



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-198

PANEL: Ms Laura Diamond, Chairperson
Ms Deborah Stewart
Ms Barbara Miller

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 31, 2005

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits
beyond August 14, 2004

RELEVANT SECTIONS: Section 81(1) of The Manitoba Public Insurance Corporation
Act ('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 May 15, 2004. As a result of the injuries which the Appellant sustained in that accident, he became entitled to Personal Injury Protection Plan benefits, including Income Replacement Indemnity ('IRI') benefits pursuant to Part 2 of the MPIC Act.

At the time of the accident, the Appellant was employed as a taxi driver. He attended his general practitioner, [text deleted], for medical care. [Appellant's doctor] diagnosed post-traumatic myalgia, recommended physiotherapy, and prescribed Tylenol 3 and Naproxen.

The Appellant also attended at the [rehab clinic] for a third party examination by [independent doctor], who examined the Appellant, and provided a report dated June 30, 2004. [Independent doctor] diagnosed "Whiplash Associated Disorder – II/mechanical neck pain". [Independent doctor] stated

Currently there are no physical impairments in and about the cervical spine secondary to the MVA. [The Appellant's] dysfunction is currently a byproduct and function of his pain levels.

Disability:

As evidenced by the history and physical examination, there was no current physical impairment that would:

1. Preclude claimant travel to and from the workplace
2. Preclude the accomplishment of essential job tasks
3. Negatively impact the natural history of the claimant's condition
4. Provide a safety risk for the claimant or those in the immediate work environment

[Independent doctor] recommended a graduated return to work program and a physiotherapy and exercise reconditioning program.

This was followed up by a physiotherapist, [text deleted], of the [rehab clinic].

Some issues arose regarding the Appellant's attendance and efforts at the reconditioning program. On August 13, 2004, [Appellant's physiotherapist] concluded that without the Appellant's full effort and participation in the reconditioning program, completion of its final week would not provide him with further benefit and he was discharged as of that date. [Appellant's physiotherapist] agreed with [independent doctor's] report of June 30, 2004 that the

Appellant was able to return to work. Accordingly, the Appellant's case manager wrote to him on August 19, 2004, confirming a telephone conversation of August 13, 2004, when the Appellant was advised that, as he was able to return to work, his entitlement to IRI benefits would end as of August 14, 2004.

Internal Review Decision

The Appellant applied for an Internal Review of the case manager's decision. On November 12, 2004, the Internal Review Officer issued a decision confirming the case manager's decision that the Appellant had recovered from his injuries and was able to return to his pre-accident employment as a taxi cab driver on August 14, 2004. It is from this decision of the Internal Review Officer which the Appellant has appealed.

Submissions

Appellant's Submission

It was submitted on behalf of the Appellant, who testified at the hearing, that while he had improved, he had suffered from pain, limited extension and lateral flexion, which prevented him from driving a taxi cab for any lengthy period of time. It was submitted that the Appellant's caregivers and physicians had recommended a gradual return to work of perhaps two to three (2-3) hours per day, and that they had recognized a driving tolerance of only ten to fifteen (10-15) minutes.

Although it was submitted that the Appellant's injuries were not of a permanent nature and he was expected to recover, he was not able to resume full time employment when cut off IRI benefits were discontinued on August 14, 2004. The stiffness and pain in his neck prevented him from changing lanes as a cab driver would have to do.

Upon questioning from counsel by MPIC, the Appellant indicated that he was able to drive his vehicle on a personal basis, although not for the twelve (12) hour shifts required of him as a taxi driver.

As well, because the Appellant did not own his own taxi cab he would have to pay a flat fee of approximately \$[text deleted] plus gas, to utilize one for a day. Thus, it would not have been financially feasible for him to work for less than full shifts of twelve (12) hours.

It was also submitted that the Appellant had complied with the reconditioning program, which was quite a rigorous process, and that if he had been late for any appointments, he had stayed late to compensate.

Finally it was submitted, that on basis of all of the medical reports, the Appellant had restrictions which prevented him from returning to full time, full duties as a taxi cab driver on August 14, 2004.

MPIC Submission

Counsel for MPIC submitted that the test was whether the Appellant was able to do the job at the time. In reviewing the medical evidence, he noted that many of the complaints of pain and limitations on driving tolerance noted by the doctors were a result of the Appellant's subjective self-reporting to them.

[Independent doctor] and [Appellant's physiotherapist] both concluded that on four objective criteria the Appellant was able to return to work. [Appellant's orthopedic specialist's] reports, he

submitted, did not indicate that the Appellant was not able to work, but rather, indicated that the Appellant's pain was improving.

Counsel for MPIC also submitted that even during a twelve (12) hour shift, a taxi driver is rarely required to drive exclusively during those hours or even for an hour straight without stopping. He submitted that there would be frequent opportunities to stop, stretch, or get out of the cab. The Appellant had not even tried to do this.

It was the submission of counsel for MPIC that the Appellant had recovered from his injuries and that the Internal Review Officer was correct in concluding that he was no longer entitled to IRI benefits after August 14, 2004.

Discussion

Section 81(1) of the MPIC 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;
- (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.

The onus is on the Appellant to show that he was unable to continue his full time employment as a result of the accident. Although counsel for the Appellant submitted that his physicians had recommended that he should return to work gradually, for one to two (1-2) hours per day, it appears this recommendation was one made early in the Appellant's rehabilitation program, in a report by [independent doctor] dated June 30, 2004. [Independent doctor], however, also found

that there were no physical impairments in and about the cervical spine secondary to the motor vehicle accident and no current physical impairment that would prevent the Appellant from working.

[Independent doctor], at that point, recommended therapy for a maximum of four to five (4-5) weeks, with a graduated return to work program (after approximately one to two (1-2) weeks of that physiotherapy) for approximately one to two (1-2) hours per shift, to be increased subsequently.

The physiotherapist, [text deleted], reported on July 27, 2004. She noted that the Appellant's potential for success in a Reconditioning Program was good, and recommended such a program at the [rehab clinic], for four (4) weeks, on a daily basis.

The Appellant embarked upon the Reconditioning Program, but according to the reports, there was somewhat less than full participation and maximum effort on the part of the Appellant. On August 13, 2004, [Appellant's physiotherapist] reported a lack of progress after three (3) weeks, and concern about full participation and punctuality. She confirmed [independent doctor's] findings regarding the Appellant's current ability to work, stating:

Disability:

As in [independent doctor's] report of June 30, 2004, as evidenced by the history and physical examination, there were no current physical impairments that would:

- 1) Preclude the claimant's travel to and from the workplace
- 2) Preclude the accomplishment of essential job tasks
- 3) Negatively impact the natural history of the claimant's condition
- 4) Provide a safety risk for the claimant or those in the immediate work environment

In conclusion, it is considered that without full effort and participation in the Reconditioning Program, completion of the final week would not provide further benefit. [The Appellant] will complete his final day of the program on August 13, 2004, and be discharged.

Therefore, the Appellant's physiotherapist was of the view, on August 13, 2004, that he was ready to return to his job, and encouraged him to continue with his exercises.

[Independent doctor] saw the Appellant in follow up, and reported on September 10, 2004.

Following his examination of the Appellant, [independent doctor] concluded:

Currently [the Appellant] has subjective complaints in and about his neck secondary to mechanical neck pain/Whiplash Associated Disorder. Currently there is no physical impairment such as neurological dysfunction, loss of cervical spine range of motion, or rotator cuff tear. At present, there is no contraindication to [the Appellant's] return to full time, full duties. Further medical treatments are not considered medically necessary at this time.

Therefore, while [independent doctor] may have encouraged a gradual return of only a few hours a day for four to five (4-5) weeks in June and July, by mid-August 2004 (six (6) weeks later, and following a Reconditioning Program) the evidence from the Appellant's caregivers was that he was able to return to work full time, full duties.

The initial medical evidence supporting the Appellant's argument that he was unable to return to work consisted of a one line note from his general practitioner, [text deleted], dated November 4, 2004. It stated that the Appellant "*was disabled from May 15/04 – Dec 15/04 from injuries sustained in a MVA.*"

The Appellant had also seen [text deleted], an Orthopedic Specialist, on September 02, 2004. [Appellant's orthopedic specialist] found the Appellant to "*have good range of motion in the cervical spine*" with normal "*sensation, muscle power and reflexes*", and normal x-rays of the cervical spine. He advised the Appellant to continue with his exercises more frequently.

[Appellant's doctor] reported again, after examining the Appellant on October 12, 2004. [Appellant's doctor] also found "*reasonable range of motion in his neck today but it does cause him pain to laterally rotate completely*". [Appellant's doctor's] report of December 21, 2004 gave no further indication that the Appellant could not work, as of October 2004.

[Appellant's orthopedic specialist] reported again on February 21, 2005. He described the Appellant's soft tissue injuries

This gentleman seemed to have sustained soft tissue strain involving the cervical spine following the accident in May 2004. At the time I saw him in February 2005 his symptoms have improved. However, he still continues to have some symptoms as described. He also had some stiffness in his neck in the form of limitation of extension and lateral flexion and rotation. . . .

[Appellant's orthopedic specialist's] findings on examination of the Appellant showed some deterioration in the Appellant's extension and rotation capabilities, when compared to the examination findings from [Appellant's physiotherapist] on August 13, 2004 some six (6) months earlier.

The physiotherapist, [text deleted], on August 13, 2004, had measured:

Range of Motion and Strength:

Cervical:

Move ment	Active ROM	Comments
Flexion	100%	Complaining of pain and pulling at end range over the left trapezius muscle.
Extension	90%	Range of cervical extension improves when corrects posture.
Left side flexion	100%	
Right side flexion	90%	Tightness of the left upper trapezius muscle.
Left rotation	WNL*	Tightness was reported in the left upper trapezius muscle with both left and right rotation.

Right rotation	WNL	
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[*within normal limits]

Six (6) months later, [Appellant's orthopedic specialist's] measurements showed

. . . His extension was to 30° in the cervical spine. At this time he had 30° of lateral flexion to the right and to the left. He had 60° of rotation to the right and to the left. . . .

[Appellant's orthopedic specialist] also went on to note the importance of the Appellant's exercise program:

. . . With continued exercises he is likely to regain full range of motion in due course. Accordingly he was advised to continue with these exercises on a regular basis a few times a day.

In spite of the recommendations of his caregivers on several occasions for the Appellant to continue with his exercise program, it appears that the Appellant's condition showed deterioration, or deconditioning, over time. However, it is the view of the Commission that the evidence fails to establish that on August 14, 2004, the Appellant was unable to perform the functions of his job and return to full duties, full time as a taxi driver. The objective examinations and measurements of both [Appellant's physiotherapist] and [independent doctor] at that time showed good range of motion, no physical impairment, and as [independent doctor] stated

. . . no contraindication to . . . return to full time, full duties.

Thus, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that he was unable to return to his job as a taxi driver on August 14, 2004 or that he was entitled to receive IRI benefits after that date. As a result, for these reasons, the Commission

dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer bearing date November 26, 2004.

Dated at Winnipeg this 13th day of June, 2005.

LAURA DIAMOND

DEBORAH STEWART

BARBARA MILLER