



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-30

PANEL: Ms. Yvonne Tavares, Chairperson
The Honourable Mr. Armand Dureault
Dr. Patrick Doyle

APPEARANCES: The Appellant, [text deleted], was represented by [Appellant's representative]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

HEARING DATE: May 12, 2004

ISSUE(S): 1. Entitlement to Income Replacement Indemnity benefits;
2. Entitlement to treatment benefits.

RELEVANT SECTIONS: Sections 85(1), 86(1), 106 and 136(1)(a) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act') and Section 5(a) of Manitoba Regulation 40/94.

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

The Appellant, [text deleted], was involved in two separate motor vehicle accidents, on March 4, 1999 and on March 8, 2002. As a result of the injuries which the Appellant sustained in those accidents, she became entitled to certain Personal Injury Protection Plan ('PIPP') benefits pursuant to Part 2 of the MPIC Act. The Appellant is appealing two separate Internal Review decisions arising out of these motor vehicle accidents.

1. Internal Review Decision of January 16, 2003

The Internal Review decision dated January 16, 2003 dismissed the Appellant's Application for Review and upheld the case manager's decision of July 24, 2002. It was the Internal Review Officer's decision therein that:

1. the medical evidence failed to establish that the Appellant was unable to carry out the essential duties of her pre-accident employment on account of any injuries arising out of the motor vehicle accident of March 4, 1999; and
2. the medical evidence failed to establish that the Appellant required any further therapeutic interventions as a result of any injuries arising out of the motor vehicle accident of March 4, 1999.

The accident on March 4, 1999 occurred when the vehicle the Appellant was a passenger in, rear-ended the vehicle stopped in front of her. As a result of the motor vehicle accident, the Appellant complained of pain in the neck, stiffness in the neck, and pins and needles sensation in the back of the head.

At the time of the motor vehicle accident, the Appellant was off work on account of a Workers Compensation Board incident. On or about March 27, 1996, the Appellant had sustained an injury to her right arm, scapular muscles and neck as a result of work activities as a sewing machine operator. The Appellant's Workers Compensation Board claim was terminated on February 4, 2000. On March 12, 2001, following receipt of the Workers Compensation Board Appeal Decision upholding the termination of benefits, the Appellant contacted MPIC in order to commence her claim with MPIC.

An investigation was subsequently carried out by MPIC's case manager in order to determine whether the Appellant was entitled to any additional PIPP benefits beyond February 4, 2000 as a result of her motor vehicle accident of March 4, 1999.

[Text deleted], Medical Consultant with MPIC's Health Care Services Team, reviewed the Appellant's file and in his Inter-Departmental Memorandum dated April 18, 2002, [MPIC's doctor] concluded that:

CONCLUSION

After reviewing [the Appellant's] file in its entirety, it is my opinion that the exacerbation of the pre-existing symptoms that she might have experienced as a result of the March 4, 1999 MVC resolved in all probability. It is also my opinion that the symptoms and the perceived functional limitations that [the Appellant] still reports are not the result of the March 4, 1999 MVC. My opinion is based on the following evidence:

- Prior to the March 4, 1999 MVC, [the Appellant] reported symptoms involving her right side of neck, right shoulder and upper extremity that dated back to the compensable injury, which had not improved to any significant level with the treatments provided to her.
- The objective physical findings identified by the health care professionals involved in her care after the March 4, 1999 MVC are in keeping with those noted prior to the MVC.
- [the Appellant's] condition improved with the treatments provided to her following the March 4, 1999 MVC (i.e., an improvement in range of motion, decrease in pain, increase in function and increase in strength).
- A specific diagnosis that would account for [the Appellant's] vast array of symptoms was not identified.
- The medical evidence does not identify [the Appellant] as developing a new medical condition as a result of the March 4, 1999 MVC.
- The diagnostic tests performed to assess [the Appellant's] various symptoms did not identify a pathological condition that would account for symptoms or stem from the March 4, 1999 MVC.
- Throughout the various appeals that [the Appellant] submitted, it is documented that the symptoms she experienced and the limitation of function she perceived were a direct result of the compensable injury. In two Appeal Commission hearings following the March 4, 1999 MVC, there is no documentation indicating [the Appellant] and/or her Advocate were of the opinion that her symptoms and/or perceived limitation of function were a direct result of the March 4, 1999 MVC.

FINAL COMMENTS

It is my opinion that the medical evidence presently contained in [the Appellant's] file does not identify a condition that developed as a direct result of the motor vehicle collision in question that in turn requires further diagnostic and/or therapeutic interventions.

Relying upon [MPIC's doctor's] Inter-Departmental Memorandum of April 18, 2002, MPIC's case manager advised the Appellant by letter dated July 24, 2002 that, since the medical information did not support an inability to work or the need for treatment as a result of the motor vehicle accident injuries, she was not entitled to Income Replacement Indemnity benefits or funding for treatment.

The Appellant sought an Internal Review of that decision. As already noted, the Internal Review Officer dismissed the Application for Review and confirmed the case manager's decision. The Appellant has now appealed to this Commission. The issue which arises on this appeal is whether the Appellant is entitled to Income Replacement Indemnity ("IRI") benefits or funding for treatment expenses beyond February 4, 2000, as a result of her motor vehicle accident of March 4, 1999.

At the appeal hearing, the Appellant's representative submitted that the Appellant did sustain injuries in the March 4, 1999 motor vehicle accident which had not resolved by February 4, 2000, and accordingly, the Appellant was entitled to ongoing receipt of benefits from MPIC arising from her motor vehicle accident-related injuries. He argued that the Appellant's injuries arising from the Workers Compensation Board claim only related to her right shoulder and neck area. However, he notes that after the motor vehicle accident, the Appellant complained that all of her right side started to become painful and she developed depressive symptoms for which she was referred to [text deleted], psychiatrist, for treatment. The Appellant's representative therefore maintains that the Appellant did sustain distinct injuries in the motor vehicle accident, which extended beyond the compensable injuries involved in the Workers Compensation Board claim.

In support of his position that the Appellant's motor vehicle accident related injuries continued beyond February 4, 2000, the Appellant's representative relied upon the opinions of [Appellant's doctor #1], [Appellant's psychiatrist] and [Appellant's doctor #2].

In his report dated January 18, 2002, [Appellant's psychiatrist] stated that:

Depression has been caused by the reaction to the loss of function and capacity to earn a living. The loss of function is related to her accident. Therefore my treatment is especially related to the motor vehicle accident.

I'm not in a position to give an opinion on her physical disability. But from the psychiatric point of view, her mental condition is such that depression has sufficiently improved and that she should be fit for work as of her last visit.

In his report dated January 2, 2002, [Appellant's doctor #1] commented that:

Impression

When she hurt her upper back her symptoms were in right shoulder blades, right trapezoid and right scapular region. After MVA there was exacerbation (*sic*) in her symptoms to previously injured areas. She complained of dizziness. I referred to [text deleted] (Neurologist) who did not feel if there was (*sic*) anything wrong neurologically. She had CT scan done of cervicothoracic spine at [hospital] on August 25, 1999 and it was normal. As she was seeing [Appellant's doctor #3] and he wrote in his letter of March 6, 2000 that there was significant improvement in her regional myofascial (*sic*) seek (*sic*) pain syndrome. She still continues to have pain right scapular, right trapezoid (*sic*) and shoulder. It is originally the same injury when she hurt at work. It may have been aggravated by car accident and [Appellant's doctor #3] who is expert in this field can give better answer.

In his report dated January 11, 2002, [Appellant's doctor #2] reported that:

[The Appellant] continues to show reduction in the intensity of her symptoms. There is still episodic increases in symptomatology (*sic*) but her added physical training is reducing the duration of these episodes. A further recommendation that may have significant benefit for this patient would be re-conditioning program overseen by an athletic therapist for a six – eight week trial. This may more quickly help re-establish the balance and endurance of paraspinal supportive soft tissue structures. After this program, a graduated work return concept should be integrated beginning at 4 hrs./day for two weeks then increasing to 6 hrs./day for two weeks with a full eight hours a day to follow. This should of course be based on the patient's ability to adapt to the increased hours.

At the time of writing this report it is my opinion that continued chiropractic intervention is beneficial at this time but other treatment forms must be integrated to help accelerate the healing process.

The Appellant's representative also cited the following reasons as grounds for the appeal:

1. that the Review Officer gave no consideration to the medical reports of the Appellant's treating practitioners, namely, [Appellant's doctor #1], [Appellant's psychiatrist], and [Appellant's doctor #2];
2. that the Review Officer placed too much weight upon the consultative opinion of [MPIC's doctor], who did not conduct any direct examination of [the Appellant]; and
3. that the Appellant and her representative were not given complete disclosure of the recent medical reports.

Counsel for MPIC submits that the Appellant's motor vehicle accident-related injuries had actually resolved by June 1999 and that any ongoing problems she had after February 4, 2000 were not related to the motor vehicle accident of March 4, 1999. In support of his position, counsel for MPIC relies upon the reports of the Appellant's treating practitioner, [Appellant's doctor #3]. In [Appellant's doctor #3's] report of June 4, 1999, [Appellant's doctor #3] comments that:

Long Term Prognosis: She has suffered soft tissue injuries and unfortunately has not responded well to the appropriate treatment prescribed to her. She will require further close follow up for her response to the recommended treatments and at this point, it is difficult to predict whether she will make complete recovery from her long-standing soft tissue and mechanical neck pain syndrome.

Counsel for MPIC also cites [Appellant's doctor #3's] report of October 26, 1999 wherein [Appellant's doctor #3] concluded that:

IN SUMMARY, [the Appellant] has mechanical neck and right shoulder pain syndrome. Clinically and neuro-radiologically there has been no evidence of disc herniation, spinal

stenosis or subluxation of the cervical spines. Unfortunately her chronic soft tissue pain has not responded well to the appropriate treatments. Prognosis for further recovery, the response to the treatments have plateaued and I would not recommend any further investigations like CT myelogram or MRI of the spine. Response to the physical modalities and physiotherapy has also plateaued. She should return to work on a graduated basis and avoid any prolonged static and dynamic strain on her neck.

Relying upon [Appellant's doctor #3's] reports, counsel for MPIC maintains that the Appellant's ongoing complaints are related to her long-standing soft tissue injuries and mechanical neck and right shoulder pain syndrome, which pre-dated the motor vehicle accident. He notes that any exacerbation resulting from the motor vehicle accident would have in all likelihood resolved by February 4, 2000, according to [MPIC's doctor's] opinion. Therefore, the Appellant's continuing complaints beyond February 4, 2000 would, in all probability, not be related to the motor vehicle accident of March 4, 1999. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review decision dated January 16, 2003 be confirmed.

After a careful review of all of the evidence, both oral and documentary, we find that the Appellant has failed to establish, on a balance of probabilities, that her ongoing difficulties beyond February 4, 2000, were as a result of injuries sustained in the motor vehicle accident of March 4, 1999.

[Appellant's doctor #3] in his report dated October 26, 1999, advised that:

On the 7th of June 1999, [[the Appellant] was reviewed in the Clinic. She stated that post-injection of the trigger points, she has noticed improvement in the movements of the neck and mild reduction in the pain. Prolonged sitting aggravates the neck pain and any repetitive activities also increase the neck pain. She tried to return to work in June and worked for four weeks but could not continue her work and had to stop working. She has been taking Tylenol No. 3 one tablet p.o. h.s. o.d. On physical examination of the cervical spines – reduced lordosis, no active trigger points of the muscles. Range of motion of the neck were within normal limits. Motor strength of the neck flexors and

extensors was graded 4 to 4+ out of 5. No sensory or reflex abnormalities in the upper extremities.

My assessment revealed that her active trigger points of the neck have resolved. Still she has low endurance and should continue further conditioning exercises. As she has significantly improved and was encouraged to return to work from July 1st, 1999.

Based upon the opinions of [MPIC's doctor] and [Appellant's doctor #3], we find that, any injuries which the Appellant sustained in the motor vehicle accident of March 4, 1999, had in all likelihood resolved by February 4, 2000. [MPIC's doctor] conducted a thorough review of all of the medical evidence on the Appellant's file and concluded that the exacerbation of the pre-existing symptoms that the Appellant might have experienced as a result of the March 4, 1999 accident had resolved in all probability. [Appellant's doctor #3], who had treated the Appellant since August 1998, indicated that the Appellant's active trigger points of the neck had resolved by June 7, 1999 and that she could return to work as of July 1, 1999.

[Appellant's doctor #1]'s report and [Appellant's doctor #2's] report provide little assistance in determining whether the Appellant's ongoing difficulties were related to the Workers Compensation Board compensable injury, or the motor vehicle accident of March 4, 1999. [Appellant's psychiatrist] may not have had the Appellant's complete medical history when he expressed his opinion that the Appellant's depression was caused by the reaction to the loss of function and capacity to earn a living. He related the loss of function to her motor vehicle accident. Yet, her loss of function clearly predated the motor vehicle accident and was caused by the Workers Compensation Board compensable injury. Therefore, we find his opinion is of little assistance in determining the cause of the Appellant's ongoing problems. Rather, we prefer the analysis provided by [MPIC's doctor] and we find that the Appellant has not established, on a balance of probabilities, that her ongoing problems beyond February 4, 2000 were attributable to the motor vehicle accident of March 4, 1999.

As a result, the Appellant's appeal is dismissed and the Internal Review decision dated January 16, 2003 is hereby confirmed.

2. Internal Review decision of August 26, 2003

The Internal Review decision dated August 26, 2003, dismissed the Appellant's Application for Review and upheld the case manager's decision of February 25, 2003. It was the Internal Review Officer's decision therein that:

1. the Section 106 criteria was correctly applied in determining an employment for the Appellant and that her determination as a sewing machine operator was consistent with the information contained in her file; and
2. the Appellant was capable of holding the determined employment as a sewing machine operator as of August 26, 2003 and therefore not entitled to Income Replacement Indemnity benefits.

The Appellant was involved in a motor vehicle accident on March 8, 2002, when the vehicle she was driving was hit on the driver's door and forced into a curb. The Appellant complained of injuries to the left side of her neck and head as a result of the collision. As well, she indicated that because she was holding her foot on the brake and hitting the curb, the right side of her hip and shoulder were also injured.

At the time of this motor vehicle accident, the Appellant was not employed, although she was capable of working, having sufficiently recovered from her previous work-related injury sustained in March 1996, and from her injuries sustained in a previous motor vehicle accident on March 4, 1999. As a result, the Appellant was classified as a non-earner at the time of the

accident. For the first 180 days after the motor vehicle accident, the Appellant's entitlement to I.R.I. benefits was governed by Section 85(1) of the MPIC Act, which provides as follows:

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

85(1) A non-earner is entitled to an 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;

(b) he or she is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

In accordance with Section 86(1) of the MPIC Act, an employment was determined for the Appellant as of the 181st day following the motor vehicle accident. Section 86(1) of the MPIC Act provides that:

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.

In a decision dated February 25, 2003, MPIC's case manager advised the Appellant that:

The factors for determining an employment are based on your education, training, work experience and physical and intellectual abilities immediately before the accident. Based on the information provided, you are determined as a sewing machine operator. This is in accordance with Section 106(1) and 106(2) of the Manitoba Public Insurance Corporation Act, attached for your reference.

The medical information on file has been reviewed and in consultation with our Health Care Services. This information indicates that you are capable of holding the employment as a sewing machine operator as of August 26, 2002. As such, you are not entitled to Income Replacement Indemnity benefits.

The Appellant sought an Internal Review of that decision. As already noted, the Internal Review Officer dismissed the Application for Review and confirmed the case manager's decision. The

Appellant has now appealed to this Commission. The issue which arises on this appeal is whether the Appellant was properly classified as a sewing machine operator for the purposes of Section 86(1) of the MPIC Act and whether the Appellant was capable of holding the determined employment as of August 26, 2002.

At the appeal hearing, the Appellant's representative submitted that the Appellant could not hold the determined employment as a sewing machine operator as of August 26, 2002, because of her subjective complaints of pain and her chronic pain syndrome. He argues that the recommendations of [Appellant's doctor #4] and [Appellant's doctor #3] were not followed by MPIC, and therefore the Appellant was not capable of returning to work, when MPIC's case manager determined that she could.

[Appellant's doctor #3] in his report dated August 8, 2002, had recommended that:

She would benefit from 4-6 weeks of cervical and lumbar dynamic stabilization exercises with the aim to improve her spinal posture and strength of the affected muscles. With the conditioning program, it will also improve her endurance and functional capabilities. On completion of the treatment, I will review her and will be pleased to send you a follow up report. In the meantime, if you could send me the specific job description and I would be pleased to comment whether she can return to her job as a sewing machine operator or not.

[Appellant's doctor #4] in his report dated September 3, 2002 had recommended the following:

Therapeutic

1. Physical Rehabilitation. As mentioned earlier in this report, in my opinion, the claimant is capable of performing full-time, full-duties at a sedentary to light occupation. To increase the level of function, a graduated physical reconditioning program, along with a chronic pain program can be offered to her as she returns to work or she is at work.
2. Chronic Pain Behavioural Management. The claimant would benefit from overall management that resembles that for somatization disorder. This should

be centered around the General Practitioner, but can involve a psychologist or psychiatrist.

As a result, since these recommendations were not followed, the Appellant's representative submits that the Appellant was not capable of returning to work as of August 26, 2002 and therefore she is entitled to IRI benefits from that date. The Appellant's representative also submits that the Section 106 criteria was misapplied by MPIC and no regard or recognition was given to the Appellant's education, training, work experience and physical and intellectual abilities immediately before the accident in determining her employment as a sewing machine operator.

Counsel for MPIC submits that the determined employment for the Appellant as a sewing machine operator was appropriate in her circumstances. He maintains that MPIC's case manager took into account her education, work history and physical and intellectual abilities when making the determination. He also maintains that the Appellant's classification as a sewing machine operator was consistent with the information contained in her file and was a logical determination since she had previously tried to return to work as a sewing machine operator. Therefore, counsel for MPIC maintains that the determination of the Appellant as a sewing machine operator was appropriate.

Counsel for MPIC also submits that the Appellant was capable of holding the determined employment as a sewing machine operator as of August 26, 2002. He maintains that this determination was in accordance with the opinions expressed by [Appellant's doctor #4] and [MPIC's doctor], based on the physical demands of sewing machine operators, as set out in the

National Occupation Classification. [Appellant's doctor #4] in his report dated September 3, 2002 stated that:

1. Physical Rehabilitation. As mentioned earlier in this report, in my opinion, the claimant is capable of performing full-time, full-duties at a sedentary to light occupation. To increase the level of function, a graduated physical reconditioning program, along with a chronic pain program can be offered to her as she returns to work or she is at work.

[MPIC's doctor] in his Inter-Departmental Memorandum dated September 9, 2002, commented that:

Response to Question #1

Based on my review of [the Appellant's] file it is my opinion that the objective medical evidence indicates she recovered from the conditions arising from the incident in question to the extent that she is able to return to her work as a sewing machine operator on a full-time basis.

Counsel for MPIC therefore submits that, according to the medical information on the Appellant's file, she was capable of returning to work as a sewing machine operator as of August 26, 2002. As a result, counsel for MPIC maintains that the Appellant's appeal should be dismissed and the Internal Review decision dated August 26, 2003 confirmed.

Section 106 of the MPIC Act provides that:

Factors for determining an employment

106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

Type of employment

106(2) An employment determined by the corporation must be an employment that the victim could have held on a regular and full-time basis or, where that would not have been possible, on a part-time basis immediately before the accident.

On her Application for Compensation, the Appellant listed her work history as:

| Name & Address of Employer | Dates Employed | Type of Work |
|----------------------------|------------------------|-------------------------|
| 1. [text deleted] | 1997 (4 weeks) | Sewing Machine Operator |
| 2. [text deleted] | May 1995 to March 1996 | Sewing Machine Operator |

On the basis of the criteria set out in Section 106 of the MPIC Act, we find that MPIC has appropriately classified the Appellant as a sewing machine operator for the purposes of determining her entitlement to IRI pursuant to Section 86(1) of the MPIC Act. The determination of the Appellant as a sewing machine operator was consistent with the Appellant's education, training, work experience and physical and intellectual abilities immediately before the accident.

Upon a review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant was capable of holding the determined employment as a sewing machine operator as of August 26, 2002. In his report dated September 3, 2002, [Appellant's doctor #4] was of the opinion that in her present condition, the Appellant was capable of resuming her previous level of function to work as a sewing machine operator at full-time full-duties with occasional discomfort. Although he did suggest a gradual physical reconditioning program along with a chronic pain program to be offered to her as she returns to work, these programs were not required in order to transition her back into the workplace. Based upon [Appellant's doctor #4's] opinion therefore, we find that the Appellant was capable of holding the determined employment as of August 26, 2002.

As a result, the Appellant's appeal is dismissed and the Internal Review decision dated August 26, 2003 is hereby confirmed.

Dated at Winnipeg this 22nd day of July, 2004.

YVONNE TAVARES

HONOURABLE ARMAND DUREAULT

DR. PATRICK DOYLE