Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-064

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Paul Johnston** **Ms Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**March 28, 2012**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits beyond December 27, 2009.**
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 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 was injured in a motor vehicle accident on March 11, 2007. As a result of the accident she reported chest pain, right side pain from her shoulder to waist, neck, back and left side pain and numbness in her right hand and right foot. She also complained that she felt dizzy when she stood to walk.

At the time of the accident the Appellant was employed part-time as a daycare worker. As a result of the accident the Appellant was not capable of working at her job. She was classified as a part-time earner and received Income Replacement Indemnity ("IRI") benefits.

The Appellant was then involved in another accident on August 15, 2007.

On September 26, 2007, the Appellant's case manager set out her 180 day determination, pursuant to Section 83(1) of the MPIC Act as a "daycare worker". It was indicated that as of September 8, 2007, the Appellant's continued entitlement to IRI was based on her capacity to hold that determined employment.

The case manager attempted, through gradual return to work programs, to arrange the Appellant's return to the workplace. However, these were unsuccessful, due to the Appellant's reports of pain. The Appellant was assessed and treated by a psychologist, who explored the possibility of post-traumatic stress disorder, panic disorder and/or depression. On June 10, 2009, the psychologist indicated that the Appellant's psychological condition would not preclude her from returning to the workplace.

A third party medical examination was conducted by [independent doctor] on August 14, 2009. He indicated that although the Appellant was experiencing a pain disorder, there was no evident physical impairment and the Appellant could resume work activities on a gradual basis.

The Appellant's file was reviewed by [MPIC's psychologist], psychological consultant with MPIC's Health Care Services, on November 10, 2009. It was his view that the Appellant's

diagnosis of a pain disorder would not preclude her from performing the determined employment of a daycare worker on a full-time basis.

On November 18, 2009, the Appellant's case manager issued a decision letter indicating that based on the information from the psychologists and [independent doctor], the Appellant was physically and psychologically capable of performing the essential duties of her determined employment and that she was not entitled to any further IRI benefits. Four more sessions of psychotherapy would be funded by MPIC.

The Appellant sought an Internal Review of this decision. On April 22, 2010 the Internal Review Officer upheld the case manager's decision regarding entitlement to IRI and overturned the decision regarding entitlement to psychological care.

The Internal Review Officer indicated that the medical and psychological evidence on the Appellant's file indicated that she was functionally capable of performing the essential duties of her determined employment and upheld the case manager's decision in that regard.

However, the Internal Review Officer found that the Appellant may be entitled to a further four sessions of psychological treatment funded by MPIC, and referred that issue back to the case manager.

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 work at the daycare and indicated that even working five hours caused her to be in pain physically, financially and emotionally.

She described her job as working with two and three year olds and indicated that because of her pain she should not even do this. She was then moved to work in the school age program so that she would not have to lift children. However, she was in too much pain to even work five hours.

Then in September of 2009, the school age program closed. The Appellant testified that she could not work with the two year olds because of her pain. She couldn't work and stopped working on July 30, 2010.

Since that time, she worked in [text deleted] as a substitute. In this way, when she has pain and can't work, she does not take on substituting duties.

The Appellant described the pain in her upper and lower back, as well as her neck and the right side of her body. She says that she is now feeling better, but still has pain on the right side of her back. She indicated that following the motor vehicle accident, her pain prevented her from working more than 3 to 4 hours a day, but that by December 2009 she was able to work for five hours a day.

On cross-examination, the Appellant indicated that although she loved working with children, it was not just lifting the children in the toddler and pre-school programs which was difficult for

her. She also had difficulty with bending over to wipe tables for the children and was concerned about her ability to help children on the playground.

[Text deleted]. When asked why she couldn't work five or six hours a day at the daycare, in spite of the reports of [independent doctor], the Appellant indicated that it was because of her pain and that the doctor did not know her pain. Because of this pain, she could not work eight hours, or even five hours, at the time when her MPIC IRI benefits were terminated. She was seeking IRI benefits from the end of December 2009 until she began working for the school division in October 2010.

The Appellant submitted a report from [Appellant's physiatrist], a physiatrist, dated May 25, 2011. [Appellant's physiatrist] addressed findings on the Appellant's CT Scan of a lucency in the body of C2. Investigation confirmed a benign lesion and a small posterior disc protrusion. [Appellant's physiatrist] indicated that there would be no clinical or radiological evidence to suggest that the Appellant had a medical contraindication to perform her duties as a child daycare worker as a result of the lucency. He indicated that on the basis of clinical examination and the likelihood of incidental small posterior disc protrusions in the general asymptomatic population, it is possible, but not probable, that her C3-C4 disc protrusion was caused by the motor vehicle accident in question.

The Appellant also submitted a letter dated September 22, 2011 from [Appellant's doctor]. [Appellant's doctor] opined that if the Appellant's lucency shown at C2 was an area of benign fatty marrow, it was unlikely to impact upon her performing her daycare worker duties. However, he noted that he would not rule out the possibility of the motor vehicle accident contributing to the Appellant's C3-C4 disc protrusion.

The Appellant submitted that the Internal Review Decision should be overturned and her appeal upheld by the Commission.

Evidence and Submission for MPIC:

Counsel for MPIC submitted that the evidence was overwhelming that the Appellant was able to return to work as a daycare worker on a full-time basis. He based this submission upon the material in the Appellant's indexed file and her medical file, as well as the more recent reports obtained in 2011.

Counsel reviewed [independent doctor's] report of August 14, 2009, following an independent examination. He found that the Appellant was capable of working six hours a day and that there was no physical impairment to prevent her from working eight hours a day, as long as she was not required to lift children under the age of three or four. He recognized the issues involved in the Appellant's pain disorder and recommended further psychological pain management interventions, including education and the achievement of function. He also recommended, since the Appellant was currently at six hours per shift, that it may be of benefit to gradually increase to eight hours in order to limit any major increases of pain.

This led to a new gradual return to work schedule for the Appellant in October 2009, with lifting requirements removed from her job on a permanent basis. The Appellant was, under this schedule, to begin working eight hours a day by December 21, 2009.

Counsel also reviewed reports from the psychologist, [Appellant's psychologist]. In a report dated October 14, 2009, [Appellant's psychologist] set out a diagnosis of "Pain Disorder with

depressive and anxiety-based symptomatology". She noted that the Appellant's current psychological conditions did not preclude her from travelling to and from the workplace, did not result in an inability to perform required tasks, nor pose a safety or health risk to her or to coworkers or prevent her from performing activities of daily living. She noted that the Appellant:

> "is currently not functioning in her reported pre-accident capacity, although, this is confused by the fact that she did reduce her work schedule as a result of commencing university.
>
> Goals of further psychological treatment would be to continue with the pain management protocol and focus on comfort, decreasing psychological distress, and relapse prevention strategies."

[Appellant's psychologist's] opinion was reviewed by [MPIC's psychologist], psychological consultant with MPIC's Health Care Services, on November 10, 2009. [MPIC's psychologist] concluded:

> "Based on the review of the file information, it is the writer's opinion that the claimant's current diagnosis of a pain disorder would not preclude her from performing the determined employment of a daycare worker on a full time basis. As noted, the claimant is increasing her hours of work and, from a psychological perspective; [Appellant's psychologist] does not feel that the claimant is precluded from engaging in such employment.
>
> It is the writer's opinion that the claimant's current pain diagnosis with associated depression and anxiety symptomatology would be considered causally related to the MVA."

As a result, [MPIC's psychologist] recommended further follow-up sessions with [Appellant's psychologist].

As a result of [MPIC's psychologist]' report, as well as [independent doctor] and [Appellant's psychologist]'s reports, the Appellant's case manager informed her, on November 17, 2009, that her IRI benefits would be ending on December 6, 2009. She would continue with her gradual

return to work plan and by the week of December 21, 2009 she should reach eight hours per day. However, in light of discussions in November 2009, the case manager revised this date, and provided a decision letter dated November 26, 2009 confirming that the Appellant's IRI benefits would end on December 27, 2009.

Counsel for MPIC also reviewed [Appellant's physiatrist's] report of May 25, 2011. He noted that, in [Appellant's physiatrist's] view, there was no medical reason why the Appellant couldn't work. He stated that the disc protrusion was possibly, but not probably related to the motor vehicle accident, recognizing that such findings are incidental in the asymptomatic general population. Although he saw her in January of 2010, just following the end of her IRI benefits, [Appellant's physiatrist] clearly saw no reason to refer her to any other specialists for assessment or treatment.

Counsel also reviewed [Appellant's doctor's] report of September 22, 2011. Although [Appellant's doctor] did not "rule out the possibility" of the motor vehicle accident contributing to the Appellant's disc protrusion, he was not prepared to say that it was caused by the motor vehicle accident on a balance of probabilities. Counsel noted that this was not sufficient to meet the Appellant's onus of showing that the protrusion was caused by the motor vehicle accident. Further [Appellant's doctor] did not state that the Appellant was not capable of performing the requirements of her job.

Counsel submitted that the Appellant's duties had already been modified, to remove the requirement of lifting children from her job duties, in 2009. There was no evidence, let alone convincing evidence, to support the position that she could not work full-time at a daycare. As

such, she had failed to meet the onus upon her before the Commission to establish that the Internal Review Decision was in error.

The evidence of [independent doctor], [Appellant's physiatrist] and [Appellant's doctor] all support MPIC's position. None of the medical evidence on the file supported the Appellant's position that she could not return to work. As a result, counsel submitted that the decision of the Internal Review Officer should be confirmed.

Discussion:

The MPIC Act provides:

> **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 on the Appellant to show, on a balance of probabilities, that the Internal Review Decision was in error and that she was not able to her work as a daycare worker when her IRI benefits were terminated.

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

The panel has carefully reviewed [independent doctor's] report of August 14, 2009. His diagnosis and comments regarding causation are set out as follows:

> "**Diagnoses**
> Pain disorder (chronic) associated with both psychological factors and a general medical condition. In regards to the general medical condition, it is felt the claimant has mechanical neck and low back pain. It is the writer's opinion that there are some depressive-type symptoms for [the Appellant], however her symptoms does not meet the criteria for a current major depressive episode. Her current symptomatology and reduced function cannot be explained on the basis of mechanical neck and low back pain in isolation in and of itself.
>
> **Causation**
> Given review of the submitted medical documentation in addition to the claimant interview and physical examination, it is the writer's opinion that the general medical condition of mechanical neck and low back pain are likely secondary to the motor vehicle accident, given the accident mechanism, temporal relationship taken in the context of no other injury occurrence and no history of previous pathologies in the region. Following the review of the submitted medical file and after the claimant's interview, the writer is unable to discern at this time any other psychological factors outside of those related to the motor vehicle accident that may have predisposed or lead to the development of a pain disorder. Given the psychological nature of this diagnosis (pain disorder), if further information is needed regarding the role of the motor vehicle accident and this diagnosis in terms of causation, a review by a Manitoba Public Insurance psychology advisor may be considered/warranted."

[Independent doctor] concluded that there was no evident physical impairment precluding the Appellant from performing her work tasks.

[Independent doctor] recognized and addressed the Appellant's psychological issues, which were more fully explored by [Appellant's psychologist] and [MPIC's psychologist]. Although she was diagnosed with a pain disorder with depressive and anxiety-based symptomatology, [Appellant's psychologist] was clearly of the view that the Appellant's current psychological condition did not preclude her from attending at work and performing the required tasks of her employment. The panel recognizes that [Appellant's psychologist] spent a significant amount of time with the Appellant and that this opinion confirmed previous reports that there was nothing to prevent the Appellant from working.

[MPIC's psychologist] confirmed this view in his opinion dated November 10, 2009:

> "Based on the review of the file information, it is the writer's opinion that the claimant's current diagnosis of a pain disorder would not preclude her from performing the determined employment of a daycare worker on a full time basis. As noted, the claimant is increasing her hours of work and, from a psychological perspective; [Appellant's psychologist] does not feel that the claimant is precluded from engaging in such employment."

More recent reports from the Appellant's caregivers confirmed the opinion of [independent doctor]. [Appellant's physiatrist's report of May 25, 2011 stated:

> "...there would be no clinical or radiological evidence to suggest that [the Appellant] had a medical contraindication to perform her duties as a child day care worker with the regards to the lucency documented.
>
> Based on the findings of the CT and MRI in isolation, there would be no contraindication to participating in a gradual return to work program."

[Appellant's doctor]'s report of September 22, 2011 concluded:

> "If the writer only looks at the CT and MRI findings surrounding [the Appellant] case, it can be concluded that that (sic) the patient could progress her work in a stepwise fashion to full time +/- modified duties as tolerated. However, [the Appellant] case is more complex with psychological and social overlay as previous noted by various mental health workers and orthopaedic specialists. It is also important once again to note that the patient was healthy prior to her accidents and also that the patient does have objective evidence of a small cervical disc herniation."

Following a review of this evidence, the panel concludes that the Appellant has failed to meet the onus upon her of showing, on a balance of probabilities, that she suffers from an injury as a result of the motor vehicle accident, which prevented her from working full-time after December 27, 2009.

While the Appellant did suffer injuries, both physical and psychological, in the motor vehicle accident, with the passage of time, treatment and several thorough gradual return to work programs that incorporated various accommodations in the workplace, we are of the view that,

by December 27, 2009, the Appellant had reached the point where she was no longer prevented by her motor vehicle accident related injuries from working full-time as a daycare worker. As a result, the Internal Review Decision of April 22, 2010 is upheld and the Appellant's appeal is dismissed.

Dated at Winnipeg this 24th day of May, 2012.

LAURA DIAMOND

PAUL JOHNSTON

LINDA NEWTON