

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-132**

PANEL: Ms. Laura Diamond, Chairperson
Ms. Lorna Turnbull
Ms. Mary Lynn Brooks

APPEARANCES: The Appellant, [text deleted], was represented by Ms. Virginia Hnytka of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Diane Pemkowski.

HEARING DATE: December 4, 2008

ISSUE(S): Whether the Appellant lost her job as a result of injuries sustained in the motor vehicle accident; and Entitlement to Income Replacement Indemnity benefits beyond 25 November 04.

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

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

The Appellant was injured in a motor vehicle accident on November 6, 2003. As a result of the accident, she sustained a soft tissue injury to her neck, back, and right shoulder. She was in receipt of Personal Injury Protection Plan (PIPP) benefits, including Income Replacement Indemnity (IRI) benefits, following the accident.

At the time of the accident the Appellant was employed approximately thirty (30) hours a week at [text deleted] doing various duties such as cleaning, laundry, taking out garbage, and serving lunch.

Following a reconditioning program and a Gradual Return to Work (GRTW) Program, the Appellant returned to work at her regular duties on August 12, 2004.

On August 17, 2004, she injured her back lifting a cambrose tray and went off work again. A further four (4) week reconditioning program involving daily sessions with the physiotherapist was then started.

According to the Appellant's case manager, the Appellant expressed an interest in obtaining alternate employment during team meetings on October 13, 2004 and October 20, 2004. The Appellant also advised that she did not like her employers and would be looking for alternate work, on October 25, 2004.

It was determined that the Appellant was fit to return to work effective October 25, 2004.

The Appellant's case manager wrote to her on December 1, 2004, stating that there was no objective evidence of a physical impairment of function that would preclude the Appellant from returning to her occupational duties effective October 25, 2004 and that her entitlement to IRI benefits would end as of October 24, 2004.

On December 2, 2004, the Appellant resigned from her employment, giving written notice of resignation due to the fact that her doctor had determined continuing in her job would cause repetitive injury to her back.

The Appellant sought an internal review of the case manager's decision terminating her IRI benefits. On May 4, 2005 an Internal Review Officer for MPIC concluded that the weight of the available expert opinions firmly supported the termination of the Appellant's IRI benefits by late October 2004. The Internal Review Officer found that there were no essential duties identified that the Appellant was categorically unable to do, nor were there any such duties which the practitioners involved were saying she should absolutely not be doing.

The Appellant's case manager also issued a decision on February 13, 2008, denying the Appellant's claim that she lost her job as a result of the motor vehicle accident. Therefore, she was not entitled to additional Income Replacement Indemnity benefits pursuant to Section 110(2) of the *Manitoba Public Insurance Corporation Act*. The Appellant did not agree with this decision, and sought an internal review. On March 31, 2008, an Internal Review Officer for MPIC found that the evidence established that the Appellant had not lost her job as a result of the motor vehicle accident, but rather, had resigned from the position. As such, the Internal Review Officer found that there would be no temporary continuation of IRI benefits for the Appellant beyond November 25, 2004.

It is from these decisions of the Internal Review Officers that the Appellant has now appealed.

Evidence and Submission For The Appellant

The Appellant testified at the hearing into her appeals. She described the motor vehicle accident and her work at [text deleted] prior to the motor vehicle accident. She testified that she had loved her job.

The Appellant also described her injuries in the motor vehicle accident for the panel. She discussed the reconditioning and Gradual Return to Work ('GRTW') Program which she participated in, through MPIC. According to the Appellant, her employer (particularly her supervisor), with whom she previously had a cordial relationship, began getting angry at her during the GRTW Program. She felt that they were hostile toward her because she could not do all her previous work.

She also described the injury which she suffered at work in August. The Appellant testified that although she was working with the physiotherapist and trying to go back to work and be normal, it seemed every time she went back to work she seemed to hurt herself.

Counsel for the Appellant submitted that the Appellant was very motivated to return to work following her motor vehicle accident and was very cooperative in her GRTW Program. This was borne out by a report of the rehabilitation counselor, [text deleted]. The employer saw an improvement, but the Appellant remained restricted in her duties.

On June 17, 2004, the Physiotherapist, [independent physiotherapist], recommended that the Appellant stop working for four (4) weeks to attend a daily reconditioning program. Following that program, the Appellant was cleared to return to work at full time duties. However, she expressed concern regarding her ability to return to work and complete all of her job duties and

also expressed her concern about the lack of support from her employer. Therefore, a part time transition period at work was recommended.

On August 17, 2004, the Appellant was re-injured at work. As a result of this, [text deleted], a physiatrist, recommended that the Appellant do only modified duties, because every time she bent and lifted she seems to have recurring back pain. [Appellant's doctor #1] recommended an intense physiotherapy program with the goal of stabilizing and reconditioning the lumbar spine without any activity involving repetitive bending or heavy lifting.

The Appellant's family doctor, [Appellant's doctor #2], noted [Appellant's physiatrist's] advice in a report on September 13, 2004.

Counsel for the Appellant noted ongoing reports of pain and pain complaints during this period. She noted that although [MPIC's doctor], MPIC's health care consultant, was of the view, in November of 2004, that the Appellant was functionally capable of returning to her employment at full regular duties, [Appellant's doctor #2] had noted that the Appellant's back condition, although showing some improvement, had not fully resolved. He had indicated that she could go back to her regular full time job on a trial basis with certain activities being performed only as tolerated and some restrictions applying as to the amounts which she was able to lift or carry.

On October 12, 2006, [Appellant's doctor #2] noted:

In a letter dated the 25th of August 2004, addressed to me, [Appellant's doctor #1] indicated that he would not recommend any activity involving repetitive bending or heavy lifting.

In another letter dated the 31st of August 2004, addressed to me, [Appellant's physiatrist] indicated that she suggested to [the Appellant] that since her back had become a problem, that maybe she should look for some kind of work that did not require her to repetitiously bend and do heavy lifting.

In my opinion, these restrictions were, based on a balance of probabilities, a result of the motor vehicle accident dated the 6th of November 2003.

Counsel submitted that although [MPIC's doctor] may have regarded these as general precautions, the employer did not agree. The employer saw these as restrictions and would not allow the Appellant to return to work as long as these restrictions were in place. Counsel submitted that because the employer would not allow the Appellant to return to work until she had no restrictions, and her doctor would not agree to remove the restrictions, she was caught between her doctor and an employer who refused to accommodate her. The Appellant's case manager was aware, as early as October 22, 2004, that the Appellant had tried to return to work and that the employer would not allow this with the restrictions in place, but the case manager took no action regarding the employer's failure to accommodate the Appellant's restrictions. Counsel submitted that in this way, MPIC had failed in its obligation to assist and rehabilitate the Appellant under Section 138 and Section 150 of the MPIC Act.

Corporation to assist in rehabilitation

[138](#) Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

Corporation to advise and assist claimants

[150](#) The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

MPIC also failed to inform the Appellant of these obligations or of the option to obtain funds for her vocational rehabilitation. Nor did the case manager inform the Appellant that she might be entitled to benefits under Section 110(2) of the Act, for individuals who may lose their employment as a result of the motor vehicle accident.

Counsel submitted that the Internal Review decision was flawed, as the Appellant, under Section 110(1) of the MPIC Act, was not able to hold the employment that she held prior to the motor vehicle accident, and the case manager and Internal Review Officer did not consider all the evidence in this regard. They ignored the fact that the Appellant's doctor had imposed restrictions and her employer would not allow her to return to work, resulting in her inability to hold the employment she held before the motor vehicle accident.

MPIC then failed to fulfill its obligations to assist the Appellant and take the steps necessary under Section 138 and Section 150 to allow her to return to work.

In the alternative, counsel argued that even if the Appellant had been able to return to work under Section 110(1), MPIC failed to provide her with benefits under Section 110(2) of the Act. According to Section 110(2)(c) of the Act, the Appellant should have been entitled to 180 days further Income Replacement Indemnity benefits because she had lost her job due to the motor vehicle accident. The fact that she resigned in December 2004 was of no relevance, since the employer had been unwilling to allow her to return to work without restrictions. She felt that her job had already been lost, and the resignation was just a formality.

Counsel for the Appellant submitted that the Appellant tried to go back to work and the employer would not accept her with the restrictions she had. MPIC knew that the employer would not allow her back and that she had restrictions placed upon her by her doctor. Under Section 110(1)(a) she was not able to go back to work and she did lose her job because of her injuries. Accordingly, the Commission should rescind both decisions of the Internal Review Officer and the Appellant should be entitled to IRI benefits with interest.

Evidence and Submission For MPIC

Counsel for MPIC took the position that the Appellant was entirely able to perform the essential duties of her employment at the time her IRI benefits were terminated. She also submitted that even if she was only substantially able to perform these duties, pursuant to Regulation 37/94 Section 8, that still does not mean she was unable to perform her duties. Any restrictions in place, she submitted, would not prevent her from doing any of the duties of her job.

Counsel noted that while some light restrictions were put in place during the Appellant's recovery (in approximately December of 2003), her treatments continued from that point.

[Appellant's neurologist] found, on January 8th, 2004, that the Appellant had recovered from any ill effect of her accident and was fit to return to work.

MPIC then, it was submitted, fulfilled any obligations it might have had to accommodate the Appellant in her rehabilitation by providing her with physiotherapy treatments, a GRTW and a reconditioning program.

A report from Physiotherapist, [text deleted], (in a third party assessment on June 2, 2004) concluded that the Appellant was pain focused, had not been educated in the concept of hurt versus harm, and required a four (4) week daily reconditioning program. This was followed by a report from Physiotherapist, [text deleted], dated July 5, 2004, who also noted that the Appellant was pain focused, and demonstrated self-limiting behaviours.

At a team meeting held on August 5, 2004, [Appellant's physiotherapist] recommended that the Appellant return to work with full duties on August 5th. His report upon completion of the

reconditioning program, dated August 12, 2004 noted that physically, he had no concerns with the Appellant returning to her job, although her significant pain focus remained, along with expectations to remain pain free prior to returning to work.

Counsel reviewed [Appellant's physiatrist] report of August 31, 2004 which noted that the Appellant has a degenerative disc and can only do modified duties. However, counsel pointed out that this report was prepared following the examination of the Appellant on August 27, 2004, less than two (2) weeks after her re-injury at work on August 17th. Similarly, [Appellant's doctor #1's] report was dated August 31, 2004. She submitted that at that time, the Appellant's work-injury was still acute, and that given the date of these assessments, [Appellant's doctor #2] should not have relied upon them in imposing restrictions upon the Appellant's later ability to return to work.

Counsel noted that the Appellant's back injury in August, from lifting the cambrose, occurred because the Appellant was improperly doing lifting that was not within her job requirement. Although it was not clear why the Appellant had attempted this task, given the requirements of her job (which she had listed as involving lifting up to ten (10) pounds), counsel emphasized that the physical demands analysis that MPIC had received indicated that the duties of the Appellant's position at the [text deleted] were well within her tolerances. Certain activities might only need to be modified with long-handled tools.

She also reviewed the opinions provided by [MPIC's doctor] on November 6, 2003 and November 28, 2006. [MPIC's doctor] reviewed the details of [Appellant's physiotherapist's] treatment, testing and physical demands analysis and concluded that the Appellant was

physically capable, based on objective measures, of performing the duties of her job. [MPIC's doctor's] report of November 28, 2006 noted:

... These functional, objective measures were compared to a Physical Demands Analysis obtained from the pre-accident place of employment [text deleted], based upon which, [Appellant's physiotherapist] opined that the job demands were "well within [the Appellant's] tolerances". Certain modifications while working were suggested to minimize symptoms while on the job, however, the opinion provided by [Appellant's physiotherapist], based on the objective measures, noted that work place lifting requirements were within the claimant's demonstrated abilities. The reader is referred to [Appellant's physiotherapist's] detailed report of October 25, 2004.

Although it is noted that [Appellant's doctor #2] indicated lifting restrictions set at 15 pounds and carrying restrictions of 30 pounds, as well as some precautions with respect to walking on slippery floors and the handling of chemicals and hot water, [Appellant's physiotherapist's] report clarified that the claimant's capability was functionally measured and met the capability of the lifting and carrying tasks involved in her pre-accident employment.

In this regard, counsel noted that the Appellant was physically capable of performing the duties of her employment entirely or substantially, even within any restrictions which were put forward by [Appellant's doctor #2]. Further, counsel for MPIC submitted that [Appellant's doctor #2's] recommendations should not be followed and relied upon, since they were based on [Appellant's physiatrist]' and [Appellant's doctor #1's] findings in August 2004 shortly after the Appellant's injury in the workplace. Instead, the Commission should rely, as [MPIC's doctor] did, on [Appellant's physiotherapist's], more accurate functional testing.

In regard to the Appellant's loss of her job, counsel for MPIC pointed to the notice of resignation submitted by the Appellant as well as a Record of Employment provided by the employer which indicated that the Appellant had quit. This was consistent, she noted, with the telephone call to her case manager on October 21, 2004, when the Appellant was noted to have said she would be looking for alternate employment, as she did not like her employers. This was also consistent

with the Appellant's indication at the team meeting on October 25, 2004 that she was in the process of searching for alternate employment.

Counsel submitted that the Appellant did not lose her job as a result of the motor vehicle accident, but rather had resigned because she was no longer happy with her employers.

She also submitted that MPIC had met all its obligations to the Appellant under Section 138 and Section 150 of the Act.

Counsel emphasized that the onus was on the Appellant, to show, on a balance of probabilities that the Internal Review decisions were not correct. In this case, the Appellant's version of events, that she was not able to go back to work and that she had only resigned because the employer had placed her in that position, was not probable. What was probable, she submitted, was that the Appellant was self-limiting, pain focused and unhappy at work. She submitted that the Commission should uphold both decisions of the Internal Review Officers.

Discussion

Section 110(1)(a)

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;

Section 8 of 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.

Section 110(2)(c)

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;

The Commission has reviewed the evidence of the Appellant, the documentary evidence on the file, and the submissions of the Appellant's representative and counsel for MPIC. The onus is on the Appellant to show, on a balance of probabilities, that she was unable to perform the duties of her job, and that she lost her employment because of the motor vehicle accident.

The Commission agrees with the submission of counsel for MPIC that the restrictions noted by [Appellant's doctor #2] were based, in a large part, upon the report from [Appellant's physiatrist]. While [Appellant's physiatrist]' report can be seen as an accurate depiction of the Appellant's condition at that time, we agree with counsel for the Appellant that, as it was based upon an examination of August 27, 2004, it reflected the condition of the Appellant very soon after her injury in the workplace in August, months before the discontinuation of the Appellant's IRI benefits and before the completion of the reconditioning program.

As [MPIC's doctor] noted, the functional assessments performed by [Appellant's physiotherapist], (who provided a detailed report on October 25, 2004), found that at that time, the workplace lifting requirements were within the Appellant's demonstrated abilities.

Further, the panel agrees that the restrictions imposed did not conflict with the requirements of the Appellant's job. On the evidence before us, repetitive bending and heavy lifting of the cambrose tray and meals, without assistance, were not requirements of the Appellant's job.

The onus is also on the Appellant to show that she lost her employment as a result of the motor vehicle accident.

While the Record of Employment submitted by the employer does indicate that the employee quit, and the Appellant did submit a letter of resignation, these factors are not, in and of themselves, necessarily determinative of whether the Appellant lost her job because of the motor vehicle accident. In this regard, we have also noted the Commission's decision in [text deleted] [1998] MAICACD No. 28, where the Commission found that the Appellant had been obliged to quit work by reason of the injuries sustained in her motor vehicle accident.

However, while it is possible that the employer was not fully cooperative, in terms of accepting the employee back to work with restrictions, the onus is on the employee to show, on the balance of probabilities, that she lost her job due to the motor vehicle accident. Other than the employee's own testimony, the panel heard no evidence regarding her termination of employment. The employer did not testify at the hearing, nor did the employer provide any written explanation, other than the Record of Employment. As a result, the Commission is not in

a position to find, on a balance of probabilities, based upon the evidence before us, that, the Appellant was terminated, or that she lost her employment because of the motor vehicle accident.

The Commission heard evidence that the Appellant was already looking for work in October of 2004 and that she had expressed unhappiness with her job. She had been warned by the rehabilitation consultant that MPI might find that she was able to perform the duties of the job.

I advised of my understanding that MPI would have to determine whether the medical information supports a return for [the Appellant] to her same employer performing the same job. It was clarified that MPI may determine, based on the medical information, that [the Appellant] is capable of returning to her previous job. However, as a back-up plan for [the Appellant], as she does not feel she is capable of returning to this job, I suggested that she begin to explore alternate employment possibilities regardless of MPI's position.

Counsel for the Appellant submitted that there had been a standoff between the employer and [Appellant's doctor #2], regarding the restrictions under which she could return to work. MPI did some investigation to try to determine what the situation was, but we still have no evidence from the employer, or resulting from these investigations, that might clarify this.

Although the Appellant stated that she previously had a good relationship with her employer and supervisors, and there was evidence from the Appellant that the relationship between her and her employer had become strained, the Appellant has failed to meet the onus upon her of showing, on a balance of probabilities, that she has lost her employment because of the motor vehicle accident. While she has provided her theories in this regard, and presented what might be possible reasons for difficulties with her employer, she has failed to provide evidence sufficient to satisfy the onus upon her in this regard, on a balance of probabilities.

Therefore, the Appellant's appeals are dismissed, and the Internal Review decisions of May 4, 2005 and March 31, 2008, are hereby confirmed.

Dated at Winnipeg this 23rd day of February, 2009.

LAURA DIAMOND

MARY LYNN BROOKS

LORNA TURNBULL