Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-166

PANEL:	**Ms Yvonne Tavares, Chairperson** **Ms Diane Beresford** **Ms Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Phil Lancaster of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.**
HEARING DATES:	**November 26, 2008 and December 22, 2008**
ISSUE(S):	**1. Whether the Appellant's employment at [text deleted] should be included for purposes of calculating her Income Replacement Indemnity benefits;** **2. Entitlement to temporary continuation of Income Replacement Indemnity benefits pursuant to Section 110(2) of the MPIC Act.**
RELEVANT SECTIONS:	**Sections 81(1) and 110(2) 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 July 5, 2002. Due to the injuries which the Appellant sustained in this accident, she became entitled to Personal Injury Protection Plan ("PIPP") benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was employed with [text deleted] ("[text deleted]") as a semi-skilled production worker on the [text deleted] line, on a full-time basis. The Appellant had however been off work since February 1, 2001, on a disability leave and was in receipt of short-term disability benefits. The Appellant received benefits from the short-term disability plan until August 27, 2002. Prior to the motor vehicle accident, the Appellant's pre-existing medical conditions included a diagnosis of Bipolar Mood Disorder and diabetes. The Appellant's medical leave from [text deleted] was due in part to her pre-existing Bipolar Mood Disorder and work-related stress. On or about August 21, 2002, the Appellant learned that she was pregnant. Concurrently, she and her husband underwent a marital separation.

On or about April 15, 2002, while on the disability leave from [text deleted], the Appellant began operating a [text deleted] business. Due to the injuries which the Appellant sustained in the motor vehicle accident, she was unable to carry out the duties of her [text deleted] business. In a letter dated November 14, 2002, MPIC's case manager advised the Appellant of her entitlement to income replacement indemnity ("IRI") benefits based upon her inability to hold employment as a manager/owner of a [text deleted] business, as a result of the injuries sustained in the motor vehicle accident. At this point, MPIC's case manager was continuing to investigate the Appellant's employment status with [text deleted] and a decision with respect to the Appellant's entitlement to IRI benefits for that employment had not been reached.

In a letter dated November 22, 2002, [text deleted] wrote to the Appellant acknowledging that her psychiatrist, [text deleted], was indicating that she might be suitable for a trial gradual return to work program, however, she was restricted due to a back injury. [text deleted] requested further medical information outlining the Appellant's exact physical restrictions and limitations preventing her from returning to her regular position, in order to consider an appropriate

alternate work placement. In a report dated December 12, 2002, the Appellant's attending physician completed a Medical Status Report indicating that the Appellant was diagnosed with myofascial pain syndrome and was limited to sit down work. In a letter dated December 19, 2002, [text deleted] advised the Appellant that it was currently unable to accommodate the Appellant's restriction of sit down work. By letter dated May 6, 2003, [text deleted] advised the Appellant that her employment would cease effective May 16, 2003, since she had not worked for a period of two years or longer due to illness.

Following the motor vehicle accident, the Appellant had attended for physiotherapy sessions for treatment of her motor vehicle accident-related injuries. The physiotherapy treatments were suspended during the Appellant's pregnancy from January 2003 to June 2003. The Appellant recommenced physiotherapy treatments when she was six weeks postpartum. Her last physiotherapy session was on September 5, 2003. At that time, the Appellant was capable of performing 90% of her work related duties as a [text deleted] operator/manager. In a letter dated October 3, 2003, MPIC's case manager advised the Appellant that since she was able to complete 90% of her work duties as a [text deleted] operator/manager, her IRI benefits would be based on her ability to complete 90% of her job related duties. The case manager also advised that she had arranged an occupational therapist to assist and instruct the Appellant with regards to the proper way to load/unload and set up her [text deleted] equipment. Once her sessions with the occupational therapist had been completed, the Appellant's IRI benefits would be revisited.

In a letter dated January 6, 2004, MPIC's case manager advised the Appellant that her entitlement to IRI benefits had ended based on her ability to perform 90% of her pre-accident duties. Since IRI benefits were based on 90% of her net income, her ability to perform 90% of

her pre-accident duties resulted in a bi-weekly IRI benefit of $0. Accordingly, her entitlement to IRI benefits ended.

The Appellant sought an internal review of that decision. The Internal Review Officer determined that although the Appellant had filed for a review of the case manager's decision of January 6, 2004, the issue with which the Appellant was in fact concerned, was whether she was entitled to IRI from her employment with [text deleted]. The Internal Review Officer noted that that issue arose from the case manager's decision of February 20, 2003. After the accident of July 5, 2002, the Appellant had been classified as a temporary earner as a [text deleted] operator/manager. The case manager's decision of February 20, 2003 contained the 180 day determination of the Appellant's employment as a [text deleted] operator. Therefore the Internal Review Officer found that the Appellant was in fact seeking a review of the case manager's decision of February 20, 2003. Notwithstanding that the Appellant was well beyond the 60-day time limit set out in the MPIC Act for filing for a review of that decision, the Internal Review Officer proceeded to review the issue of whether the Appellant's employment at [text deleted] should be included in her IRI benefits.

In the decision dated June 25, 2004, MPIC's Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision of February 20, 2003. The Internal Review Officer found that the Appellant was properly determined as a [text deleted] operator/manager and that her employment with [text deleted] should be excluded from any income replacement indemnity calculations since she would not have held that employment in the 180 days after the accident. The Internal Review Officer also found that the Appellant could have returned to her job at [text deleted] by late July 2003 and therefore the only reason which she remained off work beyond this date was her pre-accident disability leave and her pregnancy.

The Appellant has now appealed from that decision to this Commission. The issues which require determination in this appeal are:

1. Whether the Appellant's earnings at [text deleted] should be included in the calculation of her Income Replacement Indemnity benefits?
2. Whether the Appellant is entitled to a temporary continuation of Income Replacement Indemnity benefits pursuant to Section 110(2) of the MPIC Act.

Appellant's Submission

The Claimant Adviser, on behalf of the Appellant, submits that the Appellant should have been classified as a full-time employee with respect to the [text deleted] employment and that her lost earnings from that employment should have been included as part of her IRI benefits. The Claimant Adviser contends that the Appellant would have returned to work at [text deleted] by August 28, 2002 at the latest, when her short-term disability benefits ceased. The Claimant Adviser argues that there is no evidence before the Commission that would suggest that, but for the motor vehicle accident, the Appellant would not have returned to work at [text deleted] upon the cessation of her short-term disability benefits. He maintains that the stressors listed by MPIC as preventing the Appellant from returning to work are normal stresses that any person may encounter in their lives. Specifically, with respect to the events in the Appellant's life, the Claimant Adviser notes the following:

1. Infidelity on the part of a spouse and the resulting dissolution of a marriage are not uncommon events in today's world. It is clear that they would be stressful and disruptive for anyone. However, it does not necessarily lead to any disability. Absent any indication that a medical disability was created by the dissolution of the

marriage, the Claimant Adviser argues that there is no basis for the Commission to reach a conclusion that the dissolution of the Appellant's marriage would have prevented her from completing a successful return to work. The Claimant Adviser submits that it is clear from the facts that the Appellant coped with this stress and there was no resulting clinical condition from the infidelity and the dissolution of her marriage.

2. The legal issues resulting from the dissolution of a marriage are also a common event in today's society. Coping with legal issues does not usually or predictably lead to any disability. Absent any indication that a medical disability was created by having to cope with the legal issues arising from the dissolution of the marriage, the Claimant Adviser argues that there is no basis for the Commission to reach a conclusion that this stress would have prevented the Appellant from completing a successful return to work.

3. Neither pregnancy nor single parenthood is a disability. The Claimant Adviser further maintains that while they may be stressors, the Appellant is coping well with single parenthood and did so throughout the period relevant to this appeal. The Claimant Adviser argues that the Appellant's success in single parenthood throughout the period relevant to this appeal attests to her ability to cope with stress and to succeed. He maintains that there is nothing in connection with the Appellant's pregnancy which would permit the Commission to find that the Appellant would not have been able to successfully complete a return to work.

4. The fact that this was a high risk pregnancy was irrelevant to the Appellant's motivation to return to her employment at [text deleted]. The Claimant Adviser submits that the Appellant's two stays in hospital were uncomplicated hospital stays in order to monitor the transition of her drug regime to one which would enable a safe

> pregnancy and birth. He claims that is something which many diabetics undergo. The Claimant Adviser argues that the hospital stays required a period of two to four days and did not result in a disability from work. The Claimant Adviser submits that the Appellant's diabetes does not support any finding of a disability from employment.

The Claimant Adviser, on behalf of the Appellant also maintains that MPIC's contention that the Appellant would not have wanted to return to the [text deleted] employment is simply unfounded. The Claimant Adviser argues that throughout the period of her claim, the Appellant worked hard to convince MPIC that it was an important part of her employment plans. He maintains that her persistence in this should be relied upon by the Commission to support the argument that she would have indeed returned to the [text deleted] employment. The Claimant Adviser also maintains that [text deleted] would have been required to accommodate the Appellant's need for a less stressful job in her return to work from the short-term disability leave. The Claimant Adviser submits that, but for the motor vehicle accident, the Appellant could have and would have carried on both her employment at [text deleted] and her [text deleted] work.

The Claimant Adviser also submits that the Appellant lost her employment with [text deleted] on May 16, 2003 entirely due to the motor vehicle accident-related back injury. He contends that treatment of that injury was not completed until September 5, 2003, four (4) months after the Appellant's termination of employment from [text deleted]. The Claimant Adviser maintains that the Appellant's inability to return to her employment at [text deleted] was due to her motor vehicle accident-related injuries. Accordingly, he submits that the Appellant is entitled to a one hundred and eighty (180) day extension of her income replacement indemnity benefits pursuant to ss.110(2)(c) of the MPIC Act.

MPIC's Submission

Counsel for MPIC submits that when the Appellant's short-term disability benefits ended on August 27, 2002, her pre-existing disability would have prevented her from returning to her full-time employment at [text deleted] in the fall and winter of 2002-2003. Counsel for MPIC argues that, not only would the Appellant have to deal with the same work stressors which precipitated her going on disability leave, she would also have to deal with:

a) the dissolution of her marriage due to infidelity;

b) ongoing legal issues in relation to the dissolution of her marriage;

c) the fact that she was pregnant with her soon to be ex-husband's child; and

d) the fact that the Appellant had a high risk pregnancy requiring hospitalization on two (2) separate occasions.

Counsel for MPIC claims that the combination of these factors would have prevented the Appellant from returning to her employment at [text deleted] due to her inability to cope with all of the pressure from these various demands.

Counsel for MPIC also maintains that MPIC's position that the Appellant would not have returned to work in the fall and winter of 2002-2003 is supported by various reports received from the Appellant's own healthcare practitioners, including:

1. [Appellant's psychiatrist's] report dated October 30, 2002, wherein he specifically addresses [the Appellant's] ability to return to work as follows:

> [The Appellant] would have liked to believe in the recent past that she was able to return to work at [text deleted], as long as she was placed in an area where physical duties were light, and where she wasn't exposed unnecessarily to the persons with whom she ran into the difficulties that led to her reaction because of her mental illness and going off work there

> in the first place. However, with the increased emotional lability she is experiencing as a result of the marital separation and its effects on her mood, coupled with the increasing limitations of her progressing pregnancy, I am not sure it is in her best interests to return to that place of employment. Physically, she could probably handle it, but I think she knows now that she is probably better off not even trying it in her current emotional state.
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> [Appellant's psychiatrist] also noted that:
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> I will continue to work with her with psychotherapy and medication to try and restore her emotional and mental well-being to her baseline. This would hopefully allow her to work again, but I am doubtful that we can expect that before her pregnancy has come to term.

Counsel for MPIC argues that this specifically indicates that the Appellant was not operating at her optimal emotional and mental well-being in the fall of 2002 since she had yet to be restored to her "baseline".

2. [Appellant's psychiatrist's] report dated January 27, 2007, wherein [Appellant's psychiatrist] advised that:

> An extenuating circumstance occurring during this period of time was that [the Appellant's] marriage was breaking down. On Sept. 24 her father called saying he had to come out to [text deleted] from his home in [text deleted] because this situation was driving her "close to the edge". Six days later I got a call to see her in hospital which I did. Because of her diabetes and pregnancy she had to be admitted to go on insulin under the care of an internist and obstetrician.
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> He further advised that:
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> As for my comments about my interpretation of [the Appellant's] believing she could return to work at [text deleted], what I was stating was what I say in that report: physically she could probably have done it, and she may even have wanted to, as she was desperate for income, but it probably wasn't in her best interests from a mental health standpoint.

Counsel for MPIC submits that in addition to [text deleted] being a difficult work environment for the Appellant at the best of times, the Appellant's testimony at the appeal hearing was that she very much enjoyed her self-employment as a [text deleted] operator. The documentary

evidence indicates that the in the fall of 2002, the Appellant's business was expanding and she was working as many as fifty-five (55) hours per week in this employment. Counsel for MPIC submits that the suggestion that the Appellant would have returned to work at [text deleted] in the fall and winter of 2002-2003 is all the more unlikely as it seems odd that [the Appellant] would want to resume an admittedly stressful employment that previously exacerbated her pre-existing bipolar disorder at the expense of reduced hours at an employment that [the Appellant] clearly enjoyed and found rewarding (i.e. her [text deleted] business). Counsel for MPIC adds that this is especially odd when there was absolutely no guarantee that [text deleted] could have accommodated [the Appellant's] possible need for a less stressful work environment.

In summary, counsel for MPIC argues that the evidence overwhelmingly indicates that the Appellant would not have returned to work in the fall and winter of 2002- 2003 as a result of her pre-existing disability in addition to the significant life events and changes she was dealing with at that time (all unrelated to the motor vehicle accident injuries). MPIC submits that the Appellant would not have been entitled to IRI as a result of her employment with [text deleted] and did not lose her job with [text deleted] as a result of motor vehicle accident-related injuries. Accordingly, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review Decision dated June 25, 2004 confirmed.

Decision

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Adviser on behalf of the Appellant and of counsel for MPIC, the Commission finds that:

1. the Appellant would have returned to her employment with [text deleted] as of August 28, 2002, when her short-term disability benefits ended, were it not for the motor vehicle accident-related injuries which prevented her from returning to that employment. Accordingly, her full-time employment with [text deleted] should be included for the purposes of calculating her IRI benefits; and
2. the Appellant lost her employment with [text deleted] due to her motor vehicle accident-related injuries and is therefore is entitled to a temporary continuation of IRI benefits for one hundred and eighty (180) days, in accordance with ss. 110(2)(c) of the MPIC Act.

Reasons for Decision

It is clear from all of the information provided to the Commission and from the Appellant's own testimony that, at the time of the motor vehicle accident, the Appellant was a full-time earner holding a regular employment on a full-time basis with [text deleted] in [text deleted], Manitoba. According to the Appellant's Application for Compensation, she had been employed with [text deleted] in [text deleted] since January 2000 and worked forty (40) hours per week. Although she was temporarily absent from work on a short-term disability leave, her position continued to be held for her and she maintained her employment status. We find that the Appellant would have returned to her work at [text deleted] on August 28, 2002, were it not for the motor vehicle accident of July 5, 2002. As such, she became entitled to IRI benefits as of August 28, 2002, when she was unable to continue the full-time employment as a result of the motor vehicle accident.

We base our finding that the Appellant would have returned to her employment with [text deleted] in [text deleted] on August 28, 2002, on the following factors:

1. The Appellant's short-term disability benefits ceased effective August 27, 2002.
2. The Appellant's testimony at the appeal hearing that she was determined to return to her job at [text deleted], whether it was stressful or not, and that her job at [text deleted] was her best option for employment at the time. She testified that it was ultimately her personal choice about whether to return to work (once she was cleared for a return to work program by [Appellant's psychiatrist]) and she was determined to return to her employment with [text deleted].
3. [Appellant's psychiatrist's] report of July 3, 2002 ([Appellant's psychiatrist] being the Appellant's treating psychiatrist at the relevant time), wherein he states that the Appellant was suitable for a trial or gradual return to work program at twenty (20) hours per week "with some limitations".
4. [Appellant's psychiatrist's] report of October 11, 2002 where he confirms that the Appellant has been able to return to her employment at [text deleted] since July 2002 and that she is ready for full-time work by now.
5. [Appellant's psychiatrist's] letter of January 27, 2007, wherein he states:

    1. My professional opinion was that [the Appellant] could have begun to return to work at [text deleted] as of July 3, 2002, as stated in my report of that date to [text deleted].

    2. Given both [the Appellant's] mental state and her diabetes mellitus, I did not think it wise for her to return to work full-time from not having worked at all for over a year. I believed the possibility of a successful return to work was increased by making it gradual. I did not think she had the stamina/energy to work full-time at that point.

        My notes indicate that on June 26, 2002 our discussion went as follows: In part because [the Appellant] was unsuccessful with an Employment Insurance claim she felt that there was "not much choice but to return to work…mentally would be OK…[she was] open to previous [category of work]". Hence, the July 3 report referred to above.

        On our next appt. of July 25 she reported the MVA of July 5. She said she "can't life/bend" but was still working part-time at her [text deleted] job (4-6 hrs./da. 4 da/wk.). She stated she "could [still| do [the] 10-3 [shift] at [text

deleted]". My notes at this point don't actually indicate whether she had begun work any time after July 3.

We had talked on her June 26 appt. of her going off meds if she wanted to get pregnant.

On Sept. 11, our next appt., she indicated she was 8 wks. pregnant and had gone off all but her antidepressant and anxiolytic. My notes record that she was looking better and reporting that she wasn't that moody. She was in fact expanding the base of her [text deleted] operation. She also indicated that she was "clearing up [the] treatment from her MVA", suggesting she was improving in that area.

An extenuating circumstance occurring during this period of time was that [the Appellant's] marriage was breaking down. On Sept. 24 her father called saying he had to come out to [text deleted] from his home in [text deleted] because this situation was driving her "close to the edge". Six days later I got a call to see her in hospital which I did. Because of her diabetes and pregnancy she had to be admitted to go on insulin under the care of an internist and obstetrician.

3. In my professional opinion, [the Appellant] could have returned to work October 11, 2002. On our office appt. Oct. 11 she stated that [text deleted] wasn't giving her hours yet because they couldn't come to an agreement on where she could work. MPIC had apparently said they would pay 90% of her benefits, but [text deleted] wasn't giving her work so there was nothing to be gotten. [the Appellant] "was asking for cafeteria – light [work as she had] worked in [the] food industry before". She "could have worked through September".

4. Based on all of the above I would also have to say that [the Appellant] could have worked from July 3 – October 11, 2002.

5. As to what hours she could have worked, I had already indicated (see above, 1st par. Of pt. 2) my preference for beginning part-time (20 hrs./wk.) to test the waters, having been off work so long and now also being in a high-risk pregnancy, It is possible she could have worked full-time if she had gotten the light kind of work she had requested.

6. Again, going on all of the above, I believe [the Appellant] could have back to work part-time and possibly full-time as of October 30, 2002. She reported on our appt. of that date that she was doing lifting and transporting of her [text deleted] equipment four days/wk. although she was beginning to feel the effects in terms of back pain and irritability after two hours. She stated that now she actually wasn't supposed to lift on the advice of her obstetrician because of her pregnancy.

> 7. Again, as far as Bipolar Mood Disorder was concerned, as of October 31, 2002, it would appear she could have worked part-time or even full-time, depending on the nature of the work. See my comments on hours above.
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> 8. As for my comments about my interpretation of [the Appellant's] believing she could return to work at [text deleted], what I was stating was what I say in that report: physically she could probably have done it, and she may even have wanted to, as she was desperate for income, but it probably wasn't in her best interests from a mental health standpoint.
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> On balance then, it appears from my reports, based on what [the Appellant] told me, and my assessment of her through the period under discussion, that there was nothing, certainly nothing physical, impeding her having a trial of returning to work at [text deleted].

Based upon the foregoing evidence, we find that the Appellant would have returned to work at [text deleted] on a part-time basis as of August 28, 2002 at twenty (20) hours per week until October 11, 2002, at which time she would have increased her hours to forty (40) hours per week, in accordance with [Appellant's psychiatrist's] recommendations. The Appellant shall be entitled to IRI benefits, based upon her employment with [text deleted] on that basis, until the date when her IRI benefits from her self-employment as a [text deleted] owner/manager were terminated.

Section 110(2) of the MPIC Act provides as follows:

> **Temporary continuation of I.R.I. after victim regains capacity**
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> 110(2) Notwithstanding clauses (1)(a) to (c), a full-time earner or a part-time earner who lost his or her employment because of the accident is entitled to continue to receive the income replacement indemnity from the day the victim regains the ability to hold the employment, for the following period of time:
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> (a) 30 days, if entitlement to an income replacement indemnity lasted for not less than 90 days and not more than 180 days;
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> (b) 90 days, if entitlement to an income replacement indemnity lasted for more than 180 days but not more than one year;
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> (c) 180 days, if entitlement to an income replacement indemnity lasted for more than one year but not more than two years;

> (d) one year, if entitlement to an income replacement indemnity lasted for more than two years.

The Appellant's employment with [text deleted] was terminated by [text deleted] effective May 16, 2003 on the grounds that she had absent from work for a period of two (2) years contrary to Section 7, Article 7.03(6) of the Collective Agreement which states that –

> *Seniority shall be considered broken and employment terminated if an employee:*
>
> > *(6) has not work for a period of two years or longer due to illness or injury, unless by mutual agreement between the Company and the Union that period should be extended.*

There was no such agreement between the Union and [text deleted] in the Appellant's case and therefore her employment was terminated effective May 16, 2003. The Commission finds that due to the injuries which the Appellant sustained in the motor vehicle accident of July 5, 2002, she was unable to return to her employment with [text deleted] as of August 28, 2002, when her short-term disability benefits ceased. Due to the continuing nature of her motor vehicle accident-related injuries, she was prevented from returning to her [text deleted] employment prior to May 16, 2003. Accordingly, the Commission finds that the Appellant lost her position with [text deleted] due to her motor vehicle accident-related injuries. Accordingly, we find that the Appellant is entitled to a temporary continuation of IRI in accordance with Sub-section 110(2)(c) of the MPIC Act for a period of one hundred and eighty (180) days.

As a result, the Appellant's appeal is allowed and the Internal Review Decision dated June 25, 2004 is therefore, rescinded.

Dated at Winnipeg this 20th day of April, 2009.

YVONNE TAVARES

DIANE BERESFORD

LINDA NEWTON