

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-106**

PANEL: Mr. Mel Myers, Chairperson
Mr. Neil Cohen
Ms Sandra Oakley

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
The Appellant was assisted by an Interpreter, [text deleted].
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Alison Caldwell.

HEARING DATE: April 4, 2011

ISSUE(S): The capacity of the Appellant to carry out the essential duties of his pre-accident employment.

RELEVANT SECTIONS: Section 110(1)(a) 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 PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant was involved in a motor vehicle accident on August 3, 2009 when the vehicle he was operating was hit from behind. The Appellant confirmed that as a result of the impact his vehicle did not come into contact with anything else.

At the time of the accident the Appellant was employed as a cashier at [text deleted] working 40 hours per week. His duties included cash register, cooler filling, stocking shelves, cleaning, food handling and gas pump work.

In his report dated May 6, 2010 the Internal Review Officer succinctly sets out the essential facts of this appeal:

“A Primary Health Care Report was received from [Appellant’s Doctor #1] dated August 19, 2009. In that report [Appellant’s Doctor #1] confirmed that you did not: sustain a blow to the head, sustain a loss of consciousness, sustain an abrasion, contusion or laceration, that you had not had any investigative tests performed, that you did not seek health care within 24 hours of the collision.

Upon initial presentation on August 5, 2009 you were having symptoms in your neck, mid and low back. [Appellant’s Doctor #1] confirmed that the neurological examination was normal and his diagnosis was that of back strain. He prescribed medication.

You re-attended upon [Appellant’s Doctor #1] as evidenced by a number of Certificate of Illness forms covering the period August 19 to August 29, 2009, August 31 to September 15, 2009, and September 15 to September 20, 2009.

[Appellant’s Doctor #1] also provided a note September 24, 2009 confirming that you could increase your duties to three half days starting September 28, 2009 as tolerated.

A Return to Work/Modified Duty Form was completed October 16, 2009. It was anticipated that you would be working 4 to 6 hours daily for two weeks with a progression to 8 hours a day over the 3 to 4 week period. The report indicates a number of modifications. [Appellant’s Doctor #2] indicated that he was in agreement with the return to work proposed by the physiotherapist in the note signed November 20, 2009.

You were referred to [Appellant’s Doctor #2] by your physician. The note dated January 5, 2010, [Appellant’s Doctor #2] indicated that you were restricted to a maximum of 5 hours a day to be re-assessed in one month.

You (sic) medical arrangements were made for your medical file to be referred to MPI medical consultant who provided an Inter-Departmental Memorandum dated January 15, 2010. It was the medical consultant’s opinion that there was no objective findings that would support the need for your restricted hours and that:

“Based on circumstances surrounding the incident in question, the medical conditions [the Appellant] was diagnosed as having subsequent to the incident in question, the reported improvement with the treatment provided to him, and the absence of documentation indicated he was noted to have objective evidence of a physical impairment of function per se, it is my opinion he has recovered from the medical conditions arising from the incident in question to the extent he is able to perform his regular full-time duties if he so desires.”

Case Manager's Decision:

The case manager issued her decision on January 21, 2010 and concluded that the Appellant was not entitled to receive Income Replacement Indemnity ("IRI") benefits beyond December 20, 2009 and stated:

"Medical information from [Appellant's Physiotherapist] confirms that you were able to return to work full hours and duties effective December 21, 2009. As such, your entitlement to Income Replacement Indemnity ended on December 20, 2009.

On January 5, 2010, [Appellant's Doctor #2] suggested you work reduced hours for a period of 1 month. Unfortunately, [Appellant's Doctor #2's] report does not provide any objective findings that would support the need for restricted hours nor does it support your restrictions are related to your accident related injuries.

Your entire medical file was reviewed by our Health Care Services Consultant on January 15, 2010 and it was determined that your accident related injuries are not restricting you from performing your regular full time work duties.

In view of the above, you are not entitled to IRI benefits beyond December 20, 2009."

The Commission notes [Appellant's Doctor #2's] further report dated February 17, 2010 which stated:

"In regards to restrictions, [the Appellant] had restricted active forward flexion, provocative pain on extension, L4-5 – S1 tenderness, and a noted list on visual inspection which was congruent with his CT scan findings of a L5-S1 broad based disc protrusion. (as enclosed).

The goal of the restrictions of 5 hrs/day was to gradual (sic) introduce [the Appellant] back to function and eventual his hours until full hours."

It is further noted that the reason for the CT scan was that:

"Clinical History: Non-specific low back pain for greater than three months. Likely degenerative changes."

The CT scan report indicated that there is a shallow disc protrusion which appears to just contact the left S1 nerve root.

At the request of MPIC, [MPIC's Doctor], Medical Consultant for MPIC's Health Care Services, reviewed [Appellant's Doctor #2's] letter of February 17, 2010 and provided an interdepartmental memorandum to the case manager which stated:

"Based on my review of [the Appellant's] file, it is my opinion the file does not contain objective medical evidence indicating he has a physical impairment of function arising

from the incident in question to the extent that he is not able to perform his regular pre-accident, full-time duties as a clerk for [text deleted] effective December 21, 2009.

The information obtained from [Appellant's Doctor #2's] most recent report indicates he still has some symptoms and restricted low back movements but this would not interfere with his ability to perform his regular work duties on a full-time basis if he so desired.

It is noted that [Appellant's Doctor #2] did not provide information indicating [the Appellant's] condition regressed from an objective standpoint to the extent he was not able to successfully complete the gradual return to work program, which ended on December 20, 2009." (underlining added)

The Appellant filed an Application for Review of the case manager's decision dated March 5, 2010.

Internal Review Officer's Decision:

An Internal Review Hearing was held on April 15, 2010 and an interpreter was provided for you at that hearing. The Internal Review Decision confirmed the decision of the case manager that on the balance of probabilities the Appellant had not established that he was incapable of carrying out the essential duties of his pre-accident employment beyond December 20, 2009 as a clerk at [text deleted] on account of injuries arising out of the motor vehicle accident.

In arriving at his decision, the Internal Review Officer stated in his Reasons for Decision:

“Having had the opportunity of reviewing the totality of the evidence I am of the view that you have not established, on a balance of probabilities, that you are incapable of carrying out the essential duties of your pre-accident employment as a cashier at [text deleted] beyond December 20, 2009 on account of injuries arising from the accident of August 3, 2009. The nature and extent of the accident would indicate that your injuries were of a soft tissue in nature. Following receipt of treatment arrangements were made for a gradual return to work program which was agreed to by [Appellant's Doctor #2]. I agree with the MPI medical consultant that there is a lack of objective medical evidence that would explain why you are unable to progress beyond 5 hours a day at your current employment. Accordingly, based upon the two timely reviews of your file by the MPI medical consultant, with which I concur, I am dismissing your Application for Review.”

The Appellant filed a Notice of Appeal dated August 3, 2010.

Appeal Hearing:

The relevant provisions of the MPIC Act and Regulations are:

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;

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.

The Appellant attended the hearing and was assisted by a translator, [text deleted]. [Text deleted] was present in support of the Appellant. Ms Alison Caldwell appeared as legal counsel for MPIC. The Appellant understood the English language and was able to effectively communicate to the Commission in English. However, from time to time he did require the assistance of the interpreter.

The Appellant testified that:

1. At the time of the impact of the motor vehicle accident he did not come into contact with anything and did not require the attendance of an ambulance, nor did he attend the hospital as a result of the motor vehicle accident.
2. Two or three days after the accident he felt pain in his lower back which caused him to seek medical attention.
3. He described his duties as a [text deleted] employee which included cash register, cooler filling, stocking shelves, cleaning, food handling and gas pump work.

4. He worked 40 hours per week as well as additional hours from time to time.
5. As a result of the motor vehicle accident he was unable to continue working a full eight hour shift and after several hours he commenced to have severe pain in his back and was unable to work.
6. He attempted to increase his hours of work but due to the pain he was unable to do so.

[Text deleted], a co-worker at [text deleted], testified that he worked with the Appellant prior to the motor vehicle accident and the Appellant had no problems at work. However, after the accident he began to complain about pain after working several hours and was unable to continue putting in a full day's work.

DISCUSSION:

The Appellant who appeared to be a credible witness submitted that:

1. He was a hard worker prior to the motor vehicle accident but was unable to continue working full shifts after the motor vehicle accident.
2. His co-worker, [text deleted], corroborated his testimony that he was a hard worker prior to the motor vehicle accident and worked full shifts but was unable to do so after the accident.
3. Notwithstanding the lack of support of medical reports, he was not able to return to his full-time employment due to the injuries he sustained in the motor vehicle accident.
4. As a result he requested that the Commission rescind the decision of the Internal Review Officer dated May 6, 2010 and reinstate his IRI benefits.

In her submission, MPIC's legal counsel reviewed the medical evidence, the testimony of the Appellant and the witness, [Appellant's co-worker], and submitted that the Appellant has failed

to establish, on a balance of probabilities, that as a result of the motor vehicle accident he was unable to carry out the essential duties of his pre-accident employment as a cashier at [text deleted].

MPIC's legal counsel further submitted that the initial health care reports received from the Appellant's physician, [Appellant's Doctor #1], dated August 19, 2009 confirmed that he did not sustain a blow to the head or a loss of consciousness or an abrasion, contusion or laceration, he did not have any investigative tests performed and did not seek health care within 24 hours after the accident.

MPIC's legal counsel further submitted that [Appellant's Doctor #1] in his reports stated:

1. That relative to his initial examination of the Appellant on August 5, 2009, the Appellant's neurological examination was normal and his diagnosis was that of a back strain.
2. He saw the Appellant on a number of occasions during the months of August and September, and on September 24, 2009
3. On September 24, 2009 he provided a note to indicate that the Appellant could increase his duties to 3½ days a week starting on September 28, 2009.

MPIC's legal counsel referred to the medical reports of [Appellant's Doctor #2] who stated:

1. In a report to the case manager on November 20, 2009 that he agreed with the physiotherapists' recommendation for the Appellant's work program which provided that he would be able to return to full-time work effective December 21, 2009.
2. In a letter dated January 5, 2010 he indicated that the Appellant is restricted to a maximum of 5 hrs per day to be reassessed in 1 month.

MPIC's legal counsel noted that:

1. [Appellant's Doctor #2's] report was reviewed by MPIC's medical consultant who indicated that there was an absence of documentation showing any objective evidence of a physical impairment of the Appellant which would have prevented him from returning to his full-time employment.
2. The medical consultant was of the view that the Appellant had recovered from any medical conditions arising out of the motor vehicle accident and that he was able to return to his full-time employment.
3. In the follow-up report [Appellant's Doctor #2] stated that the purpose of initially restricting the Appellant to five hours per day was to gradually introduce the Appellant back to his functions and gradually increase his hours until he obtained full hours of work.

The Commission therefore finds that:

1. [Appellant's Doctor #2] did not disagree with the medical opinion of MPIC's medical consultant that there was no objective evidence that the Appellant suffered from any impairment of function which would prevent him from returning to full-time duties as an employee at [text deleted].
2. There is no medical evidence on the file to indicate that there were any neurological problems with the Appellant arising from the motor vehicle accident nor did a CT scan indicate any medical problems which could be connected to the motor vehicle accident.
3. That although the Appellant suffered a back strain as a result of the motor vehicle accident, the medical reports of [Appellant's Doctor #2] and MPIC's medical consultant indicated that the Appellant made a full recovery from any injuries sustained in the motor vehicle accident and was capable of returning to his full-time employment.

The Commission finds that the reports of [Appellant's Doctor #2] and MPIC's medical consultant support MPIC's position that the Appellant has failed to establish on a balance of probabilities that he was unable to hold the employment that he held at the time of the motor vehicle accident.

For these reasons the Commission finds that the Appellant has failed to establish that MPIC erred in concluding, pursuant to Section 110(1)(a) of the MPIC Act that he was unable to hold the employment that he held prior to the motor vehicle accident. The Commission therefore confirms the decision of the Internal Review Officer dated May 6, 2010 and dismisses the Appellant's appeal.

Dated at Winnipeg this 27th day of April, 2011.

MEL MYERS

NEIL COHEN

SANDRA OAKLEY