

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-102**

PANEL: Ms Yvonne Tavares, Chairperson
Dr. Sheldon Claman
Ms Sandra Oakley

APPEARANCES: The Appellant, [text deleted], was represented by Ms Darlene Hnatyshyn of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.

HEARING DATE: September 13, 2012

ISSUE(S): Entitlement to Income Replacement Indemnity benefits.

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, [text deleted], was involved in a motor vehicle accident on July 22, 2003, when the vehicle he was a passenger in was rear-ended by a semi-trailer truck. As a result of this accident, the Appellant sustained a sore neck and lower back pain radiating into his left leg.

Prior to this accident, the Appellant had back problems and problems with his right leg. In 1999, he had back surgery – decompression of L4 and L5. Due to the surgery, his symptoms lessened to a degree, but a CPP Medical Report from [Appellant's Doctor] dated March 18, 2003, reflects a diagnosis of lumbar degenerative disc disease and sciatica.

At the time of the motor vehicle accident, the Appellant was receiving CPP disability benefits, due to a retinal detachment and his back condition. However, he was also self-employed as a furnace installer/cleaner, working part-time. This income supplemented his CPP disability benefits. Due to the left leg pain resulting from the motor vehicle accident of July 22, 2003, the Appellant was unable to continue with his self-employed duties as a furnace installer and furnace cleaner. MPIC accepted that the Appellant's left leg symptoms were causally connected to the motor vehicle accident of July 22, 2003 and the Appellant received income replacement indemnity ("IRI") benefits from July 30, 2003 to January 25, 2005.

MPIC's case manager provided a decision dated April 11, 2006, wherein MPIC reviewed the Appellant's entitlement to IRI benefits and provided a reconciliation of his IRI entitlement from July 30, 2003 to January 26, 2005. Arrangements were also made for the Appellant to undergo a Percentage of Duties Assessment with [Appellant's Occupational Therapist] of [Rehabilitation Clinic]. [Appellant's Occupational Therapist] provided a report dated May 3, 2006 wherein he stated that, "*Based on objective observations, measurements and verbal interview with the claimant, it is opined that [the Appellant] is currently capable of working 88% of his job duties.*" [Appellant's Occupational Therapist] further added that this calculation was based upon the following factors:

1. 5 days per week
2. 4 hours per day
3. 90% of duties are **Light** strength demand – Cleaning/inspecting
4. 10% of job duties are **Medium** strength demand – Replacing equipment
5. Claimant demonstrates the ability to work at a Light strength demand based on objective testing. (handling up to 20 lbs)

Subsequently, the Appellant requested IRI benefits from January 26, 2005, to the date that the Percentage of Duties assessment was completed (April 24, 2006), as he advised that he was still unable to return to his self-employment as a furnace cleaner/installer. In a decision dated May

30, 2006, MPIC's case manager found that the medical information on the Appellant's file did not support an inability to continue with his employment. As a result, the case manager determined that there was no further entitlement to IRI benefits for the Appellant.

The Appellant sought an Internal Review of that decision. In a decision dated January 3, 2007, the Internal Review Officer allowed the Appellant's Application for Review and found that the evidence did not support the decision denying IRI benefits for the period from January 26, 2005 until April 24, 2006. The Internal Review Officer found that the evidence on the Appellant's file showed that the Appellant had chronic pain and chronic lumbar disc disease as well as a retinal detachment for which he was receiving CPP disability benefits. The Internal Review Officer determined that there was medical evidence supporting a connection with left leg numbness and the motor vehicle accident. He found that the Appellant's left leg pain prevented him from working at his pre-injury levels. As a result, the Internal Review Officer allowed the Appellant's Application for Review and found that the Appellant was entitled to IRI benefits for the period from January 26, 2005 until April 24, 2006.

MPIC's case manager provided an income replacement reconciliation decision dated January 11, 2007, wherein MPIC provided the Appellant with an IRI reconciliation for the period from January 26, 2005 to April 24, 2006. The decision further stated that there was no further entitlement to IRI benefits beyond April 24, 2006. Subsequently, the Appellant requested IRI benefits from April 24, 2006 to February 19, 2007. The Appellant indicated that he was still not working at his pre-accident level during this time period. MPIC's case manager subsequently reviewed the Appellant's file and further information supplied by the Appellant. In a decision dated August 3, 2007, MPIC's case manager advised the Appellant that there was no entitlement to IRI benefits beyond April 24, 2006. The case manager found that there was no medical

evidence to support that the Appellant was unable to perform his occupational duties as the owner/operator of [text deleted] during the time period from April 24, 2006 to February 19, 2007.

The Appellant sought an Internal Review of that decision. In a decision dated September 5, 2007, 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 evidence on the Appellant's file did not support an entitlement to IRI benefits beyond April 24, 2006. The Internal Review Officer's decision was based upon the Percentage of Duties Assessment completed by [Appellant's Occupational Therapist] on April 24, 2006 which found that the Appellant was capable of working 88% of his job duties.

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 from April 25, 2006 to February 19, 2007.

Appellant's Submission:

The Claimant Adviser submits that as a result of the injuries which the Appellant sustained in the motor vehicle accident of July 22, 2003, the Appellant was not able to return to his pre-accident level of functioning as of April 24, 2006. The Claimant Adviser argues that the Appellant attempted to return to work after April 24, 2006, but he was not able to work at the same level as prior to his motor vehicle accident. She maintains that the Appellant is a credible individual, sincerely trying to work in the face of many obstacles. The Claimant Adviser argues that the Appellant was just as frank, forthright and credible in his testimony before the Commission as

when MPIC overturned their prior decision extending his IRI benefits for the period from January 26, 2005 to April 24, 2006.

The Claimant Adviser submits that the Percentage of Duties Assessment conducted by [Appellant's Occupational Therapist] was flawed and inadequate. She maintains that the Appellant did not have the opportunity to review the assessment when it was completed. The Claimant Adviser argues that based upon the Appellant's testimony at the appeal hearing, the Appellant was not able to work at his pre-motor vehicle accident level from April 25, 2006 until February 19, 2007. As a result, she argues that the Appellant is entitled to IRI benefits for that period. She therefore submits that the Internal Review Decision dated September 5, 2007 should be rescinded and the Appellant's appeal allowed.

MPIC's Submission:

Counsel for MPIC submits that the Appellant has not established a reduced ability to perform his employment from April 25, 2006 to February 19, 2007, due to the motor vehicle accident of July 22, 2003. Counsel for MPIC argues that despite the Appellant's extensive pre-existing medical conditions, and to his credit, the Appellant has been able to do a fairly physically demanding type of work as a furnace installer/cleaner. Counsel for MPIC claims that the alleged reduction in the Appellant's business in 2006 was due to business reasons, rather than any reduced functional ability on the Appellant's part. Counsel for MPIC notes that the Appellant sold his business in 2003. As a result, counsel for MPIC maintains that it would take some time for the Appellant to get his business back to the same level as before the motor vehicle accident.

Counsel for MPIC also submits that the Appellant's evidence with respect to his functional abilities was not consistent. He argues that according to the invoices supplied by the Appellant

for the work which he did perform from April 2006 until December 2006, the Appellant was able to supply and install furnaces for more than one job within the same week. As a result, counsel for MPIC argues that the Appellant was doing the heavy labour component of his job more than 10% of the time, which is consistent with the Percentage of Duties Assessment completed by [Appellant's Occupational Therapist]. Accordingly, counsel for MPIC submits that the Percentage of Duties Assessment completed by [Appellant's Occupational Therapist] on April 24, 2006 was an accurate reflection of the Appellant's abilities at that time.

Counsel for MPIC submits that the Appellant has not established a physical inability to return to his employment beyond April 24, 2006. Rather, he submits that the medical evidence establishes that the Appellant was capable of working at his pre-motor vehicle accident level, at least substantially when he returned to work. Accordingly, counsel for MPIC submits that the Appellant's appeal should be denied, and the Internal Review decision dated September 5, 2007 should be confirmed.

Decision:

Upon hearing the testimony of the Appellant, and after 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 Claimant Adviser and of counsel for MPIC, the Commission finds that the Appellant is not entitled to IRI benefits for the period from April 25, 2006 to February 19, 2007.

Reasons for Decision:

Upon a review of all of the relevant evidence before it, the Commission finds that there is insufficient evidence to establish that the Appellant was not able to return to his pre-accident

level of functioning, due to his motor vehicle accident related injuries, for the period from April 25, 2006 to February 19, 2007.

The Commission finds that the Appellant's testimony was insufficient to establish a reduced work capacity from April 25, 2006 to February 19, 2007. The Appellant's subjective complaints and indication that he was unable to return to work at his pre-accident level from April 25, 2006 until February 19, 2007 are insufficient to establish an inability to return to work in the circumstances of this case. This is particularly so given the contradictory evidence presented by the Percentage of Duties Assessment completed by [Appellant's Occupational Therapist], on April 24, 2006. The Commission accepts this Assessment and finds that it establishes, on the balance of probabilities, that the Appellant had the ability to substantially perform his pre-accident employment as at April 24, 2006. We find that this assessment provides the most accurate indication of the Appellant's functional abilities at the relevant time.

Accordingly, the Commission finds that the Appellant is not entitled to IRI benefits beyond April 24, 2006. As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated September 5, 2007 is confirmed.

Dated at Winnipeg this 22nd day of October, 2012.

YVONNE TAVARES

DR. SHELDON CLAMAN

SANDRA OAKLEY