Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-66

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Laura Diamond** **Dr. Patrick Doyle**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**November 17, 2003**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits for the period January 21, 2003 to March 10, 2003**
RELEVANT SECTIONS:	**Sections 81(1) and 117(1) of The Manitoba Public Insurance Corporation Act ('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] was employed as a Battery Assist Technician with the [text deleted]. His duties include providing emergency road service to members of [text deleted] who require battery boosting, battery testing and/or battery installation. During the course of his employment the Appellant will make service calls to members of [text deleted] who require emergency road service.

On June 26, 2001 the Appellant was making a service call and was sitting in the driver's seat of his vehicle with the driver's door open and his left foot hanging out when another vehicle drove

into the driver's side door pinning the Appellant's left leg. As a result of the accident the Appellant sustained a fracture to his left lower leg and his inner left lower leg was punctured.

On September 25, 2001 the Appellant returned to work on a graduated basis for four hours per day. On October 30, 2001 he was able to work his regular full time hours. The Appellant received "top up" Income Replacement Indemnity ('IRI') benefits until December 21, 2001 to cover the overtime that he was unable to work. One of the Appellant's complaints as a result of the injuries sustained in the motor vehicle accident was a pain to his left calf.

On January 7, 2002, several weeks after the IRI benefits had been terminated, the Appellant attended at the office of [text deleted], his medical practitioner, and complained about persistent pain to the left calf that had been injured in the motor vehicle accident. [Appellant's doctor #1], referred the Appellant to [Appellant's doctor #2] for an assessment. On January 16, 2002 [Appellant's doctor #2] wrote to [Appellant's doctor #1] and advised him that he had seen the Appellant on January 15, 2002 and stated:

> For the last month, he has been reporting a pain in the left calf. He describes it as tightness with occasional cramping sensations. The pain is always present and is not altered by activity. It is made worse only by deeply massaging the area. He states that the pain does not improve with any specific modalities or with any specific maneuvers. The pain will generally not wake him at night. The region immediately underneath the injury site does occasionally swell for no reason. He does not have any neurologic symptoms reported in the lower extremity. Range of motion in the ankle and knee are reportedly full.

On July 22, 2002 [Appellant's doctor #1] wrote to MPIC's case manager and informed the case manager that he had seen the Appellant on February 11, 2002 who had complained of left calf tightening and aches all day. The Appellant reported that the anti-inflammatory, Viox, was of minimal benefit and that the Appellant's biggest complaint was that he was awakened at night with an achy sensation in his leg.

On January 23, 2003 [Appellant's doctor #1] again wrote to MPIC's case manager and advised him that:

1. the Appellant had visited him on this date with a complaint of a recurrence of his left calf pain;
2. the calf pain of this most recent visit had occurred over a period of two to three days and that the Appellant did not recall any trauma that could have caused the pain;
3. an examination revealed tenderness to the medial-posterior left calf, just anterior to the bulk of the left gastrocnemius muscle;
4. his diagnoses was that of a musculoskeletal strain.

[Appellant's doctor #1] further stated in this letter:

> . . . I have asked [the Appellant] to take off work from January 21, 2003 to January 25, 2003 for treatment. Based on the past history of this problem, I feel that should he not take the time off now, that he will simply aggravate his leg which would simply result in more time off work. I left him an open invitation to follow up with me the day prior to returning to work for reassessment should his pain persists beyond this time.

In a further report to MPIC's legal counsel dated May 20, 2004 [Appellant's doctor #1] stated:

> My apologies again for not communicating with you sooner. I have been asked to clarify why [the Appellant] should remain off work during the periods of January 21 to March the 10th 2003. As was outlined in my previous letter, both myself and his video (sic) therapist who worked closely with him in rehabilitating his injury felt it was in his best interest to be off work until his injury improved. This was in light of the fact that in the past a quick return to work had resulted in even more symptomatology and work missed.

The Appellant, in accordance with the advice of his medical practitioner, [text deleted], and his physiotherapist, remained off work between January 21, 2003 to March 10, 2003 and requested IRI benefits from MPIC.

[Text deleted], Medical Consultant MPIC's Health Care Services, was requested to review the Appellant's file and provided a report to MPIC dated February 24, 2003:

> Based on my review of [the Appellant's] file, it is my opinion that there is insufficient objective medical evidence identifying an impairment of physical function that precludes [the Appellant] from performing his occupational duties. [Appellant's doctor #1] was of the opinion that [the Appellant's] musculoskeletal strain prevented him from working from January 21, 2003 to January 25, 2003. The objective medical evidence he provided does not support an occupational disability, in my opinion. In other words, [the Appellant's] inability to work is based on symptoms and not on a functional limitation.
>
> It is assumed that the injuries [the Appellant] sustained as a result of the incident have healed. The actual cause of the pain at this time is not known. It is reasonable to conclude that if [the Appellant] remains compliant with this home-based exercise program that he will minimize symptoms and be able to increase his level of function.

In reply to a request by MPIC, [Appellant's doctor #2] provided a report to the case manager dated March 4, 2003. [Appellant's doctor #2] in his report stated that he had reviewed the Appellant's job description as a Battery Assist Technician at [text deleted] and was of the opinion that the Appellant would not be disabled from performing his job duties.

On March 7, 2003 the case manager wrote to the Appellant and advised him that:

1. based on the medical information received to date it was the opinion of the MPIC's Health Care Services Team that there was insufficient objective medical evidence to identify an impairment of physical function which would preclude the Appellant from performing his occupational duties;
2. MPIC concluded that the normal day-to-day activities did not aggravate anterolateral compartment syndrome and that with the Appellant's work duties he would not be exposed to a level of work that would jeopardize this type of condition;
3. MPIC had rejected the Appellant's request for reimbursement of IRI benefits.

The Appellant made application to have an Internal Review Officer review the decision by the case manager to deny his claim for IRI benefits.

Internal Review Office Decision

The Internal Review Officer wrote to the Appellant by letter dated April 14, 2003 rejecting the Appellant's Application for Review and confirming the case manager's decision. The Internal Review Officer, in arriving at his decision, rejected the medical opinion of [Appellant's doctor #1] and the Appellant's physiotherapist, and accepted the medical advice of [MPIC's doctor] and [Appellant's doctor #2]. The Internal Review Officer stated that [MPIC's doctor] was of the view that objective medical evidence by [Appellant's doctor #1] does not support an occupational disability and in [MPIC's doctor's] opinion the Appellant's inability to work was based on symptoms and not on a functional limitation. The Internal Review Officer also referred to the medical report of [Appellant's doctor #2], dated March 4, 2003, who had examined the Appellant on February 13, 2003. In his report [Appellant's doctor #2] stated, having regard to the Appellant's job description from [text deleted], the Appellant would not be disabled from performing his job duties as a Battery Assist Technician.

The Appellant filed a Notice of Appeal on April 26, 2003.

Appeal

The relevant provisions of the Act relating to this appeal are:

> **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;
> (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;

(c) the full-time earner 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.

Entitlement to I.R.I. after relapse
117(1) If a victim suffers a relapse of the bodily injury within two years
(a) after the end of the last period for which the victim received an income replacement indemnity, other than an income replacement indemnity under section 115 or 116; or
(b) if he or she was not entitled to an income replacement indemnity before the relapse, after the day of the accident;
the victim is entitled to an income replacement indemnity from the day of the relapse as though the victim had been entitled to an income replacement indemnity from the day of the accident to the day of the relapse.

The Internal Review Officer, in his decision, in rejecting the Appellant's Application for Review, did not find the Appellant's complaints in respect of pain to his left calf was not connected to the motor vehicle accident. The Internal Review Officer found, having regard to the medical reports from [MPIC's doctor] and [Appellant's doctor #2], that there was no objective medical evidence to substantiate the Appellant's position that he was unable to work. At the appeal hearing MPIC's legal counsel, in defense of the Internal Review decision, took the same position.

The Appellant testified at the hearing and stated that:

1. he initially returned to work in late September on a graduated basis of four hours per day and was able to work without difficulty, notwithstanding that there continued to be a pain to his left calf;
2. at the end of October the Appellant was able to return to his regular full hours, notwithstanding the left calf pain, and was able to carry out his duties;
3. over a period of time the pain in his left calf increased in intensity and it became very difficult for him to carry out his work activities;
4. he returned to see [Appellant's doctor #1] in early January 2002 complaining about the intense pain to his left calf, the extreme difficulty he had working and the longer

he worked the worse the symptoms became;

5. he did not take time off from work, notwithstanding the extreme difficulty he had working with the pain to his left calf, until he was so advised by [Appellant's doctor #1];
6. as a result of remaining off work between January 21, 2003 and March 10, 2003 the pain in his left calf subsided and he was able to return to work and that this leg pain only returns from time to time.

MPIC's legal counsel submitted to the Commission that [Appellant's doctor #1] had not provided sufficient medical information to the Commission that these complaints would have disabled the Appellant from working during the period January 21, 2003 to March 10, 2003. The Commission therefore requested that MPIC's legal counsel prepare a letter to [Appellant's doctor #1] asking him to more fully explain why in his view the Appellant's medical complaints prevented him from working during the period January 21, 2003 and March 10, 2003. MPIC's legal counsel did forward a letter to [Appellant's doctor #1] on November 19, 2003.

On May 20, 2004 [Appellant's doctor #1] replied to MPIC's legal counsel and stated:

> My apologies again for not communicating with you sooner. I have been asked to clarify why[the Appellant] should remain off work during the periods of January 21 to March the 10th 2003. As was outlined in my previous letter, both myself and his video therapist who worked closely with him in rehabilitating his injury felt it was in his best interest to be off work until his injury improved. This was in light of the fact that in the past a quick return to work had resulted in even more symptomatology and work missed.
>
> Again, I am not contesting the findings found by [MPIC's doctor]. This impairment does not preclude travel to and from work however may interfere with the performance of his day-to-day tasks in both entering an (sic) exiting his company vehicle and performing a multitude of tasks which require him to ambulate. From my understanding, he spends a great deal of time during the day on his feet. [The Appellant] has been very compliant with his treatment and was very eager to return to work at all costs. Unfortunately, his symptoms worsened whenever he tried to push himself and during the dates in question after his injury was reaggravated.

> My initial report dated January 27, 2003 received from the physiotherapist suggested another week of therapy before a trial return to work. The second report dated February 10, 2003 suggested another week of strengthening/conditioning. He had seen [Appellant's doctor #2] who recommended more peroneal muscle strengthening and massage to the physiotherapist (although I don't have this consultative letter). My final correspondence letter from the physiotherapist dated March the third 2003 suggested that he is made much progress at the visit. And that the plan for the return to work would be trialled 10th of March 2003. [The Appellant] was compliant with this.
>
> At this point, I'm unsure whether performing essential tasks of his job would alter the natural history of his medical condition. However, it may have impeded his rate of recovery judging from the history of his symptomatology.

MPIC's legal counsel provided [Appellant's doctor #1's] letter to the Commission and the Commission provided a copy of [Appellant's doctor #1's] letter to the Appellant and requested both parties to provide any submissions they wished in respect of this letter.

MPIC's legal counsel replied by letter dated June 3, 2004 and provided the following comments in respect of [Appellant's doctor #1's] letter:

- The letter provides little, if any, objective evidence to substantiate the suggestion he was unable to work;
- There is little evidence, if any, that a "quick return to work" in the past had resulted in even more symptoms and missed work;
- The problems [the Appellant] reported in January 19, 2003 were not caused by the motor vehicle accident.

MPIC's legal counsel's letter to the Commission was provided to the Appellant for his response. The Appellant forwarded an e-mail to the Commission in reply to MPIC's legal counsel's letter and stated that he was very disappointed that MPIC still felt fit to reject his claim when he was only doing what his doctor and physiotherapist advised him to do to get back into shape. He further stated that he felt very confused when he was following all the proper channels and it did not seem to get any results.

Discussion

Causality

The Commission notes that MPIC's legal counsel did not raise the issue of causality at the appeal hearing. One of the Appellant's complaints as a result of the injury sustained in the motor vehicle accident on June 26, 2001 was pain to his left calf. The Appellant returned to work on a graduated basis on September 25, 2001. On October 30, 2001 he was able to work his regular full time hours and received "top-up" IRI benefits until December 21, 2001 to cover the overtime he was unable to work. One of the Appellant's complaints as a result of the injuries sustained in the motor vehicle accident was pain to his left calf.

Several weeks later, on January 7, 2001, the Appellant complained to [Appellant's doctor #1] about the persistent pain to his left calf that had been injured in the motor vehicle accident. The Appellant testified that subsequent to his return to work the pain to his left calf increased in intensity and as a result of these complaints [Appellant's doctor #1] advised him to remain off work.

The Commission has determined the Appellant was a credible witness and accepts his testimony on this issue. Both [Appellant's doctor #1] and the Appellant's physiotherapist who saw the Appellant over a period of time determined that the Appellant was credible and accepted the complaints of pain in respect of his left calf as a valid complaint and corroborate the Appellant's testimony.

The Commission therefore finds, having regard to the Appellant's testimony and the medical reports of [Appellant's doctor #1], that the Appellant has established, on a balance of probabilities, that his complaints in respect of his pain to his left calf were caused by the motor

vehicle accident.

Entitlement to IRI payments

The Appellant testified that after he returned to work in September 2001 the pain in his left calf gradually increased in intensity and it became extremely difficult for him to carry out his work duties in providing emergency road services to members of [text deleted]. Notwithstanding this pain he continued to work until he was advised by [Appellant's doctor #1] and his physiotherapist that he should absent himself from work in order to avoid aggravating his left calf injury. The Commission finds that the Appellant was a credible witness who was not a malingerer and remained off work between January 21, 2003 to March 10, 2003 based solely on the advice of his medical practitioner.

MPIC rejected providing IRI to the Appellant based on the medical reports of [MPIC's doctor] and [Appellant's doctor #2]. Both doctors were of the view that there was no objective medical evidence to support an occupational disability and in their view the Appellant could have worked between January 21, 2003 and March 10, 2003.

The Commission in the decision [text deleted] (AC-03-07) stated at page 9:

> 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.

[MPIC's doctor] never personally assessed the Appellant and relied on a paper review of the medical reports he received from MPIC. [Appellant's doctor #2] did on one occasion examine the Appellant prior to providing medical reports. However, [Appellant's doctor #1], who is the Appellant's personal physician, had on several occasions over a period of time personally examined the Appellant and in the Commission's view was in the best position to determine whether the Appellant's subjective complaints of pain to his left calf were genuine and rendered it enormously difficult for the Appellant to work. [Appellant's doctor #1] and the Appellant's physiotherapist did accept that the Appellant's subjective complaints were genuine and did have a significant impact on the Appellant's ability to work.

[Appellant's doctor #1] was also of the view that a premature return of the Appellant to work placed the Appellant's health at risk, would result in greater injury to the Appellant and as a result directed the Appellant to stay off work for a period of time. The Commission notes that the Appellant remained off work between January 21st to March 30, 2003 and, as a result thereof, the Appellant was able to return to work thereafter without difficulty. The Commission further notes that after the Appellant's return to work there is no evidence he missed any further periods of work due to his left calf pain. In the circumstances the Commission concludes that the

medical advice provided by [Appellant's doctor #1] was not unreasonable and, in fact, proved to be highly successful in the treatment of the Appellant's medical problems.

The Appellant honestly believed, based on the medical advice he received, that he would put his health at risk if he did not absence himself from work in order to ensure a complete recovery from his leg pain. The Commission finds that it was not reasonable in the circumstances that the Appellant should be required to work in extreme pain, placing his health at risk, when both his doctor and his physiotherapist advised him to remain off work.

Upon considering the totality of the evidence before us, and particularly the Appellant's testimony at the appeal hearing, the Commission finds that the Appellant's pain complaints were genuine and precluded his return to his position between the period January 21st and March 10th, 2003. Whether or not his subjective pain complaints were correlated to objective physical findings is not determinative of this issue. The Commission finds that the Appellant's absence from work was legitimate and that he was therefore entitled to receive IRI benefits for the period of his absence from work. The Commission therefore determines that the Appellant, in these circumstances, has established, on the balance of probabilities, that he was unable to work during the period January 21st to March 10th, 2003 within the meaning of Sections 81(1) and 117(1) of the MPIC Act and is therefore entitled to receive IRI benefits for that period.

Dated at Winnipeg this 11th day of August, 2004.

MEL MYERS, Q.C.

LAURA DIAMOND

DR. PATRICK DOYLE