

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-28**

PANEL: Ms Laura Diamond, Chairperson
Dr. Neil Margolis
Ms Linda Newton

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.

HEARING DATE: October 7, 2010

ISSUE(S): Whether the Appellant's Income Replacement Indemnity Benefits were correctly terminated effective October 31, 2009 pursuant to Section 110(1)(a) of the MPIC Act.

RELEVANT SECTIONS: Section 110(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 was injured in a motor vehicle accident on December 10, 2008. As a result of the accident, she reported soft tissue injuries affecting her neck and back.

At the time of the accident, the Appellant was a self-employed Financial Planner.

Two months later, on February 12, 2009, the Appellant initiated an injury claim with MPIC. She was then provided with Income Replacement Indemnity ("IRI") benefits from MPIC until

October 31, 2009. At that time, she was deemed capable of resuming her full duties as a Financial Planner and her entitlement to IRI benefits was ended.

The Appellant sought an Internal Review of this decision. On January 5, 2010, an Internal Review Officer for MPIC found that by October 31, 2009, or possibly sooner, the Appellant was entirely or substantially able to perform the essential duties of a financial planner as a result of the injuries arising out of the motor vehicle accident in question. Her Application for Review was dismissed.

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 her appeal. She described her level of fitness prior to the motor vehicle accident. She worked out in the gym five days a week and worked as a Financial Planner.

After the motor vehicle accident, she felt pain and pressure in the centre of her back. She found it difficult to even stand at the kitchen counter for 10 minutes and described the pain as excruciating. She also started having trouble with her legs, feeling pain on the side.

A primary health care report dated November 27, 2009 was provided by the [Appellant's Doctor] who noted shoulder and back pain, radiating into the leg.

Following consultation with her case manager, the Appellant was referred to [Independent Doctor], Sport Medicine Physician, for a third party medical examination.

The Appellant testified that [Independent Doctor] suggested that she go into the gym to try and build up her muscles, so she went to the gym for some workout sessions. He also suggested she go see [Appellant's Chiropractor], who provided dry needling treatments. She found these to be painful, but they did provide her with some relief in her back. Towards the end of the treatments he started to treat her leg with the dry needling.

The Appellant described her attempts to build up her walking tolerances, and a trip to Hawaii where the pain made it very difficult for her to walk for exercise. She noted that between October 2009 and February 2010 she couldn't do her job because of her injuries. She couldn't walk even a block and any time on her feet created a pain in her back and caused her to limp. She could not carry or lift anything. She testified that she tried to strengthen her arms and back in the gym but that the pain was "horrific".

On cross-examination, the Appellant acknowledged that she had, prior to the motor vehicle accident, some problem with aching knees and with her left shoulder, resulting from a previous motor vehicle accident. Although she acknowledged that she had taken an anti-inflammatory, [text deleted], she noted that it was a long time ago and that she had been off it at the time of the motor vehicle accident. She agreed that the [text deleted] had been prescribed to address lower lumbar arthritis and that she had been troubled by lumbago with attendant pain in the lumbar region and sciatica in the thigh and left leg. In her view, this was aggravated by the motor vehicle accident.

Counsel for MPIC also reviewed a Job Demands Analysis of the Appellant's work which had been conducted by an occupational therapist. That Job Demands Analysis described the Appellant's occupation as sedentary, involving mostly sitting with a limited strength rating.

The Appellant described ergonomic changes made to her home office, recommended by the occupational therapist, which assisted her.

She was also asked about the work-hardening program she attended at [Rehab Facility], which she participated in at the recommendation of [Independent Doctor]. This was an eight week program. The Appellant noted that there was some improvement to her neck and shoulder following this but she still had low back and mid-back pain.

The Appellant submitted that although she had some prior back, shoulder and leg pain before the motor vehicle accident, the doctors' reports on file make it clear that this was aggravated by the motor vehicle accident. She submitted that she had not asked for the motor vehicle accident to happen. She had been rear-ended and cannot help it if she is not recovering as fast as MPIC would like her to.

The Appellant submitted that after the work-hardening program, when MPIC took the position that she could not improve any further, she still required assistance, particularly on stairways. Following the accident, the pain in her back had been so severe that she could not obtain any relief until she started receiving the dry needling treatments in the fall of 2009, so she had not been ready to work at that time and still required treatment.

She submitted that she did everything that MPIC asked her to do but to this day, if she is on her feet more than half an hour, she still experiences pain. She maintained that her job was not a sedentary job, but rather that she is up and down looking after clients, answering phones, retrieving files and other such activities. If she sits at her computer for more than 25 minutes she has to get up (due to the pain) and move around. Her new boss has been accommodating to let her interrupt her work that way, but she submitted that she is not doing the job that she used to do and only makes half of the income that she made before the motor vehicle accident.

Evidence and Submission for MPIC:

Counsel for MPIC noted that the Appellant came to the motor vehicle accident with a pre-existing medical history of lumbago, sciatica, discomfort in the leg and some inability to sit or stand. This continued after the motor vehicle accident. He noted that the treatment for this pain with [text deleted] was the same after the accident as it had been prior to the motor vehicle accident.

Further, he submitted that the Appellant's job is a sedentary, light strength rated occupation.

Counsel for MPIC reviewed [Independent Doctor's] independent medical examination report. The doctor reviewed her continuing symptomatology and diagnoses, finding that her mechanical neck pain was mostly resolved. He had not had the opportunity to review [Appellant's Doctor's] chart notes which pointed out an ongoing history with lumbago and sciatica. However, he still felt that the Appellant had recovered, in terms of functional/impairment and had achieved the physical ability to perform full work duties. She still had some symptomatic complaints, with regional areas of tenderness, so he recommended a reconditioning program assessment with [Rehab Facility]. Given the sedentary nature of her employment, it was recommended that the

Appellant be provided with a six week reconditioning program at a frequency of three times per week.

MPIC arranged this program, which the Appellant successfully completed in October of 2009. Counsel submitted that the Appellant had been successful in the program. Tests and measurements performed at the end of the program demonstrated physical abilities consistent with those required in her job.

Counsel for MPIC reviewed a Job Demands Analysis/Percentage of Duties Assessment which reviewed the components of the Appellant's employment as a certified financial planner/self-employed. He noted that at the work-hardening program the caregivers had been well aware of what her job entailed. The physiotherapist who completed the discharge report following this program, noted, on October 7, 2009 that based on the information on file regarding her job as a Financial Planner, it was his opinion that the Appellant demonstrated physical abilities consistent with those required in her job, specifically a job of sedentary physical demands. He noted some degree of deconditioning with respect to her leg strength, but did not believe this was a significant factor with respect to her job demands.

Counsel noted that although the Appellant had continued to receive the dry needling treatments from [Appellant's Chiropractor], the Appellant had not provided any evidence or reports from [Appellant's Chiropractor] to indicate that she was not able to perform her work as a financial planner while receiving dry needling treatments.

Although [Appellant's Doctor] had reported, in a healthcare report dated November 27, 2009, that the Appellant's clinical condition precluded travel to and from the workplace and posed a

safety health risk to the patient or coworkers, he had also noted that it did not result in an inability to perform required tasks.

Counsel submitted that, as concluded by [MPIC's Doctor] in his review of the file, [Appellant's Doctor's] outline of the Appellant's ongoing symptoms did not indicate that she had a physical impairment of function that in turn would preclude her from performing the required demands for occupation. It was [MPIC's Doctor's] view, on December 14, 2009, that the Appellant had been shown to be physically capable of performing the required demands of her occupation.

Counsel submitted that the Appellant's appeal should be dismissed.

Discussion:

The relevant provision of the MPIC Act is:

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;

The onus is upon the Appellant to show, on a balance of probabilities, that the Internal Review Officer was not correct in concluding that, by October 31, 2009, she was able to perform the essential duties of her occupation as a Financial Planner, and to establish that she should be entitled to further IRI benefits.

The panel has reviewed the evidence on the Appellant's file, as well as the testimony and submission of the Appellant and submission of counsel for MPIC.

The panel does not agree with the Appellant that MPIC's decision to provide her with dry needling treatments for pain management means that she could not work after October 31, 2009.

Although there is no documentary evidence to show that the Appellant received such treatments after the termination of her IRI benefits, she did testify at the hearing that they continued until approximately December of 2009. The Appellant testified that she continued to suffer from some symptoms, and MPIC continued to provide dry needling treatments to deal with those symptoms.

However, although the panel accepts that the Appellant continued to suffer from some discomfort following October 31, 2009, a review of the Physical Demands Analysis describing her job, and the medical assessments conducted by [Independent Doctor] and [text deleted], lead us to conclude that when her level of function is compared with the light strength, largely sedentary demands of this occupation, she had the ability to perform that job by October 31, 2009. On a balance of probabilities, the evidence does not support her position that her injuries or symptoms prevented her from performing the essential duties of her occupation at that time.

The only evidence which might support this claim of the Appellant was the subsequent healthcare report of [Appellant's Doctor], who checked boxes to indicate that there were some problems with travel to and from the workplace and a risk to the patient and coworkers. However, [Appellant's Doctor] also checked a box to indicate that the Appellant's condition did not result in an inability to perform her required tasks. No other, more detailed, narrative report from [Appellant's Doctor] was provided to support the Appellant's position that she was not able to work at her job by October 31, 2009 and the panel finds that this brief report of November 27,

2009, inconsistent as it is, is insufficient to meet the onus upon the Appellant of showing that she was not able to work at her occupation at the relevant time.

The panel finds that there is insufficient evidence, either oral or documentary which supports the Appellant's contention that she could not work at her sedentary occupation as a Financial Planner following October 31, 2009.

Accordingly, we find that the Appellant has not provided sufficient evidence to meet the onus upon her of showing that the Internal Review Officer was wrong in finding that she was able to work at her occupation effective October 31, 2009 and that her IRI benefits should be terminated.

Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated January 5, 2010 is confirmed.

Dated at Winnipeg this 28th day of October, 2010.

LAURA DIAMOND

DR. NEIL MARGOLIS

LINDA NEWTON