Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-163

PANEL:	**Ms Karin Linnebach, Chairperson** **Mr. Brian Hunt** **Ms Janet Frohlich**
APPEARANCES:	**The Appellant, [text deleted], was not present at the appeal hearing;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.**
HEARING DATE:	**July 19, 2016**
ISSUE(S):	**Whether the Appellant is entitled to further Income Replacement Indemnity benefits.**
RELEVANT SECTIONS:	**Subsections 184.1, 174(1), 110(1)(c) 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

Background:

The Appellant, [text deleted], was injured in a motor vehicle accident ("MVA") on July 30, 2011. Following the MVA, she received Personal Injury Protection Plan benefits, including Income Replacement Indemnity ("IRI") benefits. For IRI purposes, the Appellant was classified as a temporary earner. As such, she became entitled to a determination of employment after the first 180 days after the MVA in accordance with the MPIC Act. In a decision letter dated April

20, 2012, an MPIC case manager determined the Appellant's employment to be as a "Ticket Taker". The Appellant did not file an Application for Review regarding this determined employment.

In a letter dated October 29, 2013, the Appellant's case manager determined that the Appellant's ongoing inability to hold the determined employment was not related to the MVA and therefore her entitlement to IRI would end. Given the Appellant's personal circumstances, the case manager determined the IRI would extend to November 28, 2013.

The Appellant filed an Application for Review of the case manager's October 29, 2013 decision. In a decision dated July 31, 2014, the Internal Review Officer upheld the case manager's decision, finding that the Appellant did not have an MVA-related medical, psychological or cognitive impairment that prevents her from holding the determined employment. The Appellant filed a Notice of Appeal to the Commission on October 29, 2014. The Appellant identified the issues on the appeal to be whether a "Ticket Taker" was the appropriate 180 day determination of employment and whether she was capable of holding this determined employment.

Decision:

For the reasons set out below, the panel finds that it does not have jurisdiction to consider whether "Ticket Taker" was the appropriate determined employment. With respect to IRI benefits, the panel finds the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further IRI benefits.

Preliminary and Procedural Matters:

Two Case Conference Hearings were scheduled regarding this appeal. The purpose of the Case Conference Hearings was to discuss pre-hearing matters and to schedule a date for the hearing of the Appeal. The first Case Conference Hearing ("CCH") was scheduled for February 10, 2016 at 9:30 a.m. Notice of the CCH was sent to the Appellant by regular mail and Xpresspost to the address provided by the Appellant in her Notice of Appeal ("the Appellant's first address"). The Notice of Hearing sent by Xpresspost was returned "unclaimed", but the Notice of Hearing sent by regular mail was not returned to the Commission. However, given that prior correspondence sent to the Appellant at the Appellant's first address was returned to the Commission with the notation "moved – address unknown", the Commission requested MPIC to check its records to determine if the Appellant had provided MPIC with a new address. MPIC advised the Commission that the Appellant had, in fact, provided MPIC with a new address ("the Appellant's second address"). Although the Commission received the information regarding the Appellant's second address from MPIC, the Appellant has never provided a change of address to the Commission.

The Commission scheduled a second CCH for April 12, 2016 at 9:30 a.m. Notices of Hearing were sent to the Appellant by regular mail and Xpresspost to both the Appellant's first address and the Appellant's second address. Notices of the Hearing sent by Xpresspost to both the Appellant's first address and the Appellant's second address were returned "unclaimed". Notice of Hearing sent to the Appellant's first address by regular mail was returned with the notation "moved". Notice of Hearing sent to the Appellant's second address by regular mail was not returned to the Commission. However, the Appellant did not attend the second CCH.

The Appeal was then set for hearing and scheduled for July 19, 2016 at 9:30 a.m. Notices of Hearing were again sent to the Appellant by regular mail and Xpresspost to both the Appellant's first address and the Appellant's second address. Notices of the Hearing sent by Xpresspost to both the Appellant's first address and the Appellant's second address were returned "unclaimed". Notice of Hearing sent to the Appellant's first address by regular mail was returned with the notation "moved". Notice of Hearing sent to the Appellant's second address by regular mail was not returned to the Commission.

Section 184.1 of the MPIC Act provides how Notices may be given to the Appellant. It provides as follows:

> **How notices and orders may be given to appellant**
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> 184.1(1) Under sections 182 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant
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> (a) personally; or
>
> (b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.
>
> **When mailed notice received**
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> 184.1(2) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

Subsection 184.1(2) requires the Appellant to establish that, acting in good faith, the Appellant did not receive the Notice of Hearing, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control. The Appellant has never contacted the Commission to change her address and it appears that regular mail sent to the Appellant's

first address is not being forwarded by Canada Post to a current address. As such, pursuant to subsection 184.1(2) of the MPIC Act, the Appellant is deemed to have received the Notice of Hearing that was sent to her by regular mail to the address provided by her in her Notice of Appeal. In addition, Notice of Hearing was sent by regular mail to the Appellant's second address, the address change provided by the Appellant to MPIC. The Notice of Hearing sent to the Appellant's second address was never returned to the Commission.

On July 19, 2016, the hearing of the Appellant's appeal was convened at 9:30 a.m. with counsel for MPIC present. The Appellant did not attend. The Commission's Notice of Hearing provided that the time and date of the hearing are firm and that postponements will only be granted under extraordinary circumstances. The Notice also provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and may issue its final decision either granting or dismissing the appeal in whole or in part.

Accordingly, the appeal hearing proceeded at 9:45 a.m. and the panel heard the submissions from counsel for MPIC. After submissions were completed, the panel advised counsel for MPIC that the panel would, as is the normal course, adjourn to deliberate and advise the parties of its decision in due course by providing a written decision. The hearing then adjourned.

Submission for the Appellant:

In her Notice of Appeal to the Commission dated October 29 2014, the Appellant stated she wished to appeal the July 31, 2014 Internal Review Decision "for reasons as set forth in attached October 9, 2014 letter" from her former legal counsel. This October 9, 2014 letter was sent by the Appellant's former legal counsel to MPIC's Benefit Administration Unit.

Regarding the 180 day determination of employment as a "Ticket Taker", the October 9, 2014 letter from the Appellant's former counsel stated that the 180 day determination essentially appeared to be a "default determination" because the Appellant had not provided MPIC with documentation, specifically her Income Tax returns. Counsel then indicated that the Appellant's Income Tax returns as well as a complete five (5) year work history would be provided so that a full determination of employment could be conducted. None of this information or further submissions on this issue was provided.

Regarding the issue of termination of IRI benefits, the October 9, 2014 letter from the Appellant's former counsel stated that "there is a significant medical issue with respect to causation" and that counsel likely will be obtaining additional medical evidence to address whether the Appellant recovered from the psychological effects of the MVA. No further medical evidence or submissions on this issue were provided.

The Appellant's Application for Review dated January 29, 2014, filed in response to the case manager's decision, stated as follows:

> "1. Insufficient reviews on my Injuries.
> 2. Neglect Doctors medical Information based on Ongoing information and appts in March 2014.
> 3. Doctor specified I can Not return to work as my injury needed further over viewed for proper stability of my neck and back.
> 4. I'm in a lot of pain as winter, cold weather has worsen my back. Depression has still been a issue."

Submission for MPIC:

On the issue of the 180 day determination of employment, counsel for MPIC noted that the Appellant had not provided MPIC with her tax documents for the last five (5) years as requested by the case manager. As a result, the case manager made a default determination finding that the

Appellant's determined employment is that of a "Ticket Taker". This decision was dated April 20, 2012 and the Appellant did not file an Application for Review of the case manager's decision. Because a review of this decision was not sought at the Internal Review Office, Counsel submitted that it was inappropriate to impose the 180 day determination issue at this hearing. Therefore, the only issue the Commission has jurisdiction over is whether MPIC correctly terminated the Appellant`s IRI benefits.

Counsel submitted that the onus is on the Appellant to prove, on a balance of probabilities, that the Internal Review Office erred in upholding the case manager's decision to terminate IRI benefits as of November 28, 2013. Counsel submitted that the Appellant has not provided any evidence, did not participate in any of the case conferences and failed to appear at the hearing. As such, counsel submitted that it appears the Appellant has abandoned her appeal and asked that the Appellant's appeal be dismissed on this basis alone.

Counsel submitted that benefits were terminated in accordance with subsection 110(1)(c) of the MPIC Act which states that a victim ceases to be entitled to IRI when the victim is able to hold an employment determined for the victim under section 106 of the MPIC Act. In this case, it was reasonable for both the case manager and Internal Review Officer to end the Appellant`s entitlement to IRI. Counsel submitted that unless there is a patent error or opinions relying on inaccurate information, the panel must defer to the MPIC Health Care Services ("HCS") consultants who all determined that the Appellant was ready to return to work. Counsel referred to a neuropsychological and psychological assessment report of [Appellant's neuropsychologist] dated June 4, 2013 which states that while the Appellant did suffer a mild traumatic brain injury as a result of the MVA, her neuropsychological test results indicated that she has since recovered completely from this injury. Further, [Appellant's neuropsychologist] found that the Appellant's

reported and observed symptoms would not meet diagnostic criteria for any specific DSM-IV disorder.

Counsel referred the panel to an MPIC HCS psychology consultant review dated August 29, 2013, where the psychology consultant concluded that the Appellant's cognitive and psychological condition was not preventing her from performing the sedentary duties in her determined employment as a Ticket Taker. Counsel also referred the panel to an MPIC HCS consultant review in which the consultant was asked whether the Appellant's back and neck symptoms are casually related to the MVA, and if so, whether these physical symptoms prevented the Appellant from performing sedentary duties in her determined employment as a Ticket Taker. The consultant concluded that the Appellant's neck symptoms are casually related to the MVA. However, relying on the findings of two physiotherapists and a sports medicine physician, the consultant concluded that the Appellant's neck condition did not prevent her from returning to her position of determined employment.

Counsel submitted that it was reasonable for the Internal Review Officer to rely on the MPIC HCS reports and, given that there is no evidence to contradict this evidence, the Appellant's appeals should be dismissed.

Discussion:

Regarding the 180 day determination of employment, the panel finds that it does not have jurisdiction to consider this issue. The MPIC Act states:

Appeal from review decision

174(1) A claimant may, within 90 days after receiving notice of a review decision by the corporation or within such further time as the commission may allow, appeal the review decision to the commission.

Before an issue can properly be before the Commission, an Application for Review of a case manager's decision on the issue must be filed with the Internal Review Office. Once an Internal Review Officer has issued a decision, the matter can then be appealed to the Commission. While the Appellant included the issue of the 180 day determination of employment on her Notice of Appeal to the Commission, the Appellant did not file an Application for Review of the case manager`s April 20, 2012 decision regarding the 180 day determination. Therefore, the issue of the 180 day determination of employment is not properly before the Commission and the Commission does not have jurisdiction to render a decision on this issue.

Termination of IRI benefits is addressed in subsection 110(1)(c) which states that a victim ceases to be entitled to IRI when the victim is able to hold the employment determined for the victim. The Appellant's case manager found that the Appellant was able to hold her determined employment as of November 28, 2013 and, relying on the findings of the MPIC HCS consultants, this decision was upheld at the Internal Review Office. The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in upholding the case manager`s decision to terminate IRI benefits as of November 28, 2013.

With respect to her physical injuries, an MPIC HCS consultant provided an opinion on July 23, 2013 that the Appellant's low back problems are not related to the MVA because her symptoms were documented both prior to and following the MVA. Further, a probable diagnosis had not been established. The HCS consultant did conclude that the Appellant's neck symptoms are

related to the MVA. However, the consultant also found that the findings of two phsiotherapists and a sports medicine physician did not support a conclusion that the Appellant was prevented from returning to work in her position of determined employment.

The consultant was asked to revisit the July 23, 2013 opinion in light of a December 12, 2013 x-ray report. On June 24, 2014, the consultant stated that the opinion had not changed, finding that a physical impairment related to the Appellant's neck condition, leading to the inability to perform the essential duties of the Appellant's determined employment, was not medically supported.

While the Appellant mentions her neck and back in the Application for Review of the case manager's decision, this issue was not addressed in the October 9, 2014 letter from the Appellant's former legal counsel and no further information from the Appellant was provided on this issue. As such, the panel accepts the findings of the MPIC HCS consultant that the Appellant's low back symptoms are not related to the MVA and her neck symptoms, while related to the MVA, do not prevent her from working in her determined employment.

With respect to her psychological symptoms, the Appellant attended to [Appellant's neuropsychologist] for a neuropsychological and psychological assessment. [Appellant's neuropsychologist] found that the Appellant's symptoms did not meet diagnostic criteria for a psychiatric disorder and that the Appellant completely recovered from her mild traumatic brain injury sustained in the MVA. [Appellant's neuropsychologist] found that there was no evidence of continuing psychological, psychiatric or emotional problems related to injuries sustained in the MVA.

On August 29, 2013, an MPIC HCS psychology consultant provided an opinion after review of the Appellant's injury claim file, including the findings of [Appellant's neuropsychologist]. The psychology consultant concluded that the Appellant's cognitive and psychological condition was not preventing her from performing the duties in her determined employment.

The Appellant attended to [Appellant's doctor] who provided a report dated September 16, 2013. With respect to the MVA, [Appellant's doctor] stated that the Appellant "seems to be having post traumatic stress disorder in this regard" and would be attending to a psychiatrist, [text deleted], for an assessment and psychological counselling.

[Appellant's psychiatrist] provided reports dated March 19, 2014 and May 21, 2014. In the March 19, 2014 report, [Appellant's psychiatrist] concluded that the Appellant suffered from "Major depressive episode. Generalized anxiety disorder with anxiety attacks and Agoraphobia. Oxycodone addiction currently in remission." Under Axis III, [Appellant's psychiatrist] listed that the Appellant suffered from multiple injuries from the MVA from which she is still in chronic pain. In the May 21, 2014 report, [Appellant's psychiatrist] concluded that it was not possible for him to say whether the Appellant sustained any permanent impairment in her cognitive functioning from the MVA and that "it appears to be secondary to concentration problems related to her depression".

An MPIC HCS psychology consultant was again asked to review the Appellant's medical file, including the reports of [Appellant's doctor] and [Appellant's psychiatrist], and advise if the medical documentation changes the psychology consultant's August 29, 2013 opinion. On July 7, 2014, the psychology consultant concluded that the reports did not alter the previous opinion

provided on August 29, 2013. The psychology consultant again relied on the report of [Appellant's neuropsychologist], noting that [Appellant's neuropsychologist] found that the Appellant at that time did not meet criteria for any DSM diagnosis, but that the Appellant had a past history of depression and anxiety which pre-dated the MVA. The psychology consultant found that there was no direct temporal relationship between the Appellant's current psychological condition and the MVA, particularly in light of the Appellant's documented pre-MVA history of psychiatric difficulties. The Appellant had post MVA acute stress and bereavement that resolved, followed by a period of relative good psychological health as documented in [Appellant's neuropsychologist's] report, and now followed by a diagnosis of depression and generalized anxiety disorder. The psychology consultant concluded that the Appellant's current psychological condition was not deemed to be causally related to the MVA.

The Appellant's former legal counsel advised MPIC that they would be obtaining additional medical evidence to address the issue of whether the Appellant had in fact recovered from the psychological effects of the MVA and the extent to which any subsequent events may have contributed to her ongoing depression and anxiety. As noted above, no further medical information on the issue of causation of the Appellant's psychological condition was provided. As such, the panel accepts the conclusion of the MPIC HCS psychology consultant that the Appellant's psychological condition preventing her from performing the duties of her determined employment is not casually related to the MVA. This conclusion was made in light of all the medical reports on the Appellant's file, including the comprehensive neuropsychological and psychological assessment report of [Appellant's neuropsychologist].

After a careful review of all the reports and documentary evidence filed in connection with this appeal and after a consideration of the submissions of the Appellant and counsel for MPIC and

taking into account the provisions of the relevant legislation, the panel finds that the Appellant has failed to meet the onus upon her, on a balance of probabilities, of establishing that she has an MVA-related impairment that prevents her from holding her determined employment and therefore entitles her to IRI benefits beyond November 28, 2013.

Disposition:

Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated July 31, 2014 is upheld.

Dated at Winnipeg this 8th day of September, 2016.

KARIN LINNEBACH

BRIAN HUNT

JANET FROHLICH