Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-18-128

PANEL:	**Laura Diamond, Chairperson** **Kerissa Cymbaluk** **Corinne Thompson Bobrowich**
APPEARANCES:	**The Appellant, [TEXT DELETED], did not attend the hearing.** **Manitoba Public Insurance Corporation ("MPIC") was represented by Steve Scarfone.**
HEARING DATE:	**June 13, 2023.**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity (IRI) benefits as of the 181st day following his MVA.**
RELEVANT SECTIONS:	**Sections 70(1), 85(1), 86(1) and 86(2) of *The Manitoba Public Insurance Corporation Act* (the "*MPIC Act*") and Section 8 of Manitoba Regulation 37/94.**

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 was injured in a motor vehicle accident (MVA) on July 11, 2017. He had a history of involvement in prior MVAs and suffered from pre-existing medical conditions. In 2014 he received a Permanent Impairment (PI) benefit award from MPIC for a disc herniation.

After the 2017 MVA, MPIC provided the Appellant with funding for chiropractic treatment and athletic therapy.

In July, the Appellant reported that he did not miss time from work as he was not currently employed. On December 5, 2017 he contacted MPIC to enquire about entitlement to possible Income Replacement Indemnity (IRI) benefits.

On December 18, 2017 he advised his case manager that his last employment had been as a [occupation #1] in 2012, and that he received IRI as a result of his other MVAs until 2015. However, he had scheduled an interview for work as [occupation #2] for [text removed].

After the 2017 MVA, a review by MPIC's Health Care Services (HCS) medical consultant noted a diagnosis of WAD 2 injury and lower back sprain. The consultant opined that there was no evidence that the Appellant was unable to perform sedentary work as a result of his MVA injuries. Her opinion was that he was able to return to work, perhaps at employment that does not involve driving.

The case manager issued a decision (CMD) on March 19, 2018 noting that pursuant to medical review 181 days after the MVA, the Appellant (who had been classified as a non-earner) did not qualify for IRI benefits as the evidence on file did not support an inability to work at sedentary employment.

The Appellant sought an internal review of this decision. On November 8, 2018, an Internal Review Officer (IRO) for MPIC upheld the CMD, concluding that the medical information on file did not establish objective evidence that the Appellant had a physical impairment of function as a result of his MVA that would render him entirely or substantially incapable of performing sedentary work as of the 181st day following his MVA.

On November 12, 2018, the Appellant filed a Notice of Appeal (NOA) with the Commission.

The Appellant advised the Commission's Appeals Officer (AO) that he was seeing a physiotherapist and a chiropractor, and he provided reports from his chiropractor for inclusion into the indexed file of relevant documents to be referred to at the appeal hearing (the Index). A copy of the Table of Contents (TOC) for the Index is attached as Schedule A to these Reasons for Decision.

The AO encountered some difficulty in reaching the Appellant and a case conference was scheduled, with notice to the parties, to be held on November 15, 2022. Counsel for MPIC appeared but the Appellant did not attend. A Deputy Chief Commissioner reviewed the Index and Supplemental Index which were prepared by the AO, and noted that the Appellant had advised the AO that he would not be calling any witnesses at the hearing. Counsel for MPIC advised that MPIC would not be calling witnesses.

The appeal was scheduled for hearing, with no witnesses to be called, on June 13, 2023 at 9:30 a.m.

Notices of Hearing (NOH) dated April 18, 2023 and April 25, 2023 were sent to the Appellant by regular mail and were not returned to the Commission by Canada Post. The NOH was also sent to the Appellant's email address on April 18 and 25, 2023. A reminder email was sent to him on June 7, 2023, along with a voicemail message reminding him of the scheduled hearing date.

The Hearing

The hearing in regard to the Appellant's appeal was convened on June 13, 2023 at 9:30 a.m., via videoconference.

Counsel for MPIC was in attendance but the Appellant did not appear.

The Commission allowed a 15 minute grace period. During this time, the Commission staff received a telephone call from the Appellant's wife advising that he would not be appearing because he was under a doctor's care.

The Commission noted that the Appellant had not requested an adjournment but merely advised staff, once the hearing had already been convened, that he would not be attending. He had not provided a written request, with reasons for requesting an adjournment, in advance of the hearing, as required by the Commission's procedures regarding adjournment requests.

Counsel for MPIC did not take any position in this regard except to say that the Appellant had received ample notice in writing of the hearing.

The panel determined that, as the Appellant had received proper notice of the hearing and declined to attend, the Commission would proceed with the hearing in the absence of the Appellant, relying instead upon the documentary evidence on file and the submissions of counsel for MPIC.

Documentary Evidence

The Appellant's NOA was handwritten and appeared to say:

> *"I was on Appeal (AICAC) when the 11/July/17 MVA happened. My file was placed in a basket"*

The Appellant submitted a chiropractic report from [Appellant's chiropractor] dated December 11, 2017 supporting further chiropractic treatment benefits and stating that after the 2017 MVA "all lower back and leg made worse".

A primary health care report from [Appellant's primary physician] dated December 18, 2017 diagnosed back strain and checked boxes to indicate the Appellant was unable to perform his employment tasks and that returning to work would adversely affect his condition.

A HCS medical consultant's review dated March 1, 2018 diagnosed a WAD 2 lower back sprain/strain injury with a capability to do sedentary work (perhaps not requiring driving).

[Appellant's chiropractor] provided a report dated June 26, 2018 indicating that the Appellant's past MVA injuries have been aggravated and that he requires supportive chiropractic care.

[Appellant's chiropractor] provided further reports dated May 31, 2019 and February 11, 2020. He opined that the Appellant's condition had symptomatically and functionally deteriorated without chiropractic care and that he requires supportive care.

Clinical chart notes from the Appellant's caregivers were also provided.

Submission from MPIC

Counsel for MPIC submitted that the issue before the panel is whether the Appellant is entitled to IRI at 181 days after the MVA. This question includes a few issues.

Ability to Return to Work

Counsel submitted that because the Appellant was found not to be employed at the time of the MVA, he then had to be reclassified. Sections 85 and 86 of the MPIC Act require a determination of employment 181 days after the MVA. Section 85 classified him as a non-earner who would be entitled to IRI at any time during the first 180 days if he was unable to hold employment that he would otherwise have held.

The question at 181 days was still whether he was unable to work.

Section 8 of Regulation 37/94 defines when a victim is unable to hold employment. This occurs when a physical or mental injury that was caused by the MVA renders the victim entirely or substantially unable to perform the essential duties of the employment that he performed or would have performed but for the accident.

Although [Appellant's primary physician] indicated that the Appellant was unable to return to work, and that to do so could impact the natural history of his condition, the medical consultant reviewed [Appellant's primary physician's] clinical notes and was not able to find any analysis in his report or notes regarding the Appellant's ability to return to sedentary (as opposed to more physical) work.

The medical consultant's report of March 1, 2018 went on to opine that the compensable injuries sustained in the MVA would not prevent the Appellant from holding sedentary employment.

MPIC recognized the Appellant's history of prior MVAs and the 2017 aggravation of pre-existing injuries to his lower back. However, it was noted that the Appellant considered himself employable and had arranged a job interview with [Text removed]. He sent an email to his case manager indicating that he planned to take the necessary training to get that job. It was clear that he was pursuing the job as a [occupation #2] and felt capable of performing all the tasks relating to that work in the [text removed] field. Since it had been noted that he felt he was not able to drive to various locations to [text removed], the medical consultant identified this as a possible limitation and condition for securing that type of employment.

Counsel also pointed to notes from the Appellant's athletic therapist which indicated, in August 2017 (one month after the MVA), that he was feeling a lot better that day.

Counsel for MPIC noted that he was limited by an inability to cross-examine the Appellant as a result of his failure to appear at the hearing. Still, the documentary evidence indicates that he had indeed been driving (when he indicated to his athletic therapist that he felt tense while he was driving in the snow).

The medical consultant concluded that the Appellant was able to hold employment and substantially perform the duties of a [text removed].

Causal Connection

The question also arises as to whether the injuries complained of are directly related to the MVA. Counsel for MPIC submitted that this is a requirement under the MPIC Act and Regulation 37/94, and that the Appellant also has to meet this threshold test. It was not clear that he had done so in this case.

As the medical consultant noted, [Appellant's primary physician] and the Appellant's chiropractor had not really provided a clear diagnosis. The indication was that he had aggravated lower back injuries from earlier MVAs. The ultimate diagnosis concluded by the consultant was one of back strain. There was no diagnosis of neck injuries, which might be more limiting for his ability to drive. Further, it was not clear that his lower back complaints were directly related to this MVA.

In their report, the medical consultant reviewed the Appellant's medical records concerning his ongoing lower back issues, but struggled to find note of objective signs upon examination or of a determined diagnosis. Counsel described these notes as cryptic and not helpful in regard to any determination of causation.

Therefore, counsel submitted that the Appellant had failed to show, on a balance of probabilities, that his current complaints were caused by the MVA.

Ability to Hold Employment

Counsel submitted that the Commission should prefer the evidence of MPIC's medical consultant (who opined that the Appellant could return to work in a sedentary position) to the report of [Appellant's primary physician] (who said that the Appellant could not return to work) and the chiropractor (whose report that the Appellant was unable to work and permanently disabled came two years before this MVA).

The medical consultant considered the Appellant's whiplash disorder and lower back strain and concluded that these injuries would not have prevented the Appellant from performing sedentary work.

Counsel noted that although the MVA occurred in July of 2017, the Appellant did not reach out to MPIC for further IRI benefits until December 2017. MPIC provided treatment benefits to address the Appellant's whiplash and lower back strain, but counsel submitted that these injuries did not prevent the Appellant from holding sedentary employment or cause him to be entitled to IRI benefits as of the 181st day following the MVA.

He submitted that the appeal should be dismissed.

Discussion

Legislation

The MPIC Act provides:

Definitions

Definitions – "Employment"

70(1) In this Part,

"employment" means any remunerative occupation;

"full-time earner" means a victim who, at the time of the accident, holds a regular employment on a full-time basis, but does not include a minor or student;

"non-earner" means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or a student;

"part-time earner" means a victim who, at the time of the accident, holds a regular employment on a part-time basis, but does not include a minor or a student;

"temporary earner" means a victim who, at the time of the accident, holds a regular employment on a temporary basis, but not does not include a minor or a student;

Entitlement to I.R.I. for first 180 days

85(1) A non-earner is entitled to income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident;

(a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;

Entitlement to I.R.I. after first 180 days

86(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section 106, and the non-earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident, of the same class, or the gross income the full-time earner earned from his or her employment, whichever is the greater,

Determination of I.R.I.

86(2) The corporation shall determine the income replacement indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment, considering

(a) whether the victim could have held the employment on a full-time or part-time basis;

(b) the work experience and earnings of the victim in the five years before the accident; and

(c) the regulations.

Manitoba Regulations 37/94

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The onus is on the Appellant to show, on a balance of probabilities, that he was not able to work at the sedentary employment of [occupation #2] as a result of injuries sustained in the MVA.

The Appellant did not appear at the hearing to provide verbal testimony in support of his appeal.

The panel instead reviewed the documentary evidence provided.

We have reviewed comments made by the Appellant and recorded by his athletic therapist and case manager, which indicate that he was feeling better and trying to drive, and that he was eager to obtain new training and employment as an [occupation #2].

This documentary evidence is not compatible with his position that he could not work at sedentary employment, but the Appellant did not testify at the hearing to explain the contradiction or provide evidence regarding his symptoms and condition, and how they may have prevented him from working.

We have also reviewed [Appellant's primary physician's] primary health care report dated December 18, 2017, which diagnosed the Appellant's "back strain". [Appellant's primary physician] checked off the form's boxes to indicate that his clinical condition resulted in an inability to perform required tasks and that a return to the workplace would adversely affect the natural history of the clinical condition.

Unfortunately, the Appellant did not provide a more detailed narrative report from [Appellant's primary physician] to specifically identify the impact of the back strain on his ability to work, or address his inability to work at sedentary employment.

The Appellant's chiropractor provided narrative reports containing more analysis regarding the Appellant's condition. However, these were, for the most part, focussed primarily upon the need for further chiropractic care. A report dated July 1, 2015 referred to the Appellant as permanently disabled and unable to work, but focussed upon his older accidents in 2004 and 2006 and his presentation in 2010. His reports following the 2017 MVA do not contain analysis of the Appellant's condition and ability to perform relevant job duties, but focus instead on the need for further chiropractic care.

On the other hand, the medical consultant has provided a detailed narrative report which contains an analysis of the history of the Appellant's condition and the objective medical information on his file. They considered the Appellant's search for a job as an [occupation #2], taking this to indicate that he was feeling capable of such employment at that time. The Appellant did not provide testimony which might contradict this.

The consultant reviewed the medical file in an attempt to identify objective signs and symptoms, and a diagnosis which could be compared with the Appellant's ability to meet sedentary job demands. This review has been given more weight by the panel in this case than the reports of [Appellant's primary physician] and the chiropractor, who, in the documentary evidence before the Commission, did not undertake this analysis.

As a result, the panel finds that the Appellant has failed to meet the onus upon him to show that he was medically incapable of returning to work at sedentary employment.

Disposition

Based upon our review of the evidence on file and the submissions of counsel for MPIC, the Commission finds that the Appellant has not met his onus to show, on a balance of probabilities, that he was entitled to IRI benefits as of the 181st day following the MVA.

The Internal Review Decision dated November 8, 2018 is hereby upheld and the Appellant's appeal is dismissed.

Dated at the City of Winnipeg, in the Province of Manitoba, this 19th day of July, 2023.

LAURA DIAMOND

KERISSA CYMBALUK

CORINNE THOMPSON BOBROWICH