Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-13-115

PANEL:	**Mr. J. Guy Joubert, Chairperson** **Ms Pat Heuchert** **Mr. Les Marks**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Darlene Hnatyshyn of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.**
HEARING DATE:	**June 2, 2015**
ISSUE(S):	**Entitlement to Income Replacement Indemnity.**
RELEVANT SECTIONS:	**Sections 110, 149, 171 and 183 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

A. PRELIMINARY COMMENTS

The Commission's preference over the medical evidence relied upon by each of the parties will be the determinative factor of this case. On the one hand, there are the Appellant's subjective reports to his health care providers about his inability to perform pre-accident employment duties, together with their objective findings, while on the other hand, there are the findings of

the [rehabilitation (rehab) clinic], together with reports by MPIC's Health Care Services consultants of all of the health care providers' files on the record. Neither party called any health care providers or other witnesses to testify in support of their respective positions which testimony may have been of assistance to this Commission in its deliberations.

B. BACKGROUND

The Appellant was involved in a motor vehicle accident on Saturday, November 12, 2011 (MVA). He was a passenger on a transit bus that was rear-ended by a pick-up truck.

The Appellant testified he was facing forward and seated at the rear of the bus on the raised step. Upon impact he was propelled forward and then backward. The Appellant further stated that after the accident he got off the bus and boarded another one. It was not until the following day that he felt some stiffness in his neck and shoulder. The Appellant reported to work on Monday, November 14, 2011 and informed his employer he had been involved in the MVA. The Appellant testified he told his employer he could work and was assigned light duties that day such as sweeping, removing garbage and pieces of wood. At the time of the MVA, the Appellant was a laborer [text deleted].

The Appellant did not seek medical attention until December 8, 2011 (almost one month post-MVA) when he attended at the Emergency Department of the [hospital]. The Appellant was examined at the [hospital] and the Adult Emergency Document Form noted he had full cervical range of motion, full cervical spine and shoulder strength and some tenderness over the right trapezius. The diagnosis indicated the Appellant suffered from a neck strain and headaches. The Appellant was later seen by various health care providers, including the multidisciplinary team at [rehab clinic], [rehab clinic's doctor], [Appellant's chiropractor] (chiropractor), [Appellant's

doctor #1] and [Appellant's doctor #2]. There are written reports on the record from these health care providers.

The Appellant continued to work at his then current job until March 9, 2012 when his employment was allegedly terminated due to MVA-related injuries.

The Appellant is claiming entitlement for IRI for three distinct periods. Period 1 coincides with the termination of IRI on May 30, 2012, and collectively, Period 1, Period 2 and Period 3 coincide with intervals of unemployment following termination from employment in each case allegedly due to MVA-related injuries.

Regarding Period 1, MPIC provided the Appellant with IRI until April 30, 2012. In light of Section 110(2)(a) of the Act, MPIC extended IRI for an additional thirty days until May 30, 2012 since the Appellant's employment had been terminated due to MVA-related injuries. The Appellant was unemployed from May 31, 2012 to October 22, 2012. With respect to Period 2, the Appellant resumed work on October 23, 2012 with a new employer in the [text deleted] field but was terminated on November 6, 2012. The Appellant was unemployed from November 7, 2012 to March 20, 2013. As for Period 3, the Appellant found work on March 21, 2013 as a laborer for [text deleted]. He testified he had not told his employer about his injuries and a supervisor had noticed he was resting on the job. The next day the same supervisor discovered that the Appellant was resting once again and he was then let go June 3, 2013. The Appellant indicated to the Commission that this supervisor was "one of those bosses". The Appellant has been unemployed from June 3, 2013 to the present.

Pursuant to The Personal Injury Protection Plan (PIPP) MPIC provided the Appellant with various benefits, including IRI and chiropractic treatments.

1. Case Manager Decision Letters

MPIC issued a Case Manager Decision Letter dated April 15, 2013 wherein the Case Manager confirmed, following a review of new medical and employment information that there would be no change of its earlier decision to terminate IRI set out in a decision letter dated May 1, 2012. MPIC's position was that the above-referenced information did not provide any new information that would allow it to make a fresh decision as contemplated by Section 171(1) of the Act reproduced below as follows:

> **Corporation may reconsider new information**
> 171(1) The Corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

The Appellant appealed the Case Manager's decision.

2. Internal Review of the Case Manager Decision Letter

On September 24, 2013 MPIC issued an Internal Review decision letter which affirmed the Case Manager's decision, however the Internal Review Officer varied the Appellant's entitlement to IRI by continuing the same for an additional thirty (30) days until May 30, 2012 pursuant to Section 110(2)(a) of the Act reproduced below as follows:

> **Temporary continuation of I.R.I. after victim regains capacity**
>
> 110(2) Notwithstanding clauses (1)(a) to (c), a full-time earner, a part-time earner or a temporary earner who lost his or her employment because of the accident is entitled to continue to receive the income replacement indemnity from the day the victim regains the ability to hold the employment, for the following period of time:
>
> (a) 30 days, if entitlement to an income replacement indemnity lasted for not less than 90 days and not more than 180 days; …

The Internal Review Officer found that the evidence on file supported that the Appellant was capable of performing the essential duties of his pre-MVA employment; and that the Case Manager's decision was supported by the evidence, the Act and the Regulations.

In reaching the decision, the Internal Review Officer stated in part below as follows:

> "…
>
> Entitlement to Income Replacement Indemnity (IRI) benefits is contingent upon the medical information to support that you are substantially incapable of performing the essential duties of your employment …
>
> Decisions respecting PIPP benefits are governed by the medical evidence available. While your subjective reports are important and should by no means be denigrated, the medical information gathered on assessments indicates that greater weight should be given to objective data for the purpose of determining your status.
>
> In order to assist you in your rehabilitation a comprehensive Work Hardening (Rehabilitation) Program was administered through [rehab clinic]. Based on the reports submitted you gradually increased your strength and functional ability during the rehabilitation program. At the time of your discharge on April 27, 2012 you demonstrated the ability to return to your pre-MVA position on a full time basis.
>
> MPI's medical consultant completed a thorough review of the medical evidence on file available regarding the issue of your work capacity. The medical consultant opined the medical evidence on file did not support you had a physical impairment of function that would prevent you from performing the essential duties of your pre-accident employment. MPI's Medical Consultant opined "*Based on what documents are presently contained in [the Appellant's] [text deleted] claim file, it is not medically probable that the symptoms he reported to [Appellant's doctor #2] and the numerous soft tissue findings have a causal connection to the incident in question*".
>
> It is noted that you were employed as a Labourer and following the accident you continued to perform your regular work duties with no indication of limitations or

> problems. The file does not contain documentation outlining any difficulties you noted to have by your employer when performing your regular work duties that might indicate you sustained some type of musculoskeletal injury as a result of the accident.
>
> …"

The Internal Review Officer indicated that on a balance of probabilities it had not been demonstrated that the MVA-related injuries precluded the Appellant from performing essential employment duties.

The Appellant appealed the Internal Review Officer's decision.

C. THE POSITION OF THE PARTIES

1. The Appellant

The CAO's position is that the Appellant has made his case and is entitled to IRI for Period 1, Period 2 and Period 3. The CAO therefore urged the Commission to rescind the Internal Review Officer's decision.

The CAO submitted that the Appellant honestly wants to work but he can no longer do any heavy work as this would aggravate his injuries. It was pointed out to the Commission that the Appellant did return to work after the MVA and for some periods thereafter because he had bills to pay and was supporting his family. It was also emphasized that the Appellant was examined by his health care providers who, apart from obtaining subjective input from him, also had the opportunity to make objective findings of their own. Their assessments were not based upon a "paper review" in comparison with that undertaken by MPIC's Health Care Services consultants. It was strongly asserted that the Appellant's health care providers were best positioned to assess both his credibility and state of health.

In addition, the CAO pointed to some minor discrepancies and typographical errors in the ARCC reports with the view to demonstrating carelessness which should overall diminish the conclusions reached therein.

Finally, the CAO argued the Appellant's case was parallel to an earlier decision of the Commission in AC-02-85 and this Commission should similarly find in favor of the Appellant.

2. MPIC

MPIC summarized its position by stating the Appellant suffered some soft tissue injuries in the MVA and his health care providers relied upon his subjective account of the MVA and his abilities in reaching their conclusions he was not capable of returning to pre-MVA employment. However, MPIC submitted the Appellant was tested by and underwent strength training with [rehab clinic] and that [rehab clinic] ultimately concluded the Appellant was fit for an immediate and unmodified return to work. In addition, MPIC submitted its Health Care Services consultants had reviewed all of the medical evidence and opined that the Appellant was functionally capable of returning to pre-MVA employment.

Overall MPIC argued the Appellant's appeal should be dismissed.

D. DECISION – ISSUES UNDER APPEAL

Whether the Appellant is entitled to IRI for Period 1, Period 2 and Period 3?

After considering all evidence and arguments of the parties, and for the reasons set out in this Decision, this Commission finds the Appellant has failed to establish on a balance of

probabilities that due to the MVA he was and continues to be incapable of working so as to be entitled to IRI for Period 1, Period 2 and Period 3, and that MPIC otherwise improperly terminated IRI.

In reaching this decision we rely on the evidence found in reports issued by [rehab clinic] (notwithstanding any discrepancies and typographical errors pointed out by the CAO which we deem to be insignificant in any event), as well as those issued by MPIC's Health Care Services consultants. We give considerable weight to the report of [rehab clinic's doctor] from [rehab clinic] who stated on April 27, 2012 that "[a]s of April 27, 2012, [the Appellant] has completed a rehabilitation program at [rehab clinic]. [The Appellant] is cleared to return to work." In addition we rely upon the assessments entered in the [rehab clinic] Work Hardening Program Discharge Report dated April 27, 2012 which indicated the Appellant demonstrated a heavy strength level at the end of the program compared to a medium strength level when he first started, and that he was "[f]it for an immediate, unmodified return to pre-injury employment". Furthermore, we rely upon the conclusions reached by MPIC's Health Care Services consultant in the report dated April 10, 2013 which re-affirmed the opinions rendered on December 14, 2012 reproduced in part below as follows:

> "…
>
> It is interesting to note that [the Appellant] was not noted to have any physical impairments or objective physical findings when assessed at the [hospital] in December 2011. Based on this, it is difficult to establish a probable cause/effect relationship between the incident in question and the symptoms [the Appellant] reported on December 26, 2011. It is noted that [the Appellant] was employed as a Laborer and following this incident in question he continued to perform his regular work duties with no indication of limitations or problems. The file does not contain documentation outlining any difficulties [the Appellant] was noted to have by his employer when performing his regular work duties that might indicate he sustained some type of musculoskeletal injury as a result of the incident in question.
>
> [Appellant's doctor #2] submitted a report dated September 12, 2012 outlining the results of an assessment he performed of [the Appellant] on July 25, 2012. It is noted

> that [Appellant's doctor #2's] examination identified a mild decrease in cervical and lumbar range of motion as well as numerous tender muscle groups and sensitized spinal segments. Muscle hypertonus was also identified. [Appellant's doctor #2] opined that [the Appellant] was recovering from myofascial pain. Based on what documents are presently contained in [the Appellant's] [text deleted] claim file, it is not medically probable that the symptoms he reported to [Appellant's doctor #2] and the numerous soft tissue findings have a causal connection to the incident in question.
>
> When reviewing the April 27, 2012 work hardening Discharge Report, it is noted that [the Appellant] reported increasing pain while participating in the program. It is documented that [the Appellant] demonstrated decreased scores in various functional tasks that were somewhat puzzling to the health care professionals involved in his care. It is noted that increased co-efficiency of variance was identified that might represent inconsistencies of effort and inadequate attempts. [The Appellant's] attendance report indicates numerous days were missed from the program as well as a variety of days which he either arrived late or left early. This raises some concern with regard to [the Appellant's] compliance and motivation to participate in a program that was prescribed to aid his functional recovery.
>
> …"

At this juncture, this Commission indicates that it read the AC-02-85 case submitted by the CAO and finds the same not to be of any assistance in this matter as that case was decided on its own facts/merits. If anything is to be gleaned from the AC-02-85 case it is that parties seeking to clarify or otherwise challenge documentary evidence ought to obtain further written clarification and tender the same as evidence, and/or call in witnesses they may deem appropriate all with the view to assist with their case … and to assist the Commission in its deliberations.

The AC-02-85 case dealt with a situation of conflicting reports from [rehab clinic] which the Commission hearing that matter, as an extraordinary measure, exercised its discretion and sought an independent third party opinion presumably pursuant to Section 183(4) of the Act reproduced below as follows:

> **Commission may carry out investigation**
> 183(4) The commission may, before or during a hearing, carry out any investigation or inspection or refer any question for an expert opinion that it considers necessary or advisable.

As an aside, this Commission was and remains of the view that the circumstances of this case did not and do not warrant it exercising similar discretion with respect to evidence on the record or any other matter properly before it.

Turning now to the Appellant's testimony in this hearing, although the same and his subjective comments to health care providers (as alluded to in their reports) were carefully considered by this Commission, we are left with some doubt about his credibility and have consequently placed less weight on this evidence overall.

As a result this the Commission dismisses the Appellant's appeal and the Internal Review Officer's decision of September 24, 2013 is hereby confirmed.

Dated at Winnipeg this 11th day of September, 2015.

J. GUY JOUBERT

PAT HEUCHERT

LES MARKS