

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]**  
**AICAC File No.: AC-98-08**

**PANEL:** Ms Yvonne Tavares, Chairperson  
Mr. Les Marks  
Ms Deborah Stewart

**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. Kirk Kirby.

**HEARING DATES:** September 29 and 30, 2010

**ISSUE(S):** Entitlement to Income Replacement Indemnity benefits for the period July 21, 1997 to September 12, 1997.

**RELEVANT SECTIONS:** Section 81(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, [text deleted] was involved in a motor vehicle accident on May 13, 1994, when her vehicle t-boned another vehicle. As a result of that accident, the Appellant sustained injuries to her neck, right arm, right shoulder and right hip. Due to the bodily injuries which the Appellant incurred in this motor vehicle 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 had 3 separate employments, as follows:

1. She was employed with [text deleted] on a seasonal basis, processing income tax returns;
2. She tutored students at [text deleted]; and
3. She ran a small [text deleted] business out of her home.

Due to the injuries which the Appellant sustained in the motor vehicle accident, she was unable to continue her employment with [text deleted] after the accident. Accordingly, she qualified for income replacement indemnity (“IRI”) benefits.

The Appellant received IRI benefits for her employment at [text deleted] from May 21, 1994 until June 8, 1994 when she would have been subject to the seasonal lay off. She returned to her position with [text deleted] on February 27, 1995 and worked there until the seasonal lay off on June 6, 1995. The Appellant returned to [text deleted] on February 26, 1996 and worked there until she was subject to the seasonal lay off on June 7, 1996. The Appellant again returned to [text deleted] on February 18, 1997 and was employed there until July 18, 1997 when she ceased working.

The Appellant requested further IRI benefits from MPIC commencing July 21, 1997 on the basis that her shoulder injury (sustained in the May 13, 1994 motor vehicle accident) prohibited her from continuing with her employment at [text deleted].

In a decision dated November 28, 1997, MPIC's case manager advised the Appellant that she did not qualify for further IRI benefits arising from the May 13, 1994 motor vehicle accident. The case manager found that:

As previously stated, in order to be eligible for PIPP, there must be a causal connection between the injury preventing you from doing your job and the motor vehicle accident in question. Given all of the above facts, the medical and other information does not support a causal relationship between your shoulder injury and your inability to perform your duties at [text deleted].

The Appellant sought an internal review of that decision. In a decision dated January 21, 1998, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found as follows:

It is not surprising when one considers all of the above that MPI would have concerns over your suggestion that your absence from [text deleted] approximately three years after the accident is related to injuries from that accident. In that regard the file was referred to [MPIC's Doctor], Medical Services Team, and he provided a thorough assessment of the claim based upon all of the information contained in your file. While you have expressed concerns about [MPIC's Doctor's] findings you will have no doubt noted his comments concerning the absence of objective findings in the reports of [Appellant's Doctor #1]. I am not of the view that [Appellant's Doctor #2's ] conclusions are totally persuasive of the issue before me given the fact that you attended upon him for approximately 15 minutes on a walk-in clinic basis only.

Accordingly, in light of the above and particularly the report of [MPIC's Doctor] dated November 21, 1997, it is my view that [text deleted] had ample evidence upon which to base his decision of November 24, 1997 and I uphold same.

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 IRI benefits for the period July 21, 1997 to September 12, 1997.

**Appellant's Submission**

The Claimant Adviser, on behalf of the Appellant, submits that the Appellant was unable to continue with her position at [text deleted] in July 1997 due to her right shoulder pain. She argues that the Appellant never had any shoulder pain prior to the motor vehicle accident. The shoulder pain was caused by the motor vehicle accident of May 13, 1994 and has continued ever since. The Claimant Adviser maintains that the Appellant's shoulder pain was aggravated by the rapid repetitive hand movements required in her position as a clerk at the [text deleted]. The Appellant's pain would subside following the completion of her term each year. However in 1997, the pain in the Appellant's shoulder increased to the point that she was no longer able to continue her job with the [text deleted] and had to stop her employment on July 18, 1997 due to the increased pain from her shoulder injury.

The Claimant Adviser maintains that the Appellant was an ambitious individual who made every effort to remain employed. The Appellant's shoulder injury prevented her from continuing with her employment at [text deleted] as it was easily aggravated by the rapid repetitive hand movements required in the Appellant's position processing tax returns with [text deleted]. As a result, the Claimant Adviser argues that the Appellant is entitled to IRI benefits for the period July 21, 1997 to September 12, 1997.

**MPIC Submission**

Counsel for MPIC submits that the Appellant has not established that her inability to continue with her [text deleted] employment was due to an injury sustained in the motor vehicle accident of May 13, 1994. Counsel for MPIC maintains that the Appellant left her seasonal employment with [text deleted] due to long standing medical problems which predated the accident of May 13, 1994. Further, counsel for MPIC claims that the

Appellant's injuries related to the motor vehicle accident of May 13, 1994 could have been resolved much sooner if she had complied with the treatment recommendations of [Rehab Facility #1] and [Rehab Facility #2].

Additionally, counsel for MPIC relies upon the videotape surveillance of the Appellant taken during a road trip by the Appellant from [Manitoba] to [Ontario] in October 1997. The surveillance revealed that the Appellant was the sole driver for the trip with her [text deleted] young children. She was very active during the trip and was videotaped shopping, running, walking, carrying items and groceries in both hands, picking up a child, bending, operating a video camera with her right hand, squatting, and shaking her head vigorously, pulling a buggy with her left hand while her son was seated inside, carrying a back pack over both shoulders, carrying a laundry basket, carrying a suitcase, using both hands and arms to assist her climbing a gym apparatus. Counsel for MPIC maintains that the Appellant did not, at any time during the videotape surveillance, show any kind of pain, discomfort, restriction of movement or any limitation whatsoever during the extensive surveillance. Counsel for MPIC maintains that the surveillance in Ontario and [Manitoba] demonstrates she was very active and showed no signs of any problem with her right arm or shoulder.

Counsel for MPIC further submits that the medical reports provided by the Appellant's caregivers are questionable given that the Appellant's doctors did not have a complete picture of her history or her functional abilities. Counsel for MPIC maintains that in light of the videotape surveillance showing the Appellant to be functionally able to carry out numerous activities, the Appellant has not established an inability to continue with her employment at [text deleted] from July 18, 1997 to September 12, 1997. As a result,

counsel for MPIC submits that that Appellant's appeal should be dismissed and the Internal Review Decision dated January 21, 1998 should be confirmed.

### **Decision**

Upon a careful review of all of the 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 an entitlement to IRI benefits for the period July 21, 1997 to September 12, 1997.

### **Reasons for Decisions**

The Commission finds that the Appellant has failed to establish, on a balance of probabilities, that she was physically unable to continue with her employment at [text deleted] beyond July 18, 1997. In this respect, the Commission finds that the Appellant's activities demonstrated on the videotape surveillance are inconsistent with her reported limitations in function to MPIC and to her employer. Further, the Appellant's evidence that she built a fence in her backyard in July 1997, shortly after leaving her employment with [text deleted], is also inconsistent with her reported level of functional limitations.

In light of all of the evidence before us, including the videotape surveillance, the Commission is unable to conclude that the Appellant was functionally unable to hold her employment as a clerk with [text deleted] beyond July 18, 1997. Rather, the videotape surveillance demonstrates that the Appellant was an active individual with no pain behaviours, discomfort, restriction of movement or any limitation whatsoever during the extensive surveillance.

Additionally, the Commission finds that the Appellant has not established, on a balance of probabilities, that her inability to continue with her employment at [text deleted] beyond July 18, 1997 was caused by the motor vehicle accident of May 13, 1994. Throughout the Appellant's employment with [text deleted] subsequent to the accident, she was able to attain the high level of proficiency and accuracy required in that position. Additionally, based upon the medical reports documenting pre-accident numbness in both of the Appellant's hands, the Commission is not satisfied that the Appellant's difficulties with her right arm and shoulder had their origin in the motor vehicle accident of May 13, 1994. Given that the Appellant was able to work for the 1995, 1996 and the 1997 tax seasons, we find that there is simply a lack of evidence to attribute any difficulties beyond July 18, 1997 to the motor vehicle accident of May 13, 1994.

Accordingly, the Appellant's appeal is dismissed and the Internal Review Decision dated January 21, 1998 is therefore confirmed.

Dated at Winnipeg this 8<sup>th</sup> day of November, 2010.

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**YVONNE TAVARES**

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**LES MARKS**

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**DEBORAH STEWART**