

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-140**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Paul Johnston
Mr. Les Marks

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

HEARING DATE: February 6, 2012

ISSUE(S): Entitlement to top-up Income Replacement benefits beyond June 12, 2008.

RELEVANT SECTIONS: Section 81 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, [text deleted], was involved in a motor vehicle accident on February 3, 2008, when her vehicle hit another vehicle that turned in front of her. As a result of that accident, the Appellant experienced pain in the back of her neck, soreness in her upper chest and pain and burning in her upper back and shoulder blade area. Due to the bodily injuries which the Appellant sustained in this accident, she became entitled to Personal Injury Protection Plan ("PIPP") benefits in accordance with Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was employed as a [text deleted] at [text deleted]. The Appellant was able to work her shifts on February 4 and 5, 2008 as scheduled. However, on February 6, 2008 the Appellant had to leave work due to a severe throbbing and burning pain in her chest. She remained off work until March 3, 2008, when she returned to work for a four hour shift on the advice of her chiropractor, [text deleted].

Prior to the motor vehicle accident, the Appellant's typical weekly average hours were 29 hours per week. Following the motor vehicle accident, the Appellant testified that her typical weekly average hours were 20 hours per week. Prior to the motor vehicle accident, five hour shifts were normal. However, the Appellant testified that following her return to work on March 3, 2008, she has been unable to increase her hours beyond four hours. She maintains that her chest pain is the major obstacle to working longer hours. She claims that her body has told her that she can only work four hour shifts. Since March 3, 2008, the Appellant has not worked more than four hour shifts.

In a letter dated June 12, 2008, MPIC's case manager advised the Appellant as follows:

I advised you that in order to qualify for further Income Replacement Indemnity (IRI) benefits; you must be substantially incapable of performing the essential duties of the employment that you held at the time of the accident. This is in accordance with Section 8 of the Manitoba Public Insurance Corporation Act, Regulation 37/94.

Based on the medical information received to date by [Appellant's doctor #1] and [Appellant's chiropractor], we are unable to establish that you sustained an impairment of function that would render you entirely or substantially incapable of performing the essential duties (sic) your employment at this time.

On June 12, 2008 it was confirmed that you last attended chiropractic treatment on March 17, 2008. You indicated that this type of treatment was doing more harm to you than good.

As such, this will confirm that you are not entitled to further Income Replacement Indemnity benefits past May 17, 2008 as a result of the above noted motor vehicle accident.

The Appellant sought an Internal Review of that decision. In a decision dated September 25, 2008, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision to end the Appellant's entitlement to IRI benefits. However, the Internal Review Officer did change the end date of the Appellant's entitlement to IRI benefits from May 17 to June 12, 2008. The Internal Review Officer found that there was no objective medical information to identify any restrictions which would restrict the Appellant's return to work at four hours per shift. As a result, the Internal Review Officer confirmed the case manager's decision to terminate the Appellant's entitlement to IRI top-up benefits, although she extended those benefits until the date of the case manager's decision letter of June 12, 2008.

The Appellant has now appealed that decision to this Commission. As noted above, the issue which requires determination on this appeal is whether the Appellant is entitled to further IRI top-up benefits beyond June 12, 2008.

Appellant's Submission:

The Claimant Adviser, on behalf of the Appellant, claims that the Appellant has not been able to extend her hours to five hours per shift from four hours per shift since the motor vehicle accident. She maintains that the Appellant's inability to increase her hours is due to the injuries which the Appellant sustained in the motor vehicle accident of February 3, 2008. The Claimant Adviser maintains that prior to the motor vehicle accident, the Appellant would work extra hours when available. However, since the motor vehicle accident, the Appellant has not been able to increase her shifts beyond four hours. The Claimant Adviser maintains that the Appellant is not a malingerer based upon her exemplary work record.

The Claimant Adviser submits that from the outset the Appellant's injury has been reported as a chest wall injury. She contends that [Appellant's doctor #2's] examination findings establish a cause and effect relationship between the Appellant's chest wall pain and the motor vehicle accident. The Claimant Adviser argues that the Appellant has continuously reported ongoing chest wall difficulties since the motor vehicle accident. She submits that the ongoing report of chest wall pain together with the Appellant's testimony establish a causal connection to the motor vehicle accident.

The Claimant Adviser submits that the Appellant's IRI benefits were terminated because her family physician, [Appellant's doctor #1], did not respond to the case manager's request for a report. The Claimant Adviser argues that MPIC's case manager had a duty to request updated medical reports from the Appellant's treating practitioner. She maintains that the case manager failed in her obligation to the Appellant as she did not obtain updated medical reports prior to terminating the Appellant's IRI benefits. The Claimant Adviser submits that the Appellant was a credible witness and that the Commission should rely upon her testimony that she cannot work more than four hours per day.

In summary, the Claimant Adviser submits that the medical evidence on the Appellant's file, together with the Appellant's testimony at the hearing, establish a causal connection between the Appellant's ongoing chest wall complaints and the motor vehicle accident and her inability to work more than four hours per day. Accordingly, the Claimant Adviser argues that the Appellant is entitled to ongoing top-up IRI benefits from June 12, 2008 due to her motor vehicle accident related injuries which prevent her from working more than four hours per day.

MPIC's Submission:

Counsel for MPIC submits that there is no objective medical evidence which establishes that the Appellant's ongoing chest wall pain is connected to the motor vehicle accident of February 3, 2008. Additionally, counsel for MPIC submits that there is no objective medical evidence supporting the Appellant's inability to progress beyond four hours per shift at her job as a cashier for [text deleted].

Counsel for MPIC submits that the evidence of the Appellant's caregivers, including her family physician and her chiropractor are of little assistance in the determination of causation and the Appellant's functional abilities. Counsel for MPIC argues that the Appellant's caregivers provide no objective evidence and no basis for the Appellant only working four hours per shift. Counsel for MPIC contends that there is actually no evidence that the Appellant cannot work more than four hours per shift. He submits that there is no evidence of a loss of spinal range of motion, no tear of any structure, and no test of her endurance at the workplace. It is only her belief that she is limited to four hours per shift which restricts her time at work to four hours. Counsel for MPIC argues that the evidence on the Appellant's file does not establish that she could not work more than four hours per day.

As a result, counsel for MPIC submits that the Appellant has not met the onus of proof in this appeal and therefore her appeal should be dismissed and the Internal Review Decision dated September 25, 2008 should be confirmed.

Decision:

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal,

and after hearing the submissions of the Claimant Adviser and of counsel for MPIC, the Commission finds that the Appellant is not entitled to top-up IRI benefits beyond June 12, 2008.

Reasons for Decision:

The onus is on the Appellant to show that, on a balance of probabilities, she is unable to perform the essential duties of her employment, as a result of injuries arising from the motor vehicle accident of February 3, 2008, for more than four hours per shift. The Commission has carefully reviewed the medical evidence before it and has concluded that the evidence fails to establish, on a balance of probabilities, that the Appellant is unable to progress beyond four hours per shift as a result of injuries sustained from the motor vehicle accident of February 3, 2008.

The Commission finds that the Appellant has failed to establish, on a balance of probabilities, that her ongoing chest wall complaints restrict her working hours to four hours per shift. As noted by counsel for MPIC, had the Appellant attempted working more than four hours and then reported increased pain, loss of range of motion, or any other increased symptomatology, then there would be objective evidence upon which to establish that she could not work more than four hours per day. However, the lack of such evidence and the Appellant's ongoing limitation to four hours per shift is insufficient evidence upon which to base a finding that she cannot work more than four hours per shift. Simply stated, the Appellant has not attempted to work more than four hours per shift. She does not know what will happen if she increased her work activity. As a result, we are unable to find that she is limited to four hours per shift.

Accordingly, the Commission finds that the Appellant has not established, on a balance of probabilities, that she is limited to four hour shifts as a result of injuries arising from the motor vehicle accident of February 3, 2008. As a result, the Commission finds that the Appellant is not

entitled to top-up IRI benefits beyond June 12, 2008. Accordingly, the Appellant's appeal is dismissed and the Internal Review Decision dated September 25, 2008 is confirmed.

Dated at Winnipeg this 9th day of March, 2012.

YVONNE TAVARES

PAUL JOHNSTON

LES MARKS