

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-196**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Mary Lynn Brooks
Ms Sandra Oakley

APPEARANCES: The Appellant, [text deleted], was represented by Ms Virginia Hnytka of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATES: April 20 and 21, 2010 and May 6 and 10, 2010

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits and Treatment Benefits beyond July 17, 2005.

RELEVANT SECTIONS: Sections 110(1)(a) and 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant, [text deleted], was involved in a motor vehicle accident on December 9, 2003. As a result of the accident, the Appellant's knees hit the dashboard and she had instant pain in her right foot, neck and back. Due to the injuries which the Appellant sustained in this accident, she became entitled to Personal Injury Protection Plan ("PIPP") benefits in accordance with Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was employed as a health care aide with [text deleted] working .8 of full-time hours. Her job duties were personal care to 20 residents.

The duties included bathing, feeding, etc. Due to her injuries, the Appellant was incapable of working her full duties as a health care aide and thus she qualified for income replacement indemnity (“IRI”) benefits as a full-time earner.

The Appellant had previously been diagnosed with fibromyalgia in 1997 by [Appellant’s Doctor #1]. This diagnosis was confirmed by [Appellant’s Doctor #2] in August 2004. [Appellant’s Doctor #2] also noted that the Appellant was deconditioned, overweight and depressed and that the Appellant had a history of migraines and hypertension.

The Appellant was off work from the accident until February 2004 when a gradual return to work program was arranged to reintegrate her into the workplace. The Appellant commenced the gradual return to work program in a supernumerary capacity. She progressed to working 5 hour shifts, approximately 4 days per week. However, her progress in the gradual return to work program stalled and the Appellant was not able to complete the gradual return to work program and progress to full duties and full hours.

On August 3, 2004, the Appellant was seen by [Appellant’s Psychiatrist], for assessment and treatment recommendations. [Appellant’s Psychiatrist] diagnosed the Appellant with Major Depression and prescribed Sertraline.

In January 2005, arrangements were made for the Appellant to attend a multi-disciplinary assessment at [Rehabilitation (Rehab) Clinic]. The assessment recommended a 6-week work hardening program and this was arranged at [Rehab Clinic] in order to increase the Appellant’s tolerance to full-time work.

The work hardening discharge report dated February 24, 2005 concluded that based on objective testing, the Appellant demonstrated the ability to work at a medium strength demand which met the demands of her pre-accident position as a health care aide. She also demonstrated the ability to perform 19 consecutive squats which correlated with the medium strength demand. Overall, [Rehab Clinic] found that the Appellant's clinical presentation and objective test results indicated that she was capable of performing the essential duties of her pre-accident employment. As a result, the Appellant was discharged and found fit for an immediate, unmodified return to her pre-injury employment.

The Appellant's file was subsequently referred to MPIC's Health Care Services for a review. In an interdepartmental memorandum dated March 17, 2005, [MPIC's Doctor], [text deleted] concluded that:

1. [The Appellant] exacerbated her pre-existing medical conditions as a result of the incident in question. The information on file does not indicate [the Appellant] developed a new medical condition as a result of the incident in question. It is my opinion [the Appellant's] exacerbation of pre-existing symptoms contributed to the development of her major depressive episode to some extent. It is my opinion the medical information on file does not indicate the episode was solely the result of the incident in question.

It is my opinion that [the Appellant] sustained a contusion to her right ankle and foot. The information leads me to conclude this condition resolved with no long term sequelae.

2. It is my opinion [the Appellant] developed a temporary partial impairment of physical function as a result of the medical conditions she developed secondary to the incident in question. The information leads me to conclude [the Appellant's] medical status improved following the incident in question to the extent she was able to return to her pre-accident occupational duties on a gradual basis in February 2004. The file does not contain documentation indicating [the Appellant] developed a condition as a result of the incident in question that in turn would result in permanent, partial and/or total occupational disability.

It is my opinion [the Appellant's] inability to progress through an extended Graduated Return to Work Program during a time she was receiving a comprehensive treatment program was the byproduct of pre-existing medical conditions (i.e. fibromyalgia, deconditioning and obesity). It is also my opinion

[the Appellant's] perceived disability is not supported by the objective physical findings noted by the health care professionals involved in her care. I am unable to extract information from the file indicating [the Appellant's] MVA-related medical conditions deteriorated to the extent she was unable to complete a Graduated Return to Work Program.

The information obtained from [the Rehab Clinic] indicates [the Appellant] has the physical ability to perform her pre-accident occupational duties without restrictions if she so desires. It is possible that her pre-existing fibromyalgia, which likely continues to contribute to symptoms of pain, adversely affects her perceived functional capabilities.

3. It is my opinion [Rehab Clinic] has received sufficient supervised treatment interventions to address the medical conditions she developed secondary to the incident in question. Accordingly, further supervised treatment interventions are not medically required.

In a decision dated June 30, 2005, MPIC's case manager advised the Appellant that as she had recovered from the medical conditions arising from the accident, to the extent that she did not have a physical and/or psychological impairment, MPIC would no longer fund any further benefits under the PIPP. Further, the decision advised that as the Appellant was medically capable of performing her occupational duties as a health care aide, she was no longer entitled to IRI benefits as of June 30, 2005. However, in order to provide the Appellant with advance notice of the termination of her IRI benefits, IRI entitlement was extended up to July 17, 2005.

The Appellant sought an Internal Review of that decision. In a decision dated October 19, 2005, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found that the medical documentation on the Appellant's file did not establish that she was unable to work as a result of a medical condition arising out of the motor vehicle accident of December 9, 2003. The Internal Review Officer also found that since the documentation on the Appellant's file indicated that she was able to function at a level required for a health care aide, the Appellant was not entitled to

further IRI benefits. With regards to reimbursement of treatment expenses, the Internal Review Officer found that the medical information on the Appellant's file indicated that she had received care that far exceeded that normally required to address an exacerbation such as that which the Appellant suffered. As a result, the Internal Review Officer found that she was not entitled to further funding for treatment expenses.

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

1. Whether the Appellant is entitled to further IRI benefits beyond July 17, 2005; and
2. Whether the Appellant is entitled to reimbursement of treatment expenses beyond July 17, 2005.

Relevant Legislation:

Events that end entitlement to I.R.I.

[110\(1\)](#) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;

Reimbursement of victim for various expenses

[136\(1\)](#) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

Appellant's Submission:

The Claimant Adviser on behalf of the Appellant submits that the Appellant's PIPP benefits were incorrectly terminated as of July 17, 2005 and that the Appellant is entitled to benefits beyond that date. The Claimant Adviser maintains that the Appellant's pre-existing condition was enhanced by the motor vehicle accident and the accident caused a persistent decline in her function. In support of her position, the Claimant Adviser argues that:

1. The Appellant worked diligently to return herself to the level of function she had before the motor vehicle accident. She participated fully in the gradual return to work program, she attended an athletic therapist, she attended a gym and she completed the work-hardening program at [Rehab Clinic]. However, despite all of these efforts, the Appellant was not able to progress to the level of function she had prior to the accident.
2. The Appellant's treating practitioners support her position that she is unable to return to work due to the injuries which she sustained in the motor vehicle accident. [Appellant's Doctor #3] in his report dated April 14, 2005 advised that he would not support the Appellant's return to full unmodified duties as her fibromyalgia was quite active and her tolerance was decreased. In his report dated April 6, 2009, [Appellant's Doctor #3] commented that:

It is my opinion that there is medical evidence that would support the conclusion that [the Appellant's] pre-existing fibromyalgia was enhanced by the 2003 motor vehicle accident, and that in balance, the medical evidence argues against a temporary exacerbation as favored by [MPIC's Doctor] in his report.

The simplest observation to make about [the Appellant's] case is that she was able to manage employment despite her fibromyalgia up until the accident of December, 2003. After this, despite significant rehabilitation efforts, she was physically and mentally not able to manage a return to work, and has experienced ongoing pain, easy fatigability, a musculoskeletal limitations that have qualified her for CPP Disability.

...

As is typical of fibromyalgia, symptoms exist far in excess of any objective physical signs, which can lead patients to be accused of malingering. As [the

Appellant's] family physician over the last 4 ½ years, I am in agreement with [text deleted] observation and contention that, in the balance of probabilities, the motor vehicle accident of 2003 caused an ongoing enhancement of her fibromyalgia symptoms that has left her physically and mentally unable to return to work despite significant rehabilitation efforts. I do not believe that she had an exacerbation of her symptoms that resolved, despite the [Rehab Clinic] report, and I do believe that the natural course of her fibromyalgia has been altered by the motor vehicle accident of 2003. I also find her to have a permanent occupational disability, and note that the Canada Pension Plan has reached the same conclusion in her case.

3. The [Rehab Clinic] discharge report is unreliable. The Appellant did not complete many of the tasks that were required of her during the evaluations. The [Rehab Clinic] program was not an accurate assessment of the Appellant's level of functioning because she continued to have pain with activity. Also, the [Rehab Clinic] program did not closely simulate her work environment. Further, the Appellant maintains that there really wasn't any improvement in her condition and functional ability over the 3 functional capacity evaluations conducted by [Rehab Clinic].
4. The gradual return to work program was not indicative of her actual situation as she was not doing her full complement of duties. Although she was able to tolerate a 5 hour work day, she was working in a supernumerary capacity. She was not working her full duties, with a full patient load, as she would if she returned to work on unmodified duties.
5. The Appellant never recovered to her pre-accident status despite the fact that she genuinely wants to return to work. Prior to the motor vehicle accident, the Appellant was able to work with her pre-existing fibromyalgia and low back pain. However, her condition dramatically worsened after the motor vehicle accident, to the point where the Appellant realized she could no longer return to work at her pre-accident level and decided to apply for disability benefits.

The Claimant Adviser therefore maintains that the Appellant's PIPP benefits should be reinstated effective July 17, 2005 and her appeal be allowed.

MPIC's Submission:

Counsel for MPIC submits that the Appellant's PIPP benefits were appropriately terminated on July 17, 2005 and that the Appellant is not entitled to PIPP benefits beyond that date. Counsel for MPIC argues that the motor vehicle accident caused a temporary exacerbation of the Appellant's fibromyalgia. However, at some point in time that exacerbation ended and ceased to play an ongoing role in her presentation. Counsel for MPIC argues that [Rehab Clinic's Doctor] assessed the Appellant's condition and concluded that she could meet the job demands of her pre-accident occupation. He maintains that at the time the Appellant's PIPP benefits were terminated, any ongoing disability she might have had was due to her pre-existing conditions and no longer attributable to the motor vehicle accident.

Counsel for MPIC further contends that the Appellant's pre-existing conditions were significant and were getting more serious just prior to the motor vehicle accident of December 9, 2003. Additionally, counsel for MPIC argues that there are numerous references throughout the course of the file to the Appellant's manipulative behaviour. In particular, he notes [Appellant's Doctor #4's] diagnosis of her nomogenic presentation, referring to a psychopathologic disorder in which the law and its application through awards and the granting of benefits plays an etiologic role. Counsel for MPIC insists that secondary gain was a significant factor in the Appellant's presentation throughout the course of her claim with MPIC.

Counsel for MPIC contends that [Rehab Clinic's Doctor] and [MPIC's Doctor] acknowledge the Appellant's fibromyalgia and were not dismissive of that condition. However, counsel for MPIC submits that [Rehab Clinic's Doctor] concluded that the Appellant's motor vehicle accident-related injuries were no longer presenting as a barrier to her carrying out her duties as a health care aide.

In summary, counsel for MPIC claims that the Appellant's fibromyalgia was exacerbated by the motor vehicle accident. However, this exacerbation was temporary and was no longer a factor in the Appellant's ongoing presentation beyond July 17, 2005. He insists that the Appellant improved initially with her treatments, the motor vehicle accident-related injuries subsided and then ceased to play an ongoing role in her presentation. Therefore, counsel for MPIC maintains that the Appellant has been appropriately compensated by MPIC for any exacerbation in her condition caused by the motor vehicle accident of December 9, 2003. Accordingly, counsel for MPIC argues that the Appellant's appeal should be dismissed.

Decision:

Upon a careful review of all of the medical, paramedical and other reports and oral 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 the Appellant has not established, on a balance of probabilities, an entitlement to IRI benefits or to reimbursement of treatment expenses beyond July 17, 2005.

Reasons for Decision:

The Commission finds that any inability to return to work on the Appellant's part was, on a balance of probabilities, related to her pre-existing conditions rather than to any ongoing effects of the motor vehicle accident. We find that the motor vehicle accident caused a temporary exacerbation of the Appellant's condition and that exacerbation ended prior to July 17, 2005. Any ongoing disability beyond July 17, 2005 is due, on a balance of probabilities, to her pre-existing conditions rather than to any ongoing effects from the motor vehicle accident.

The Commission accepts the [Rehab Clinic] discharge report and the conclusions reached therein that the Appellant was capable of the job demands of her pre-accident occupation as a health care aide. We find that the discharge report establishes that the Appellant demonstrated the ability to work at a medium strength demand, which meets the demands of her pre-accident position as a health care aide. We find that the Appellant's criticisms of the [Rehab Clinic] report and the work hardening program were insufficient to refute the conclusions reached by [Rehab Clinic] that her functional ability met the requirements for work at a medium strength demand. Further in that respect, the Commission also accepts the testimony of [Rehab Clinic's Doctor] that the Appellant's self-perceptions were not borne out by the work simulation activities and that he didn't have any concerns regarding her ability to meet the job demands of a health care aide.

The Commission finds that the Appellant was unable to establish, on a balance of probabilities, that the motor vehicle accident permanently enhanced her condition. When taking into consideration all of the information before us, the Commission finds that it is more likely that the Appellant's pre-existing conditions contribute to her ongoing disability. As a result, we find that the conditions which prevent her from working are not related to the motor vehicle accident, on a balance of probabilities, but rather to her significant pre-existing history, including fibromyalgia, depression and deconditioning. Additionally, we find that any ongoing treatment expenses incurred by the Appellant are more likely attributable to the Appellant's pre-existing conditions, rather than any exacerbation from the motor vehicle accident. Therefore, the Appellant is not entitled to reimbursement of treatment expenses beyond July 17, 2005.

As a result, we find that the Appellant's appeal should be dismissed and the Internal Review Decision dated October 19, 2005 is therefore confirmed.

Dated at Winnipeg this 17th day of August, 2010.

YVONNE TAVARES

MARY LYNN BROOKS

SANDRA OAKLEY