Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-127

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Linda Newton** **Ms Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf and was assisted by an Interpreter, [text deleted]; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski and Mr. Andrew Robertson.**
HEARING DATE:	**October 28, 2010**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity Benefits**
RELEVANT SECTIONS:	**Section 83(1) 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 driving a vehicle which was rear-ended on February 4, 2008. As a result of the accident, he reported injuries to his neck and back causing him to suffer headaches, inability to sleep and blurry vision.

At the time of the accident, the Appellant was employed at [text deleted] as a dishwasher, with essential duties of washing dishes and garbage disposal. He was working part-time, for approximately 25 hours per week.

The Appellant received treatment from [Appellant's Doctor #1], [Appellant's Physiotherapist] and [Appellant's Doctor #2].

The appellant sought Income Replacement Indemnity ("IRI") benefits from MPIC, indicating that the injuries he suffered in the motor vehicle accident affected his ability to work at his job.

On July 20, 2009, the Appellant's case manager wrote to him and indicated that for the purposes of IRI he would be classified as a part-time earner under the MPIC Act. However, in order to qualify for IRI benefits, the medical information must support that he was unable or substantially unable to perform the essential duties of his employment. The case manager indicated that a review of the medical information on the Appellant's file, in consultation with the Health Care Services Team, did not support that the Appellant sustained an impairment of function which would have affected his ability to perform the duties of his employment and that the Appellant was not entitled to IRI benefits as a result of the motor vehicle accident.

The Appellant sought an Internal Review of this decision. On October 6, 2009, the Appellant's file, including reports from [Appellant's Doctor #1], [Appellant's Physiotherapist], and [Appellant's Doctor #2] were reviewed, along with a report from MPIC's Health Care Consultant, [MPIC's Doctor].

The Internal Review Officer concluded that following the motor vehicle accident, the Appellant continued to work his regular hours as a dishwasher at [text deleted], without restrictions, until December 22, 2008. Immediately after the accident his healthcare provider supported his ability to work without modifications of any kind. Although the Appellant complained of pain

experienced during work shifts, this did not equate to functional incapacity. Although the Appellant had indicated that he became unable to perform the duties of his employment after 10.5 months, the Internal Review Officer concluded that no objective reasons had been given for any such deterioration and that there was no evidence the Appellant was unable to perform the essential duties of a dishwasher.

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

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He described the motor vehicle accident. He explained that after the motor vehicle accident he was shaky and had pain in his neck for six months. The pain started in his neck and went to his leg. He went to see his family doctor and tried medication, but it did not work.

He testified that he tried to contact authorities at MPIC, but that he had difficulty because he did not speak English well.

The Appellant also described his pre-motor vehicle accident employment as a dishwasher at [text deleted]. He explained that he worked approximately 4 to 5 shifts per week. The lengths of the shifts varied but were usually about 3 to 4 hours a day. These shifts were scheduled by his manager. The Appellant's duties involved collecting dishes and putting them in a dishwasher and then, after they were washed, collecting them, drying them and putting them away.

The Appellant testified that following the motor vehicle accident, he did the same job for sometimes less and sometimes more hours. He stated that his manager told him that if he could

not work he should take time off and go home, but the Appellant testified that he did not have a choice as he needed the work and the income, so he told his manager he could do the job.

The Appellant estimated that before the motor vehicle accident, he was working approximately 5 hours a day but that after the motor vehicle accident he could only do the job for a few hours a day. He maintained that as a result of his injuries and sleep deprivation he didn't have the strength he had before the motor vehicle accident to lift heavy dishes and work the same way as he had been working and that he worked fewer hours a day because of his motor vehicle accident injuries.

On cross-examination, the Appellant confirmed that he had indicated to the Internal Review Officer that he had not reduced his hours at work until December 22, 2008. He also confirmed that in 2008 he took a six week trip to [text deleted], but up until that vacation he had been working normal hours and days as he had before the motor vehicle accident. After he returned from [text deleted], his work hours were reduced by his manager, although he himself had not requested that his manager do this.

The Appellant also confirmed that his manager had asked him to take on work at [text deleted] as a baker, but that this would have involved night shift work which he could not do, due to family commitments. He also indicated that his difficulty with reading English would make the bakery job too difficult for him.

Although notations made by the Appellant's case manager indicated that the Appellant had never discussed his motor vehicle accident injuries with his employer, the Appellant denied this and indicated that he had told his manager that he was injured.

The Appellant also confirmed that [Appellant's Doctor #1] and [Appellant's Physiotherapist] had not placed any restrictions upon his working. Despite having worked up to 25 hours a week for 11 months between the motor vehicle accident and his trip to [text deleted], when he went to see [Appellant's Doctor #2], in approximately January of 2009, he was only able to work 4 hours a day and was not able to do any heavy lifting.

The Appellant submitted that following the motor vehicle accident, he saw various physicians and a physiotherapist. He was living with pain following the motor vehicle accident, which impacted upon his ability to do his job. Accordingly, he submitted that he should be entitled to receive IRI benefits from MPIC.

Evidence and Submission for MPIC:

[MPIC's Doctor] testified at the hearing into the Appellant's appeal. He described his education and qualifications, as well as his work as a consultant for MPIC's Healthcare Services Team. He was qualified as an expert physician witness.

[MPIC's Doctor] described his review of the medical evidence on the Appellant's file, leading to his report dated July 3, 2009. The Appellant's case manager had requested that he review the file to determine whether the medical evidence and the reports on file indicated that the Appellant suffered from a physical impairment as a result of the motor vehicle accident which prevented him from continuing to do the regular work duties he had performed prior to the motor vehicle accident.

[MPIC's Doctor] indicated that the information on file indicated that the Appellant had been able to continue with his work duties for approximately six months after the motor vehicle accident. The reports documented that the Appellant suffered symptoms such as muscle tendon strains. These were soft tissue injuries, and the natural history for that type of injury is one of recovery with time, in most cases. Reports on file indicated that the Appellant was assessed after the motor vehicle accident and that his condition had not deteriorated to the point that he was not physically able to perform his previous work duties. [MPIC's Doctor] did not see any objective evidence that the Appellant had sustained an injury that would result in physical impairment preventing him from performing his work duties six months after the motor vehicle accident.

[MPIC's Doctor] also reviewed [Appellant's Doctor #2's] reports and copies of clinic notes. He indicated that the clinic notes did not reflect that significant disabilities had been reported. The Appellant was able to perform his job, although he did report to [Appellant's Doctor #2] that he was having trouble performing it, as a result of symptoms.

A review of the clinical notes also showed that the Appellant had some symptoms or problems with soreness in his neck and back prior to the motor vehicle accident.

[MPIC's Doctor] indicated that the physiotherapist's notes showed that the Appellant's condition had improved with only a small number of treatments, which was in keeping with a soft tissue strain and a sign that no significant problems were present.

[Appellant's Doctor #1's] notes also indicated that the Appellant had suffered a WAD I cervical spine with no other spinal disorders or major physical findings, and as such, it was concluded that the Appellant had suffered a minor injury.

[MPIC's Doctor] concluded that it was not medically probable that the Appellant's symptoms from the motor vehicle accident had resulted in his inability to perform the job he had performed prior to the motor vehicle accident.

Counsel for MPIC submitted that, as had been admitted by the Appellant, his hours and days of work had not been reduced following the motor vehicle accident. Possibly until December 22, 2008, or at least until he left for his six week vacation in [text deleted], the Appellant had worked at the same job, sometimes less and sometimes more than he had worked before the motor vehicle accident. Although he testified that he had some symptoms, he was able to work and was able to travel on an 18 to 20 hour flight to [text deleted].

[MPIC's Doctor's] evidence showed that the Appellant had reported some back and neck pain prior to the motor vehicle accident.

[Appellant's Doctor #1's] diagnosis following the motor vehicle accident was of a WAD I injury, which [MPIC's Doctor] described as a minor injury. No restrictions were placed on the Appellant's activities or ability to work by [Appellant's Doctor #1].

[Appellant's Physiotherapist] reported improvement following only three treatments.

Counsel noted that it was only after the Appellant returned from his vacation that [text deleted] reduced his hours at work, and that the Appellant had not requested this reduction. He told [Appellant's Doctor #2] that he could only work four hours, and his doctor confirmed that this was all he could work, but as [MPIC's Doctor] had pointed out, [Appellant's Doctor #2's]

clinical notes did not reflect a record of disability. The notes did not show any deterioration or indication that the Appellant was getting worse.

Counsel for MPIC submitted that not only was the Appellant substantially able to do the duties of his job following the motor vehicle accident, but that he was in fact doing that job. He worked similar hours both before and after the motor vehicle accident.

Then, after the Appellant returned from vacation, on August 19, 2008, just over six months after the motor vehicle accident, his employer reduced his hours. This was not requested by the Appellant.

Although the Appellant indicated that his hours were reduced in December of 2008, the information on file from the employer shows that the Appellant did not complain of injuries or ask for this reduction of hours.

Counsel submitted that on the balance of probabilities, the information on file and presented at the appeal hearing supported the Internal Review Officer's Decision that the Appellant was not entitled to IRI benefits. Accordingly, she submitted that the Appellant's appeal should be dismissed.

Discussion:

Entitlement to I.R.I. for first 180 days

83(1) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:

> (a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;
>
> (b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

The onus is on the Appellant to show, on a balance of probabilities, that he was unable to continue the employment he held at the time of the motor vehicle accident.

The panel has reviewed the evidence on file as well as the testimony at the hearing from the Appellant and from [MPIC's Doctor].

The panel notes that both [Appellant's Doctor #1] and the physiotherapist diagnosed the Appellant as suffering from a minor WAD I injury. No significant impairment was found at that time and no restrictions were placed upon his activities or work abilities.

Later reports by [Appellant's Doctor #2], dated May 28, 2009 and September 1, 2009, indicated that the Appellant was disabled as a result of his motor vehicle accident injuries:

> "This man continues to experience pain and spasm in his neck, shoulders, back and lower back. His symptoms get worse after working three to four hours at his job with [text deleted]. It is my opinion that he is able to work just three to four hours per day, three to five days per week as a result of the injuries sustained in the motor vehicle accident of February 8, 2008."
>
> "It is my opinion that he is able that he is able (sic) to work just three to four hours each day as a result of the injuries sustained in the motor vehicle accident of February 8, 2008. He continues to experience a significant degree of ongoing disability as of (sic) direct result of the injuries sustained in the motor vehicle accident of February 8, 208 (sic). I suspect that his injuries are permanent."

[MPIC's Doctor] reviewed the reports on file and [Appellant's Doctor #2's] chart notes. He found evidence of the Appellant suffering from prior symptoms in his neck and back. [MPIC's

Doctor] did not find any evidence of significant injuries or restrictions upon the Appellant's ability to work.

The panel finds that this is consistent with the evidence of the Appellant's work history.

Following the motor vehicle accident, the Appellant continued to perform the duties of his job and continued to work similar hours, which varied slightly from week to week, as he had worked before the motor vehicle accident, until the period from July 2 to August 18, 2008, when he was away on vacation in [text deleted].

The Appellant returned and continued working until December 2008. He then indicated to the Internal Review Officer that he worked fewer hours, until April 20, 2009. The Appellant testified that the employer had reduced his hours at that point, without the Appellant asking him to reduce his working hours on account of his injury.

The panel finds that the Appellant was not impaired by his motor vehicle accident injuries in performing the substantial duties of his job. In fact, we find that he continued to work at his job for essentially the same or similar hours following the motor vehicle accident and that any reduction in the hours he worked did not occur as a result of the motor vehicle accident or the injuries he sustained therein.

Accordingly, the decision of the Internal Review Officer dated October 6, 2009 is confirmed and the Appellant's appeal is dismissed.

Dated at Winnipeg this 2nd day of December, 2010.

LAURA DIAMOND

LINDA NEWTON

SANDRA OAKLEY