Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-188

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Errol Black** **Ms Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.**
HEARING DATES:	**January 19, 2009 and July 8, 2010**
ISSUE(S):	**1. Entitlement to further Income Replacement Indemnity benefits beyond July 17, 2006 with respect to the motor vehicle accident of August 24, 2005.** **2. Entitlement to Income Replacement Indemnity benefits following the motor vehicle accident of March 20, 2006.**
RELEVANT SECTIONS:	**Sections 81(1), 110(1)(a) and (e) and 110(2)(b) 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 was injured in a motor vehicle accident on August 24, 2005. She sustained soft tissue injuries to her neck, back, chest and left shoulder.

At the time of the accident the Appellant was employed as a [text deleted] with various clerical duties. She worked for about 2 weeks following the accident, but then was unable to continue working due to her injuries. She began physiotherapy treatment and was also referred to [Rehabilitation (Rehab) Clinic] for assessment and rehabilitation.

She was also injured in another car accident on March 22, 2006.

The Appellant applied for a review of an injury claim decision which found that she was not entitled to IRI benefits following the second accident of March 20, 2006. On November 20, 2006, an Internal Review Officer for MPIC found that there was no new medical evidence to contradict the case manager's decision that she was not precluded from working and thus not entitled to IRI as of the 181st day following the March 20, 2006 accident.

The Appellant was in receipt of Income Replacement Indemnity ("IRI") benefits until April 21, 2006, when her case manager advised that the medical information confirmed she was able to hold employment and that she was not entitled to any further benefits. However, benefits were extended, pursuant to Section 110(2) of the Act for 90 days, as her job was no longer available. Therefore, her benefits continued until July 17, 2006.

That decision of the case manager was confirmed on September 25, 2006 by an Internal Review Officer who stated:

> "While the decision of April 21, 2006 may have been premature in that there is not a lot of evidence in support of the decision, other than progress reports from [Rehab Clinic], which did not conclude you could return to work, the subsequent medical evidence supports the ultimate decision that your benefits were properly terminated effective July 17, 2006. "

It is from this decision of the Internal Review Officer that the Appellant appealed.

Hearing of January 19, 2009:

The Commission conducted a hearing into the Appellant's appeal on January 19, 2009. The Appellant testified regarding her injuries from the accident, its effect upon her ability to do her job, and the treatment she received. The Appellant explained that her recovery was delayed by her second accident in March of 2006 and this prevented her from working until August or September of that year. In August, when she started to feel ready to start looking for a job, she was fortunate to find a job with her previous employer. She still had lots of pain at that time and was trying to increase her exercise and the amount of things she could do in a day. Because the job she was offered involved a lot of sitting and a lot of walking, she did not feel she had the ability to sustain that for 8 hours a day. Accordingly, she began to work on a graduated return to work program in August, returning to work on a full-time basis in September.

At the hearing on January 19, 2009, counsel for MPIC pointed out that the Appellant had been cleared in a report dated May 5, 2006, to return to her pre-accident employment by caregivers at [Rehab Clinic].

However, following submissions, the appeal hearing was adjourned sine die, to allow counsel for MPIC to investigate a question which arose at the hearing concerning the effect and operation of Section 110(2)(b) on the Internal Review Officer's decision. Since the Internal Review Officer appeared to have concluded that the decision of April 21, 2006 may have been premature and that the subsequent medical evidence supported the ultimate decision that the Appellant's benefits be terminated effective July 17, 2006, the question arose as to whether Section 110(2)(b)

had been applied to extend the Appellant's IRI benefits for a further 90 days from that effective date of July 17, 2006.

Subsequent Investigation and Decision:

Counsel for MPIC referred this question back to the Appellant's case manager and the IRI calculation department.

On November 16, 2009, the Appellant's case manager issued a decision which noted that the Appellant regained the ability to hold employment on July 17, 2006. As she had lost her part-time employment as a result of the accident, the case manager indicated that IRI would continue for 90 days from that date, until she gained an employment from which the gross income is equal to or greater than the gross income on which the IRI was determined.

MPIC issued, with this decision, a cheque to the Appellant covering the period from July 17, 2006 for 90 days of IRI. The letter noted that the Appellant had return to work earnings for the period of August 21 to 31, 2006, and September 1 to 19, 2006, but a cheque was still issued to cover the period from July 17 to October 14, 2006, including interest.

The Appellant requested that the matter be reconvened for hearing.

Prior to the hearing, counsel for MPIC wrote a letter to the Commission dated April 23, 2010. The letter referred to the case manager's decision of November 16, 2009 and the payment which was issued to the Appellant as a result. She advised that it was her understanding that the outstanding issue still before the Commission was "whether the Appellant's IRI was properly terminated as of July 17, 2006" and whether the "proper Section 110(1)(a) termination date is

July 17 as determined by MPI, or September 5, 2006 when the Appellant in fact returned to work". Counsel noted:

> "It is MPI's position that the issue of IRI entitlement between July 17 and September 1, 2006 is moot given the applicable sections. Although Section 110(2)(b) provides for an extension of IRI, it only does so "notwithstanding" Section 110(1)(a)-(c). Sections 110(1)(e)-(g) may operate to terminate IRI irrespective of Section 110(2)(b)."

Counsel took the position that although the Appellant is entitled to IRI until October 14, 2006, pursuant to Section 110(2)(b) she returned to an employment where her gross income was greater than that used to determine her IRI entitlement as of September 1, 2006. In accordance with Section 110(1)(e), there was no further entitlement to IRI after her September 1, 2006 return to work.

Hearing of July 8, 2010:

When the appeal hearing reconvened on July 8, 2010, the Appellant submitted that, as of July 16, 2006, she had still not been able to work. She continued going to physiotherapy and chiropractic treatment and doing exercises in the hope that she would be able to go back to work. When she did find employment, she still found the gradual return to work difficult, but she persevered. She had not been ready to do that in July however and even in August found it difficult. However, beginning in September, she was ready to work full-time and believes that the medical evidence supported that she was not able to work until that time.

Counsel for MPIC reiterated the position set out in her letter of April 23, 2010. She pointed out that the Appellant was paid Income Replacement Indemnity benefits to October 14, 2006, pursuant to Section 110(2) of the Act, because she had lost her employment as a result of the motor vehicle accident. However, it was undisputed that she returned to work on September 1, 2006 on a full-time basis. Therefore, pursuant to Section 110(1)(e), on October 14, 2006, the

Appellant was earning a gross income equal to or greater than that used to determine her IRI entitlement. (In fact, counsel for MPIC pointed out that the Appellant's benefits should have been terminated on September 1, 2005, pursuant to this Section. However, any payment that MPIC had made after September 1, 2006 was gratuitous and MPIC was not seeking to have it repaid.)

MPIC took the position that the Appellant's entitlement to IRI benefits, whether under Section 81 or Section 110(2)(b) of the Act, ended as of September 1, 2006, pursuant to Section 110(1)(e).

Discussion:

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 *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

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;

(e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;

Temporary continuation of I.R.I. after victim regains capacity

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:

> (b) 90 days, if entitlement to an income replacement indemnity lasted for more than 180 days but not more than one year;

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Decisions of September 25, 2006 and November 20, 2006, as amended by the case manager's decision of November 16, 2009, were incorrect, and that she is entitled to further IRI benefits.

The panel has reviewed the evidence and submission of the Appellant, as well as the material on the indexed file and the submissions of counsel for MPIC.

The panel agrees that the Appellant was not able to go back to work on July 17, 2006. The evidence establishes that the Appellant was not able to go back to work on a part-time basis until August, and then on September 1, 2006, she was able to go back to work on a full-time basis. We found the evidence of the Appellant to be credible when she testified that, upon her discharge from [Rehab Clinic], she was not ready to go back to work, but was still going for chiropractic treatment and physiotherapy as well as doing her exercises, while still experiencing symptoms. She went back to work on a gradual return to work basis in August, and received some assistance from an occupational therapist in regard to ergonomic modifications. She was then able to return to work on a full-time basis on September 1, 2006. Although the [Rehab Clinic's] discharge report dated May 5, 2006 asserted that the Appellant was ready to return to work in a light strength category to unmodified duties as of April or May 2006. [Appellant's Doctor], in a letter dated April 25, 2006 noted the Appellant's disc herniation and current symptoms of lumbosacral and left radicular pain secondary to the motor vehicle accident. He imposed restrictions on heavy lifting, bending and twisting.

In a report dated June 26, 2006, [Appellant's Doctor] referred to the Appellant's second motor vehicle accident, noting that while some of her symptoms had improved, some had increased as a result of this accident. They were slowly subsiding. He stated that she was not exaggerating her symptoms and limitations and recommended her pursuit of current management and continuing treatment.

Finally, in a letter dated August 22, 2006, [Appellant's Doctor] indicated that the Appellant's condition could possibly be exacerbated by prolonged sitting, bending, and lifting and imposed restrictions limiting heavier lifting, repetitive bending and twisting.

[MPIC's Doctor], [text deleted], provided a report dated August 5, 2008. She noted that:

> "The cervical and low back/left lower limb symptoms, on the balance of probability, temporally relate to the collision of August 24, 2005 with exacerbation at the time of the March 20, 2006 collision. The limiting factor with respect to work tasks is the report of pain in relation to these areas along with the other symptoms noted. As commented upon by [Appellant's Doctor] and the treating physiotherapist, pain in relation to the cervical and lumbar sequelae could present difficulty in performing some of the required tasks. Attention to stabilization techniques, exercise and ergonomic factors would likely result in better pain control and assist in the performance of duties of a medical receptionist."

The panel finds on the whole that the Appellant has established, on a balance of probabilities that she was not able to return to work full-time until September 1, 2006.

As a result, Section 81(1) of the MPIC Act operates to entitle the Appellant to IRI benefits until September 1, 2006. Section 110(2)(b) of the MPIC Act would then operate to continue her IRI benefits, because she had lost her job as a result of the motor vehicle accident, until December 1, 2006.

However, the evidence before the panel also clearly establishes that the Appellant was working full-time by September 1, 2006. Counsel for MPIC is correct in pointing out that this triggers the operation of Section 110(1)(e) of the MPIC Act. As a result, the Appellant ceased to be entitled to an IRI benefit as of September 1, 2006 when she held an employment from which the gross income was equal to or greater than the gross income on which her IRI was determined.

Counsel for MPIC has indicated that although the Appellant was paid IRI benefits until October 14, 2006, with some possible reduction for periods of work between August 21 and 31, 2006 and September 1 and 19, 2006, the Corporation would not be seeking reimbursement for any of that IRI already paid, even though her entitlement to IRI benefits technically ended on September 1, 2006, pursuant to the operation of Section 110(1)(b).

Accordingly, the panel dismisses the Appellant's appeal and confirms the Internal Review Decisions of September 25, 2006 and November 20, 2006, as amended by the case manager's decision of November 16, 2009 and Ms Robinson's letter of April 23, 2010.

The Appellant was entitled to receive IRI benefits until September 2006 and did receive them until October 14, 2006. Accordingly, the Appellant's appeal is dismissed.

Dated at Winnipeg this 1st day of September, 2010.

LAURA DIAMOND

ERROL BLACK

SANDRA OAKLEY