

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-67**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Wilf DeGraves
Ms Sandra Oakley

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Ken Kaltornyk of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.

HEARING DATE: September 10, 2010 and November 25, 2010

ISSUE(S): Whether the Appellant's Income Replacement Indemnity Benefits were properly terminated on July 16, 2006 pursuant to Section 110(1)(c) of the MPIC Act.

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, [text deleted], was involved in a motor vehicle accident on December 17, 2005. As a result of that motor vehicle accident, the Appellant complained of low back pain and right shoulder pain. Due to the bodily injuries which the Appellant sustained in the motor vehicle accident, he became entitled to Personal Injury Protection Plan ("PIPP") benefits in accordance with Part 2 of the MPIC Act.

At the time of the accident, the Appellant was unemployed, but he had been promised employment with [text deleted] as a technical helper [text deleted]. The position was to start on December 19, 2005. However, because of the injuries sustained in the accident, the Appellant was unable to start that position. The Appellant was classified as a non-earner, with promised employment, and qualified for income replacement indemnity (“IRI”) benefits in accordance with Section 85(1) of the MPIC Act, which provides as follows:

Entitlement to I.R.I. for first 180 days

85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

(a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;

(b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

Pursuant to Section 86(1) of the MPIC Act, the Appellant was entitled to a determination of employment 180 days after the accident, as he was unable to return to work by June 16, 2006. Based on the information provided by the Appellant, the 180-day determined employment for the Appellant was as a service technician.

As part of the Appellant’s rehabilitation program, he underwent a seven week work hardening program at [Rehabilitation (Rehab) Clinic]. The program commenced on May 8, 2006 and terminated on June 30, 2006. The [Rehab Clinic] Discharge Report dated July 11, 2006 found that the Appellant was fit to return to full-time employment immediately with no restrictions. Further, the report found that prior to discharge the Appellant achieved a functional strength demand of Heavy according to the Dictionary of Occupational Titles (DOT), Fourth Edition. Specifically, [Rehab Clinic] found that:

[The Appellant's] function increased. He demonstrated the ability to perform at the low level Heavy strength category which exceeds (sic) the strength demands of his job at Medium. He is able to reach with weight, crouch and stoop at the constant level. He has no restriction with sitting or walking. He has demonstrated to perform multiple lift from knee height isometrically of 286 lbs.

In a decision dated July 21, 2006, MPIC's case manager wrote to the Appellant to advise him that his entitlement to IRI benefits would cease on July 16, 2006 as the [Rehab Clinic] Discharge Report stated that he demonstrated the ability to meet the job demands of the promised employment, with no restrictions.

On or about July 28, 2006, the Appellant advised the case manager that his condition had regressed following his discharge from the [Rehab Clinic] work hardening program and he was unable to return to work. A multidisciplinary reassessment was arranged for the Appellant at [Rehab Clinic] due to his increased complaints of headaches, neck pain and numbness from the top of the shoulder to the fingertips and low back pain. In a report dated August 23, 2006 following the multidisciplinary reassessment, [Rehab Clinic's Doctor] noted that the Appellant's subjective complaints were not consistent with the objective findings. He also found that symptom magnification was evident. [Rehab Clinic's Doctor] further noted that:

[The Appellant] continues to claim to have soft tissue aches and pains that he says stop him from being able to return to work. He seems to think that his statements alone should be enough to substantiate that he is unable to return to the job that he was to return to at the time that he finished rehab at [Rehab Clinic]. Furthermore he feels that the functional testing that he performed today should provide certain evidence that he is unable to return to that job.

However, the minor clinical findings on today's assessment do not correlate with [the Appellant's] protestations that he can't return to the job that he said he was able to. The functional testing he did today revealed lower tested values than he had done while in rehab. I ([Rehab Clinic's Doctor]) am not entirely confident that today's testing reflects [the Appellant's] true physical capabilities since he now appears to be quite motivated to appear unwell or unfit enough to be able to return to that job. Despite these things, [the Appellant's] functional testing reveals that he still has very good functional capabilities and that his present capabilities appear to fall within the parameters necessary to return to his old job.

As such, it is our opinion that [the Appellant] could return to his job at this time, if that was what he wanted to do. No medical findings or diagnoses have been found in this assessment that would preclude [the Appellant] from returning to his job right now if he wanted to do so, even with his present symptoms.

In a decision dated November 9, 2006, MPIC's case manager advised the Appellant that he was entitled to an additional 90 days of IRI benefits from the date he regained the ability to hold the employment (July 17, 2006) in accordance with subsection 110(2)(b) of the MPIC Act.

In a further decision dated January 5, 2007, MPIC's case manager confirmed the previous decision of July 21, 2006 with respect to the Appellant's ability to return to work as of July 17, 2006. In arriving at that decision, the case manager relied upon [MPIC's Doctor's] interdepartmental memorandum dated December 15, 2006 wherein [MPIC's Doctor] noted that:

Based on my review of the comprehensive Case Summary as well as the MRI report, it is my opinion the MRI abnormalities (i.e. left posterior foraminal disc herniation at C5-C6), which resulted in a moderate degree of left foraminal encroachment might contribute to some of the symptoms he reports involving his neck and left upper extremity. The information indicates [the Appellant] has not been noted to have evidence of nerve dysfunction. Based on the information obtained from [Rehab Clinic] it appears that [the Appellant] progressed through a work hardening program to the extent he was capable of performing work as a service technician. It is noted that [the Appellant] was reassessed by healthcare professionals at [Rehab Clinic] in order to re-evaluate symptoms he reported and it was determined that his condition had not changed from a functional standpoint.

The Appellant subsequently attended upon [Appellant's Psychologist] for treatment of depression. In a report dated September 5, 2007, [Appellant's Psychologist] opined that the Appellant met the DSM-IV diagnosis of Major Depression. Further, [Appellant's Psychologist] found that the Appellant's major depression was on the balance of probabilities directly related to the motor vehicle accident. [Appellant's Psychologist] found that as a direct result of the motor vehicle accident, [the Appellant's] financial situation deteriorated to the point where his only realistic living accommodation was to move back with his mother. Having to move back in

with his mother was one of the major contributors to [the Appellant's] depression. [Appellant's Psychologist] recommended a series of 8-10 one hour therapy sessions utilizing a cognitive behavioural approach. [Appellant's Psychologist] further opined that the Appellant's psychological functioning decreased significantly following the motor vehicle accident to the point that he was unable to work due to a combination of physical pain combined with depressive symptomatology.

The Appellant's file was reviewed again by [MPIC's Doctor], Medical Consultant to MPIC's Health Care Services Team. In his interdepartmental memorandum dated October 29, 2007, [MPIC's Doctor] noted that:

COMMENTS

The reports do not contain much in the way of physical findings indicating [the Appellant] was noted to have objective evidence of a physical impairment that would indicate he is physically unable to perform the required demands of an Electronic Service Technician if he so desired. It is reasonable to assume that [the Appellant's] reported symptoms, and his belief that he is not physically capable to performing work as an Electronic Service Technician is the reason he has not returned to work at this time...

Based on information indicating [the Appellant] has the physical ability to perform work as an Electronic Service Technician, his decision to to return to work even though he was physically capable of doing so, did have a negative impact on his financial state in all probability. Information obtained from [Appellant's Psychologist] indicates [the Appellant's] financial problems led to the need to move in with his mother, which in turn contributed to the development of his Major Depressive Disorder. It is possible that had [the Appellant] returned to work when he was deemed to be physically capable of doing so, his financial problems would not have been as significant and as such, less potential to contribute to the development of a depressive disorder...

It is not medically probable that [the Appellant's] Major Depressive Disorder will lead to permanent psychological dysfunction that will prevent him from performing work as an Electronic Service Technician in the future. It is noted that [the Appellant's Psychologist] based his opinion on causation on information obtained from [the Appellant] indicating his new job as an Electronic Service Technician was physically demanding to the extent he was unable to accept the position due to the injuries sustained in the motor vehicle accident.

It should be noted that [the Appellant] was deemed to be physically capable of performing the required demands of his occupation prior to his assessment with [Appellant's Psychologist] and that the work level of this employment involved light

strength demands. In other words, medical conditions arising from the incident in question did not preclude [the Appellant] from returning to work following completion of his work hardening program at [Rehab Clinic].

CONCLUSION

It is my opinion the information obtained from the above-noted reports does not indicate [the Appellant] has been noted to have a physical impairment of function arising from the incident in question that in turn precludes him from performing the essential duties of an Electronic Service Technician.

It is my opinion the symptoms [the Appellant] developed as a result of the incident in question could have contributed to the development of his Major Depressive Disorder. The information does not lead me to draw a clear cut opinion as [Appellant's Psychologist] has, as it relates to [the Appellant's] psychological dysfunction being causally related to the incident in question. As such, it might be appropriate to have [the Appellant's] file reviewed by one of the Clinical Psychologists on the Health Care Services Team.

On December 28, 2007, the Appellant underwent an independent psychiatric examination with [Independent Psychiatrist]. [Independent Psychiatrist] was provided with a copy of the medical information on the Appellant's file along with documentation pertaining to the Appellant's [text deleted]. In his report dated January 22, 2008, [Independent Psychiatrist] noted the following:

[The Appellant] does not meet criteria for a Major Depressive Episode based on his description of day-to-day activities, as well as his mother's collateral information. [The Appellant] does not have difficulty with sleep consistent with a depressive illness. He does not have any difficulty with his appetite and he does not have difficulty with concentration as evidenced by his ability to do the crossword puzzles everyday and read. He acknowledged enjoying activities such as doing crossword puzzles and visiting with neighbors. Aside from some appropriate guilt related to living off his mother at the age of [text deleted], there is no evidence of pathological guilt. In fact, [the Appellant] maintains a positive perception of himself and tends to blame others for his current difficulties.

[The Appellant] does appear to maintain a distorted perception of pain and its meaning. He reported the pain, in and of itself, is evidence of disability. He spends much of his time preoccupied with his pain experiences. These difficulties are consistent with a Pain Disorder.

Recommendations

1. It is my opinion, based on reasonable medical certainty, that [the Appellant] does not suffer a Major Depressive Disorder nor is he in the midst of a Major Depressive

Episode. Having said this, he certainly is experiencing significant emotional and psychological distress as a result of his current anger towards Manitoba Public Insurance related to perceived mistreatment, his current severe financial difficulties and reliance on his mother, and her failing health. It is my opinion that the one intervention that would have the most significant positive impact on [the Appellant's] mental status is to return to work. There is no psychiatric disability that would prevent his return to work. In fact, having little else in his life other than his preoccupation with anger and frustration over his mistreatment by Manitoba Public Insurance increases the difficulties associated with his pain disorder. The treatment for pain disorder is to increase activity despite the pain and attempt to modify distorted cognitions regarding the meaning of pain.

2. [The Appellant's] longstanding difficulties with trust, anger and maladaptive coping strategies would best be served by long-term supportive psychotherapy. [The Appellant] could certainly investigate options for accessing this time of therapy. The Canadian mental Health Association would be able to provide him with a list of counselling services available at low or no cost.

The Appellant's file, including [Independent Psychiatrist's] report, were subsequently reviewed by [MPIC's Psychologist], Psychological Consultant to MPIC's Health Care Services Team. In his interdepartmental memorandum dated February 22, 2008, [MPIC's Psychologist] noted the following:

OPINION

Based on the review of the file documentation, it is writer's opinion that the claimant does not have a psychological or psychiatric disability that would prevent him from performing the essential duties of a service technician. This is evident from the information contained in [Independent Psychiatrist's] report as well as the reports from [Rehab Clinic's Doctor] and [MPIC's Doctor]. [Independent Psychiatrist] specifically indicates that *"It is my opinion that the one intervention that would have the most significant positive impact on [the Appellant's] mental status is a return to work. There is no psychiatric disability that would prevent his return to work"*.

Furthermore, while the claimant does appear to have pain concerns, these do not, on the balance of probabilities, appear to be causally related to the MVA in question, nor are they preventing the claimant from returning to work. [Independent Psychiatrist] also indicates that the claimant is not clinically depressed, but does have numerous stressors in his life related to his legal difficulties, financial concerns, perceived mistreatment and reliance on his mother. These stressors are further exacerbated by his longstanding problems with trust, anger and maladaptive coping arising from his mixed personality disorder.

In terms of psychological treatment, there is no medical information indicating that such treatment would be medically required in relation to the MVA at this time. According to

[Independent Psychiatrist], the claimant may wish to seek treatment for his ongoing psychosocial stressors through a community agency.

The Appellant sought an Internal Review of the case manager's decision of January 8, 2007, which had indicated that there was no objective information that would indicate inability to work as a service technician and therefore there was no entitlement to further IRI benefits. Subsequent to the Internal Review Hearing, the Internal Review Officer engaged a vocational rehabilitation consultant to complete a Labour Market Survey. The Internal Review Officer requested that the vocational rehabilitation consultant research the [text deleted] Labour Market for employment in NOC 2242-Electronic Service Technician, concentrating on the occupational title of photocopy machine technician. The Internal Review Officer also requested that the vocational rehabilitation consultant report on the strength demands of this position. In a labour market survey dated April 16, 2008, the vocational rehabilitation consultant noted the following:

In reviewing the information collected from employers, it appears this occupation typically falls within the light category with the exception of one employer advising lifting of 25lbs on a daily basis. The weight in which they are required to lift on a daily basis is determined by: what tools and supplies are required for each service call; and how many service calls they perform each day. For example, a Photocopy machine Technician may be required to perform 5 service calls per day and would be required to take tools and supplies to each call.

In addition, approximately three times per month, the [text deleted] may be required to lift up to 50lbs. As per the Career Handbook's definition 50lbs is considered to be in the heavy strength category. However, several employers advised that this weight may be accommodated with a wheeler.

In a decision dated May 5, 2008, the Internal Review Officer confirmed the case manager's decision of January 8, 2007 and dismissed the Appellant's Application for Review. The Internal Review Officer considered whether the Appellant's IRI benefits were correctly terminated on July 16, 2006 pursuant to Section 110(1)(c) of the MPIC Act. The Internal Review Officer found that:

Section 8 of Manitoba Regulation 37/94 defines what is meant by “unable to hold employment”. This provision (copy attached) states that a claimant is unable to hold employment when their injuries render them “entirely or substantially unable to perform the essential duties of the employment that were performed at the time of the accident”.

Based upon all of the medical evidence that is provided as set out above, including all medical reports reviewed in [the Appellant’s] file, I find that the case manager was correct in terminating his entitlement to Income Replacement Indemnity benefits effective July 16, 2006. I find that [the Appellant] is both mentally and physically capable of working full-time in his determined employment and that there are no physical or mental impairments of function to preclude him from doing so. In fact, the medical evidence on file supports that he was capable of performing the duties of his determined employment even before he was provided with a work-hardening program at [Rehab Clinic].

In my opinion, the file is more than well documented that [the Appellant] simply does not want to return to work.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant’s IRI benefits were correctly terminated on July 16, 2006 pursuant to Section 110(1)(c) of the MPIC Act.

Appellant’s Submission:

The Appellant submits that he was unable to commence employment as a photocopy service technician as of July 16, 2006. He argues that his pain complaints in July of 2006 were genuine and precluded his return to work. The Appellant maintains that:

1. MPIC erred by providing incorrect information to its medical consultants and the third party independent medical examiner;
2. MPIC erred in determining that the occupation of a photocopy service technician was a light duty position;
3. MPIC misinterpreted the NOC classification 2242; and
4. MPIC erred in failing to consider evidence of the Appellant’s pain disorder.

The Claimant Adviser, on behalf of the Appellant, argues that there was erroneous information provided to MPIC's medical consultants which seriously impacted the reliability of their reports. The Claimant Adviser claims that MPIC continued to describe the Appellant's determined occupation of an electronic service technician as a light duty occupation, rather than medium to heavy and therefore the opinions of MPIC's health care providers, which relied on that information, are unreliable.

The Claimant Adviser submits that a photocopy service technician position most accurately falls within the heavy to very heavy category based upon the information supplied by the Appellant. As a result, the Claimant Adviser argues that the determination that the Appellant could return to work was flawed since he was not able to work at the heavy to very heavy category.

The Claimant Adviser also argues that the Appellant was suffering from chronic pain and depression which further prevented his return to the workforce, in addition to the Appellant's inability to physically handle the demands of the determined position. In support of this position, the Claimant Adviser relies on the report from [Appellant's Psychologist], clinical psychologist, who found that the Appellant met the DSM-IV diagnostic criteria for Major Depressive Disorder and that, on the balance of probabilities, the Appellant's depression was directly related to the motor vehicle accident.

The Claimant Adviser maintains that a combination of physical and psychological conditions prevented the Appellant from returning to the determined employment. He argues that the Appellant suffered from a number of painful physical injuries arising from his motor vehicle accident of December 17, 2005. Additionally, the medical evidence indicates that the Appellant has a personality type which predisposes him to developing depression and chronic pain

disorders in response to the physical pain and other stressors arising from the motor vehicle accident. As a result, the Claimant Adviser argues that the Appellant was not able to return to work at the determined employment in July of 2006. He argues that the Appellant is entitled to IRI benefits from that day until the date of his return to work on September 1, 2008. The Claimant Adviser therefore requests that the Appellant's appeal be allowed.

MPIC's Submission:

Counsel for MPIC submits that the Appellant does not have a medical condition related to the motor vehicle accident of December 17, 2005 that prevented him from returning to work on July 17, 2006.

Counsel for MPIC argues that the Appellant underwent a work hardening program at [Rehab Clinic] and that [Rehab Clinic] was in the best position to assess the Appellants' employability. Counsel for MPIC claims that at the end of the work hardening program, the Appellant had the demonstrated strength ability of a heavy strength level. He therefore argues that, even though a photocopy technician is classified as a medium strength position, when the Appellant was discharged from the work hardening program at [Rehab Clinic], he was performing as a heavy demand strength level and therefore exceeded the strength demands of the photocopy service technician position.

Counsel for MPIC also relies on the report of [Independent Psychiatrist]. Counsel for MPIC maintains that the report of [Independent Psychiatrist] should be preferred to those of [Appellant's Doctor] and [Appellant's Psychologist]. [Independent Psychiatrist] had had the advantage of relating the information from the Appellant to collateral information provided by

the Appellant's mother. [Independent Psychiatrist's] opinion was that the Appellant was not suffering from any psychological condition related to the motor vehicle accident.

Counsel for MPIC submits that the Appellant's evidence falls short of the standard required to establish that he couldn't return to work because of his pain. He maintains that the Appellant's claim was not credible to begin with and therefore his claim for ongoing IRI should not be accepted. The Appellant's evidence was insufficient and accordingly, the Appellant's appeal should be dismissed and the Internal Review Decision dated May 5, 2008 should be confirmed.

Decision:

Upon a careful review of all of the oral and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that the Appellant's IRI benefits were properly terminated on July 16, 2006 pursuant to Section 110(1)(c) of the MPIC Act.

Reasons for Decision:

Upon a review of all of the evidence before it, the Commission finds that the termination of the Appellant's IRI benefits as of July 16, 2006 was appropriate. The Commission finds that the [Rehab Clinic] work hardening program Discharge Report of July 11, 2006 is determinative of the Appellant's ability to return to work at a heavy strength level demand position as of that date. We find that [Rehab Clinic] was in the best position to assess the Appellants' functional abilities and his employability. Further, the Discharge Report represents the best objective evidence of the Appellant's functional abilities as of July 2006. In contrast, the Appellant's testimony with respect to his pain complaints was unreliable and there was insufficient objective evidence to confirm his inability to hold the determined employment as of July 16, 2006. Accordingly, we

are satisfied on a balance of probabilities, based upon the [Rehab Clinic] Discharge Report, that the Appellant was physically capable of holding the determined employment as of July 16, 2006.

With respect to the Appellant's depression and psychological condition, the Commission prefers the report of [Independent Psychiatrist] to those of the Appellant's treating practitioners with respect to the relationship between the Appellant's psychological condition and the motor vehicle accident of December 17, 2005. The Commission finds that [Independent Psychiatrist's] reports are the most objective review of the file and provide the most objective review of the Appellant's psychological condition. Based upon [Independent Psychiatrist's] report, while the Appellant does appear to have pain concerns, they are not, on the balance of probabilities causally related to the motor vehicle accident in question, nor do they prevent the Appellant from returning to work. As a result, the Commission finds that the Appellant was not prevented from returning to work due to a psychological condition arising from the motor vehicle accident of December 17, 2005.

Accordingly, the Commission finds that the Appellant is not entitled to further IRI benefits. As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated May 5, 2008 is confirmed.

Dated at Winnipeg this 9th day of February, 2011.

YVONNE TAVARES

WILF DEGRAVES

SANDRA OAKLEY