Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-61

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms Wendy Sol** **Ms Deborah Stewart**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**March 29, 2007**
ISSUE(S):	**1. Termination of Income Replacement Indemnity benefits pursuant to Section 110(1)(a) of the MPIC Act effective October 18, 2004** **2. Entitlement to Income Replacement Indemnity benefits pursuant to Section 81(1)(c) of the MPIC Act** **3. Entitlement to reimbursement for medical or treatment expenses after April 8, 2005 pursuant to Section 5 of Manitoba Regulation P215-40/94**
RELEVANT SECTIONS:	**Sections 81(1)(c) and Section 160(c) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Section 5 of Manitoba Regulation P215-40/94**

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

Motor vehicle accidents of March 17, 2003, December 15, 2003 and December 16, 2004.

[The Appellant] was involved in three (3) motor vehicle accidents on March 17, 2003, December

15, 2003 and December 16, 2004. In respect of the March 17, 2003 accident, the Appellant had been injured and was in receipt of Income Replacement Indemnity ('IRI') benefits and other Personal Injury Protection Plan benefits. The Appellant was also in receipt of these benefits when she was involved in a second accident on December 15, 2003 wherein she sustained multiple bruising, soft tissue injuries to her neck and all regions of her back, and was hospitalized for approximately one (1) week. The Appellant had a third accident on December 16, 2004 in which she was a passenger and was struck from the rear by another vehicle.

The Internal Review Officer's decision dated March 3, 2005 succinctly describes the Appellant's negative attitude about returning to work as a Health Care Aide [text deleted] as follows:

> 2. At the time of this accident, [the Appellant] was [text deleted] years of age. She had obtained a nursing degree in the [text deleted] prior to coming to Canada, but her degree did not enable her to practice in Manitoba. She had been working as a Health Care Aide [text deleted] from June, 2002 until the time of the March, 2003 accident. She has not worked at all since March, 2003.
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> 3. A note on the file regarding the March, 2003 accident states that [the Appellant] had been seeking "retraining" benefits from the outset of that claim, and that she had resisted a return to work (which was to have occurred just before this accident happened) based on ongoing pain complaints. Her level of participation in an active rehabilitation program at [rehab clinic] was considered questionable.
>
> 4. The issue of retraining was raised immediately after this accident by a social worker at the [hospital #1], and has come up on several other occasions since that time.
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> 5. From the time of this accident, [the Appellant] has complained that her pain has severely impacted on her ability to function on a daily basis. On May 5, 2004, she told the case manager that she could walk (slowly) for a half-hour, but was unable to shoulder-check when driving, was unable to lift or carry a 4-litre jug of milk, and was unable to lift her left arm above her head.
>
> 6. A telephone conversation on August 13, 2004 between [Appellant's doctor] and the case manager is rather telling.
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> According to [Appellant's doctor], [the Appellant] did not seem motivated to return to her previous employment, or to seek out suitable alternate employment. She continued to complain that her functional abilities (in terms of activities of daily

living) were minimal, and that she had realized only "slight" symptomatic improvement with the medications that had been prescribed.

[Appellant's doctor] said he had suggested retraining for [the Appellant] because of her apparent lack of motivation and her ongoing subjective complaints. She had left him with the (inaccurate) impression that her employer would not take her back unless she was able to do her full duties. [Appellant's doctor] did not think that [the Appellant] would participate in a gradual return to work program, even if one were put in place for her.

7. The case manager also spoke to [the Appellant] on August 13, 2004. She advised that she was planning to go to [text deleted] for a course which she hoped would enable her to qualify to become a practicing nurse in Canada and the United States. She expressed an interest in pediatric nursing (which she felt would be less physically demanding than other nursing jobs). [the Appellant] declined to answer an inquiry from the case manager about how she expected to be able to work as a nurse when - according to her own evidence - she was unable to walk more than 1-2 blocks at a time, was unable to bend, and was unable to lift or carry even very lightweight items.

8. In early October, 2004, the case manager had a number of conversations with the employer (which is described in the material as a "no lift and two-person transfer facility") regarding a return to work program for [the Appellant]. The employer indicated a willingness, and an ability, to accommodate all of the restrictions mentioned by [Appellant's physiatrist] (discussed in more detail below).

   [The Appellant], however, was unconvinced. She maintained that she was not able to return to work, even on modified duties and a graduated schedule, at that time.

The Internal Review Officer's decision summarizes the medical evidence on page 7 as follows:

9. The medical evidence on the file may be summarized as follows:

   a. X-Rays of the cervical spine, thoracolumbar spine, and right knee taken December 15, 2003 disclosed no fractures or other abnormalities.

   b. A CT scan of the cervical spine taken December 17, 2003 did not identify any abnormalities.

   c. An MRI of the cervical and thoracic spines taken December 20, 2003 disclosed "no significant abnormalities". A "tiny incidental hydromyelia" was noted at T2.

   d. An x-ray of the left shoulder taken December 20, 2003 did not disclose any fractures or dislocations. An x-ray of the cervical spine the same day indicated "very limited range of motion" and a "reversal of the normal lordosis", but "no instability"

e. A form report from [Appellant's doctor] dated January 13, 2004 noted neck and back complaints, reduced ranges of neck and lumbosacral spine motion, and associated muscle tenderness.

f. A form report from [Appellant's physiotherapist] dated January 16, 2004 noted complaints of constant neck and back pain, and difficulty walking. Active cervical and lumbar ranges of motion were limited to 20% in all directions. The anticipated duration of in-clinic care was 8 weeks (2x/week).

g. A form report from [Appellant's chiropractor] dated February 4, 2004 listed a host of other complaints including headaches, light-headedness, dizziness, heaviness of the head, shoulder pain, rib pain, tailbone pain, and hip pain. Reduced ranges of motion and muscle tenderness were again noted. Nine months of in-clinic chiropractic care was anticipated.

   While [Appellant's doctor] and [Appellant's physiotherapist] both felt [the Appellant] was unable to work at any job, [Appellant's chiropractor] felt she could "work supernumerary'.

h. The form report from [Appellant's doctor] dated February 13, 2004 indicated that [the Appellant] was not improving. Neck and lower back pain remained the main complaints. Neck ranges of motion were described as "full", although the lumbar ranges were still reduced. Significant muscle tenderness was again noted. [Appellant's doctor] opined that [the Appellant] was still unable to work at any job due to "too many physical symptoms".

i. The form report from [Appellant's chiropractor] dated April 5, 2004 noted decreased headaches, ongoing neck and back pain, general muscle soreness with spasms, and fatigue. Cervical range of motion was now "reduced". Another four months of treatment (2-3x/week) was recommended.

j. The narrative report from [Appellant's physiotherapist] dated April 29, 2004 noted complaints of constant, intense left shoulder and low back pain. All spinal, and some left shoulder, ranges of motion were reported as reduced, some by half of normal.

[Text deleted], the Appellant's personal physician, referred the Appellant to [Appellant's physiatrist], a physiatrist, at the [hospital #2].

[Appellant's physiotherapist], who had been providing physiotherapy treatments to the Appellant, provided a report to the case manager on August 3, 2004:

> At present, based on subjective and objective findings, I feel that [the Appellant] is incapable of carrying out her job as a Health Care Aide. I do feel that a graduated return to modified duties that involved no lifting and the ability to change positions frequently

> would be possible. (underlining added)

[MPIC's doctor], a member of MPIC's Health Care Services Team, was requested by the case manager to review the Appellant's medical file and, in a report to MPIC dated September 20, 2004, he stated:

> Based on my previous review of [the Appellant's] file in conjunction with the recent information obtained from [Appellant's physiatrist], it is my opinion [the Appellant] does not have objective evidence of a physical impairment of function that precludes her from performing her full-time occupational duties if she so desires.

[Appellant's physiatrist], in a report to [Appellant's doctor] dated August 24, 2004, stated:

> Overall, I think one of the best things for [the Appellant] would be to return to activity. She does not plan to continue on with her chiropractic and physiotherapeutic treatments as she has plateauxed, and I would support this. . . . She is still quite strongly intending to return to nursing eventually as a career and I would support this, albeit not as a ward nurse. Hopefully by return to employment within the health care agencies, including possibly her previous job depending on her response to these interventions, then she would be able to achieve this goal.

On the same date [Appellant's physiatrist] wrote to MPIC's case manager:

> Return to full time duties: Present primary limitation remains soft tissue pain and discomfort. No other clear abnormalities at present and no evidence of deterioration with increased activity was recognized. I had encouraged her to increase her activity levels on her own, rapidly work through gym return and consider return to some form of activity in a graduated return. In terms of return to her underlying job, I think restrictions should be short term and followed via review by [Appellant's doctor]. Restrictions at present include functional ones as evidenced by abnormalities on the previous examination with heavy lifting greater than 50 pounds, repetitive lifting greater than 35 pounds and prolonged standing greater than 2 hours. Prolonged sitting greater than 3 hours was also prescribed. These should be reviewed after 12 weeks. (underlining added)
>
> Permanent impairment: No specific impairments greater than soft tissue pain syndrome were noted. Therefore, no permanent impairments are felt warranted at this time.

The case manager, in a note to file dated October 1, 2004, reported a telephone discussion with

[text deleted], an officer at the [text deleted] where the Appellant had been employed prior to the motor vehicle accident. The case manager advised [text deleted] that he would like to plan for a return to work program for the Appellant. [Text deleted] stated that he was aware of the restrictions under which the Appellant would be employed on a return to work program which included no heavy lifting greater than 50 lbs., no repetitive lifting greater than 35 lbs., no prolonged standing greater than 2 hours, no prolonged sitting greater than 3 hours. The note to file further reported that [text deleted] informed the case manager that the return to work program could be put in place starting the following week. [Text deleted] also indicated that, based on the restrictions provided, the Appellant should be able to do a good portion of the job duties.

In a further note to file dated October 15, 2004, the case manager reported a telephone conversation with the Appellant wherein she informed the Appellant that the medical information did not support that she was functionally unable to perform her job duties and a return to work plan had been developed with her employer for the Appellant's return to work. The Appellant advised the case manager that she had been in contact with [text deleted] and she had advised [text deleted] that she did not feel that she was able to return to work. The case manager advised the Appellant that since the medical information does not support an inability to perform her job duties, her entitlement to IRI had ended. However, if the return to work program was implemented, the Appellant would receive IRI while she participated in the return to work program. The Appellant indicated that she would have to discuss this matter with [Appellant's doctor].

On October 18, 2004 the case manager wrote to the Appellant and stated:

> You have indicated that you are unable to return to your job as a Health Care Aide as you

> do not feel that you are able to perform the duties of this job. You are training to pursue a career in nursing with the likely focus on pediatrics. For this, you left [text deleted] on September 19, 2004 to attend training for nursing in [text deleted] and returned to [text deleted] on October 8, 2004.
>
> Previously, you had enquired if Income Replacement Indemnity would be paid to you during the time you attended schooling in [text deleted]. You had been informed that medical information was needed prior to determining if IRI would be paid to you during the time you were away. You were informed that if the medical test results were negative, return to work options at [text deleted] as a Health Care Aide would be pursued for you. You were informed to advise Manitoba Public Insurance if you left [text deleted] for the out of town schooling.

The case manager further stated in this letter that:

1. [Appellant's doctor] was informed that the Appellant's employer would accommodate her return to work with restrictions.
2. [Appellant's doctor] informed the case manager that he was not aware of this and had been informed by the Appellant that her employer would not accommodate her return to work unless she was able to do full duties.
3. on August 20, 2004 she had been in contact with the Appellant's employer and stated:

   > . . . Your employer confirmed that they would accommodate your return to work based upon restrictions and that Manitoba Public Insurance would pay Income Indemnity while you worked with restrictions. (underlining added)

4. on October 1, 2004 the Appellant's employer confirmed with MPIC that they would accommodate the Appellant's return to work based upon restrictions as set out by [Appellant's physiatrist], and that she would be able to do a good portion of her job duties based on these restrictions.
5. On October 13, 2004 your employer contacted Manitoba Public Insurance and left a message that they had spoken to you about the return to work. You had told your employer that you would not be returning to work as you did not feel that you were able to return to work at modified duties. (underlining added)

6. the Appellant had informed her that she wished to discuss this matter with her doctor but she felt that she was unable to return to her job duties as a Health Care Aide.

The case manager concluded this letter by stating:

> Based upon the objective medical information, you cease to be entitled to Income Replacement Indemnity as the medical information does not support a functional impairment of physical function that would preclude you from performing your occupational duties, Section 110(1)(a) of the Manitoba Public Insurance Corporation Act. This is effective on October 18, 2004.
>
> Even though you cease to be entitled to Income Replacement Indemnity as of October 18, 2004, to assist in your return to work, twelve weeks of Income Replacement Indemnity will be provided while you participate in the return to work plan based upon the restrictions provided. At the end of the twelve week period, there is no further entitlement to IRI. Should you chose not to participate in the twelve week return to work plan, your entitlement to benefits may be affected, Section 160© of the Manitoba Public Insurance Corporation Act.

On November 3, 2004 the case manager wrote to the Appellant and confirmed that the Appellant had not advised that she would participate in a return to work program. The case manager informed the Appellant that the Appellant must inform her if she will participate in the return to work program by November 19, 2004 and, if she did not choose to participate in the plan, the IRI benefits would be terminated effective November 22, 2004.

Case Manager's Decision

On November 25, 2004 the case manager wrote to the Appellant and stated that since the Appellant had chosen not to participate in the gradual return to work program effective November 22, 2004, the Appellant's entitlement to IRI was terminated as of that date.

The Appellant filed an Application for Review of the Internal Review decision dated November 22, 2004 and an Internal Review hearing was held on January 19, 2005.

Internal Review Officer's Decision

On March 3, 2005 the Internal Review Officer wrote to the Appellant's legal counsel confirming the decision of the case manager to terminate the Appellant's IRI effective November 22, 2004 and dismissing the Appellant's Application for Review. The Internal Review Officer reviewed all of the relevant medical evidence and the reports of the case manager relating to discussions with the Appellant and stated:

> Early on, [Appellant's physiatrist] [text deleted] was perplexed, but nonetheless supportive. He was far less supportive of a continuing - and complete - absence from work in his most recent report to MPI (August 24, 2004).
>
> The assertion by [the Appellant] that she cannot perform the duties of a Health Care Aide and therefore requires retraining (funded by MPI) to become a qualified nurse (which, according to the NOC guidelines, has essentially the same job demands as a Health Care Aide), is - to say the least - troubling.
>
> Equally troubling is the evidence that - from the very outset of her first claim – [the Appellant] wanted to be retrained at MPI expense, and the indications in the material that she frequently exhibited little or no motivation to return to her pre-accident employment (regardless of her physical ability to do so). [the Appellant] steadfastly ignored the recommendations of her three primary caregivers regarding a gradual return to her former employment (along with a general increase in activity level), insisting all the while that she was unable to do the job, even with the accommodations that the employer was willing to extend.
>
> The objective evidence of an ongoing work-related disability beyond August, 2004 is rather sparse. The refusal to return to her workplace at that time was based almost entirely on [the Appellant's] subjective pain complaints (although her month-long trip to [text deleted] to take the nursing course played a role as well).
>
> The apparent willingness of the employer to take her back - even with the restrictions enumerated by [Appellant's physiatrist] - suggests that they were satisfied that [the Appellant] could be returned to the workplace without compromising the safety of the [text deleted] (or, indeed, her own safety).
>
> Notwithstanding all of the above, there is no clear evidence that – as at October 18, 2004 – [the Appellant] was able to hold her pre-accident employment. On the contrary, a successful return to work would almost certainly have required some form of graduated re-introduction to the workplace – if for no other reason that that [the Appellant] had not worked at all for over 18 months at that point.

The Internal Review Officer concluded that, pursuant to Section 160(c) of the MPIC Act, the Appellant, without valid reason, refused to return to her former employment. The Internal Review Officer stated:

> . . . The only reason offered by [the Appellant] for refusing to return to work in November, 2004 was that she felt unable to do so.
>
> It is true that [Appellant's doctor] supported her position to some extent, but his support seems to have been based upon a misperception of the accommodations the employer was willing to put in place to meet the restrictions suggested by [Appellant's physiatrist].
>
> [The Appellant] had, for months, maintained a steadfast refusal to even consider a return to work. By August, 2004, that position was no longer reasonable in light of the opinions expressed by [Appellant's physiatrist] and by [Appellant's physiotherapist], [text deleted].
>
> I am satisfied that Section 160(c) was properly invoked as at November 22, 2004, and that [the Appellant's] entitlement to IRI from the December 15, 2003 accident ended at that time.

Appeal

Section 160(c) of the MPIC Act – Termination of IRI

The relevant provision in respect of this appeal is Section 160(c) of the MPIC Act:

> **Corporation may refuse or terminate compensation**
> **160** The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person
>
> (c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;

The appeal hearing took place on March 29, 2007. The Appellant appeared on her own behalf and MPIC was represented by Mr. Terry Kumka.

The Appellant testified at this hearing and asserted that she had valid reason to refuse to return to

her employment as a Health Care Aide at [text deleted] because of the injuries she sustained in the motor vehicle accidents on March 17, 2003 and December 15, 2003. The Appellant reviewed the job demands of the Health Care Aide position that she had been employed in prior to these motor vehicle accidents and submitted that the essential physical demands of the job were beyond her ability to perform as a result of her motor vehicle accident injuries. She testified that the job of a Health Care Aide involved extensive standing, walking, bending and lifting, which she was not able to perform. She further testified that as part of her duties as a Health Care Aide she was required to give bed baths, tub baths and showers and transferring the [clients], all of which required lifting which she was unable to do. In addition, the work required constant bending on a repetitive basis in king beds and assisting [clients], as well as assisting [clients] with ambulation. For these reasons the Appellant submitted that as a result of the motor vehicle accident injuries, she was prevented from carrying out these essential duties, therefore MPIC was not justified in terminating her IRI.

Not surprisingly, MPIC disagreed with the Appellant's position and submitted that there was no objective medical evidence that did not support the Appellant's position. MPIC's legal counsel further stated that:

1. in the August 3, 2004 report of [text deleted], the Appellant's physiotherapist, that although the Appellant was incapable of carrying out all of her duties as a Health Care Aide, a graduated return to modified duties which involved no lifting, and the ability to change positions frequently, would be possible.
2. the Appellant's personal physician, [text deleted], had referred the Appellant to a physiatrist, [text deleted], and his report to MPIC dated August 24, 2004 also recommended that the Appellant return to work on a graduated basis.
3. [MPIC's doctor], a member of MPIC's Health Care Services Team, who had

reviewed the Appellant's medical file on September 20, 2004, stated that in his view the Appellant did not have any objective evidence of a physical impairment of function which precluded her from performing her full time duties.

4. the case manager advised the Appellant that:
    a) on October 1, 2004 her employer would accommodate the Appellant's return to work based on restrictions as set out by [Appellant's physiatrist].
    b) these restrictions involve no heavy lifting beyond 50 lbs, no repetitive lifting greater than 35 lbs, no prolonged standing greater than 2 hours, as well as no prolonged sitting greater than 3 hours.
5. In addition, MPIC was prepared to continue the payment of IRI while the Appellant worked under these restrictions.
6. the Appellant indicated that she would not return to work under these conditions as she was unable to work at modified duties.

MPIC's legal counsel therefore submitted that:

1. having regard to the medical reports of [Appellant's physiotherapist] and [Appellant's physiatrist], the Appellant was capable of returning to work with the restrictions as enumerated by [Appellant's physiatrist].
2. as a result, the Appellant did not have a valid reason, within the meaning of Section 160(c) of the MPIC Act to return to her pre-accident employment.
3. the Appellant's appeal should be rejected and the Internal Review Officer's decision confirmed.

Discussion

The onus is upon the Appellant, under Section 160(c) of the MPIC Act, to establish that she had

valid reasons for refusing to return to her pre-accident employment as a result of the motor vehicle accident injuries. The Commission finds, however, that having regard to the reports of [text deleted], the physiotherapist, and [text deleted], the physiatrist, that there is no objective medical evidence which would have prevented the Appellant from returning to work with the restrictions as enumerated by [Appellant's physiatrist]. The Appellant's employer was prepared to modify the Appellant's job duties in order to permit her to work on a graduated return to work program but the Appellant refused even to make an attempt to return to work on this basis.

The Commission determines that, in these circumstances, it would have been reasonable for the Appellant to attempt to return to work on a modified basis and her refusal to do so in the circumstances is without valid reason. As a result, the Commission concludes that the Appellant has not established, on a balance of probabilities, that MPIC erred in terminating her IRI pursuant to Section 160(c) of the MPIC Act. Accordingly, the Commission confirms the Internal Review decision of the Commission dated March 3, 2005 and dismisses the Appellant's appeal.

Motor Vehicle Accident - December 16, 2004

The Appellant was involved in a third motor vehicle accident on December 16, 2004. The Appellant was not working at the time of this motor vehicle accident. The Appellant was not in receipt of IRI benefits at this time but was in receipt of Employment Insurance benefits regarding her apparent reports of an inability to work for the period December 12, 2004 to February 19, 2005.

As a result of the motor vehicle accident the Appellant made Application for Compensation to MPIC on February 23, 2005. [Appellant's doctor] provided a Primary Health Care Report to MPIC dated February 24, 2005. In this report [Appellant's doctor] noted that, as a result of the

motor vehicle accident, the Appellant's symptoms were neck pain, headaches and low back pain and the clinical diagnosis was myofascial pain.

In a note to file dated March 1, 2005 the case manager indicates that she met with the Appellant on February 23, 2005 in respect of this motor vehicle accident. The Appellant advised the case manager that she suffered injuries from the top of her neck to her lower back. In respect of her lower back it was tingling to toes in left foot, tingling from neck down the left side of arm to her left pinky finger occasionally. The case manager noted that this time the Appellant was waiting to receive a decision from the Internal Review Officer regarding entitlement to IRI. The Appellant advised the case manager that, subject to the decision of the Internal Review Officer regarding IRI, she would be in further discussion with the case manager in respect of receipt of IRI benefits arising out of this motor vehicle accident.

On March 21, 2005 [MPIC's doctor], Medical Consultant to MPIC's Health Care Services, provided a Inter-departmental Memorandum to the case manager indicating that the Appellant had been diagnosed with having myofascial pain involving neck, upper back and lower back regions and had submitted receipts for Citalopram (Celexa) which was an anti-depressant.

In this Memorandum [MPIC's doctor] indicated there did not appear to be sufficient medical information to support his opinion that this medication was required to treat a medical condition arising out of the motor vehicle accident. He further indicated that it would be helpful to obtain further information from [Appellant's doctor] outlining the reason for prescribing this medication.

On April 4, 2005 the case manager wrote to the Appellant advising her that MPIC had scheduled

an independent examination with [independent doctor] on Friday, April 8, 2005. On April 5, 2005 the case manager wrote to [independent doctor] and stated that:

1. the Appellant was involved in a motor vehicle accident on December 16, 2004 and described to [independent doctor] the symptoms the Appellant reported in respect of this motor vehicle accident and the care that the Appellant received as a result of the injuries she sustained in this accident.
2. the Appellant had been involved in previous motor vehicle accidents on March 17, 2003 and December 15, 2003, and informed [independent doctor] of the chiropractic and physiotherapy treatments that the Appellant had obtained in respect of these accidents.

[Independent doctor] was requested to determine the nature and extent of the injuries the Appellant sustained with respect to the December 16, 2004 motor vehicle accident. In respect to the Appellant's work capacity the case manager requested [independent doctor] to advise:

Work Capacity

- Does [the Appellant's] clinical condition preclude travel to and from the workplace? If so, please explain.
- Does her clinical condition relating to injury and MVA's result in an inability to perform the required tasks of her job position? (Copy of Physical Demands Analysis of Job position included for your review). If so, please explain.
- Does her clinical condition pose a safety/health risk to her or her co-workers? If so, please explain.
- Does her clinical condition and return to work to her workplace adversely affect the natural history of the clinical condition? If so, please explain.

The case manager also requested [independent doctor] to advise whether any further therapeutic or diagnostic interventions were required with respect to the Appellant.

On April 8, 2005 [independent doctor] forwarded a report to the case manager indicating that he

saw the Appellant on April 8, 2005.

In his report [independent doctor] noted a number of inconsistencies in the Appellant's physical presentation during her examination. [Independent doctor] stated:

> It was noted that she initially walked with a limp coming in, dragging the left leg sideways as she walked, that as she gave the historical data while sitting, she moved her neck freely in all directions, without apparent pain or discomfort. When distracted, she moved her neck freely without apparent pain or discomfort.
>
> Her gait and limp varied quite markedly. At times she limped forward, at other times she limped with a sideward drag of the left leg. At times she walked sideways like a crab, dragging the left leg or occasionally the right leg. She tended to keep the left knee extended fully, held rather stiffly. However, with distraction as when climbing up the stair, it was noted that she readily bent the left knee without any apparent pain or discomfort. It was also noted that occasionally, the limp shifted from left to right side. However, the dragging of the leg sideways, was consistently applied to the left leg only.
>
> It was also noted that as she sat, the left knee which could not be bent at all while she was standing or walking, was bent at a right angle without any apparent pain or discomfort. When climbing onto the examination couch, she bent first the right knee then the left knee, without apparent pain or discomfort. . .
>
> Her gait was as described above. Quite variable. Examination of the neck revealed no abnormality. With distraction, neck movements were full. There was no paraspinal muscle spasm or tenderness.
>
> Examination of the spine revealed no abnormality. Spinal movements were normal. There was no paraspinal muscle spasm or tenderness.
>
> However, with percussion of the spine, she complained of pain at various areas. With repeat percussion, location of the tender area varied quite markedly. It must be pointed out that percussion was performed gently with minimal applicable force. After about four widely spaced attempts at percussion, with a marked variation in location of the tender areas noted, she stated that the entire spine was tender.
>
> On getting off the examination couch as part of the examination, she did not keep her left knee extended, flexing it at a right angle.
>
> It was noted when she removed her socks and shoes for examination, that she was able to bend both knees quite well, using each foot to shove her shoes and socks below the chair on which she was sitting. This of course included the left knee, which she was apparently unable to bend just a few minute before.
>
> Subsequently, on redressing, she was able to bend and manipulate both of her lower limbs, flexing the knees under the chair, using her feet and toes, to retrieve her socks and

shoes from under the chair on which she was sitting.

She was then able to bend forward, flexing the lower limbs, to replace her socks and shoes, all of this without any apparent pain or discomfort.

On the examination couch, she was able to sit up, with her hips fully flexed, knees fully extended, bend forward, and touch the region of her ankles, (for "examination of her spine",) without apparent pain or discomfort.

Spinal movements on distraction, were normal. No paraspinal muscle spasm or tenderness was noted.

Regarding the straight leg raising test, this activity was variable. However, with distraction, she was able to flex the left hip and the right hip, at a right angle, with the knees extended. This would be a negative straight leg raising test.

. . .

Whereas initially, movement al all joints, was restricted, particularly at the left shoulder and left hip and left knee, with distraction, it was found that movements at all joints was normal.

In addition, whereas, it was found that strength at all joints was quite weak, quite variable, with distraction, it was found that strength at all joints was normal.

It is also to be noted that in the documentation of her previous symptoms, historical data, etc., that it was the right leg that was affected.

However, at this time, the right leg was functioning normally for 90% of the time, abnormally for only 10% of the time. The left leg, was functioning abnormally for 90% of the time, normally at 10% of the time.

[Independent doctor] further stated:

On the date she was seen, I could not detect any neurological abnormality. I could find no evidence of any organic neurological basis for any of her symptoms. I could not find any evidence of any type of known disorder, which could account for her symptoms on an organic basis. It is my opinion that not only is there no organic basis for any of her symptoms but, it is my opinion, that the entire clinical problem is factitious.

. . . I can state that on the date she was seen (April 8, 2005) there was no neurological defect detected. There was no evidence of any neurological disorder, or any other type of disorder, resulting from any of the motor vehicle accidents. It is my opinion that on the date she was seen, [the Appellant] had recovered completely from any ill effect of the accident.

. . . on the date she was seen (April 8, 2005), there was no evidence of any clinical

> condition related to her motor vehicle accident or otherwise, resulting in ability to perform the required tasks of her job position. (underlining added)

In respect of work capacity, [independent doctor] stated:

> d. As stated above, it is my opinion that [the Appellant] has recovered completely from any ill effect of her accident. There was no aspect of her clinical condition and return to her workplace that would adversely effect the natural history of her clinical condition. She had already recovered completely.
>
> 4. Therapeutic interventions. No therapeutic interventions of any kind is indicated. No treatment of any kind is indicated. It is my opinion that the medications which [the Appellant] is taking at this time, and which have been prescribed, in relationship to her accident, are not required. (underlining added)

Case Manager's Decision

On April 26, 2005 the case manager wrote to the Appellant rejecting her claim for IRI benefits, and reimbursement of the cost of the drug Citalopram.

The case manager stated:

> You had applied for sick benefits from Employment Insurance Benefits regarding apparent reports of inability to work. The waiting period for sick benefit from Employment Insurance Benefits was from November 28, 2004 to December 11, 2004. Entitlement to EI benefits was provided from December 12, 2004 to February 19, 2005.
>
> You are therefore not entitled to Income Replacement Indemnity under this injury claim as you were receiving benefits from Employment Insurance Benefits regarding alleged inability to work and were not deprived of a benefit from Employment Insurance, section 81(1)(c) of the Manitoba Public Insurance Corporation Act.
>
> For further information, you were scheduled and attended an Independent Medical Exam on April 8, 2005 at 10:30 a.m. with [independent doctor]. From the examination, [independent doctor's] noted impression was:
>
> > "On the date she was seen, I could not detect any neurological abnormality. I could find no evidence of any organic neurological basis for any of her symptoms. I could not find any evidence of any type of known disorder, which could account for her symptoms on an organic basis. It is my opinion that not only is there no organic basis for any of her symptoms but, it is my opinion, that the entire clinical problem is

factitious."

Additional information noted:

> "…I can state that on the date she was seen (April 8, 2005) there was no neurological defect detected. There was no evidence of any neurological disorder, or any other type of disorder, resulting from any of the motor vehicle accidents. It is my opinion that on the date she was seen, [the Appellant] had recovered completely from any ill effect of the accident."
>
> "…on the date she was seen (April 8, 2005), there was no evidence of any clinical condition related to her motor vehicle accident or otherwise, resulting in ability to perform the required tasks of her job position."

From the objective findings noted in the independent examination (which had been requested by the corporation) and the inconsistencies noted in your physical presentation during the exam, the accuracy of your physical presentation at this appointment comes into question and the accuracy of information provided by you during the exam, therefore section 160(a) of the Manitoba Public Insurance Corporation Act applies.

Additionally, information provided in the report states that there are no required therapeutic interventions, treatment, diagnostic interventions indicated, and the prescribed medications in relation to the accident are not medically required. As such, there is no entitlement for therapeutic interventions, treatment or medications under the injury claim, in accordance with Section 5 of Manitoba Regulation 40/94.

The Appellant made an Application for Review of the case manager's decision dated June 6, 2005.

Internal Review Officer's Decision

The Internal Review Officer issued his decision on August 12, 2005 confirming the case manager's decision and rejecting the Appellant's Application for Review.

The Internal Review Officer defined the issues under review as:

1. Your entitlement to IRI in connection with the 2004 accident;

. . .

3. Whether you are presently entitled to reimbursement under PIPP for medical or

treatment expenses incurred subsequent to the 2004 accident. The only specific claim identified in this regard was the prescriptions for Citalopram.

The Internal Review Officer, in his decision, stated:

1. At the time of the 2004 accident, you had not been working for close to two years, although you were technically still a full-time employee of the [text deleted]. As I noted in my earlier decision, you should have made yourself available for a graduated return to work several months earlier. The medical evidence supporting your continued voluntary absence from the workforce was weak.

   This situation remained in effect when the 2004 accident occurred. By that time, you were collecting Employment Insurance benefits. Those benefits continued, unimpaired, through to February 19, 2005 – more than two months after the 2004 accident.

   There is no indication on the file that you sustained significant or disabling injuries from the 2004 accident, certainly nothing which would justify an absence from work beyond mid-February, 2005.

   In my view, the case manager correctly concluded that you were not entitled to IRI – from the 2004 accident – pursuant to Section 81(1)(c) of the *Act*.

   . . .

2. It is clear from the report of [independent doctor] that you were making every attempt during your visit with him to portray yourself as rather more disabled than was actually the case. He noted numerous instances where your ability to move various body parts was radically different when you were unaware that you were being observed than it was during formal testing.

   I note in passing that this was not a new phenomenon and that this type of behaviour was evident throughout the materials relating to the 2003 accidents.

   Nevertheless, I am not entirely convinced that this is the type of behaviour intended to be proscribed by Section 160(a) of the *Act.*

   While there are certainly other valid basis for denying you the PIPP benefits claimed in connection with the 2004 accident, Section 160(a) is not one of them.

3. In terms of prescribed medications, the only one in issue is Citalopram (Celexa). This is apparently an anti-depressant often prescribed to treat depression.

   There is no mention of this medication in the Primary Health Care Report from your family physician, [text deleted], dated February 24, 2005.

   The note from [Appellant's doctor] in support of this aspect of the claim was not received until after the decision of April 26, 2005 had been rendered.

> The note does support that the prescriptions of Citalopram – starting in January, 2005 – were made in response to "poor mood, depressed" which [Appellant's doctor] attributed to the 2004 accident. This satisfies the requirements of Section 5 of Manitoba Regulation P215-40/94.
>
> The report from [independent doctor] dated April 8, 2005 clearly indicates, however, that there was no longer a medical necessity for this, or any other, medications or therapeutic interventions at that time.
>
> I am therefore directing that you be reimbursed for the cost of Citalopram up to and including April 8, 2005. I concur with the conclusion of the case manager that your entitlement to coverage for this, or any other, medications or other therapeutic interventions does not extend beyond that date.

Appeal

Section 81(1) of MPIC Act and Section 5(a) of M.R. 40/94
Entitlement to IRI and Drug Expenses

The Appellant filed a Notice of Appeal dated September 1, 2005. The appeal hearing, which dealt with the third motor vehicle accident on December 16, 2004, took place at the same time that the Commission heard the Appellant's appeal in respect of the two (2) motor vehicle accidents in 2003.

The relevant provisions in respect of this appeal are:

> **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;
> . . .
> (c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.
>
> **Manitoba Regulation 40/94:**
> **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;

The Appellant asserted that, as a result of the 2003 motor vehicle accident injuries, she was unable to return to work as a Health Care Aide and her medical problems were exacerbated by the motor vehicle accident which occurred on December 16, 2004. She further asserted that due to the injuries she sustained in the 2004 motor vehicle accident she was unable to perform her duties as a Health Care Aide.

MPIC's legal counsel, in a submission to the Commission, reviewed the Internal Review Officer's decision and submitted that the Appellant has failed to establish, on a balance of probabilities, that MPIC erred in failing to provide the Appellant IRI benefits pursuant to Section 160(a)&(c) of the MPIC Act.

Decision

The Commission notes that at the time the Appellant was involved in the motor vehicle accident on December 16, 2004, she was in receipt of Employment Insurance Benefits and these benefits continued unimpaired until February 19, 2005, a period of two (2) months after the 2004 motor vehicle accident. The Commission agrees with the decision of the Internal Review Officer that for this period of time, pursuant to Section 81(1)(c) of the MPIC Act, the Appellant would not have been entitled to IRI benefits.

The Commission also agrees with the decision of the Internal Review Officer that the Appellant's medical file did not establish that she sustained significant or disabling injuries from

the 2004 accident which would have justified her absence from working beyond February 2005. Having regard to the testimony of the Appellant, the lack of medical evidence in support of her medical problems, and the highly critical report of [independent doctor], the Appellant has not established, on a balance of probabilities, that MPIC erred in refusing to provide her with IRI pursuant to Section 81(a) of the MPIC Act subsequent to February 19, 2005.

In respect of the issue relating to prescribed medications, the Commission, for the reasons set out in the Internal Review decision, agrees that the Appellant should be reimbursed only for the cost of Citalopram up to and including April 8, 2005 and that the Appellant was not entitled to further coverage from MPIC for Citalopram or any other medications or therapeutic interventions beyond that date.

For these reasons the Commission dismisses the Appellant's appeal and affirms the decision of the Internal Review Officer dated August 12, 2005.

Dated at Winnipeg this 18th day of June, 2007.

MEL MYERS, Q.C.

WENDY SOL

DEBORAH STEWART