



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-07

PANEL: Ms. Yvonne Tavares, Chairperson
Mr. Les Marks
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Morley Hoffman.

HEARING DATE: November 5, 2003

ISSUE(S): Termination of Income Replacement Indemnity Benefits as
of August 30, 2002.

RELEVANT SECTIONS: 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 accident on January 26, 2001, wherein she sustained injuries to her lower back. Due to those injuries, the Appellant became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was employed as a Casino Dealer at the [text deleted]. The Appellant was able to continue with her employment duties for the most part after the accident, however, she missed time from work when her low back pain flared up. By October 25, 2001, the Appellant's condition had deteriorated and her family doctor authorized her to remain off work indefinitely. As a result, the Appellant became entitled to Income Replacement Indemnity ("IRI") benefits, since she was unable to continue with her full-time employment due to the injuries she sustained in the motor vehicle accident of January 26, 2001. As of December 16, 2001, the Appellant began returning to work on a gradual basis.

In order to assist with her recovery, the Appellant was referred for a rehabilitation assessment at [rehab clinic] on March 6, 2002. [Appellant's rehab doctor] conducted the examination and in his report dated April 3, 2002 noted the following conclusions:

Diagnoses

The diagnoses are listed in rank order, with most prominent difficulties listed first.

1. Myofascial Pain Syndrome – Lumbosacral – Mild to Moderate Severity
2. Myofascial Pain Syndrome – Bilateral Gluteal – Mild to Moderate Severity
3. Degenerative Vertebral Disease – Lumbar Spine – Mild Severity

The subjective complaints of the claimant are consistent with the objective physical findings. Symptom magnification behavior was not evident.

Prognosis

The claimant's prognosis for complete resolution of pain complaints is fair to good. The painful condition has now been present for approximately 13 months and has been resistant to treatment. The claimant has **not yet** reached her Maximal Medical Improvement (MMI) from a physical point of view. It is medically probable that the claimant will achieve further improvements with physical treatments and rehabilitative interventions.

The claimant's prognosis for complete restoration of function is fair to good.

The overall prognosis is fair to good.

Work Capacity

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I am of the opinion that in her present condition the examinee is capable of continuing her Graduated Return To Work (GRTW) program at 4 hours per day, 4 hours per week. In my opinion, the claimant should be able to perform her pre-accident occupation full-time, full-duties, without restrictions with proper physical treatments and rehabilitative interventions.

In his report, [Appellant's rehab doctor] also made the following recommendation:

Therapeutic

1. **Physical Rehabilitation.** A work hardening program intergraded (*sic*) with her graduated return to work program should be appropriate to assist this Claimant to resume her pre-accident occupation full-time, full duties with out restrictions. This would be a structured program that capitalizes on the claimant interest in undertaking a physical rehabilitation program. She could benefit from participation in a physically sound program that addresses the musculoskeletal and cardiovascular conditioning. The program should consist of work hardening elements, stretching and strengthening exercises, lumbar stabilization exercises, muscle endurance exercises, and education as per "hurt vs. harm", body mechanics, posturing, and pacing.

As recommended by [Appellant's rehab doctor], the Appellant commenced the work hardening program at [rehab clinic] on May 6, 2002. In conjunction with the program, she also continued with her gradual return to work as a Casino Dealer at the [text deleted].

On June 4, 2002, it was mutually agreed between the Appellant, her case manager and the staff at [rehab clinic] to discharge the Appellant from the program. It was determined that the Appellant was not progressing with her program and therefore the program was terminated.

[Appellant's rehab doctor] provided a Discharge Summary dated July 2, 2002. In this report, [Appellant's rehab doctor] concluded the following:

Conclusion

On discharge, it is the opinion of the [rehab clinic] staff that no objective medical information exists that would prevent [the Appellant] from resuming her pre-accident employment as a Casino Dealer with [text deleted]. At present, [the Appellant] limits her physical ability on her subjective complaints of pain, for which no objective medical reason has been found. [the Appellant] has an understanding of the exercises that she needs to continue to perform on a regular basis to help improve her range of motion and strength within and around her lumbar spine.

An independent medical examination was subsequently arranged for the Appellant with [independent doctor] on August 23, 2002. In his medical report dated August 26, 2002, [independent doctor] noted the following with regards to his medical examination of the Appellant:

This patient has pre-existing degenerative changes in the lumbosacral spine, history of prior pneumonia, and history of prior headaches.

She was involved in a motor vehicle accident on January 26, 2001, and sustained soft tissue strain to her low back. Her progress has been prolonged. She has now no impairment due to this accident. The prognosis is good. I expect no permanent impairment and no sequelae from the effects of this accident.

In my opinion, she requires no ongoing treatment, medications, manipulations or therapies pertaining to this accident.

In my opinion, she may require treatment for her pre-existing conditions.

She should be informed that the soft tissue injuries which she sustained heal in approximately six to ten week's time.

The following answers your questions:

1. Objective physical findings are noted in the report – slight restriction of neck movements, clicking and grinding in right and left temporomandibular joints, no palatal reflex, slight restriction of dorsolumbar spine movements, and slight tenderness to palpation at the right sacroiliac region.
2. *Relationship* – In my opinion, these objective physical findings are now not related to this motor vehicle accident. The soft tissue injuries which she sustained from this accident have long since healed.
3. *Functional deficits and limitations* – She has very minor impairment in movements of her neck and dorsolumbar spine. In my opinion, she is fit and able to perform all activities of daily living and to perform all

the duties of her job as a casino dealer. She is able to drive her car to work.

4. *Current treatment* – In my opinion, she now requires no treatment pertaining to this accident. The effects of this accident have long since ceased to play any part in the production of her symptomatology; she has been receiving medication and treatment for symptomatology not related to this accident.

In a letter dated August 28, 2002, MPIC's case manager advised the Appellant that her entitlement to IRI benefits would cease as of August 30, 2002, since the medical information on her file supported the Appellant's ability to return to work on August 30, 2002.

The Appellant sought an internal review of that decision. In a decision dated December 16, 2002, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. In arriving at her decision, the Internal Review Officer relied on [MPIC's doctor's] report dated December 3, 2002 and his review of the Appellant's file. In her decision, the Internal Review Officer noted that:

With respect to whether or not the medical information on your file supports the contention that you are unable to work as a result of the motor vehicle accident, [MPIC's doctor] writes that in determining if medical impairments are a significant cause of an individual's work disability, the following factors must be considered.

1. Do the impairments preclude travel to and from the work place;
2. Do they interfere with the performance of the essential tasks of the occupation;
3. Do they pose a safety risk to the person or her co-workers;
4. Will performing the essential tasks of the occupation adversely alter the natural history of the medical condition.

[MPIC's doctor] writes that although it cannot be stated that physical impairments did not exist in this case, the measured functional impairment that you did suffer would not likely prevent you from returning to your pre-accident occupation. [MPIC's doctor] notes that the majority of partial work disability documented in the [rehab clinic] report was based upon pain limitation. [MPIC's doctor] notes that the degree of pain limitation was also documented in the letters from your co-workers and your supervisor. In [MPIC's doctor]'s opinion, based upon the information submitted by the multi-disciplinary treatment team at [rehab clinic], it is probable that your functional abilities are greater than those that you perceive.

[MPIC's doctor] writes that the association between the motor vehicle collision and your symptoms and physical findings have changed in so far as he does not agree with the report from [independent doctor] regarding the cause of your symptoms. In [MPIC's doctor's] opinion your symptoms and physical findings are probably related to the motor vehicle accident in question.

[MPIC's doctor] concludes that in his opinion, the injuries that you suffered in your motor vehicle accident of January 2001 would not prevent you from returning to your pre-accident occupation. In closing [MPIC's doctor] recommends that you explore means of controlling your chronic pain with your family physician.

The Appellant has now appealed from the Internal Review decision to this Commission. The issue which requires determination in this appeal is whether the Appellant's IRI benefits were properly terminated pursuant to Subsection 110(1)(a) of the MPIC Act as of August 30, 2002.

At the appeal hearing, the Appellant argued that her IRI benefits were improperly terminated as of August 30, 2002. She advised that she was not capable of returning to her full-time duties as a Casino Dealer as of that date, and has not yet regained the ability to return to work full-time as a Casino Dealer. As of December 2002, she did return to work at the [text deleted] in the uniform department, working four hours per day, five days per week.

In support of her position, the Appellant called two witnesses to testify. Both of these witnesses were the Appellant's co-workers. They each testified that they had witnessed the Appellant's struggle with the activities of daily living because of her pain. They also testified that the Appellant had not regained her physical functioning since the motor vehicle accident and continued to have difficulty coping with her pain. In their opinions, the Appellant was not malingering and had suffered a serious injury as a result of the motor vehicle accident, which significantly limited her physical abilities.

Counsel for MPIC submits that the medical evidence on the file suggests that the Appellant could return to work full-time as a Casino Dealer as of August 30, 2002. Counsel for MPIC relies on the reports of [rehab clinic], [MPIC's doctor] and [independent doctor]. He submits that each of these reports suggest that the Appellant could return to work full-time despite her pain complaints. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review decision dated December 16, 2002 confirmed.

Discussion:

Upon a review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant was not able, as of August 30, 2002, to return to her full-time duties as a Casino Dealer. Taking into consideration all of the evidence before us, we are not satisfied on a balance of probabilities that the Appellant was capable of holding the employment which she held at the time of the accident on a full-time basis. Therefore, we find that the termination of IRI benefits pursuant to subsection 110(1)(a) of the MPIC Act as of August 30, 2002 was not justified.

In the Internal Review Decision dated December 16, 2002, the Internal Review Officer concluded that the medical information on the Appellant's file did not support a finding that the Appellant was unable to return to her pre-accident occupation as a result of the motor vehicle accident of January 26, 2001. The Internal Review Officer relied upon [MPIC's doctor's] opinion in upholding the case manager's decision. At the hearing of this appeal, counsel for MPIC submitted that the reports of [rehab clinic] and [independent doctor] also supported the decision that the Appellant could return to work as a Casino Dealer on a full-time basis. Our review of those reports, however, raises sufficient doubts as to whether the Appellant was

capable of performing her employment duties, so as to call into question the termination of her benefits as of August 30, 2002.

[Appellant's rehab doctor's] initial assessment of the Appellant, detailed in his report of April 3, 2002, concluded that the Appellant had not yet reached maximum medical improvement and should be able to perform her pre-accident occupation full-time, full duties without restrictions with proper physical treatments and rehabilitative interventions. After taking part in the work hardening program at [rehab clinic] for approximately one month, the Appellant was discharged from the program due to a lack of progress with the program. In his Discharge Summary dated July 2, 2002, [Appellant's rehab doctor] concluded that no objective medical information existed that would prevent the Appellant from resuming her pre-accident employment as a Casino Dealer. In light of the information that the Appellant did not improve with the work hardening program, we find it difficult to reconcile [Appellant's rehab doctor's] two reports. Given [Appellant's rehab doctor's] original opinion that the Appellant had not reached maximum medical improvement and was not able to work full duties on a full-time basis, and the Appellant's lack of progress with the work hardening program at [rehab clinic], [Appellant's rehab doctor's] subsequent conclusion that the Appellant could resume her pre-accident employment as a Casino Dealer appears to be without foundation.

It also appears that the Appellant's subjective complaints of pain were discounted by both the [rehab clinic] treatment team and [MPIC's doctor]. [MPIC's doctor], in his Inter-Departmental Memorandum dated December 3, 2002, comments that:

In this case, there was documentation of physical impairments by both [independent doctor] and by the [rehab clinic] treatment team. [Appellant's doctor] reported that the Discharge Summary from [rehab clinic] did indicate that the claimant's physical ability remained consistent with her intake assessment. However, what he did not report were

the conclusions drawn by the [rehab clinic] treatment team in their Discharge Summary of July 2, 2002. This conclusion read,

“On discharge, it is the opinion of the [rehab clinic] staff that no objective medical information exists that would prevent [the Appellant] from resuming her pre-accident employment as a Casino Dealer with [text deleted]. At present, [the Appellant] limits her physical ability on her subjective complaints of pain, for which no objective medical reason has been found. [The Appellant] has an understanding of the exercises that she needs to continue to perform on a regular basis to help improve her range of motion and strength within and around her lumbar spine.

Although it cannot be stated that physical impairments did not exist in this case, the measured functional impairments, as determined and concluded by the [rehab clinic] treatment team, would not likely have prevented the claimant from returning to her pre-collision occupation. The majority of partial work disability documented in the [rehab clinic] reports was based upon pain limitation. This was documented not only by the [rehab clinic] treatment staff. The degree of pain limitation was also documented in the letters from the claimant’s co-workers and supervisor. In general terms, pain cannot be considered a measurable functional impairment. Pain can impact upon an individual’s perceived level of function. In this case, it would be probable, in my opinion, and based upon information submitted by the multi-disciplinary treatment team at [rehab clinic], that the claimant’s functional abilities would be greater than those that she perceived.

Despite the Appellant’s ongoing complaints of pain, little weight was given to her subjective concerns. Judicial treatment of subjective pain complaints in disability cases is considered by Richard Hayles in his book, Disability Insurance, Canadian Law and Business Practice, Canada: Thomson Canada Limited, 1998, at p. 340, where he notes that:

Courts have recognized that pain is subjective in nature. They have also acknowledged that there is often a psychological component in chronic pain cases. Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary*, Mr. Justice O’Leary of the Alberta Court of Queen’s Bench expressed a common approach to chronic pain cases as follows:

In my view it is not of any particular importance to determine the precise medical nature of the plaintiff’s pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.

In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.

Although [MPIC's doctor] concluded that the Appellant's subjective pain complaints would not likely have prevented her from returning to her pre-collision occupation, he did suggest that she see her treating family physician to explore means of controlling her chronic pain.

Upon considering the totality of the evidence before us, and particularly the Appellant's testimony at the appeal hearing, we find that the Appellant's pain complaints were genuine and precluded her return to her position as a Casino Dealer on a full-time basis as of August 30, 2002. Whether or not her subjective pain complaints correlated to objective physical findings was not determinative of the issue. Her subjective pain complaints should have been considered in light of her inability to resume her normal physical function, the consistency of the findings reported by all of her caregivers and her co-workers and the severity of her complaints.

Although we have found that the Appellant was not capable of holding employment as a Casino Dealer as of August 30, 2002, on a full-time basis, an additional issue arises on this appeal as to whether the Appellant's continuing problems beyond August 30, 2002 were still related to the motor vehicle accident of January 26, 2001.

At the appeal hearing, the Appellant testified that she had been recently diagnosed with a disc herniation at the L4-L5 level. While the disc herniation may account for the Appellant's pain complaints and limitations in physical functioning, there was no evidence presented at the appeal hearing to suggest that the disc herniation was caused by the motor vehicle accident. Indeed, an x-ray report dated October 2, 2001 suggested that only minor degenerative changes were present in the lumbar spine at that time. As a result, there is insufficient evidence before the

Commission at this time to permit us to make a finding with respect to the cause of the Appellant's continuing problems beyond August 30, 2002.

The Commission therefore finds that an issue with respect to causation has arisen in light of the Appellant's current diagnosis. In light of our findings, it will be incumbent upon MPIC's case manager to determine if a relationship between the Appellant's disability and the motor vehicle accident existed beyond August 30, 2002, in assessing any further entitlement to benefits on the Appellant's behalf.

With respect to the issue currently before us, we find that the Appellant's IRI benefits were improperly terminated as of August 30, 2002 pursuant to subsection 110(1)(a) of the MPIC Act. As a result, the Appellant's appeal is allowed and the Internal Review decision dated December 16, 2002 is therefore rescinded.

Dated at Winnipeg this 15th day of January, 2004.

YVONNE TAVARES

LES MARKS

PAUL JOHNSTON