

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-067**

PANEL: Ms Laura Diamond, Chairperson
Mr. Paul Johnson
Ms Linda Newton

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

HEARING DATE: February 29, 2012 & March 1, 2012

ISSUE(S): Whether the Appellant's Personal Injury Protection Plan benefits were properly terminated pursuant to section 160(a), 149 or 110(1)(a) of the MPIC Act;

And if so, whether MPIC is entitled to recover any overpayment of Income Replacement Indemnity benefits pursuant to section 189(1) of the MPIC Act

RELEVANT SECTIONS: Sections 160(a), 149, 110(1) (a) and 189(1) 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 was injured in a motor vehicle accident on February 15, 2009, reporting injuries to her neck, back, left arm, right leg and foot as well as headaches and stomach sickness.

At the time of the accident the Appellant was employed full time for [text deleted] as an Office Clerk/[text deleted].

The Appellant was in receipt of Income Replacement Indemnity (“IRI”) benefits as a result of her inability to perform her duties as a [text deleted] from February 23, 2009 to March 8, 2009. The Appellant’s position was classified as sedentary.

The Appellant returned to work at reduced hours on March 9, 2009 and her IRI was reduced accordingly. However, in an Application for Compensation form dated April 15, 2009, the Appellant reported that she was unable to sit, hold the phone, type, or walk and was unable to work at her job. She continued to receive IRI benefits and also began a multidisciplinary assessment and work hardening program, at [rehab clinic] on May 26, 2009 and May 27, 2009.

Throughout the program at [rehab clinic], the Appellant completed Level of Function forms. Progress reports were provided by [rehab clinic], as well as a work hardening program discharge report dated July 27, 2009 indicating that after the six week program, the Appellant’s condition was improved. According to this report, she exhibited a medium strength level ability and was fit for an immediate unmodified return to her pre-injury employment.

MPIC also collected videotape surveillance of the Appellant on several days between June 19, 2009 and July 19, 2009.

Caregivers at [rehab clinic] were asked to review the video surveillance materials. [Rehab clinic’s doctor], after viewing the video material, concluded that the Appellant’s physical capabilities documented on the video exceed her stated physical abilities, that she would be

easily capable of returning to her sedentary job and she could have done so by June 19, 2009, the first date in the video surveillance.

The Appellant's case manager wrote to her on November 27, 2009 confirming the termination of her entitlement to Personal Injury Protection Plan ("PIPP") benefits as a result of her violation of Section 160 (a) of the Act. The case manager concluded that the Appellant demonstrated a level of function contrary to the advice and information she had provided her caregivers and to MPIC and that she knowingly provided false or inaccurate information to the corporation. Furthermore, the Appellant had failed to notify or provide accurate information to MPIC in contravention of Section 149 of the MPIC Act. The case manager took the position that since there was no identified impairment of function preventing her from returning to her pre-accident employment, even if her benefits had not been terminated under Section 160(a) of the MPIC Act, her entitlement to IRI benefits would have ended June 19, 2009 in accordance with section 110(1a) of the MPIC Act.

The case manager also set out the Appellant's obligation to reimburse MPIC for excess payments it had made for the period between June 19, 2009 and July 19, 2009, pursuant to Section 189(1) of the MPIC Act.

The Appellant sought an Internal Review of the case manager's decision. On March 23, 2010, an Internal Review Officer for MPIC upheld the case manager's decision. The Internal Review Officer reviewed the material on the Appellant's file, including the videotape surveillance, [rehab clinic's doctor] and [rehab clinic's] reports and reports, from [MPIC's doctor] of MPIC's Health Care Services.

The Internal Review Officer concluded that on a balance of probabilities the Appellant's PIPP benefits were properly terminated pursuant to Section 160(a) of the MPIC Act, for knowingly providing false or inaccurate information to MPIC. In addition, the Internal Review Officer found that as of June 19, 2009, the Appellant had regained the functional capacity to perform her pre-accident employment. The Internal Review Officer found that, pursuant to Section 189(1) of the MPIC Act, the Appellant was required to reimburse MPIC for the IRI benefits paid from June 19, 2009 to July 19, 2009 in the amount of \$2,612.19.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submissions for the Appellant:

The Appellant testified at the hearing into her appeal. She described the motor vehicle accident and her pre-motor vehicle accident work duties.

The Appellant described the treatment she pursued following the motor vehicle accident and her attempts to return to work. She described the pain that she suffered, including low back and neck pain. She could not sit for long periods at work, or hold a phone to her head, ear and shoulders.

The Appellant discussed her assessment at [rehab clinic] and the work hardening program in which she participated. She described the exercises she did there, and the exercises which she did as part of her home program.

The Appellant was also asked to view portions of the videotape surveillance evidence and to comment. The video evidence showed her doing gardening activities, including bending, squatting, crouching and leaning, and carrying items such as a bed frame. It also showed her

participating in social activities at parties or restaurants and bars. She was shown sitting and standing for periods in bars and around VLT machines, as well as dancing at [text deleted]. She was shown shopping, driving, and walking while holding a cell phone to her ear.

The Appellant was asked about these activities, both in her direct testimony and upon cross-examination. She compared many of the activities to the exercises that she was doing at [rehab clinic], indicating that they were similar. On cross-examination, the Appellant was asked about the activities portrayed on the videotapes. The energy, ease of movement, strength, range of motion and endurance displayed by the Appellant in the videotapes was compared to the difficulties and limitations she described in Level of Function forms prepared for [rehab clinic] and MPIC, as well as with her performance on variance tests and assessments conducted at [rehab clinic] and reports and observations of the caregivers at [rehab clinic].

The Appellant maintained that her abilities on the videotapes were consistent with the reports she gave to [rehab clinic] and MPIC. The strenuous activities she was asked to perform at [rehab clinic], and the length of these exercise sessions were consistent with the abilities, intensity and frequency of activities seen on the video surveillance tapes.

Counsel for the Appellant reiterated this position in his submission. He submitted that the evidence of the Appellant, as well as her [rehab clinic] training diary, showed that the exercises she was performing at [rehab clinic] were considerably more strenuous than the activities she was seen doing in the surveillance videos. The exercise log listed exercises that included bending, sitting, stair climbing and various other activities which were carried out at an intensity and frequency far exceeding anything seen in the videotapes. Similarly, the light gardening activities performed by the Appellant in the videotapes were consistent with the ranges of motion

and exercises which she was developing at [rehab clinic]. Through the work hardening program the Appellant showed significant improvement. Her self-assessment reports were totally consistent with the activities seen on the videotapes as well.

Counsel submitted that it was not only the type of activity which is depicted, but also the duration of the activity, which is important. He reviewed each of the activities, such as walking, standing, climbing stairs, bending, sitting, driving and twisting, to show that none of the activities depicted were inconsistent with the abilities displayed and reported at [rehab clinic].

Counsel for the Appellant also dealt with psychological issues which the Appellant was experiencing, as the Appellant had indicated that she was depressed when she was not able to go out and do what she had done before the accident. He addressed a report the Appellant had made that she “did absolutely nothing”, describing it as just a figure of speech which did not mean that the Appellant could never go out, never do anything or never sit for any periods of time at all.

Counsel for the Appellant reviewed the medical evidence on file, including [rehab clinic’s doctor’s] discharge report of July 27, 2009 and his comments regarding the videotape evidence he had viewed. He also addressed Oswestry scores which appeared to put the Appellant into the crippled category. He submitted that not once did the Appellant describe herself as being crippled or behave as if she was crippled and that she participated fully and actively, according to [rehab clinic’s doctor], in the work hardening program.

Counsel for the Appellant questioned [rehab clinic’s doctor’s] credibility as a witness, since both the Appellant’s self-reported capabilities and her demonstrated capabilities at [rehab clinic] far exceeded her activities on the surveillance videotapes. As there was no significant discrepancy

between the self-reported level of function and the activities on the surveillance videotapes, there was no basis for the case manager to claim that she was not kept fully informed of the claimant's current physical abilities. The case manager was well aware, throughout the course of the work hardening program, that the Appellant's functional abilities were at least at the same level as her job demands and that by the middle of the work hardening program, she knew that those abilities were considerably greater than the job demands. However, instead of ending the program and sending the Appellant back to work, she kept her at [rehab clinic] and allowed the surveillance videotaped evidence to be gathered, resembling a kind of entrapment rather than good case management.

Although the subjective wording used by the Appellant in describing her abilities may have led to some minor inconsistencies between her reporting and her activities, counsel submitted that misrepresentation under Section 160 of the MPIC Act must mean more than the making of some imprecise remarks. It must mean a deliberate attempt to mislead. The remedy sought by MPIC under Section 160, 149 and 189 of the MPIC Act was too severe for the few examples of imprecision in the Appellant's reporting. Termination of benefits was hardly warranted in such a minor case. Counsel for the Appellant submitted that the Appellant's appeal should be allowed, and that the decision of the Internal Review Officer terminating the Appellant's benefits and requiring reimbursement of benefits paid should be overturned.

Evidence and Submission for MPIC:

[Rehab clinic's doctor] testified at the hearing into the Appellant's appeal. The parties agreed that he was qualified as an expert in physical medical and rehabilitation, specializing in chronic pain and rehabilitation.

[Rehab clinic's doctor] reviewed the multi-disciplinary assessment conducted at [rehab clinic], which included a physical examination, subjective questionnaires and other test scores. The Appellant presented primarily with low back pain and secondary upper back and neck pain. He indicated that her Oswestry scores, based upon self-reporting, were at the 74% level, which indicated that the Appellant had a perception of herself as being crippled. She indicated range of motion restrictions in her hips. Some strength testing was not even completed because of the Appellant's complaints of pain.

[Rehab clinic's doctor] explained that some of the results of the tests performed with the Appellant were very unusual and not within normal patterns. That led to some expectation that the Appellant's effort in those instances had been less than full. Some of these results came in areas, such as the pinch stress test, where the Appellant had not had an injury to that area.

[Rehab clinic's doctor's] evidence regarding the work hardening program was that although the Appellant had sedentary abilities which matched her sedentary occupation, other concerns arose resulting from her reporting of her symptoms. [Rehab clinic's doctor's] evidence was that there were many areas, including training the Appellant to increase her endurance and educate her about such concepts as hurt vs. harm, etc., which formed the basis of recommendations for the work hardening program.

[Rehab clinic's doctor] indicated that his team first examined whether there may have been an improper diagnosis and whether something had been missed. The Appellant had already failed at one attempt to return to work and her subjective pain complaints did not match other findings.

[Rehab clinic's doctor] indicated that the Appellant was accepted into the rehabilitation program because the Appellant's reports of back pain were still a central issue regarding her condition.

She received physiotherapy treatment, saw her own doctor, and received chiropractic treatment and an exercise program. Still she was not progressing. She had failed her three week return to work program and the initial levels of treatment were clearly not helpful. Even with some response to her initial medications, the Appellant had failed the return to work attempt. She also had high levels of symptoms, anxiety and fear of activity. Accordingly, [rehab clinic's doctor] indicated that his team first looked for a wrong diagnosis or something that had been missed, in trying to explain the previous treatment failure. Then, a therapeutic work hardening program was recommended.

[Rehab clinic's] report also contained a discussion of possible myofascial pain syndrome consistent with whiplash and the Appellant's exaggerated symptoms.

The magnitude of the Appellant's symptom complaints seemed very high for the type of injury that she had sustained.

Through the work hardening program, the Appellant's pain level did not really go down, although her anxiety scale did.

[Rehab clinic's doctor] was asked to compare the Appellant's self-reporting and his team's experience with her in the clinic to the videotaped surveillance from June 19 and 20, July 3, 20 and 21, which he had an opportunity to review. He commented upon videos showing the Appellant gardening and weeding, sitting in bars, walking, pushing shopping carts and dancing. [Rehab clinic's doctor] testified that he was shocked when he saw some of these videos and surprised that she was able to do these activities repeatedly, continuously and for a sustained period of time when she was not able to do them at all in the clinic setting. The videotapes

indicated to him that she was capable of doing these activities and he had no explanation as to why that could not have happened in the clinic.

[Rehab clinic's doctor] indicated that it was his understanding that her job performing clerical work does not require a lot of these actions. In the videotapes, he saw several sequences where the Appellant was performing activities which would have put a lot of stress on her spinal discs. His impression was that if her spine was strong enough to do those motions over and over, the pressure of sitting at her job, or any job, would be negligible compared to that and he would expect her to be able to do the job.

What he saw of the Appellant in the videos, when she appeared to be sitting for 10 to 30 minutes continuously, looked like normal sitting to him, without excessive or continuous shifting in position.

In previous narrative reports and in his letter dated October 5, 2009 (based upon his review of the medical information and the video surveillance material), it was [rehab clinic's doctor's] view that the Appellant could have returned to her job by June 19, 2008, the first date on the video surveillance, or even earlier. She had at least a sedentary work capacity at that time.

Further, [rehab clinic's doctor] testified that even if the Appellant had remained symptomatic while putting her spine through the rigours of yard work and other activity shown on the videotapes, he didn't understand why she couldn't have carried out all the activities in his clinic, or why she could not work at her job.

[Rehab clinic's doctor] also indicated that had he been concerned regarding any possible psychological contributors such as depression, he would have initiated the involvement of a psychologist to deal with those issues. However, it had not been his clinical impression that he was dealing with significant depression and he did not make that referral, as he had occasion to do with other patients.

Counsel for MPIC submitted that the evidence supported the termination of the Appellant's benefits under Section 160 of the MPIC Act for knowingly providing false and inaccurate information.

The Appellant provided inconsistent evidence and testimony regarding the figures of speech she used and what she really meant when she said or wrote certain things about her condition.

Counsel submitted that the Appellant's actions speak louder than her words and that the Appellant's attempts to construe different meanings to words she had used in her self-reporting of symptoms were inconsistent with the actions shown on the videotapes accumulated over a period of two weeks. What the panel saw in the videotapes, as [rehab clinic's doctor] indicated, is a more accurate representation of the Appellant's functional abilities than what she had verbalized and written in her dealings at [rehab clinic] and with MPIC.

The decision to terminate her benefits was not only based upon the opinion of [rehab clinic's doctor]. A careful review of the documents on her file and the videotaped evidence supported the Internal Review Officer's decision to terminate benefits. The Appellant had described and conveyed a severe medical condition. However, it is clear that was inconsistent with the activities shown in the videotapes. The only reconciliation possible is to conclude, on a

reasonable review of the documents and the videos, that the Appellant's true functional abilities were depicted in the videotapes.

This, combined with [rehab clinic's doctor's] expert evidence assessing the Appellant's functional capacity, must be given appropriate weight. When [rehab clinic's doctor] saw the Appellant's level of function when leaving the clinic he expressed some concern. This led MPIC to request videotape surveillance of the Appellant. [Rehab clinic's doctor] then described his reaction when viewing the videotapes as "shocked". This should be given weight by the Commission as well.

Counsel reviewed the numerous examples of discrepancies between the Appellant's reporting of her function and conditions and the activities depicted in the videotapes. The inconsistencies were contained in examples such as the Appellant getting in and out of her car, driving and shoulder twisting, twisting her torso while emptying a shopping cart into her trunk, going out with friends even though she claimed to have no social life, sitting on stools that had no backs on them, sitting for lengthy periods in a pub, climbing stairs, dancing, etc. He submitted that there were numerous inconsistencies between what the Appellant indicated to her caregivers, wrote on the documents regarding what she could do and what was viewed on the videotaped surveillance. On a balance of probabilities and a standard of reasonableness, the Appellant's reporting and evidence did not ring true.

The Appellant had not established that depression was part of the reason for her difficulties, and [rehab clinic's doctor] had not assessed this as a factor contributing to her condition.

The evidence of [rehab clinic] and [rehab clinic's doctor] also confirmed that the Appellant was capable of returning to her pre-motor vehicle accident employment.

Accordingly, counsel urged the Commission to uphold the decision of the Internal Review Officer. On a balance of probabilities and preponderance of the evidence before the Commission (well supported by documentary and video evidence), it was clear that MPIC's termination of the Appellant's benefits for providing fraudulent information and failing to keep MPIC apprised of changes in her condition, should be upheld. The Appellant should be required to repay MPIC for IRI benefits received after June 9, 2009, and the Appellant's appeal dismissed.

Discussion:

The MPIC Act provides:

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;

Corporation to be reimbursed for excess payment

189(1) Subject to sections 153 (payment before decision by corporation), 190 and 191, a person who receives an amount under this Part as an indemnity or a reimbursement of an expense to which the person is not entitled, or which exceeds the amount to which he or she is entitled, shall reimburse the corporation for the amount to which he or she is not entitled.

The onus is on the Appellant to show on a balance of probabilities that the Internal Review Officer erred in finding that her IRI benefits should be terminated as a result of her knowingly providing false or inaccurate information to the Corporation and that she should not be under an obligation to repay IRI benefits received after June 19, 2009.

The panel has reviewed the evidence on the Appellant's indexed file, the testimony of the Appellant and of [rehab clinic's doctor] at the hearing, and the submissions of counsel for the Appellant and counsel for MPIC.

It is the position of the Appellant that inconsistencies did not arise between her self-reporting of symptoms, her performance at and the reports from the [rehab clinic] and the evidence depicted on the videotapes. The Appellant submitted that in many instances, conflicts arose merely because of a misunderstanding created by figures of speech used in describing her limitations and frustrations regarding her condition.

Counsel for the Appellant argued that MPIC's actions in videotaping the Appellant through surveillance could be considered entrapment. It was argued that it was even entrapment for MPIC to allow the Appellant to undertake a work hardening program and to pursue it, when they had doubts about her reported symptoms and lack of functionality.

However, the Commission does not view the actions of MPIC as constituting entrapment. Suspicions were raised by [rehab clinic's doctor's] observations of the Appellant in the parking lot, and to the extent to which that differed from his examinations of her, he reported it to MPIC.

The panel finds the evidence of [rehab clinic's doctor] to be reasonable and credible. We also find that MPIC's support of the recommended return to work program was reasonable. In spite of its concerns regarding the Appellant and the subsequent decision to investigate through videotape surveillance, MPIC followed [rehab clinic's doctor's] recommendations regarding the work hardening program. [Rehab clinic's doctor] clearly explained this plan in his evidence before the Commission.

The panel has reviewed and compared the documentary evidence on the Appellant's file, including her Level of Function forms, and her assessment by [rehab clinic] (which included falling within the crippled category on the Oswestry scales).

The panel has also reviewed the case manager's notes of a telephone conversation with the Appellant discussing the subject of the Appellant's upcoming return to work in July of 2009. The Appellant claimed that knowing the shape she was in and the pain she was in, the return to work might cause her to have to go to the hospital. She stated that she needed to know who would pay for it if she had to take an ambulance to the hospital, since she didn't know what was going to happen when she went to work Monday and tried to sit for eight hours.

We have also reviewed the reports from [rehab clinic] regarding the Appellant's subjective reporting of her symptoms.

These were compared with activities depicted in the video surveillance.

The panel has concluded that many of the statements and representations made by the Appellant conflict with her activities on the videotapes. Various areas reflecting inconsistencies include:

- The Appellant's failure to complete a stoop test and other tests at [rehab clinic], claiming extreme spinal difficulties, while displaying ease of bending, squatting, twisting and other activities while gardening.
- The Appellant's low performance on grip strength testing, although there was no evidence regarding any damage to the Appellant's hand, while displaying ease of use of garden clippers.
- The Appellant's complaints and limitations regarding mobility, while displaying an ability to get in and out of cars and go up stairs and curbs without any apparent difficulty.
- The Appellant's claims of difficulty in twisting and cervical rotation, while displaying an ability to shoulder check while driving, twist while unloading a cart at [text deleted] and while standing, and get into her car with ease while carrying coffee and donuts.
- The Appellant's reports of limitations on her social life, while visiting clubs, sitting on bar stools, dancing, wearing high heels and attending parties and bars until late in the evening.

The Appellant testified that there had been changes in her life and her abilities caused by the motor vehicle accident, but she did not provide sufficient supporting evidence to establish this, particularly when the videotape evidence was considered. She submitted that her depression had enhanced her pain, but no evidence was provided from a psychologist or a psychiatrist to establish this depression or its effects and the panel has accepted [rehab clinic's doctor's]

evidence that had he believed she required psychological assistance he would have made such a referral, but did not see the need to do so.

The inconsistencies between the Appellant's reports and activities are reflected in the timing of the recovery process in her case. The evidence showed that as the Appellant started to make improvements in the work hardening program and discussions began regarding her return to work, the results of her functional testing and her pain reporting got worse. This was followed, on July 16, 2009, by the Appellant's expression of concern regarding the need to call an ambulance to take her to the hospital if she attempted to return to work. It was also around that time that the Appellant was seen for the first time on videotape (upon her return to [rehab clinic] on June 30, 2009) rubbing her back. [Rehab clinic's doctor] confirmed that there are signs located at that spot advising of the presence of video surveillance.

In the panel's view, this pattern, combined with the pattern of contradictions and inconsistencies between the Appellant's reports of her experience and the activities which she was observed performing, lead the panel to conclude that the Appellant's evidence is not credible. The panel is of the view that she was not honest and forthright in her dealings with MPIC and that the information she provided to MPIC and her caregivers did not accurately reflect her condition and abilities.

The panel finds that the Appellant has failed to establish, on a balance of probabilities, that she notified and provided MPIC with accurate information in accordance with Section 149 of the MPIC Act. We also find that she knowingly provided false or inaccurate information to the Corporation and that, by June 19, 2009, she was able to hold the employment that she held at the time of the accident.

Accordingly, the Appellant's appeal is dismissed. The decision of the Internal Review Officer dated March 23, 2010 terminating the Appellant's IRI benefits and requiring repayment, is upheld. The Commission confirms the termination of the Appellant's IRI benefits, as well the responsibility of the Appellant to reimburse MPIC for excess payment of IRI benefits received, for the period of June 19, 2009 to July 19, 2009, in the amount of \$2,612.19.

Dated at Winnipeg this 24th day of April, 2012.

LAURA DIAMOND

PAUL JOHNSTON

LINDA NEWTON