Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-24

PANEL:	**Ms Yvonne Tavares, Chairperson** **Dr. Patrick Doyle** **Mr. Robert Malazdrewich**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Laurie Gordon of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**May 13, 2009**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits beyond February 22, 2004**
RELEVANT SECTIONS:	**Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

On March 6, 2003, the Appellant, [the Appellant], was a passenger in a motor vehicle when it was involved in a front-end collision. On impact, his head was thrown forward, backward, and to the side, where he hit the passenger side window. As a result of the accident, the Appellant had immediate neck and back pain that progressively got worse. Due to the injuries that the Appellant sustained in the motor vehicle accident, he became entitled to Personal Injury Protection Plan ("PIPP") benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was self-employed as a property manager/contractor. He operated a business which purchased houses and/or apartment buildings and renovated them for resale or rental. His duties were assessed as 80% residential property renovations and 20% property management. Due to the injuries which the Appellant sustained in the motor vehicle accident, he was unable to perform the renovations portion of his occupational duties. As a result, the Appellant became entitled to income replacement indemnity ("IRI") benefits based on the portion of the pre-accident duties which he was incapable of performing.

The Appellant undertook chiropractic care and physiotherapy treatments for the injuries he sustained in the motor vehicle accident. However, his improvement stalled and he was unable to progress to a return to full occupational duties. As a result, MPIC referred the Appellant to [rehab clinic] for an assessment and recommendations regarding treatment and future rehabilitation plans. In the Intake Assessment report dated September 25, 2003, [rehab clinic] recommended that the Appellant undergo a modified work hardening program to increase his overall functional ability and to provide him with education on self-management of his pain complaints. [Rehab clinic] further recommended that the Appellant attend a six week program, daily, consisting of four-hour sessions to help simulate full-time workday tolerance. Since the Appellant had been cleared to return to work no greater than four hours per day by his chiropractor, the Appellant was to work four hours a day and attend rehab for the remainder of the day. The purpose of this program was to increase his strength and also to increase his endurance for full-time work.

The Appellant commenced the program and progressed through the work hardening program. Throughout the program the Appellant reported back and leg pain and occasionally neck pain.

Medication and modalities such as acupuncture, ice, heat and inferential current were used for pain relief. The Appellant completed the program on December 19, 2003. In a work hardening discharge report dated January 9, 2004, [rehab clinic] recommended that the Appellant was fit for an immediate, unmodified return to pre-injury employment. [Rehab clinic] also found that the Appellant's functional abilities had increased to the point where he met a heavy/frequent demand and had the ability to meet his job demands. However, because of the Appellant's continued subjective reports of pain, [rehab clinic] recommended that supportive care be provided on his return to work by means of chiropractic care.

In a decision dated February 2, 2004, MPIC's case manager wrote to the Appellant to advise him that his entitlement to IRI benefits would cease effective February 22, 2004 in accordance with Section 110(1)(a) of the MPIC Act. The case manager noted that the totality of the medical information on the Appellant's file supported that he was capable of returning to his pre-accident employment. In order to give the Appellant notice of the decision ending his entitlement to IRI, benefits continued to be paid inclusive to February 22, 2004.

Due to the Appellant's ongoing complaints of pain, his physician referred him to [Appellant's doctor] of the [text deleted]. [Appellant's doctor] assessed the Appellant on January 20, 2004 and on March 9, 2004. In a report dated March 9, 2004, [Appellant's doctor] noted that:

> "On examination today [the Appellant] has close to full range of motion of his back with pain. There is no dural tension in either leg.
>
> I discussed the above with [the Appellant] and I feel he can return to his physical work starting at four hours per day and then progress to six and then eight hours eventually at two week intervals. He is going to begin this on March 15, 2004 and I will be seeing him again in a few weeks. Because his chronic low back pain persists I am also going to refer him to [Appellant's physiatrist], a Physiatrist who does injection treatments. This may help settle his chronic pain symptoms."

The Appellant sought an Internal Review of the case manager's decision of February 2, 2004. In a decision dated November 15, 2005, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's application for review. In his reasons for decision, the Internal Review Officer noted the following:

> "Your approach to this Review focused on an attack on the conclusions in the [rehab clinic] discharge report to the effect that you were capable of a return to your pre-accident duties, full-time, and without restrictions, as of February 22, 2004. Your objections to the [rehab clinic] assessment seemed to have enough merit to warrant further investigation. Accordingly, as you know, I had your case manager obtain the complete [rehab clinic] file, as well as letters of explanation from [rehab clinic's doctor #1]. Your case manager also arranged for the reports from [text deleted]. You arranged for the production and filing of the other medical material listed above (with the exception of [MPIC's doctor #1's] report, of course). [MPIC's doctor #2] has reviewed all of this evidence. Her 7-page opinion, dated October 24, 2005, concludes that the [rehab clinic] assessment was a reliable one. I still needed clarification as to whether you still needed a graduated return to work program to allow you to return to work in February 2004. [MPIC's doctor #2's] brief memo of clarification dated November 7, 2005 indicates that such a program may have been of some assistance in easing you back into the workplace, but it was not, strictly speaking, necessary. Her assessment is that the evidence supports the view that you were capable of a full-time, and unrestricted, return to your pre-accident duties as of February 22, 2004.
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> [MPIC's doctor #2's] assessment is a thorough, fair, and detailed one. I have no hesitation in accepting her conclusions. Accordingly, this Review will confirm the February 2, 2004 decision, which ended your IRI entitlement as of February 22, 2004."

The Appellant has now appealed that decision to this Commission. The issue which requires determination in this appeal is whether the Appellant is entitled to further IRI benefits beyond February 22, 2004.

Relevant Legislation:

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;

Appellant's Submission:

The Claimant Adviser, on behalf of the Appellant, submits that an absolute termination of IRI benefits on February 22, 2004 is not supported by the evidence on the Appellant's file. She maintains that the Appellant tried to return to work but was unsuccessful. The Claimant Adviser contends that the Appellant was advised to return to work on a gradual basis beginning March 14, 2004. She notes that the Appellant attempted to do this gradual return to work, but experienced an increase in pain. The Appellant was referred to [Appellant's physiatrist], a physiatrist, because his chronic low back pain persisted. When he finally did see [Appellant's physiatrist], [Appellant's physiatrist] advised that the Appellant could not perform the heavier aspects of his job and recommended that a personal trainer or athletic therapist work with him at his job site and set up a program that was directly related to the type of work he does. The Claimant Adviser notes that this never occurred. However, the Appellant did eventually return to work full-time, although he has never been able to return to performing the heavier aspects of his job, and now focuses more on the property management duties. As a result, the Claimant Adviser submits that the Appellant's IRI benefits should be reinstated from February 22, 2004 and should continue for the period of time that the Appellant was unable to return to his full work duties.

MPIC's Submission:

Counsel for MPIC submits that the Appellant's IRI benefits were properly terminated pursuant to Section 110(1)(a) of the MPIC Act as of February 22, 2004. Counsel for MPIC maintains that the decision to terminate IRI benefits is well supported by the evidence on the Appellant's file. He contends that the Appellant's IRI benefits were properly terminated as at February 22, 2004 since the Appellant had undergone an extensive rehabilitation program and was in the best shape at that time to return to work. Counsel for MPIC notes that [Appellant's physiatrist] did not

make any comment on the Appellant's return to work in February 2004. Rather, [Appellant's physiatrist's] report, which was based upon an examination of June 22, 2004, cannot be relied upon because at that point the Appellant was de-conditioned since he had not kept up with his home exercise program since the completion of the work hardening program at [rehab clinic]. Counsel for MPIC also refers to the report of [Appellant's doctor], dated March 9, 2004, wherein [Appellant's doctor] concludes that the Appellant could return to his physical work, although on a gradual basis. In summary, counsel for MPIC submits that based upon the [rehab clinic] discharge report, the Appellant was capable of returning to his pre-accident duties as a renovator upon completion of that program. Accordingly, Counsel for MPIC maintains that the Appellant's appeal should be dismissed and the Internal Review Decision dated November 15, 2005 confirmed.

Decision:

Upon hearing the testimony of the Appellant, and after a careful review of all the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Adviser on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant's IRI benefits shall be reinstated effective February 23, 2004 and shall be extended in accordance with the gradual return to work recommendations of [Appellant's doctor], from March 15, 2004 to April 9, 2004.

Reasons for Decision:

Section 110(1)(a) of the MPIC Act provides that entitlement to IRI benefits ceases when a victim is able to hold the employment that he or she held at the time of the accident. The Commission finds that the preponderance of the evidence on the Appellant's file establishes that the Appellant was capable of returning to work in late February/early March 2004, at reduced hours and that a

gradual return to work should have been implemented in order to transition the Appellant back to full-time hours and full duties. We base our findings on the following:

1. [Rehab clinic's] report dated December 23, 2003 wherein [rehab clinic's doctor #2] concludes that the Appellant is presently capable of working at a heavy strength in terms of physical demands, which corresponds with the physical demands applicable for a renovator employment.
2. [Rehab clinic's] work hardening discharge report dated January 9, 2004 wherein [rehab clinic] recommended that the Appellant was "fit for an immediate, unmodified return to pre-injury employment".
3. [Appellant's doctor's] report of March 9, 2004 wherein [Appellant's doctor] opined that the Appellant could return to his physical work starting at four hours per day and then progress to six and then eight hours eventually at two week intervals beginning on March 15, 2004.
4. [MPIC's doctor #2's] Inter-departmental memorandum dated April 13, 2004 wherein she supports a return to pre-accident duties for the Appellant in a graduated manner as suggested by [Appellant's doctor]. [MPIC's doctor #2] had the opportunity to review all of the medical information on the file and her opinion supported that of [Appellant's doctor].
5. [MPIC's doctor #2's] Inter-departmental memorandum of November 7, 2005 wherein [MPIC's doctor #2] indicates that her review of the medical documentation available through January/February 2004 supports that based on the [rehab clinic] measurements, the claimant had demonstrated the ability to return to the demands of his pre-accident vocation. She also notes that the treating chiropractor [text deleted], in correspondence of February 3, 2004 agreed with the comments regarding return to

> work as presented by the [rehab clinic] staff. She further comments that [Appellant's doctor] also acknowledged the measurement of the functional capacity evaluation obtained at [rehab clinic], however, suggested a short graduation back into the workplace over a four week period beginning at four hours per day. [MPIC's doctor #2] explained that the rationale for graduated work re-entry, in general terms, is typically one of assistance in terms of adjusting and affording conditioning to the tasks of the employment. She notes that the suggestion of a graduated return to work was one of attempting to be helpful in assisting with the transition back to the work environment.

The Commission finds that based upon the foregoing, the available evidence in February/March 2004 recommended that the Appellant was capable of a full return to work. The Appellant's testimony at the appeal hearing, that he was not ready for a return to work, was not sufficient to contradict the evidence from [rehab clinic] and from his own treating health care provider, [Appellant's doctor]. [Appellant's doctor] evaluated the Appellant on January 30, 2004, as well as providing an update to the MPIC case manager on March 9, 2004. [Appellant's doctor] reviewed the reports from the work hardening program, as well as those from [rehab clinic's doctor #2] and [Appellant's chiropractor]. He also noted that a CT scan had been obtained subsequent to his initial evaluation of January 30, 2004, which revealed shallow disc protrusions at L4-L5 and L5-S1 levels, with no definite compression. [Appellant's doctor's] assessment of March 9, 2004 noted that "On examination today [the Appellant] has close to full range of motion of his back with pain. There is no dural tension in either leg". [Appellant's doctor] advised that he had discussed the findings with the Appellant, providing his opinion that the Appellant could return to his physical work starting at four hours per day and then progressing at two week intervals to six hours and then eight hours. The plan was for the Appellant to begin

this re-entry on March 15, 2004. Follow-up with [Appellant's doctor] was to take place following several weeks. The Commission finds that [Appellant's doctor's] opinion is consistent with the recommendations of the [rehab clinic] work hardening program and supported the Appellant's capability of return to work. However, we find that a graduated return to work as recommended by [Appellant's doctor] should have been implemented for the Appellant, in order to transition him back into the workforce on a full-time basis.

Accordingly, we find that the Appellant's IRI benefits shall be extended from February 22, 2004 to April 9, 2004 in accordance with the gradual return to work program recommended by [Appellant's doctor]. That being, the Appellant returning to work at four hours per day commencing March 15, 2004 and progressing at two week intervals to six hours and then eight hours per day, which would have been completed by April 9, 2004. The Appellant's entitlement to IRI benefits shall cease effective April 10, 2004.

Accordingly, the Appellant's appeal is allowed in part and the Internal Review Decision dated November 15, 2005 is therefore varied accordingly.

Dated at Winnipeg this 20th day of July, 2009.

YVONNE TAVARES

DR. PATRICK DOYLE

ROBERT MALAZDREWICH