

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-69**

PANEL: Ms Laura Diamond, Chairperson
Dr. Patrick Doyle
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Bob Sample of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Kathy Kalinowsky.

HEARING DATE: February 7, 2008

ISSUE(S): Entitlement to further Income Replacement Indemnity benefits.

RELEVANT SECTIONS: Section 110(1)(c) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

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 was injured in a motor vehicle accident on July 3, 2003. As a result, she sustained soft tissue pain in her neck, lower back and between her shoulder blades.

The Appellant had been involved in prior motor vehicle accidents and sustained whiplash type injuries, but had not missed any time from work as a result of those accidents. She was employed as an office administrator at [Text deleted].

Following the motor vehicle accident of July 3, 2003, she was off work from July 12th to August 11th, 2003. She was in receipt of Income Replacement Indemnity ('IRI') benefits, as well as other Personal Injury Protection Plan benefits during this time.

On August 11, 2003, the Appellant attempted to return to work part time. She received a "top up" IRI benefit.

When the Appellant was unable to return to her full time hours, her employment was terminated by her employer, on September 5, 2003.

The Appellant continued to receive physiotherapy treatment and rehabilitation services from MPIC, as well as IRI benefits. On May 27, 2004, the Appellant's case manager issued a decision letter indicating that the medical evidence showed that the Appellant could return to work and was no longer entitled to IRI benefits, (although her IRI was continued for ninety (90) days pursuant to Section 110(2)(b) because her job was no longer available).

The Appellant sought an Internal Review of her case manager's decision. On February 3, 2005, an Internal Review Officer for MPIC reviewed the Appellant's file, including a report from [MPIC's Doctor's #1 & #2] dated January 28, 2005. Based on this information, the Internal Review Officer concluded that the Appellant showed no neurologic findings. Diagnosed conditions of cervical spondylosis and osteoarthritis were pre-existing conditions. The Internal Review Officer concluded that the Appellant had sustained a Whiplash Associated Disorder Grade II and a Spinal Associated Disorder Grade II from the accident and that there was no

objective physical evidence of impairment of function which would prevent her from returning to work as an office administrator.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant

The Appellant gave evidence at the hearing regarding the previous motor vehicle accidents and injuries which she had suffered. She testified that she returned to work following these accidents, but saw her family doctor for treatment, which included the use of muscle relaxants, pain killers, anti-inflammatories and physiotherapy.

She testified that she had not fully recovered from the previous motor vehicle accident when she was injured on July 3, 2003. She tried to continue working, seeking treatment from her family doctor, but found that she had suffered a great exacerbation of neck pain and pain between her shoulder blades. She also suffered from severe headaches. She tried to take time off work to allow her injuries to heal and then reintegrate back into her job by working four (4) hours a day, on alternate days.

The Appellant described the tasks of her job and the difficulties she had performing them after her injuries. She testified that the scope of her office administrator job involved prolonged sitting and data entry, as well as answering phones, filing (which involved reaching and bending), handling supplies, and payroll entry into a handwritten ledger.

The Appellant testified that she could not perform these tasks on a full time basis.

The Commission also heard evidence regarding an assessment done by [the Appellant's Occupational Therapist] [text deleted], who was contracted by the Corporation to assist with the Appellant's rehabilitation. [The Appellant's Occupational Therapist] submitted a report dated December 8, 2003, after evaluating the Appellant and conducting a Physical Demands Analysis regarding her job. The Appellant testified that she was not invited to participate in that assessment and so on her own provided a summary of her job duties to [the Appellant's Occupational Therapist] and her case manager.

It was submitted, on behalf of the Appellant, that [the Appellant's Occupational Therapist] had proposed certain recommendations for the Appellant's rehabilitation. These included further physiotherapy, and a return to work plan including resume preparation training and job search assistance.

The Appellant testified that while she continues to have good days and bad days, with occasional flare ups, she believed she would be able to handle a gradual integration into a four (4) hour work day, with proper training and the necessary ergonomic supports.

The Appellant's representative also referred to medical reports provided by the [Appellant's Doctor], and [the Appellant's Orthopedic Surgeon] [text deleted]. He submitted that it was [the Appellant's Doctor's] opinion that the Appellant was unfit to return to her full time position. Her physiotherapist reported that she may be able to do light duty work and should be referred to a specialist for consultation.

[The Appellant's Orthopedic Surgeon] stated that it was possible that the Appellant had cervical spondylosis and osteoarthritis which became symptomatic following the accident, from stress

and strain to the soft tissues involved in that area. In his view, it would be possible for the Appellant to go back to her job, subject to the evaluation of an occupational therapist or physiatrist related to her job activity.

The Appellant's representative submitted that while the medical experts were of the opinion the Appellant could return to work, this was with restrictions, in terms of the amount of time she could work, and that she should be restricted to light duties. He submitted that the Appellant was not capable of resuming her full time employment as an office administrator, and that the medical evidence supports this position.

The Appellant did not dispute the idea that she could have worked at graduated modified duties. It was her position that MPIC should have acted on the recommendations of [the Appellant's Occupational Therapist], [text deleted], to return her to modified duties on a gradual basis, providing the necessary rehabilitative supports for her to return to work.

Submission for MPIC

Counsel for MPIC submitted that the medical evidence from 2004 supported MPIC's position that the Appellant could return to work at that time. She referred to the evidence of [the Appellant's Physiatrist] who treated the Appellant and provided trigger point injections in September and October of 2004. [The Appellant's Physiatrist] prescribed involvement in walking, bicycling or swimming, which are all more strenuous exercises than the sedentary duties of an office administrator.

[The Appellant's Neurologist] [text deleted] found no neurologic defect, nor any neurological basis for the Appellant's symptoms.

[MPIC's Doctor's #1 & #2] opined that the Appellant suffered from pre-existing chronic conditions of disc degeneration and osteoarthritis. They stated that the Appellant had improved objectively from the injuries sustained in the motor vehicle accident, and although she continued to have subjective pain complaints, there was no objective physical evidence of impairment of function which would prevent the Appellant from returning to work as an office administrator.

Counsel also noted [the Appellant's Orthopedic Surgeon] comments, on December 27, 2006, that it would be possible for the patient to go back to her job, subject to the evaluation of the occupational therapist or physiatrist. She also noted that the Appellant had no major acute symptoms and the "gist" of [the Appellant's Orthopedic Surgeon's] opinion was that notwithstanding her symptoms, the Appellant could return to work.

Counsel reviewed a report from [the Appellant's Physiotherapist] [text deleted], which noted that the Appellant might be able to return to light duty office work for two (2) hours per day on a modified return to work program.

She noted the report of [the Appellant's Doctor], dated September 28, 2006 which stated that the Appellant was still unable to work as an office administrator full time, due to her neck problems, arm problems and back problems.

However, counsel pointed out, a graduated return to work program could not be arranged, since the Appellant no longer had employment, due to it being lost on account of the accident. Therefore, all the Appellant was entitled to by statute, was ninety (90) days of IRI due to this lost employment.

She submitted that the Appellant was able to return to work as an office administrator, as it was a very light occupation, listed as sedentary.

Counsel also pointed out the relatively minor damage which the Appellant's vehicle had suffered and noted that the Appellant had failed to make any attempt to return to work in the three (3) or four (4) years which had passed since the claim for benefits had been filed.

It was counsel's submission that the Appellant has failed to establish that she was not capable of returning to work at the time of the case manager's decision, and that the Internal Review decision should be upheld and the appeal dismissed.

Discussion

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;

The onus is on the Appellant to show, on a balance of probabilities, that she was not capable of returning to work as an office administrator on May 27, 2004.

The panel has reviewed the evidence on file, as well as the testimony of the Appellant and the submissions of the parties.

We agree with the Appellant's representative that the employment which the Appellant held at the time of the motor vehicle accident was that of a full time office administrator. She did not

hold part time employment at the time of the motor vehicle accident, but rather, held regular full time employment as an office administrator.

At the time of the case manager's decision, May 27, 2004, the Appellant's general practitioner was of the opinion that she could not work full time at her job.

[The Appellant's Doctor] stated, even in September of 2006, that:

As of 29 Aug 2004 [the Appellant] was unable to work full time at any position due to her neck problems, arm problems and back problems. Since she had no problems of this nature prior to the accidents I can only conclude this was due to the motor vehicle accidents. . . .

I believe [the Appellant] is still unable to work as an office administrator. If forced to return to work it should only be to the lightest of duties, no bending no lifting >5 lbs no using the phone ®; initially to 2 hrs a day with a 4 hr maximum. As an employer I would not hire her as I know from her history a flare up would occur in the near future and render her completely unemployable.

[The Appellant's Occupational Therapist] assessed and evaluated the Appellant and identified barriers to her return to work. He recommended, in his report of December 8, 2003, that the Appellant should receive further physiotherapy treatment with a focus on increasing her physical abilities while controlling pain. He recommended that she be encouraged with training in resume preparation as well as job search support and vocational training.

Further physiotherapy should be structured so that greater focus is placed on increasing [the Appellant's] physical ability while controlling her continued complaints of pain. [The Appellant] should also be encouraged to begin preparing a resume and overall job search process. Once it is deemed appropriate for [the Appellant] to begin working she can actively begin applying for various employment situations with appropriate vocational support provided if necessary.

Proposed Actions and Rationale

1. Contact [the Appellant's] physician and physiotherapist to determine current physical status and barriers to attempting to return to work at this time. [The Appellant's Doctor] and [the Appellant's Physiotherapist] will be contacted and provided with copies

of the completed physical demands analysis as well as the information that [the Appellant] provided on her pre-accident employment. Both treatment professionals will be asked to provide objective physical findings that prevent [the Appellant] from attempting her pre-accident level of employment. This information will be used to establish a return to work plan and further vocational training and support as deemed appropriate.

2. Maintain regular contact with [the Appellant] to ensure no barriers to her recovery are encountered. [The Appellant] stated she wished to receive a copy of this report to ensure that her concerns regarding the completed Physical Demands Analysis were highlighted to clarify what she related as her pre-accident employment.

3. Provide appropriate vocational training; resume preparation and job search skills to help [the Appellant] find alternative employment. Employment support skills will help to ensure that when deemed able, all applicable employment opportunities are discovered for [the Appellant] to meet her employment, physical and financial needs.

The panel agrees with the Appellant's representative regarding the possibility, that with such support and with the treatments she was receiving from [the Appellant's Physiatrist], combined with the extensive physiotherapy the Appellant has pursued, the Appellant could have improved sufficiently to be able to return to work as an office administrator.

However, she was not provided with all of these recommended supports. The recommendations from [the Appellant's Occupational Therapist] were not put into place by MPIC.

Rather, MPIC seems to have taken the position that although the Appellant could not work at the job of an office administrator performing full time duties and required a graduated return to work program, because she had been terminated from her job at [Text deleted], there was no available graduated return to work program for her, and she should be left only with the remaining IRI benefits (90 days) under the statute.

The panel finds this to be a somewhat circular approach. In identifying a need for a graduated return to work program, MPIC should have recognized the Appellant's inability to work full time

at full duties. The fact that there was no readily available job for her to go back to should not have prevented MPIC from providing her with the supports and programs which had been recommended by the contracted specialist.

The Appellant has testified, and her representative submitted, that she may well have been able to work part-time in an office administrator type of position, hopefully with a view to increasing her participation to full time status with the appropriate supports and therapies. However, we find that the Appellant has established, on a balance of probabilities, that she did not have the capability, at the time of the case manager's decision, to return to full time work as an office administrator or a similar position, and she was not provided with the recommended supports which might have enabled her to do so.

Accordingly the panel finds that the Internal Review Officer erred in his decision of February 3, 2005, in determining that the Appellant met the requirements of Section 110(1)(a) of the MPIC Act and was able to hold the employment that she held at the time of the accident. We find that the Appellant has established, on a balance of probabilities, that although she may have been capable of working part time in a rehabilitative return to work program, she was not able to return to full time full duties as an office administrator when her IRI benefits were discontinued.

Accordingly, the Appellant's appeal is allowed and the decision of the Internal Review Officer, dated February 3, 2005, is set aside. The Appellant's IRI benefits shall be reinstated with interest, from May 27, 2004.

Dated at Winnipeg this 13th day of March, 2008.

LAURA DIAMOND

DR. PATRICK DOYLE

PAUL JOHNSTON