Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-63

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Yvonne Tavares** **Mr. F. Les Cox**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill .**
HEARING DATES:	**January 21, 2002, and July 3, 2002**
ISSUE:	**Entitlement to Income Replacement Indemnity ('IRI') benefits.**
RELEVANT SECTIONS:	**Section 81(1) and Section 110(1)(a) of The Manitoba Public Insurance Corporation Act (the '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, [text deleted], was involved in a motor vehicle/deer collision on October 17, 1999. The Appellant was operating a motor vehicle on a gravel road when the vehicle was struck on the driver's side by a deer. The collision of this animal with the driver's side of the vehicle did not cause the car to roll or go off into a ditch. The Appellant drove to the opposite side of the road and tried to get out of her car but could not because the door was crushed at the hinge level. She was able to drive the vehicle to her mother's residence. After the motor vehicle

accident, the Appellant did not suffer any immediate neck pain, back pain or headaches, and had no change in the level of her activities.

The Appellant was able to return to work as a farrowing technician on Monday, October 19, 1999. At that time, she did not complain of headaches, neck pain or thoracic pain. In a discussion the Appellant had with [text deleted], an occupational therapist, the Appellant described the job demands of a farrowing technician. This description is contained in [Appellant's occupational therapist's] report which was completed on March 8, 2000. This report sets out a description of the job demands to include lifting/holding 3-kg piglets approximately 100 times daily, lifting/holding 1-kg piglets 100 to 150 times daily, pushing/pulling against up to 20 lbs of resistance (pushing a feed cart), scooping up to 3.5 kg 128 times daily and scraping pens and sweeping aisles. There was occasional climbing over 2.5-ft barricades and frequent bending in a confined space. The Appellant advised the Commission at the appeal hearing that she worked a 40-hour week and was required to work every second weekend.

On October 25, 1999 (eight days after the accident), the Appellant complained of an onset of back pain, neck pain and headaches and, as a result, sought medical treatment from her personal physician, [text deleted]. The Initial Health Care Report from [Appellant's doctor #1], dated October 28, 1999, indicated that the Appellant was complaining of mid-back pain, and there were objective findings of tenderness and muscle spasm over mid-back area, decreased range of motion of the shoulders, and decreased flexion of the neck.

The Appellant denied any history of neck pain, interscapular pain or headaches prior to the motor vehicle accident. The Appellant further indicated that the pain she experienced was sharp in nature, with no particular exacerbating events or positions, and was relieved with the use of Flexeril. She was unable to return to work because of this ongoing pain.

On or about December 8, 1999, the Appellant attempted to return to work and to perform light duties only. However, on that date, she contacted her case manager and informed him that she was unable to continue the light duties because she had too much pain. Since the Appellant was unable to work due to her injuries, she commenced receiving IRI benefits. It should be further noted that [Appellant's doctor #1] had recommended physiotherapy treatments and the Appellant was attending at physiotherapy several times each week at this time.

At the request of MPIC, the Appellant underwent a third-party physio assessment on February 10, 2000, and a job-site visit by an occupational therapist on March 8, 2000. In her Job Site Visit Report dated March 9, 2000, the occupational therapist noted that the Appellant was working in a self-employed capacity as a dog breeder. She advised the occupational therapist that she was not interested in returning to her full duties as a farrowing technician and indicated that she was concentrating on her dog-breeding business.

The occupational therapist further noted in her report that the Appellant was required to be present for the dog-breeding tasks each day for approximately two hours each morning and for a period in the late afternoon. As part of her work as a dog breeder, the Appellant advised the occupational therapist that she had been dependent on assistance for carrying 5-gal. pails of

water to the kennel area. She also stated that she had been unable to perform bi-monthly sweeping of cages and was unable to handle 18-kg feed bags.

The physiotherapist states in her report dated March 1, 2000, that:

> The details of the Physiotherapy examination are enclosed in Appendix A. In summary, her physical findings are localized to decreased forward bending of her neck, and tightness of the neck and upper back muscles. She has normal reflexes, dermatomes and myotomes are within normal limits bilaterally. Her grip strength is average and sufficient for work and home function.

The physiotherapist also made a number of recommendations, including the recommendation that physiotherapy had progressed to a home program of stretching, pacing and education in proper sleeping positions.

In a supplementary report dated March 13, 2000, the physiotherapist, [text deleted], on review of the occupational therapist's report, stated:

> [The Appellant] has the physical components that would allow her to return to her full duties as a Farrowing Technician. However, she has indicated that she is not interested in doing this and is concentrating on her dog breeding business.
>
> She is also functioning full-time in this regard. Any residual symptoms can be minimized by the recommendations of the previous report, ie home program of stretching, pacing and proper sleeping positions.

After reviewing the reports of the occupational therapist and the physiotherapist, the case manager indicated in a note to file that he contacted the Appellant on March 24, 2000, to discuss the report with her. During the course of discussion, the case manager indicated that the Appellant advised him that she preferred to follow through with dog breeding, and she did not want to return to her job as farrowing technician. The Appellant also advised the case manager that she did not believe she could perform her pre-accident duties. The case manager further indicated in his note to file that he informed the Appellant that the information in his possession

indicated that the Appellant could perform her pre-accident duties and that the payment of IRI benefits would cease.

On April 14, 2000, the case manager received a letter from [Appellant's doctor #1] wherein he states:

> This will acknowledge receipt of the reports from the Physiotherapist, [text deleted] and Occupational Therapist, [text deleted]. I have reviewed these reports and wish to advise you that I agree with the objective findings stated.

On August 30, 2000, the case manager wrote to the Appellant and stated:

> On March 13, 2000 we received a report from [independent physiotherapist], of [independent physiotherapist], indicting [*sic*] that you had regained the functional capacity to perform your occupational duties, thus ending your entitlement to Income Replacement Indemnity. [Appellant's doctor #1] also confirms, that you have regained the functional capacity to perform your occupational duties.
>
> Since you regained the capacity to do your job duties, but no longer hold the job you had at the time of the accident, you will be entitled to a further ninety (90) days of Income Replacement Indemnity as of August 1, 2000. This means that your entitlement to Income Replacement Indemnity will end on October 29, 2000.

The case manager requested that MPIC's medical consultant review the file and advise whether the Appellant was capable of returning to regular duties as a farrowing technician. In an inter-departmental memorandum to the case manager, dated September 26, 2000, [text deleted], medical consultant for MPIC, stated:

> In a supplementary report of March 13, 2000, after a review of the occupational therapist's job site assessment report, the third party physiotherapist opined that [the Appellant] had the physical components that would allow her to return to her full duties as a Farrowing Technician. She opined that any residual symptoms could be minimized by a home program of stretching, pacing and proper sleep positions.
>
> In the most recent report on file of April 14, 2000, the family physician acknowledged receipt of the reports from the physiotherapist and occupational therapist and advised that he agreed with the objective findings stated.

> I spoke with [the Appellant's] family physician on September 21, 2000. I reviewed [the Appellant's] history and referred to the aformentioned [*sic*] physio and occupational therapy reports. The family physician was asked to clarify what he meant in his letter of April 14, 2000. He advised that he agreed with the physiotherapist's opinion of March 13, 2000 that [the Appellant] had the physical components that would allow her to return to her full duties as a Farrowing Technician.
>
> **CONCLUSIONS**
>
> The information reviewed indicates that [the Appellant] is not restricted from returning to her usual duties as a Farrowing Technician.

The Appellant made Application for Review of the case manager's decision in an application dated September 29, 2000. The Internal Review hearing took place on December 7, 2000, and the Internal Review Officer issued his decision on March 12, 2001, confirming the case manager's decision and rejecting the Application for Review.

In his decision dated March 12, 2001, the Internal Review Officer stated:

> Following your car accident of October 17, 1999, you were under the care of [Appellant's doctor #1] and you underwent a prolonged course of physiotherapy. In March 2000, you underwent a physiotherapy examination conducted by [independent physiotherapist] and an occupational therapist, [Appellant's occupational therapist], did a Job Site Analysis. The conclusion expressed in [independent physiotherapist's] report of March 13, 2000 is that you had the physical capacity to return to your full pre-accident duties as a Farrowing Technician. [Appellant's doctor #1's] report of April 14, 2000 states that he agrees with the objective findings set out in the reports from [independent physiotherapist] and [Appellant's occupational therapist]. One of our medical consultants examined your file and provided an opinion dated September 26, 2000 concluding you were able to return to your pre-accident work.
>
> [Text deleted] attached Section 110(1)(a) of the Act to his decision. This Section sets up an objective test. It provides that entitlement to IRI ends when a claimant is *able* to hold the employment she held before her accident. The date on which the claimant actually does return to those pre-accident duties, and her own feelings about whether her ongoing symptoms allow her to return to such duties, are not very relevant.

> The available medical evidence supported [text deleted's] decision when he made it.

The Internal Review Officer concluded that the case manager's decision was a reasonable one and rejected the Application for Review.

As a result, the Appellant appealed the decision of the Internal Review Officer, dated March 12, 2001, to this Commission. The issue which requires determination in the Appellant's appeal is whether the injuries which the Appellant sustained in the motor vehicle accident on October 17, 1999, rendered her incapable of continuing with her employment. The relevant sections of the Act governing the entitlement to IRI are Section 81(1)(a) and Section 110(1)(a).

Section 81(1)(a) of the Act provides:

> **Entitlement to I.R.I.**
> **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the full-time employment;

Section 110(1)(a) of the 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.

Prior to the initial hearing of this appeal on January 21, 2002, the Appellant, through legal counsel, filed a medical report with the Commission from [Appellant's doctor #2], dated October 12, 2001. [Appellant's doctor #2], who had been treating the Appellant, stated in his report that,

based on the medical reports provided and his understanding of the Appellant's problems, he did not believe that she was capable of returning to work as a farrowing technician on August 1, 2000.

Legal counsel for MPIC forwarded this report to MPIC's medical consultant, [text deleted]. In an inter-departmental memorandum from [MPIC's doctor] to MPIC's legal counsel, dated December 11, 2001, [MPIC's doctor] stated:

> **IMPRESSION**
>
> The updated medical information has not referred to measurable impairment of function that would contradict earlier medical information indicating that [the Appellant] had the physical components (range of motion, strength) to allow a return to her pre-accident duties as a Farrowing Technician.

The appeal hearing commenced on January 21, 2002. The Appellant was represented by [Appellant's representative], and MPIC was represented by Mr. Mark O'Neill. At this hearing, the Appellant testified and was cross-examined by legal counsel for MPIC. At the conclusion of the evidence, both legal counsel jointly agreed to adjourn the proceedings in order to obtain an orthopedic report from an orthopedic specialist. Both counsel subsequently agreed that this report should be obtained by the Commission from [text deleted], an orthopedic specialist.

The Commission provided [independent orthopedic specialist] with all of the medical reports it had received from both parties and requested [independent orthopedic specialist] to examine the Appellant and to provide an opinion to the Commission as to whether or not the complaints of the Appellant related to her back were accident-related and whether these complaints prevented her from returning to work in respect of her pre-existing job from March 6, 2000, onward.

[Independent orthopedic specialist] was also provided with a list of the activities that the Appellant was required to carry out as a farrowing technician.

[independent orthopedic specialist] examined the Appellant on May 17, 2002, and provided the Commission with a written report dated May 21, 2002, a copy of which report was provided to legal counsel for both parties.

In his report dated May 21, 2002, [independent orthopedic specialist] stated:

> CONCLUSION AND PLAN: [The Appellant] was involved in a motor vehicle accident with a deer. Although there was damage to her motor vehicle her car was not written off nor was her vehicle forced into a rollover maneuver or impeded from ongoing travel. She did not have any symptoms related to this event until the following Friday when her accident occurred on a Saturday the 17th of October 1999. Her symptoms consist of pain in the left paraspinal region of the thoracic spine, pain in the left paraspinal region of the cervical spine and to a lesser degree on the right side of the cervical spine. She does not have any neurological deficit related to this pain. On her examination today there is no objective evidence of loss of function secondary to these symptoms.
>
> It is unusual for a patient to manifest symptoms approximately one week from her accident and not at the time of the collision. Therefore I do not think that there is ongoing impairment from a physical function stemming from the October 17th 1999 event and that there is not evidence that would preclude her from performing her pre-accident duties as she has no limitation of function on today's examination. She is currently employed as a dog breeder and receives income from this. I do not think the complaints of the appellant related to her back are accident related and prevented her from returning to work in respect to her preexisting job from March 6th 2000 onward. [*underlining added*]

The Commission reconvened the appeal hearing on July 3, 2002, and heard submissions from legal counsel for the Appellant and legal counsel for MPIC.

Counsel for the Appellant submits there was sufficient medical evidence, together with the testimony of the Appellant, to establish the Appellant's injury and her inability to work. He

stated that the work of a farrowing technician was physically very demanding and that the Appellant was unable to perform her regular duties because of the pain and discomfort she was suffering.

Legal counsel for MPIC submitted that there was no evidence that the Appellant was unable to work due to the injuries sustained in the motor vehicle accident on October 17, 1999. In support of his submission, MPIC's legal counsel referred to:

1. the physiotherapy examination conducted by [independent physiotherapist] and occupational therapist, [Appellant's occupational therapist], who did a job-site evaluation. The conclusion expressed in [independent physiotherapist's] report of March 13, 2000, was that the Appellant had the physical capacity to return to her full pre-accident duties as a farrowing technician.
2. the medical report of the Appellant's medical practitioner, [text deleted], dated April 14, 2000, who stated that he agreed with the objective findings set out in the reports from [independent physiotherapist] and [Appellant's occupational therapist].
3. the medical report of [text deleted], MPIC's medical consultant, who examined the entire file and provided a medical opinion dated September 26, 2000, and concluded that the Appellant was capable of returning to her pre-accident work.
4. the report of [MPIC's doctor], dated December 11, 2001, who reviewed [Appellant's doctor #2's] medical report dated October 12, 2001, and found there was no objective information contained in [Appellant's doctor #2's] report to contradict the earlier medical information which indicated that the Appellant had the physical capacity which permitted her to return to work as a farrowing technician.

5. the medical report of [independent orthopedic specialist], dated May 21, 2002, in which [independent orthopedic specialist], after examining the entire file and interviewing the Appellant, concluded that the Appellant's complaints relating to her back did not prevent her from returning to work in respect of her pre-existing job from March 6, 2000, onward.

The Commission agrees with the submission of MPIC's legal counsel. The onus of proof in this appeal rests with the Appellant to show, on the balance of probabilities, that the injuries sustained in the motor vehicle accident prevented her from continuing her full-time employment. The Commission finds that the Appellant has not met that standard.

Accordingly, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of the Manitoba Public Insurance Corporation's Internal Review Officer, bearing date March 12, 2001.

Dated at Winnipeg this 19th day of July, 2002.

MEL MYERS, Q.C.

YVONNE TAVARES

F. LES COX