Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-079

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Leona Barrett** **Ms Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.**
HEARING DATE:	**March 6, 2014**
ISSUE(S):	**1. Whether the Appellant's Personal Injury Protection Plan benefits were properly terminated under Section 160(a)** **2. Whether the Appellant was able to hold pre-accident employment** **3. Whether the Appellant is responsible for reimbursing MPI $5,211.70 as an excess payment**
RELEVANT SECTIONS:	**Sections 110(1), 149, and 160 of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

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 injured in a motor vehicle accident on November 23, 2005. He was in receipt of Income Replacement Indemnity ("IRI") benefits as he was unable to perform his job as a conversion mechanic.

While the Appellant was in receipt of IRI benefits from MPIC, he advised his case manager that he was attempting to work as a shop estimator/manager in a [text deleted] auto body shop. While attempting this employment, he was in receipt of IRI top up benefits.

MPIC then obtained surveillance information and MPIC's Health Care Services reviewed this information in conjunction with the Claimants Reported Level of Function forms.

On December 4, 2007 the Appellant's case manager wrote to him indicating that an investigation had revealed that he had exaggerated his injuries and was in fact capable of returning to his pre-accident employment as of (at least) August 2007. The Appellant's entitlement to PIPP benefits was terminated, pursuant to Section 160(a) of the Act, for knowingly providing false or inaccurate information to MPIC, Section 149 of the Act for failing to advise of a change in his situation, and Section 110(a) of the Act, when it was concluded that he was able to hold the employment that he held at the time of the accident. Further, the case manager sought reimbursement for excess IRI payments made to the Appellant, in the amount of $5,211.70, pursuant to section 189(1) of the Act.

The Appellant sought an Internal Review of this decision. On May 5, 2008, an Internal Review Officer for MPIC reviewed the Appellant's file and concluded that the Appellant had knowingly provided false or inaccurate information to MPIC regarding his functional ability. The medical evidence, it was concluded, showed that he was capable of performing his pre-accident employment and that the Appellant should re-pay some of the IRI benefits that he had received.

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

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He described the motor vehicle accident and the injuries he suffered, which included injuries to his knees, lower back, upper back, shoulders, neck, wrist and forearm.

He described the surgeries which he had undergone as well as the medications which he uses for pain control, which have included, Morphine, Tylenol #3, muscle relaxants, Tridural and Duragesic patches.

The Appellant described the work that he was doing as a truck conversion auto body mechanic prior to the motor vehicle accident and the difficulty that he had performing this labour following the accident. However, he testified that he did not want to stay home and do nothing. Since he had a friend who had an auto body shop, he proposed working for him on a part-time basis. The shop was expanding and would require a body shop manager. The Appellant's understanding was that he would not have to do a lot of physical labour and that a small room would be set aside for him, containing a bench and an inversion table, so that he could rest when he was not feeling well. Arrangements were made with the Appellant's case manager to obtain necessary upgrades through courses which would allow him to perform this new job.

His back was still bothering him and he had surgery on his knees as well as Cortisone injections to help his knees.

The Appellant explained that he had some good days and some bad days and that the medication and patches helped him to function at the job. Sometimes he was able to do normal daily tasks required such as painting, sanding and taking parts off. He explained that he still felt grinding

knee pain as well as backaches, shoulder spasms, neck pain and headaches, but these were always worse in the evenings and that during the day he would try and rest and continue on, working for 2-3 hours, with breaks in between. This meant that he might be able to spend 6 hours in the workplace, but some of this time was spent taking breaks, so he charged his hours accordingly. It was his understanding that his employer was sending reports regarding his hours and pay directly to his case manager, on a weekly basis.

The Appellant explained that although he had been hired to be a shop manager and not a labourer, it was the only job that he could get so he did whatever he could, at whatever level he could, in spite of it sometimes causing him pain.

He also explained that at the same time, he used the Permanent Impairment benefit that he received to invest in mini quad bikes which he was assembling and fixing up, with a view to re-selling them for some extra income. He explained that these bikes weighed only about 100 pounds and it was not a heavy job to work on them.

The Appellant explained that, with his injuries, it was very difficult for him to work in the truck conversion industry. The physical work involved in lifting the panels, opening the hoods and climbing up and down, cutting and drilling, required a lot of strength. He was able to do very little of this work. He added that because of limited feeling in his left hand resulting from the motor vehicle accident, he could not perform smooth, quality body work on vehicles. He could not do heavy lifting, bending and could not climb on ladders, since he has fallen off a few. Although this has caused him depression, anger and some suicidal thoughts, he has not received psychological counselling, since he could not afford it. He has recently received some counselling through his church.

The Appellant also described a stroke-like medical event which he had suffered, which meant that he was not able to travel to [text deleted] for work.

The Appellant testified that when he filled out the Level of Function forms, he filled them, as instructed by his case manager, with a view to describing how he felt on his worse days.

This was challenged on cross examination, when counsel for MPIC suggested to the Appellant that his case manager had not instructed him to fill out the form this way and that he did not indicate anywhere on the form that this was the method he was using.

In fact MPIC suggested that the case manager had made careful notes which did not indicate telling the Appellant to fill out the forms as though it was his worst day. The Appellant maintained that the answers on the form were filled out in accordance with how he felt on his worst days. He also indicated that he was aware of the video surveillance following him, as he knew the investigator.

The video tape collected by the surveillance was reviewed with the Appellant. The video tape showed the Appellant working on the quad bikes as well as doing some spray painting and other duties on big trucks. The Appellant explained that the work on quads was light and not heavy work which he did using gel knee pads and under the effects of a great deal of pain medication. He indicated that he had never denied working and had kept this case manager informed of the hours that he was working.

Counsel for the Appellant submitted that the evidence on the indexed file established that the Appellant had suffered a serious injury to his wrist and forearm as well as injuries to both knees,

his neck, shoulders and back. He first tried Morphine for pain control and was then prescribed the more effective Duragesic patch, a delivery mechanism for Fentanyl which is far more powerful than Morphine. [Appellant's Doctor's] reports indicated that he was still experiencing pain over a year after the accident, which was an indication that the pain was chronic.

In spite of this, the Appellant attempted to return to work and kept his case manager advised of his work status. He was willing to work 4-5 hours a day, however the work was more physical than he had anticipated and it aggravated his knee problems, leading to surgery first on the right knee and later on the left.

Following surgery he returned to work for 2 hours per day. Although he was expecting, as indicated by the case manager, an occupational therapist to attend at his workplace to prepare a graduated return to work plan, this did not occur and no graduated return to work plan was drawn up. Regardless of this, the Appellant increased his work to an average of 4-5 hours per day. The Appellant testified that although he had understood he was to perform mainly management duties and some repairs, he was asked to do a lot of physical work on trucks. The case manager was kept informed of the kind of work the Appellant was performing.

The Appellant completed a Claimant's Reported Level of Function form in July of 2007. At this point, it appears that the case manager had already retained a surveillance team.

Counsel for the Appellant suggested that if the case manager had questions about the Appellant's physical abilities during the spring and summer of 2007, then the proper course of action would have been to order a Functional Capacity Evaluation. Instead, the Appellant's benefits were terminated solely on the basis of subjective information found in the Claimant's Reported Level

of Function report and the video tape evidence. Video tape evidence does not show how heavy or light any of the objects were that the Appellant might have been lifting and no questions were put to the Appellant regarding this weight, upon cross examination.

Further, there is extensive evidence that during this time, the Appellant was experiencing severe pain symptoms and utilizing strong pain medication. The Appellant also testified that he attended the [text deleted] Centre for approximately a year. But instead of requesting a Functional Capacity Evaluation, the case manager requested video surveillance and failed to take into account the narcotic patch which the Appellant used to mask his pain in order to work. Even [MPIC's Doctor #1] (from MPIC's Health Care Services Team) noted on October 1, 2007 that it was noteworthy that the patient had been prescribed potent narcotics during his rehabilitation and such narcotics may make it possible to work despite significant pain experience. [MPIC's Doctor #1] also noted that the Appellant's medical information was not current and that there was an absence of documentation regarding his current prescriptions and current psychological state, and he recommended getting updated the medical and psychological information prior to taking any formal action.

Although the case manager did request updated medical information from [Appellant's Doctor], and received a report dated October 23, 2007 confirming that the Appellant was still using a Duragesic patch and Tylenol #3, no psychological report was obtained. Then [Appellant's Doctor's] report regarding the Duragesic patch and the Tylenol #3 was sent back to [MPIC's Doctor #1] for further review, leaving [MPIC'S Doctor #1] to simply conclude that the Appellant does "demonstrate the ability to perform the essential tasks of his occupation as a conversion mechanic as I understand them".

A Physical Demands Analysis report dated May 29, 2006 concluded that the position of a Highway Truck Conversionist required a heavy level of work and physical strength. It recognized significant physical demands which included prolonged lifting, fine finger work, handling, gripping, neck motion and standing. However, [MPIC's Doctor #2's] report and the case manager's conclusions do not appear to have taken this into consideration.

Counsel submitted that the Appellant had not misled MPIC in regards to his physical capabilities. He kept the case manager informed of his work hours and duties and, given the Appellant's testimony, the information was not inconsistent with his summary of his condition on his worst days or the work shown on the videotapes.

Further, MPIC relied upon videotape surveillance in order to determine the Appellant's physical capabilities. His pre-accident employment had been classified as heavy, yet nowhere in the videotape evidence was the Appellant seen lifting 50 or 100 pounds. Nor did he lift 20 pounds on a constant basis. Further, there was no prolonged lifting, fine finger work, handling, gripping, neck motion or standing. It is difficult to understand how [MPIC's Doctor #1], in his final report, could render an opinion that the Appellant was able to perform these duties and meet these job requirements.

Counsel emphasized that the only available objective determination of an individual's physical capability, a Functional Capacity Evaluation, was never done. Accordingly, it was submitted that the Internal Review Officer erred in finding that the Appellant intentionally misled MPIC regarding his abilities and his work activities. He further submitted that the Appellant suffered from a well documented chronic pain condition and still had not fully recovered from the injuries from the motor vehicle accident. He was not capable of working on a full-time basis. He was

incapable of performing the heavy work that he performed prior to the accident. The Appellant's benefits should not have been terminated and he should not be required to reimburse MPIC for IRI benefits received. He should be entitled to receive IRI benefits on an ongoing basis.

Evidence and Submission for MPIC:

Counsel for MPIC relied upon videotape surveillance evidence of the Appellant, the Appellant's completed Level of Function forms and reports from MPIC's Health Care Services team.

Counsel noted that the Level of Function forms did not indicate that they had been completed on the basis that these represented how the Appellant felt on his worst days. The case manager's notes established that no reference had been made by the case manager to filling out the forms in this way.

The Appellant had admitted that the level of function demonstrated on the videotape surveillance far exceeded the abilities represented in the Level of Function forms. No obvious pain behaviour was demonstrated in the surveillance footage and it was apparent that the Appellant was able to move easily with no limitations or pain behaviours demonstrated even through squats, bending and lifting.

Counsel submitted that although the videotape surveillance does not document every minute of every day (which would be impractical) it does represent a snapshot which supports the submission that the Appellant's overall function was much higher than what he reported to MPIC. The level of function demonstrated was so different from that which was reported that the Appellant had to have known that the information he was giving to MPIC was false or inaccurate, as the videotapes demonstrate almost no limitations whatsoever in his abilities.

This evidence was then considered by MPIC's medical consultant who concluded that:

> "Based on review of the documented surveillance information, the patient is able to work longer than his stated time limitations.
>
> Based on my understanding of human movement, the patient moves in a fluid and symmetrical capacity. There are no external manifestations of pain behaviour or impairment."

[Appellant's Doctor], who had not seen the surveillance material, believed that it was safe for the Appellant to perform light duty work for six hours a day. [MPIC's Doctor #1] considered this opinion as well as the videotape evidence. He noted that the Appellant's previous symptoms of phobia, anxiety and depression had abated and that his medical regime appeared to be short acting narcotics, as well as the long acting narcotic patch.

From this he concluded that the Appellant had the ability to perform the occupation of a conversion mechanic. Counsel submitted that [MPIC's Doctor #1] also had access to the Physical Demands Analysis for the position of conversion mechanic and it should be assumed that he took this into account when reaching his conclusion, in spite of the fact that [Appellant's Doctor] referred to a position of "light auto mechanic".

Counsel submitted that the only medical reports on file which address whether the Appellant is capable of performing his pre-medical duties came from [MPIC's Doctor #1], who concluded he could return to his pre-motor vehicle accident employment. Therefore, on this basis, the Commission should uphold the termination of the Appellant's IRI benefits pursuant to Section 110(1)(a) of the MPIC Act.

Further, given the surveillance evidence, the Commission should conclude that the Appellant knowingly provided false and inaccurate information to MPIC. Therefore, while MPIC may

suspend or terminate the Appellant's benefits under such circumstances, this is not the type of case where one should suspend benefits. The Appellant's actions have attacked the insurance trust relationship, as MPIC has to rely on insureds to provide accurate information so that they receive the appropriate benefits. Accordingly, counsel for MPIC submitted that the Appellant's termination of benefits under Section 160 of the Act should be upheld and that the Commission should require the Appellant to repay MPIC for the IRI benefits he inappropriately received.

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;

The onus is on the Appellant to show, on the balance of probabilities, that the Internal Review Officer erred in upholding the Appellant's termination of benefits and finding that he was responsible for reimbursing MPIC for excess payments.

The panel has reviewed the evidence provided by the parties as well as the Appellant's testimony and the submissions of counsel. The panel finds that the evidence submitted on behalf of the Appellant, combined with evidence of MPIC's failure to properly case manage the Appellant's file and follow through on the recommendations of his caregivers and their own consultants, establishes that the Appellant has met the onus upon him of showing, on a balance of probabilities, that the Internal Review Officer erred in her decision of May 5, 2008.

Our review of the indexed file revealed a number of observations and recommendations contained in reports from caregivers and medical experts which do not seem to have been pursued. These include references to the Appellant's psychological condition as well as to his physical limitations arising from the accident and the demands of his heavy labour occupation. These include:

- Note on the Outpatient and Emergency report form from the [text deleted] Health Centre dated December 27, 2005 to watch for PTSD...
- Case manager's note dated January 10, 2006 of a telephone conversation with claimant regarding psychological assistance and the recommendation from his doctor to "refer him to [text deleted] for psychological counselling due to the problems he has been having with nightmares and being unable to fall asleep".
- [MPIC's Doctor #1's] report of October 1, 2007 noted:

  "It should be duly noted that the patient's self-report is that he is in constant pain. Such pain must be taken at face value, and cannot be confirmed or refuted. It is also noteworthy that the patient has been prescribed potent narcotics during this rehabilitation. Such narcotics may make it possible to work despite significant pain experiences.

  The patient's medical information is not current, and there is an absence of documentation regarding his current prescriptions, as well as his current psychological state."

- Report from [Appellant's Doctor] dated October 23, 2007 diagnosing the Appellant with mild depression secondary to functional loss and to financial hardship with impairment caused by "current compensable injuries":

  "[The Appellant] still suffers from nightmares and occasional flashback. However, the previous symptoms of phobia, anxiety, and depression have gone.

  The medically required treatments include:
  a) Pain control (Tylenol #3 [text deleted], Duragesic Patch [text deleted])
  b) Functional loss suggests physiotherapy to gain function, however, the fund for physiotherapy has "Ran out" and patient cannot afford to continue treatment.

  The patient is frustrated by a sense of in coordination (sic) and clumsiness of the left hand, which is the result of a laceration and contusion during the accident.

  I have suggested that it is safe for him to return as a light duty auto body mechanic, working maximum of 6 hours per day. In the hope that this will eventually translate into a full-time job."

In spite of these references and recommendations regarding the Appellant's psychological condition, and his physical limitations, the case manager failed to obtain any independent medical information from a psychologist, physiatrist or rehabilitation expert. Nor is there a record of a formal graduated return to work assessment or plan.

The occupational therapist report dated May 29, 2006 assessed the Appellant's position of truck conversionist to require:

> "...a **heavy level of work** of physical strength. **Heavy work** is described as exerting 100 pounds of force occasionally, and/or up to 50 pounds frequently, and/or up to 20 pounds of force constantly to move objects.
>
> Significant physical demand include prolonged lifting, fine finger work, handling, gripping, neck motion, and standing."

Her recommendations were as follows:

- "Education and instruction regarding proper body mechanics and posture for all work activities.

- Encourage use of supportive footwear.
- Education for proper lifting techniques."

In assessing the Appellant's ability to return to this work in his report of November 2, 2007, [MPIC's Doctor #1] refers to both [Appellant's Doctor's] statement that it was safe for the Appellant to return to the occupation of a light duty auto body mechanic and to his return to the "essential tasks of his occupation as a conversion mechanic as I understand them".

It is not clear whether [MPIC's Doctor #1] understood that the job of a light duty auto body mechanic and of a conversion mechanic are two very different jobs, with different physical demands or that one is classified as light and one as heavy, with very specific skills required. The evidence before the panel established that no comprehensive assessment was done as to whether the Appellant's injuries prevented him from fulfilling these specific skills and heavy work requirements. The Appellant's testimony described his difficulties with doing this heavy work, including issues with his grip strength and with loss of feeling in his hands.

The occupational therapist report of October 23, 2006 makes it clear that the Appellant was not performing any of the duties for his truck conversion business at that time and that the garage he works out of no longer performs conversions, but rather only does body shop work. The Appellant confirmed this to his case manager a number of times.

Having regard to the significant injuries suffered by the Appellant in the motor vehicle accident, the Commission would require more than the evidence present on the indexed file or videotapes to accept that the Appellant had recovered from such injuries to the extent that he could perform the heavy job of a conversion mechanic, when the Appellant's evidence was quite clear that he

could not do these tasks. The Appellant's evidence regarding the heaviness of that job, as well as his difficulties with carrying, weight, grip and touch was un-contradicted, and the indexed file did not contain medical analysis comparing his functional capacity and ability with the physical demands of the job.

The only evidence in this regard is [Appellant's Doctor's] statement that the Appellant is able to do the task of a light duty auto mechanic for six hours per day. This may be considered consistent with the activities which the panel viewed on the videotape evidence.

The indexed file does contain documentation of numerous instances where the Appellant communicated with his case manager regarding his work at [text deleted]. On January 7, 2007, the case manager recorded a conversation with the Appellant where the Appellant "volunteered the information that he has started doing some small duties at [text deleted], such as sweeping the floor, picking up supplies, etc. He explained that he is not receiving any compensation for this and indicated that he wanted to let me know this to avoid problems later on."

This was followed by a letter from his employer setting out the requirements for the Appellant's work in the position of "Estimator/Manager" after required [text deleted] training requirements, which MPIC agreed to provide for the Appellant. Clearly, the Appellant had communicated with his case manager and there was no question that MPIC was aware of his involvement with [text deleted]. Then, in July 2007 the Appellant's case manager sent him a Reported Level of Function form, requesting completion. An MPIC Investigative Report dated September 18, 2007 indicated that the file had been referred to the Special Investigation Unit on July 24, 2007 for the purpose of investigating the Appellant's claim, and surveillance was assigned on July 27, 2007.

On July 31, 2007, the case manager called the Appellant to request the self-reporting Level of Function form and the Appellant also provided a report to the case manager regarding his hours of work.

On August 1, 2007, the Appellant provided the completed Level of Function form, but surveillance continued into October 2007.

It is not clear why, in spite of the Appellant's regular communications with the case manager regarding the work he was performing as well as his employer's reports regarding his hours of work, the case manager sought to obtain videotape surveillance evidence to compare with the Level of Function Report which he had yet to even receive from the Appellant. Nor is it clear why the case manager failed to obtain a Functional Capacity Evaluation of the Appellant's abilities, which could be properly compared to the Physical Demands Analysis for the truck conversion job.

However, the panel has concluded that the evidence establishes, on a balance of probabilities, that the Appellant did not fail to advise MPIC as to his functional status and did not knowingly provide false or inaccurate information to the Corporation.

Further the panel finds that the evidence has established that the Appellant was not able to hold the employment that he held at the time of the accident.

A review of the evidence shows that the Appellant was largely left to his own devices to recover and rehabilitate, with the help of his family physician and orthopedic surgeon, [text deleted]. By his own admission, the Appellant's attempts at small business and self-employment were largely

unsuccessful, and so he attempted, through his own initiative, to volunteer and then work part-time at a trial work placement with the auto body shop.

The Appellant did not suffer only from soft tissue injuries following the motor vehicle accident. The evidence on the Appellant's indexed file clearly established significant injury requiring transport to [text deleted] in the company of a physician. He suffered a significant injury to his hand and wrist and required surgery on both his knees. In spite of his injuries and the heavy nature of his job, no Functional Capacity Evaluation, no graduated return to work plan, no rehabilitation plan, no formal institutional therapy-based work hardening program, no psychological counselling and no vocational rehabilitation counselling were provided for the Appellant. Instead, MPIC decided that in spite of his injuries he was able to work at a job classified as heavy, without a thorough consideration or comparison of the Appellant's abilities with the demands of the job.

Accordingly, the Appellant's appeal is allowed. The decision of the Internal Review Officer dated May 5, 2008 which found that the Appellant's benefits were properly terminated under Section 149 and Section 160(a), that the Appellant was able to hold his pre-accident employment and that the Appellant was responsible for reimbursing MPIC for excess payments is overturned. The panel finds that the Appellant was and continues to be entitled to PIPP benefits, including IRI benefits subsequent to August 14, 2007.

Dated at Winnipeg this 16th day of April, 2014.

LAURA DIAMOND

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LEONA BARRETT

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LINDA NEWTON