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Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-16

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Mr. Errol Black

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

HEARING DATE: December 18, 2007

ISSUE(S): Whether the Appellant is entitled to Income Replacement Indemnity benefits beyond September 7, 2006

RELEVANT SECTIONS: Sections 110(1)(a) and 110(2)(d) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') Section 8 of Manitoba Regulation 37/94

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant, [text deleted], is appealing the Internal Review decision dated May 18, 2006, with respect to the termination of her Income Replacement Indemnity ('IRI') benefits as at September 7, 2006.

The Internal Review decision of May 18, 2006 confirmed the case manager's decision of November 4, 2005 and dismissed the Appellant's Application for Review. The Internal Review

Officer found that, on the basis of the totality of the evidence, the Appellant was capable of carrying out the essential duties of her pre-accident employment as of September 7, 2005.

The relevant sections of the MPIC Act and Regulations are as follows:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold 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:

...

(d) one year, if entitlement to an income replacement indemnity lasted for more than two years.

Manitoba Regulation 37/94:

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Appellant's Submission

At the hearing of this appeal, the Appellant's representative submitted that MPIC improperly terminated the Appellant's IRI benefits. He maintains that the Appellant is still incapable of returning to work and has not been able to return to work since the motor vehicle accident of October 20, 1995.

The Appellant's representative claims that MPIC has not considered the Appellant's subjective complaint of pain, which prevent her from returning to work, in arriving at their decision to

terminate her IRI benefits. He relies upon the opinion of [Appellant's Doctor #1], the Appellant's general practitioner, who indicates that the Appellant is incapable of returning to work. The Appellant's representative also maintains that the Appellant suffers from psychological difficulties as a result of the motor vehicle accident, which prevent her from returning to work. He argues that MPIC has consistently disregarded the Appellant's concerns and the opinions of her caregivers in the management of her claim. The Appellant's representative also asserts that the medical reports and assessments, upon which MPIC based their decision, were flawed. He submits that the numerous reports incorrectly conclude that the Appellant could return to work. As a result, the Appellant's representative submits that the Appellant's IRI benefits were improperly terminated as of September 7, 2006 and that they should be reinstated.

MPIC's Submission

Counsel for MPIC submits that the Internal Review decision was comprehensive and that the totality of the evidence supports that the Appellant is capable of returning to work. In support of her position, counsel for MPIC refers to the following documents:

- The case manager's decision dated November 4, 2005, wherein the case manager found that all of the information on the Appellant's file confirmed her ability to return to work, as early as the fall of 2003.
- The Functional Capacity Evaluation ('FCE') dated November 22, 2004 which concluded that functionally, [the Appellant's] abilities would place her between a light and medium category of work. The only restriction which would be placed on [the Appellant] would be for repetitive squatting.
- The report of the [Appellant's Occupational Therapist], dated January 20, 2005, wherein

[Appellant's Occupational Therapist] concluded that, "Based on her (the Appellant's) performance in work simulation, her FCE results and the DOT/NOC classifications, our team (the [text deleted] Rehabilitation Department) feels that [the Appellant] has the ability to perform in a [text deleted] operator occupation".

- [Appellant's Neuropsychologist's] report of November 12, 2008, wherein [Appellant's Neuropsychologist] concluded that the results of the neuropsychological assessment documented a number of neuropsychological and broad or cognitive deficits. However, given all of the information available to him it was his impression that these deficits were not likely due to the results of the motor vehicle accident, but rather were likely pre-existing in nature.

- [MPIC's Doctor's] report of April 19, 2005 wherein [MPIC's Doctor] concluded the following:

1. [The Appellant] regained the physical and psychological ability to perform her pre-accident occupational duties as a [text deleted] operator. [The Appellant] has been identified as being physically capable of performing light to medium level work.
2. [The Appellant's] symptoms of dizziness are not a byproduct of a medical condition arising from the incident in question based on the balance of medical probabilities.
3. [The Appellant] has recovered from the medical conditions arising from the incident in question and does not require any further supervised treatment interventions or diagnostic tests to address the conditions arising from the incident.

- [MPIC's Doctor's] Memorandum dated June 6, 2005 wherein [MPIC's Doctor] concluded the following:

The information obtained from the video surveillance tapes supports the opinions I rendered in my April 19, 2005 interdepartmental memorandum. It is my opinion that on the dates [the Appellant] was under surveillance, she did not have a physical impairment of function arising from the incident in question that in turn would preclude her from performing her full-time occupational duties in all probability.

- [Appellant's Doctor #2's] medical report of April 2, 2004 wherein [Appellant's Doctor #2] opines that:

At this stage I feel this lady has fully recovered from any injury to the right leg and hip area. I have not been able to find any pathology whatsoever on clinical examination. MRI has been done which has revealed no abnormality. Nerve conduction studies have been done which revealed no neurological abnormality. I feel that there has been in the past injury, but now she has recovered. She still has considerable psychogenic overlay.

I feel this lady is quite suitable for any sedentary employment or the entry level occupations as mentioned in your letter of request for information. I do not think this work would aggravate the condition, and does not put her at any risk for injury to herself.

Based upon the totality of the foregoing evidence, counsel for MPIC submits that the overwhelming evidence supports that the Appellant was capable of working as of September 2005. Counsel for MPIC therefore submits that the Appellant's appeal should be dismissed and the Internal Review decision of May 18, 2006 confirmed.

Discussion

Upon a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant's representative and of counsel for MPIC, the Commission finds that the Appellant has not established, on a balance of probabilities, that she was entirely or substantially unable to perform the essential duties of the employment that she held at the time of the accident as of September 7, 2005. Rather, we find that the overwhelming evidence persuades us that the Appellant was capable of carrying out the essential duties of her pre-accident employment, as a [text deleted] operator, as at that date. In accordance with ss. 110(2)(d) of the MPIC Act, the Appellant's IRI benefits were extended for a further year (to September 7, 2006), since the

Appellant was determined to have lost her employment because of the accident.

In considering the totality of the evidence before us, we find that the Appellant has not established, on a balance of probabilities, that she continues to suffer from either a physical or mental injury, that was caused by the accident and that prevents her from returning to work. The medical reports filed on behalf of the Appellant did not provide any objective evidence for her continued inability to return to work. Additionally, the Appellant did not provide any medical evidence of a psychological condition, resulting from the accident, which would preclude her return to work. As a result, the Appellant's appeal is dismissed and the Internal Review decision dated May 18, 2006 is hereby confirmed.

Dated at Winnipeg this 10th day of January, 2008.

YVONNE TAVARES

NEIL COHEN

ERROL BLACK