

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-061**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Mr. Paul Johnston

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

HEARING DATE: May 4, 2012

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits beyond July 13, 2008.

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

The Appellant, [text deleted], was involved in a motor vehicle accident on December 12, 2007. At the time, she was the driver of a vehicle travelling westbound on [text deleted], when a vehicle went through the red light and hit her vehicle on the passenger side. Her vehicle spun around and was hit on the passenger side by a third vehicle travelling eastbound. The Appellant was taken to [Hospital] by ambulance, where she was examined and released from hospital. As a result of the accident, the Appellant experienced neck, chest, shoulder and back pain. Due to the

injuries which the Appellant sustained in this motor vehicle 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] for [text deleted], working a weekly average of 30 hours per week. Due to the injuries which she sustained in the motor vehicle accident, the Appellant was unable to perform her duties as a retail stocker at [text deleted] and therefore she became entitled to income replacement indemnity (“IRI”) benefits. She was classified as a full-time earner and accordingly her entitlement to IRI benefits was based upon Section 81 of the MPIC Act.

Following the motor vehicle accident, the Appellant attended for physiotherapy treatments approximately two to three times per week. By February 29, 2008, the Appellant had completed 25 sessions of physiotherapy, but still had ongoing neck, right arm, shoulder, collar bone and armpit pain, causing range of motion restriction and weakness. The physiotherapist did not recommend a return to work for the Appellant at that time.

On March 17, 2008, the Appellant commenced a modified work hardening program at [rehab clinic]. The program was to last eight weeks and the goal of the program was to increase the Appellant’s functional ability while attempting to control her subjective complaints of pain, allowing her to successfully return to her previous employment. The Appellant was discharged from the [rehab clinic] work hardening program on May 16, 2008. The Work Hardening Program Discharge Report dated May 26, 2008 indicated that her “status at completion” was “improved” and the “vocational recommendation” was that the Appellant was “fit for an immediate, unmodified return to pre-injury employment”. The discharge report also stated that

the Appellant had achieved a functional strength demand of medium according to the Dictionary of Occupational Titles, Fourth Edition.

The Appellant's family doctor, [Appellant's doctor #1], provided a report dated May 21, 2008, wherein he advised that the Appellant was not fit to return to her job at [text deleted] mainly due to pain and stiffness of her neck and right arm. [Appellant's doctor #1] noted that the Appellant was still quite tender over the right trapezius muscle and in the upper fibres of the right latissimus dorsi muscle. Flexion of the neck and left rotation was painful. [Appellant's doctor #1] disagreed with the opinion from [rehab clinic] that the Appellant could return to her job as a stocker at [text deleted].

The Appellant's file was subsequently referred to MPIC's Health Care Services Team for review. [MPIC's doctor] provided an inter-departmental memorandum dated June 20, 2008, wherein he found that the Appellant had recovered from the medical conditions arising from the accident in question to the extent that she had the physical ability to return to her regular pre-accident full-time duties. [MPIC's doctor's] opinion was based upon the documentation obtained from [rehab clinic] indicating that the Appellant had successfully completed the reconditioning/work hardening program and met the demands of her occupation without restrictions.

On June 26, 2008, the Appellant's physiotherapist provided a narrative report advising that the Appellant had returned to physiotherapy on June 24, 2008 for reassessment and treatment. The Appellant had described her time at [rehab clinic] as a very painful experience. The Appellant also advised that she now had frequent episodes of severe dizziness, which were brought on or worsened by neck flexion or extension. These episodes of dizziness had caused some falls. Due

to these findings and the requirements of the Appellant's job, the physiotherapist recommended that it would be unwise to send the Appellant back to work. She would be at risk of causing an accident or further injury if she were to become dizzy while on a ladder or carrying stock. The Appellant was referred to [Appellant's physiotherapist] for assessment and treatment of her dizziness.

In a decision dated June 26, 2008, MPIC's case manager advised the Appellant that her entitlement to IRI benefits would cease as of July 13, 2008 according to Section 110(1)(a) of the MPIC Act. The case manager based her decision upon the Health Care Services Review which found that based on the documentation provided by [Appellant's doctor #1], there was no objective medical evidence confirming a physical impairment of function resulting from the motor vehicle accident that would prevent the Appellant from performing the required demands of her job.

The Appellant disagreed with the case manager's decision and filed an Application for Review. Prior to rendering her decision, the Internal Review Officer obtained further medical reports from [Appellant's physiatrist] (whom the Appellant had started seeing in September 2008 for trigger point injections) and from the physiotherapist, [Appellant's physiotherapist], of the [text deleted].

In her report dated January 28, 2009, [Appellant's physiotherapist] advised as follows:

At that time, she was referred to me at the [text deleted]. On initial assessment July 8, 2008, [text deleted] presented with lots of pain to her neck. Her main concern aside from neck pain radiating into her clavicle and right shoulder was the constant dizziness with very little head movement, nausea and ataxia.

On assessment, she presented with severe neck limitation and was guarding into extension especially on the left side. Abnormalities were noted in smooth pursuit,

saccadic eye movement and VOR cancellation. Ataxia was noted during gait, unable to walk in tandem. Spontaneous nystagmus was noted.

I felt that she possibly had vertebro-basilar insufficiency and that she should seek immediate medical attention. Education was given on avoidance of left rotation and extension. A letter was sent to her family physician, [Appellant's doctor #1]. The patient had her spouse drive her to the local emergency department for further investigation. A note was sent with the patient with pertinent assessment findings.

[The Appellant] attended for follow-up on October 14, 2008. She had some injections done by [Appellant's physiatrist] which helped with her neck pain, relieving some of the dizziness. At this point, she wanted to improve her motion sensitivity and return to work as a shelves stocker at Wal-Mart.

[Appellant's physiatrist], in his report dated February 19, 2009, advised that:

In summary, [the Appellant] has made significant improvement in her cervicospinal strain with the appropriate treatment prescribed to her. Since she has increased her working hours to full time for the past four to six weeks, she has noticed recurrence of the neck pain. This is partially contributed by her low endurance and repetitive and heavy activities of the upper extremities. On this visit she underwent right C5 and C7 paraspinal blocks and trigger point injections of the right infraspinatus and trapezius muscles each with 2cc of 1% lidocaine followed by specific stretching exercises and application of local moist hot packs. She was instructed to continue self-management stretching and strengthening exercises, follow the principles of proper ergonomics and body mechanics to reduce mechanical stresses on her spine and shoulders. I prescribed Robaxacet to take one tablet p.o. t.i.d.

In a decision dated March 13, 2009, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision of June 26, 2008. The Internal Review Officer found that:

The issue posed by the decision under review is essentially a medical issue. The recent opinion from [MPIC's doctor] (dated March 4, 2009) reviews all of the medical evidence submitted to date to address whether you have a physical impairment of function arising from the MVA that prevents you from your pre-accident occupational duties (copy enclosed). [MPIC's doctor] opines:

"I was unable to extract any information from the reports indicating [the Appellant] was advised not to perform her work duties as a result of a physical impairment she was identified as having by either of these health care professionals. Information obtained from [Appellant's physiatrist] indicates [the Appellant's] physical examination findings at a time when she was not working were not significantly different from the findings noted when she was working

full-time. In other words, [the Appellant] did not demonstrate objective evidence of a physical impairment of function when assessed by either [Appellant's physiatrist] and/or [Appellant's physiotherapist] that would indicate she was physically impaired from performing the required demands of her occupational [sic] if she so desired. The information leads me to conclude that [the Appellant's] reluctance to return to work while under the care of these two health care professionals was a byproduct of symptoms and not secondary to a physical impairment arising from the incident in question.

Based on this review, the opinions previously rendered remain unchanged.”

I accept [MPIC's doctor's] assessment on the issue of whether you developed a physical impairment of function from the MVA that prevents you from returning to your pre-accident occupational duties as a Retail Stocker at [text deleted]. Further, [rehab clinic's doctor] of [text deleted] cleared you for a return to work as of May 16, 2008, stating that you were fit for an immediate, unmodified return to your pre-injury employment.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to IRI benefits beyond July 13, 2008.

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 the Appellant was not able to hold her pre-accident employment as of July 13, 2008 and therefore her IRI benefits were terminated prematurely. The Claimant Adviser claims that due to the Appellant's subjective complaints of pain, she was unable to return to work on July 13, 2008. He argues that the

Appellant is entitled to IRI benefits until January 2009, when she returned to work on a full-time basis at her pre-accident employment.

The Claimant Adviser submits that the Appellant consistently reported pain in her neck, shoulders and armpits. She was not a malingerer and diligently pursued treatments, including physiotherapy and the work hardening program at [text deleted]. She attended upon a number of specialists, including [Appellant's neurologist], [Appellant's doctor #2], and [Appellant's physiatrist]. However, despite her best efforts, the Appellant was not able to improve her pain complaints. The Claimant Adviser argues that the discharge report from [text deleted] did not take into account the Appellant's subjective complaints of pain. He also submits that the Appellant did not successfully complete the [text deleted] program. Although she had some increase in function with the work hardening program at [text deleted], she still had ongoing complaints of pain which limited her functional abilities. Further, the Appellant never progressed to full-time hours at [text deleted] prior to her discharge. The Claimant Adviser insists that it was [Appellant's physiatrist's] treatment, which started in September 2008, that helped the Appellant reduce her pain complaints and transition back to the workplace.

The Claimant Adviser submits that the Appellant was unable to return to work on a full-time basis prior to January 2009 due to her ongoing complaints of pain. He maintains that the Appellant was a credible witness. She did not exaggerate her symptoms, nor was she a malingerer. Based upon the reports of the Appellant's caregivers, including [Appellant's physiatrist] and [Appellant's doctor #1], the Claimant Adviser submits that the Appellant's appeal should be allowed and that she should be entitled to IRI benefits from July 14, 2008 until January 5, 2009.

MPIC's Submission:

Counsel for MPIC submits that the Appellant has not established an entitlement to IRI benefits beyond July 13, 2008. In support of his position, counsel for MPIC relies upon the following:

1. The [text deleted] discharge report of May 26, 2008 which advised that the Appellant was fit for an immediate return to her pre-injury employment.
2. [Appellant's neurologist's] report of June 11, 2008, wherein [Appellant's neurologist] advised that the Appellant's problem was not a neurological problem, but rather a musculoskeletal problem and there were no symptoms of dizziness at that point.
3. [MPIC's doctor's] inter-departmental memorandum dated June 20, 2008 wherein [MPIC's doctor] opined that the Appellant had received sufficient supervised care to address the medical conditions arising from the accident and that she had the physical ability to return to her regular pre-accident full-time duties at that time.
4. [MPIC's doctor's] inter-departmental memorandum dated July 18, 2008, wherein he comments that the Appellant's problems with dizziness were not related to the motor vehicle accident and that the Appellant had recovered from the medical conditions arising from the accident to the extent that she was able to return to her pre-accident occupational duties.
5. [Appellant's doctor #2's] report of July 29, 2008, wherein [Appellant's doctor #2] advised that the Appellant had either benign paroxysmal positional vertigo or vestibular neuronitis and further that the Appellant's symptoms were much less severe and she did not require any further investigations or treatment at that time (July 25, 2008).
6. The Job Demands Analysis Report dated March 12, 2012 which determined that the Appellant's pre-accident employment as an [text deleted] should be classified as a medium job demands category.

Counsel for MPIC submits that [Appellant's physiatrist's] medical report dated June 29, 2011 cannot be relied upon. There were several facts and assumptions upon which [Appellant's physiatrist] based his opinions which were inaccurate. [Appellant's physiatrist] assumed that the Appellant's job as a [text deleted] was a heavy physical demands level, which was not correct. Therefore, [Appellant's physiatrist] applied the wrong standard when determining whether the Appellant could return to work. Further, [Appellant's physiatrist] assumed that the Appellant's dizziness was related to the motor vehicle accident. [Appellant's physiatrist] noted that the Appellant's significant dizziness prevented her from returning to work. However, counsel for MPIC submits that the Appellant's dizziness was not related to the motor vehicle accident. Further, [Appellant's physiatrist] did not provide any objective clinical findings for his opinion that the Appellant could not return to work. Rather, he relied upon the Appellant's subjective complaints to base his opinion that the Appellant could not return to work.

Counsel for MPIC submits that the primary reason after July 2008 for which the Appellant could not return to work was the dizziness. However, he maintains that there is no medical evidence linking the Appellant's dizziness to the motor vehicle accident. He argues that there is no objective evidence after July 2008 that the Appellant could not return to work. Counsel for MPIC submits that only where the Appellant was a reliable historian should her subjective pain complaints factor into the decision as to whether she could return to work. However, in this case, counsel for MPIC submits that the Appellant's version of her claim is suspect. He submits that the Commission cannot rely upon her complaints of pain being so severe given the inaccuracies throughout the file. Accordingly, counsel for MPIC argues that the Appellant's subjective reports of pain cannot provide the basis for her inability to return to work.

In summary, counsel for MPIC submits that the preponderance of evidence on this file supports the Internal Review Decision. He maintains that the Appellant has not discharged the onus of proving otherwise. Therefore, he submits that the Internal Review Decision dated March 13, 2009 should be confirmed and the Appellant's appeal dismissed.

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 IRI benefits beyond July 13, 2008.

Reasons for Decision:

The onus is on the Appellant to show that, on a balance of probabilities, she was unable to perform the essential duties of her pre-accident employment, as a result of injuries arising from the motor vehicle accident, beyond July 13, 2008. 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 was unable to hold her pre-accident employment due to injuries sustained from the motor vehicle accident beyond July 13, 2008. We find that, while the Appellant presented significant subjective complaints relating to her shoulders, neck, armpit, and her pain experience, there was insufficient objective evidence in the file before us to establish that the Appellant could not return to work as an [text deleted] at [text deleted] as of July 13, 2008 due to injuries sustained from the motor vehicle accident.

The Commission finds, on a balance of probabilities, that the primary reason beyond July 13, 2008 which the Appellant could not return to work were her complaints of dizziness.

Additionally, we find that the complaints of dizziness which the Appellant experienced in late June and July 2008 were not related to the motor vehicle accident. We find that there was no medical evidence linking the dizziness to the motor vehicle accident other than the reports from the physiotherapist, [Appellant's physiotherapist]. However, we prefer the opinion of [Appellant's doctor #2], that the dizziness could have been due to an ear infection, especially since the complaints of dizziness essentially resolved by the end of July 2008. As a result, we are unable to find that the Appellant was prevented from returning to her pre-accident employment as of July 13, 2008 due to injuries sustained from the motor vehicle accident.

With respect to the reports of the Appellant's caregivers, including [Appellant's physiatrist] and [Appellant's doctor #1], which supported the Appellant's absence from the workplace, the Commission finds that those reports could not be relied upon to base an extension of the Appellant's IRI benefits. As noted by counsel for MPIC, there were several facts and assumptions upon which [Appellant's physiatrist] based his opinions which were inaccurate. Further, we note that [Appellant's doctor #1's] clinical notes state the following:

Entry of July 31, 2008 – *“wants to take time off for month of August”*

Entry of August 25, 2008 – *“wants to stay off work until she sees [Appellant's physiatrist]”*

Entry of October 8, 2008 – *“wants to start work on November 3rd gradual return to work”*

According to these notes the Appellant was directing her own return to work. We are unable to rely upon [Appellant's doctor #1's] notes during this time in order to extend the Appellant's IRI benefits as there was no objective evidence provided as to why the Appellant should remain off work from August until November 2008.

Accordingly, the Commission finds that the Appellant has not established, on a balance of probabilities, that she was substantially unable to perform her pre-accident employment on July 13, 2008, as a result of injuries arising from the motor vehicle accident of December 12, 2007. As a result, the Commission finds that the Appellant is not entitled to IRI benefits beyond July 13, 2008. Accordingly, the Appellant's appeal is dismissed and the Internal Review Decision dated March 13, 2009 is confirmed.

Dated at Winnipeg this 28th day of June, 2012.

YVONNE TAVARES

NEIL COHEN

PAUL JOHNSTON