the rehabilitation consultant, and by [Appellant's physical medicine and rehabilitation specialist] in his report of May 1998, demonstrates that the Appellant was capable of returning to work in June 1998. He argues that the fact that the Appellant may have had some continuing pain, would not have prevented her from returning to work in a clerical position.

Counsel for MPIC also submits that many of the Appellant's complaints pre-existed the 1996 motor vehicle accident. Counsel for MPIC notes that the Appellant was suffering from chronic regional myofascial pain syndrome in 1995 and that many of her ongoing complaints are identical to those which pre-dated her accident. Counsel for MPIC notes that prior to the accident, the Appellant was performing two to three hours of data entry per day, and in 1998 she had progressed to two to three hours of data entry per day in her work hardening placement. He

concludes that the objective evidence demonstrates that the Appellant was capable of holding the employment which she held prior to the accident in June 1998, and that the Appellant has not demonstrated that she was unable to hold that employment. Accordingly, counsel for MPIC submits that the decision of the Internal Review Officer should be confirmed and the Appellant's appeal dismissed.

Subsection 110(1)(a) of the MPIC Act provides that an entitlement to IRI ends when a victim is able to hold the employment that she held at the time of the accident. In June 1998, the Appellant had successfully completed a graduated return to work program. The objective evidence at that time, including the evidence of her own caregivers, was that she was capable of returning to her employment. Upon consideration of the totality of the evidence, we find that as of June 12, 1998, the Appellant was able to hold the employment that she held at the time of the accident.

As the Internal Review Officer concluded, the medical information on the Appellant's file fails to establish any substantial inability to perform the essential duties of her employment on account of injuries arising out of the accidents in question. Rather, the evidence before the Commission, confirms that the Appellant did return to work in January 1999 performing clerical duties. The Appellant's own testimony at the appeal hearing was that she returned to work at that time because her IRI benefits had ceased and she financially had to take the job. Frankly, until IRI benefits were terminated, it appears that there was no incentive for this Appellant to return to work.

Additionally, we are not persuaded that the Appellant's inability to progress to full-time hours is as a result of any injuries arising out of the accidents in question. The Appellant testified at the

hearing that her hours have varied depending upon the workload. She has on occasion worked full-time, when required to do so. Once again, we find that the Appellant's inability to progress to a full-time position is due to her self-imposed limitations based upon her subjective complaints.

Consequently, we find that the Appellant's entitlement to IRI benefits was properly terminated by MPIC pursuant to Subsection 110(1)(a) of the MPIC Act. Additionally, since the Appellant lost her previous position because of the accident, she was entitled to continue to receive IRI benefits for an additional 180-days, pursuant to Subsection 110(2)(c) of the MPIC Act.

Accordingly, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer, bearing date May 27, 1999.

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

YVONNE TAVARES

BARBARA MILLER

WILSON MACLENNAN