

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-06-19**

**PANEL:** Ms Yvonne Tavares, Chairperson  
Mr. Trevor Anderson  
Ms Deborah Stewart

**APPEARANCES:** The Appellant, [text deleted], appeared on his own behalf;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Ms Danielle Robinson.

**HEARING DATE:** January 6, 2010

**ISSUE(S):** Entitlement to Personal Injury Protection Plan Benefits

**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 January 14, 2004. At the time of the accident, the Appellant was driving a [text deleted] truck and was towing a tanker-trailer carrying 67,000 pounds of [text deleted]. The Appellant was travelling on a highway, when a vehicle passed him and almost immediately slowed to a stop in order to make a left turn. The Appellant was travelling at approximately 90 kms per hour and started to apply his brakes. The Appellant attempted to avoid hitting the vehicle in front of him; however, the right front of his tractor-trailer unit hit the left rear of the smaller car. As a result of this motor vehicle accident, the Appellant sustained a soft tissue injury to his left shoulder region, lower mid and

upper back pain and neck pain associated with headaches. Due to the injuries which the Appellant sustained in the motor vehicle accident, he 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 had two employments. Firstly, he was employed as a truck driver with [text deleted], operating out of [text deleted], Manitoba. The Appellant’s primary duties in this occupation consisted of hauling [text deleted] from the [text deleted] to several [text deleted] in the [text deleted] area. He also occasionally hauled [text deleted] for [text deleted].

The Appellant was also self-employed as the owner of [text deleted] in [text deleted], Manitoba. At the time of the accident, the Appellant had little involvement in the daily operations of this store as his son was responsible for the day to day operations.

Initially, the Appellant attended for physiotherapy treatments and was able to continue to work with his symptoms. He then discontinued physiotherapy and began a course of treatment with a chiropractor and again, continued to work with his symptoms. The Appellant was also under the care of [Appellant’s Doctor #1], since the motor vehicle accident.

In March of 2005, the Appellant approached MPIC indicating that his caregivers had advised that he would only recover from his motor vehicle accident related injuries if he was off work for a period of time. The Appellant then filed a claim for income replacement indemnity (“IRI”) benefits with MPIC.

In order to assess the Appellant's claim for IRI benefits, the medical information on the Appellant's file was reviewed by MPIC's Health Care Services team. In an Inter-departmental Memorandum dated May 30, 2005, [MPIC's Doctor], Medical Director of MPIC Health Care Services, commented that:

The key component at this time appears to be that the patient's long work hours in the occupation of a truck driver are altering the favorable natural history of whiplash. Given that reality, temporary respite from the workplace may be appropriate, coupled with therapy to help the individual ameliorate his pain and increase his function.

The information on file indicates the therapeutic plan from [Appellant's Doctor #1] is a temporary respite from the workplace. It makes sense to pursue some other type of care at this time to help with the patient's symptoms.

MPIC then received independent information that the Appellant intended to stop truck driving and to begin an increase in his hours at his business at [text deleted]. An investigation was undertaken by MPIC to determine the Appellant's activities. The investigation took place on May 26, 27 and 29, 2005, with the Appellant being observed and video-taped performing numerous activities. This information was then referred to [MPIC's Doctor] for review and comment. In his Inter-departmental Memorandum dated June 23, 2005, [MPIC's Doctor] comments as follows:

Based on the information in the surveillance video-tape I would change the opinion expressed in my May 30, 2005 memorandum. The key concern in that memorandum was whether the patient met the criteria for being able to work. The criteria are as follows:

1. The ability to get to and from the workplace.
2. The ability to perform the essential tasks of one's occupation.
3. Whether one's occupation would alter the natural history of the condition.
4. Whether one puts other co-workers at risk by virtue of one's clinical condition in performing one's occupation.

I would state that based on the surveillance video-tape [the Appellant] successfully meets all of these criteria. It appears that he has the capability of dealing with his painful circumstance as manifested by the surveillance video-tape. I do not think that his occupation in the driving industry would be substantially different in quality or quantity from that demonstrated in the surveillance video-tape.

[The Appellant] appears to be capable of working long hours, with relatively little sleep at his occupation at the [text deleted].

I would change my prior conclusion. I believe that the surveillance video-tape substantiates that opinion. The videotape does not support the opinion of disability from [Appellant's Doctor #1] dated May 10, 2005.

In a decision dated July 7, 2005, MPIC's case manager wrote to the Appellant and advised that based upon the investigation and the medical consultant's opinion, MPIC would not consider payment of IRI benefits for the time that the Appellant was off work commencing April 1, 2005 and any future or ongoing treatment costs associated with the Appellant's ongoing symptoms.

The Appellant sought an Internal Review of that decision. In a decision dated December 22, 2005, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the video tapes of the Appellant's activities showed the Appellant leading a normal lifestyle, with no outward manifestations of pain. Based upon the functionality of movement which the Appellant demonstrated in the video tapes, the Internal Review Officer found no reason to alter the conclusion of the case manager that the Appellant was able to perform the essential tasks of his occupation as a truck driver.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to PIPP benefits beyond April 1, 2005.

**Appellant's Submission:**

At the hearing of the appeal, the Appellant explained that he had been up-front with his case manager at MPIC about his physical condition. The Appellant claims that he advised his case

manager that he owned a [text deleted] store and that he did work occasionally at the [text deleted] store. The Appellant submits that he was told to stop truck driving by his family doctor and his chiropractor because the physical labour involved was continuing to aggravate his physical condition. The Appellant also testified that he was taking a lot of medication and pain killers in order to tolerate his ongoing pain symptoms. He maintains that he should not have been truck driving because of the amount of medication which he was consuming.

The Appellant argues that his two employments were very different – driving a truck was much more physical than running a [text deleted] store. The duties involved in running a [text deleted] store were much lighter than truck driving and he was able to take frequent breaks, as required, when at the [text deleted] store. As a result, he was able to work at the [text deleted] store, although he was unable to continue truck driving. The Appellant therefore requests that his appeal be allowed and his claim for PIPP benefits beyond April 1, 2005 be reinstated.

**MPIC's Submission:**

Counsel for MPIC submits that the Internal Review Decision is correct and that the Appellant's appeal should be dismissed. She maintains that although [MPIC's Doctor] initially accepted that the Appellant would require a temporary absence from work, in order to recover from his accident-related injuries, that opinion was changed when [MPIC's Doctor] viewed the Appellant's activities on the video-taped surveillance. She argues that the video surveillance of the Appellant demonstrates that the Appellant had the following functional abilities:

- he had a full neck range of motion;
- he had the ability to lift and carry heavy cases of pop;
- he had the ability to push and pull a barbeque;

- he could pull a heavy trailer door; and
- he could carry heavy pails.

Counsel for MPIC maintains that the Appellant was able to carry out the foregoing activities over fairly lengthy hours with no pain behaviours associated with his movements.

Counsel for MPIC submits that [MPIC's Doctor's] reports should be preferred to those of [Appellant's Doctor #1] and [Appellant's Doctor #2], the Appellant's caregivers, since he was the only doctor that saw the video tapes along with all of the other medical information on the file. As a result, counsel for MPIC argues that [MPIC's Doctor] was in the best position to determine the Appellant's functional abilities.

With regards to the Appellant's claim that he should not have been truck driving considering the amount of medication he was taking, counsel for MPIC argues that the Appellant's caregivers were well aware of his medications, yet they did not suspend his driver's licence. As a result, counsel for MPIC asks the Commission to draw the inference that the Appellant's doctors did not believe that driving under the influence of those medications was a problem.

Counsel for MPIC submits that the video surveillance demonstrates that the Appellant had the ability to cope with his pain symptoms and to carry out a significant amount of physical activity while doing so. Counsel for MPIC maintains that based upon the functional abilities demonstrated on the video tapes, that the Appellant is capable of his occupation as a truck driver. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review Decision dated December 22, 2005 should be confirmed.

**Decision:**

Upon 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 Appellant and of counsel for MPIC, the Commission finds that the Appellant is entitled to PIPP benefits as of April 1, 2005.

**Reasons for Decision:**

In accordance with the Physical Demands Analysis dated May 20, 2005 of the Appellant's position and duties as a truck driver, the physical demands of the duties and responsibilities of the Appellant's position were determined to fall within the medium to medium-heavy category. The Commission finds that the activities depicted on the video tape surveillance do not equate to the physical demands of a medium to medium-heavy position as a truck driver. The Commission finds that the physical job demands of the occupation at the [text deleted] store were much less physically strenuous than that of the Appellant's truck driver position.

The evidence before the Commission also established that the Appellant frequently worked between 15 and 22 hours per day operating the truck. In view of the Appellant's long work hours in the occupation of a truck driver, [MPIC's Doctor] had accepted that the Appellant's exposure to this activity was altering the natural history of the Appellant's whiplash. Given that fact, [MPIC's Doctor] had recommended that a temporary respite from the workplace would be appropriate, coupled with therapy to help the Appellant ameliorate his pain and increase his function. The Commission finds that the activities depicted on the video tape surveillance do not equate to exceptionally long hours of work in the truck driving industry. Rather, given the fact that the Appellant had been off work from his truck driving position since the middle of March 2005, and his functional abilities were taped at the end of May 2005, one should have expected a

reasonable degree of functional ability given that the Appellant had already had a temporary respite from the truck driving position. As a result, we find that [MPIC's Doctor's] original opinion set out in his Inter-departmental Memorandum of May 30, 2005, allowing the Appellant a temporary respite from the workplace, coupled with therapy to help with the Appellant's pain symptoms should have been instituted in order to allow the Appellant to recover from his motor vehicle accident related injuries.

Although the Commission finds that the Appellant was reasonably functional by the end of May 2005, there was a lack of evidence presented to the Commission in order to determine when the Appellant's PIPP benefits should have ended. As a result, we find that the Appellant's PIPP benefits should be reinstated effective April 1, 2005 and should continue until such time as they may be terminated in accordance with the MPIC Act.

As a result, the Appellant's appeal is allowed and the Internal Review Decision dated December 22, 2005 is therefore rescinded.

Dated at Winnipeg this 11<sup>th</sup> day of March, 2010.

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**YVONNE TAVARES**

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**TREVOR ANDERSON**

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**DEBORAH STEWART**