Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-052

PANEL:	**Ms Laura Diamond**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Anselm Clarke of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.**
HEARING DATE:	**January 23, 2012**
ISSUE(S):	**Whether the Appellant's PIPP benefits were properly terminated.**
RELEVANT SECTIONS:	**Sections 149 and 160(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

Reasons For Decision

The Appellant was involved in a motor vehicle accident on December 14, 2002. As a result of soft tissue injuries to the area of his cervical spine and surrounding tissue, he sought Income Replacement ("IRI") benefits from MPIC, due to an inability to return to his self-employed business as a computer consultant. He also sought personal care assistance benefits, and received treatment benefits.

The Appellant attended for a professional Occupational Rehabilitation Assessment on January 13, 2005 and reported he had difficulty bending at the waist, sweeping, picking up items from the floor, lifting more than two pounds, shovelling or any repetitive movements involving the shoulders or reaching. On February 16, 2005, he met with his case manager to confirm these functional limitations.

MPIC obtained surveillance, including videotapes, of the Appellant's activities around that time.

His case manager wrote to him on July 10, 2006 setting out the information regarding functional limitations which he had provided to his assessor and case manager. She contrasted these self-reported limitations with observations of the Appellant during the investigation, when he was observed to be:

- "Gesturing with your hands on numerous occasions
- Turning your head repeatedly
- You were seen running across the street without any apparent difficulty
- You were observed working on the front fence of your property, banging with a hammer and leaning over top of the fence, turning your head to look down the line of the fence.
- You were found repeatedly turning your head left and right
- Using a push broom
- Rolling up the garden hose
- Rolling a gas barbeque towards the house."

The case manager also referred to an independent medical examination conducted by [Independent Doctor] on February 3, 2006 where [Independent Doctor] concluded that all the Appellant's current symptoms appeared to relate to pre-existing conditions present prior to the accident. [Independent Doctor] found no objective evidence that the Appellant suffered from symptoms related to the motor vehicle accident and also concluded that he could return to his pre-accident employment.

The Appellant's case manager concluded that he had provided false and inaccurate information to MPIC concerning the extent of his injuries and functional abilities and concluded that he was in contravention of Section 160(a) and Section 149 of the MPIC Act. She also found that the investigative material confirmed his functional ability to return to his pre-accident employment. The Appellant's entitlement to benefits was ended, as a result, effective June 25, 2006.

The Appellant sought an Internal Review of this decision.

On April 20, 2007, an Internal Review Officer for MPIC reviewed the Appellant's file and the case manager's decision. She agreed with the case manager's decision to terminate the Appellant's benefits in accordance with Section 160(a) and also noted that had the Appellant's benefits not been terminated under that section, they would have been terminated in accordance with Section 110(1)(a), which states that he should cease to become entitled to IRI benefits should he regain the ability to return to pre-accident employment, which was consistent with [Independent Doctor's] findings. It is from this decision of the Internal Review Officer that the Appellant has appealed.

A hearing into the Appellant's appeal was scheduled for January 23, 2012. A Notice of Hearing dated December 8, 2011 was sent to counsel for MPIC and to the Appellant's counsel, the Claimant Adviser Office, by regular mail. A Notice of Hearing was also served upon the Appellant by regular mail and Xpresspost. The Appellant indicated receipt of the Xpresspost with his signature, on December 13, 2011.

The Appellant indicated, by letter to the Commission dated December 13, 2011, that although he did not wish to attend the appeal hearing, he had no desire to abandon his claim and wished to be represented at the hearing by the Claimant Adviser Office representative.

At the hearing into the Appellant's appeal the panel was shown videotape evidence of the Appellant undertaking various activities on February 2 and 3, 2005 and May 18 and 19, 2005 and July 27 and 28, 2005. The videotapes showed the Appellant shovelling snow, scraping and chopping ice from his driveway, scraping his car windows, driving, walking, shopping, taking his car to a wand wash, carrying groceries, pushing a dolly, filling his car tires with air and carrying computer components (such as monitors and printers) from the trunk of his car into a store.

Evidence and Submission for the Appellant:

The Appellant did not attend at the hearing into his appeal, but was represented by the Claimant Adviser Office. As a result, no verbal testimony was provided by the Appellant.

His representative provided letters and documents from the [Appellant's Chiropractor]. [Appellant's Chiropractor] indicated that he did not have the opportunity to review the videotaped evidence in regard to the Appellant's actions, but indicated that it was his opinion that the actions described had been performed with a degree of pain and that some of the actions could have been enabled by the relief the Appellant obtained from the chiropractic treatments he was receiving at the time.

[Appellant's Chiropractor's] opinion, dated February 23, 2011, also indicated that in February of 2005 the Appellant "was not able to perform the majority of his work duties" and that "his residual symptomalogy and my residual objective findings were permanent affects (sic) of the healing sequel to the injuries [the Appellant] sustained in the accidents of December 14, 2002 and November 26, 2003."

[Appellant's Chiropractor] also indicated:

> "In order to answer the question of whether [the Appellant] is capable of work at the present time I would require a list of the required physical duties associated with the job in order to properly form a clinical opinion."

Counsel for the Appellant submitted that a review of the Claimant's Reported Level of Function Form showed that the Appellant did not claim an absolute inability to do the tasks and activities set out. Rather, the forms indicated that his ability was "limited". Accordingly, the Appellant was not being fraudulent or misrepresenting his abilities; he was able to do these things to a certain extent, but suffered from pain and was limited in his ability.

The videotape surveillance, on the other hand, showed the Appellant on days when he had had chiropractic appointments around that time, which, as explained by [Appellant's Chiropractor], allowed an increased level of function, due to those treatments.

In regard to the videotape surveillance which was viewed at the hearing, counsel for the Appellant indicated that the activities shown on the tapes, such as squatting into a crouched position, were well within the abilities reported by the Appellant. He had never said that he could not do that, although he may be limited in certain ways. Further, some of the chipping away at ice on the steps or scraping of ice, fell within his abilities; he had merely indicated that he was limited in regard to such repetitive motions.

Much of the videotape evidence contained obscured views of the Appellant and further, it was not inconceivable that, with the chiropractic treatments that he had received a day prior to that and after that, that he could perform such tasks, even having regard to his reported limitation of function.

Counsel for the Appellant submitted that the Commission should prefer the evidence of the chiropractor over that of [Independent Doctor], as the chiropractor was a treating caregiver who had seen the Appellant many times. He also pointed to a report provided by [Appellant's Doctor], dated September 13, 2004, where he opined that the Appellant had been disabled by the accident and not fit to return to his pre-injury occupation as of June 6, 2003. Although [Appellant's Doctor] recognized that it was difficult to determine how much the Appellant's pre-existing condition (spondylosis of the cervical spine) contributed to his condition, [Appellant's Doctor] believed his condition of disc herniation was most likely caused by the motor vehicle accident.

Counsel submitted that based on the information obtained from the Appellant's different doctors, he was not able to hold the employment he had at the time of the motor vehicle accident. The videotapes showed no general fitness activities, but rather a little bit of walking. He was not able to return to his job as a computer consultant, as the requirements of the position, as set out in the Physical Demands Analysis dated February 6, 2003, were well beyond his abilities, as can be seen in the reports of his caregivers.

<u>Evidence and Submission for MPIC:</u>

Counsel for MPIC reviewed excerpts from the videotape surveillance with the Commission. As the Appellant did not attend the hearing, it was not possible to question the Appellant or provide him with any opportunity to comment upon the videotape evidence.

Counsel for MPIC reviewed the assessment reports, including the Self Reported Level of Function Forms that the Appellant had completed. The Appellant was in receipt of IRI benefits and had been for some time. He also received medical treatment benefits and had applied for personal care assistance benefits.

However, when this information was contrasted with the activities depicted on the videotapes, the two did not overlap. Although the Appellant had indicated that he was not able to carry heavy groceries, and that he was unable to do things like shovelling (due to lifting and repetitive reaching), such activities were depicted on the videotapes.

The Appellant had claimed to have difficulty walking more than 0 to 15 minutes and indicated that he could not lift his hands above his head and had limited bending due to pain in his neck. He indicated that he had difficulty driving and that after an hour and a half had to stop and get out, experiencing signs of dizziness.

All of this was contradicted by the video surveillance, counsel submitted. The videotapes were reviewed and counsel pointed out examples of the Appellant, driving, walking, shopping in [text deleted], carrying groceries in one hand, vigorously chipping away at ice in his yard, shovelling not insignificant amounts of snow, raising his arms and bending into shovelling. Videotapes showed him as quite an active gentleman who did not spend his days at home. He was also shown taking his car into a wand wash, walking quickly in parking lots, wheeling bins out of a [text deleted] Store and loading and unloading boxes and computer components, including monitors and printers, into the store. There was no evidence of any discomfort shown on the videotapes and there were several examples shown of vigorous repetitive activity.

As a result, counsel for MPIC submitted that the Appellant had knowingly provided false or inaccurate information to MPIC and that his reporting to the corporation did not represent his true level of function.

Counsel noted that the Appellant's lack of attendance at the appeal hearing and failure to refute any of the surveillance information could result in an adverse inference being drawn against him.

Although the medical evidence confirmed that for a period of time following the motor vehicle accident the Appellant did suffer from functional limitations which led to his receiving IRI benefits, he remained on IRI far longer than he should have. The problem which arose was that due to the Appellant's self-reporting, his IRI benefits continued to be paid. When it became apparent to MPIC that his functional limitations had been exaggerated, his IRI benefits were terminated.

Counsel for MPIC also reviewed the independent medical report provided by [Independent Doctor] on February 10, 2006. [Independent Doctor] examined the Appellant and did a complete review of a variety of medical information made available to him. His report was the most reliable report on the Appellant's file, as he was the individual who was provided with and had the most access to relevant information needed to make a comprehensive review. He noted inconsistencies in the Appellant's examination and set out a number of conclusions, which included the finding that any objective findings upon clinical examination were related only to pre-existing conditions. He concluded that there did not appear to be a requirement for any specific therapy with respect to the motor vehicle accident and, after reviewing the transferable skills analysis regarding the Appellant's occupation, concluded that the Appellant was able to perform his prior consulting duties.

Counsel for MPIC submitted that it was clear from all of the evidence that the Appellant had knowingly provided false and inaccurate information to the corporation which would support the termination of his benefits.

In addition, the evidence was clear that the Appellant was capable of returning to his pre-motor vehicle accident occupation and that his IRI could be terminated under Section 110(1)(a) of the MPIC Act. Counsel submitted that the appeal should be dismissed and the decision of the Internal Review Officer dated April 20, 2007 should be upheld.

<u>Discussion:</u>

The relevant provisions of the MPIC Act 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;
>
> **Claimant to advise of change in situation**
>
> 149 A person who applies to the corporation for compensation shall notify the corporation without delay of any change in his or her situation that affects, or might affect, his or her right to an indemnity or the amount of the indemnity.
>
> **Corporation may refuse or terminate compensation**

> 160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person
>
> (a) knowingly provides false or inaccurate information to the corporation;

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer dated April 20, 2007 should be overturned.

The Commission has reviewed the medical evidence on the Appellant's indexed file, as well as the videotape surveillance evidence and the submissions of counsel for the Appellant and for MPIC.

Although the [Appellant's Chiropractor] indicated that in his opinion, in February 2005 the Appellant was not able to perform the majority of his work duties, his opinion letter, which was dated February 23, 2011, indicated a lack of familiarity with the list of required physical duties associated with the Appellant's job.

[Appellant's Chiropractor] also provided his opinion that the treatments which the Appellant was receiving would assist him in performing the activities described in the videotape surveillance evidence, and that in his opinion these actions would have been performed with a degree of pain. However, the doctor also indicated that he had not seen the videotapes of the Appellant's actions on February 22, 2005.

Although some information was provided to him, [Appellant's Chiropractor] did not have an opportunity to undertake a comprehensive review of the medical information on the Appellant's file and to compare that to the activities depicted on the videotapes.

[Independent Doctor] on the other hand did have the opportunity, in addition to examining the Appellant, to conduct a thorough examination of the medical information on the Appellant's file.

Yet, [Independent Doctor] was unable to identify any patho-anatomic diagnosis related to the motor vehicle accident or any permanent impairment and structural functional limitations or measurable impairment of function related to the motor vehicle accident, although pre-existing conditions were present.

Finally, the Commission notes that in spite of extensive videotape evidence of the Appellant undertaking frequent and vigorous activity which appeared to be beyond the functional limitations he had reported to MPIC and some of his caregivers, no testimony was provided by the Appellant to explain the contrast between his self-reporting and the videotape activity.

Accordingly, the Commission finds that the Appellant has failed to meet the onus upon him of showing, on a balance of probabilities, that the conclusion of the Internal Review Officer that the Appellant had knowingly provided false or inaccurate information to the Corporation was in error. The Commission does not, therefore, find it necessary to decide upon the Appellant's ability to hold his employment, under Section 110(1)(a) of the MPIC Act.

As a result, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated April 20, 2007 terminating the Personal Injury Protection Plan ("PIPP") treatment and IRI benefits which the Appellant was receiving on June 25, 2006, is therefore upheld.

Dated at Winnipeg this 23rd day of February, 2012.

LAURA DIAMOND