

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-11-093**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Paul Johnston
Dr. Chandulal Shah

APPEARANCES: The Appellant, [text deleted], was represented by Ms Virginia Hnytka of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.

HEARING DATE: April 3, 2013

ISSUE(S): Entitlement to Income Replacement Indemnity benefits from March 28, 2011 to April 12, 2012.

RELEVANT SECTIONS: Section 86(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 involved in a motor vehicle accident on January 20, 2009 and complained of soft tissue injuries to his neck and back. At the time of the accident the Appellant was unemployed and scheduled to start a new job as a warehouse helper/half-ton truck driver. The Appellant was deemed to be a non-earner for the purpose of Income Replacement Indemnity ("IRI") benefits and as a result, he was in receipt of IRI benefits.

Due to the heavy lifting required in respect of this occupation, the case manager referred the Appellant to [Rehabilitation (Rehab) Facility #1] for a reconditioning program. Upon completion of the program, the physiotherapist and assistant physiotherapist found that the Appellant was ready to return to work.

Background:

The Appellant saw [Appellant's Physiotherapist #1] for treatment on February 3, 2009 with complaints of mid-back and hip pain. He commenced treatment with [Appellant's Physiotherapist #1] and in a report of April 4, 2009, she indicated that the Appellant was complaining of low back pain and that she would be starting a reconditioning program. [Appellant's Physiotherapist #1] issued a Therapy Discharge Report on April 15, 2009 and indicated that the Appellant was still complaining of lower back pain which resulted in an inability to lift more than 10 to 20 lbs. On October 28, 2009, [Appellant's Physiotherapist #1] wrote a letter indicating that the Appellant had received physiotherapy treatments after the motor vehicle accident and that he continued to have lower back pain and was unable to return to the type of work he was doing prior to the motor vehicle accident. The Appellant saw [Appellant's Physiotherapist #1] again on June 14, 2010 and her clinical diagnosis was chronic low back pain. The treatment plan was to improve flexibility and strength.

The Appellant sought treatment from a physiotherapist at [Hospital], [Appellant's Physiotherapist #2] who provided a report to [Appellant's Doctor] and stated that the Appellant's initial physiotherapy assessment occurred on December 19, 2011. In respect of the Appellant's assessment, [Appellant's Physiotherapist #2] stated:

- 1) Constant low back pain 1-2/10 that increased to 8-9/10 after walking.

- 2) Sitting, walking, and rising from a chair made him worse, while side lying made him feel better. His symptoms were worse in the a.m. and eased off as the day progressed, as long as he kept walking to a minimum.
- 3) Sneezing increased his pain, suggesting a possible disc involvement.
- 4) Improved posture in sitting with a lumbar roll decreased his low back pain.
- 5) Straight leg test was positive bilaterally for low back pain.
- 6) A major decrease in trunk flexion, extension, and right side gliding.
- 7) Decreased hamstring and calf flexibility.
- 8) Decreased exercise tolerance.

[Appellant's Physiotherapist #2] further stated that there was improvement to the Appellant's back as a result of his treatment and he reported:

"I was initially struck by [the Appellant's] loss of lumbar flexibility. It was my feeling that he would not have been able to function in his previous employment with this lack of range of motion and expressed pain. Therapy focused on regaining his flexibility, strength and function. His treatment included education regarding posture/lifting, passive and active lumbar extension, hamstring/calf stretches, ischemic compressions (quadratus lumborum), strengthening (bridging, planks, contralateral arm/leg raises in prone), and lifting practice.

Over the course of treatment [the Appellant's] strength and tolerance for exercise showed good improvement. Initially he could not lift a crate from a chair or the floor without a high level of pain. At discharge [the Appellant] was able to lift approximately 60 lbs. from a chair height and 40 lbs. from the floor without pain. His back ROM showed good improvement with flexion and extension almost full. [The Appellant] has been in contact with his previous employer and is planning to return to work in the near future. He was discharged from physiotherapy on April 12, 2012."

The Appellant then returned to work as a truck driver on April 12, 2012.

Case Manager's Decision – March 9, 2009:

The case manager determined that the Appellant was capable of performing the job demands for the employment that he would have held. A decision ending the Appellant's entitlement to IRI benefits was issued on June 23, 2009.

Internal Review Officer's Decision – October 2, 2009:

The Appellant filed an Application for Review. The Internal Review Officer upheld the case manager's decision and dismissed the Application for Review.

Notice of Appeal – October 6, 2009:

The Appellant filed a Notice of Appeal to this Commission. A Case Conference was held and as a result of discussions between the Claimant Adviser, the Appellant and MPIC's legal counsel, the Commission determined that a Functional Capacity Evaluation ("FCE") was required. The Commission requested an occupational therapist, [text deleted], to conduct an FCE.

On January 10, 2011, [Appellant's Occupational Therapist] provided a report setting out in detail the physical demands the Appellant was subjected to and the Appellant's response to these demands. In [Appellant's Occupational Therapist's] recommendations to the Commission, she stated:

"[The Appellant] demonstrates very good potential to be able to improve his abilities, and demonstrates a keen motivation to be able to work as a Warehouse Worker/Truck Driver. A reconditioning program is recommended which includes core strengthening and trunk stability exercises. It is recommended that the client then be progressed to a work hardening program in order to improve his tolerance for the frequent lifting and carrying that is required for the Medium level strength demand."

The case manager referred the Appellant to [Rehab Facility #2] for a work hardening reconditioning program. The work hardening program commenced on February 28, 2011 and concluded on March 21, 2011. [Rehab Facility #2] issued a work hardening discharge report on March 24, 2011 and stated:

"[The Appellant] has shown over-all improvement in physical function while in rehab such that he has now demonstrated the ability to meet the physical requirements of his job."

Case Manager's Decision – March 28, 2011:

On March 28, 2011 the case manager issued a decision to the Appellant and advised him that his employment was determined as a truck driver and since the Appellant was found by [Rehab Facility #2] to be fit to continue with his determined employment, his IRI benefits would be terminated on March 28, 2011.

Application for Review:

The Appellant filed an Application for Review as he was unable to carry excess amounts of weights and that the training he received from [Rehab Facility #2] did not address this issue. He stated that he was unable to walk or sit for any length of time which caused pain and he sought reinstatement of his IRI benefits.

Internal Review Officer's Decision – July 12, 2011:

The Internal Review Officer issued his decision on July 12, 2011 which confirmed the case manager's decision and dismissed the Appellant's Application for Review. In the reasons for the dismissal, the Internal Review Officer stated:

“In the [Rehab Facility #2] Work Hardening Program Discharge report dated March 24, 2011, [Rehab Facility #2's Doctor], on behalf of the rehabilitation team, opined you were capable of holding the position of a short haul truck driver. Upon completion of the program you were performing at a functional heavy strength demand according to the DOT. However, there was no reference with regard to your limited walking and sitting tolerance which you brought up as a concern in your Application.

I forwarded the DOT Job Demands to [Rehab Facility #2's Doctor] for his opinion on your ability to perform the demands of a light truck driver as described in the Job Demands Work Sheet. [Rehab Facility #2's Doctor] responded in his report of June 28, 2011 (copy attached) your positional tolerances were all in the constant category which exceeds the occasional requirement noted in the DOT job demands. [Rehab Facility #2's Doctor] reiterated you tested at the heavy physical demands upon completion of the program which exceeds the demands of the determined occupation.

I find that the totality of medical evidence supports your ability to hold the determined position of a [light] truck driver. Accordingly, I am upholding the case manager's decision and dismissing your Application for Review."

Notice of Appeal – July 14, 2011:

On July 14, 2011 the Claimant Adviser Office filed a Notice of Appeal on behalf of the Appellant stating that he did not agree with the Internal Review Officer's decision and that he could not perform any of the work activities. He further stated that he was limited to what he could do as a delivery driver which required him to load and unload.

Appeal Hearing:

The appeal hearing took place on April 3, 2013. The Appellant was represented by Ms Virginia Hnytka of the Claimant Adviser Office and MPIC was represented by Ms Cynthia Lau.

The Appellant testified that:

1. He had been employed at [text deleted] for 10 years from January 1996 to May 2006.
2. As a result of difficulties with his supervisor, he terminated his employment and was hired by [text deleted], a cabinet manufacturer, as a truck driver and warehouse worker.
3. The motor vehicle accident happened before he started working at [text deleted].
4. After the motor vehicle accident he attempted to work at his new job but was unable to do so.
5. He spent one day on the new job working with another employee, lifting approximately 30 cabinets onto a truck but he was not physically capable of doing this work and he did not return the next day.

The Appellant further testified that;

1. The treatment provided by [Rehab Facility #2's Doctor] at [Rehab Facility #2] did not resolve his back problems.
2. The [Rehab Facility #2's] treatment did not concentrate on his low back which was the primary problem.
3. He was in constant pain during the entire four-week period of the work hardening program at [Rehab Facility #2].
4. His back problems were not resolved when he was discharged from [Rehab Facility #2] and as a result he was unable to return to his employment.

The Appellant further testified that:

1. The physiotherapy treatments provided by [Appellant's Physiotherapist #3] and [Appellant's Physiotherapist #1] assisted in resolving his neck problems but did not resolve his back problems.
2. The treatments provided by [Appellant's Physiotherapist #2] concentrated on his low back problem and resulted in the ability to do lift items that he had been unable to lift in the past and permitted him successfully return to his previous employment.

Submissions:

MPIC submitted that the Appellant's treatment at [Rehab Facility #2] was successful and that the Internal Review Officer was correct in relying on the [Rehab Facility #2] report that the Appellant was capable of returning to work as a truck driver.

The Commission rejects MPIC's submission and allows the Appellant's appeal.

The case manager failed to follow [Appellant's Occupational Therapist's] recommendation that the Appellant be subjected to a reconditioning program including core strength and trunk stability exercises as part of the work hardening program. MPIC was unable to explain why [Rehab Facility #2] failed to comply with [Appellant's Occupational Therapist's] direction.

The Commission further finds that the Appellant's testimony stating he was in pain throughout the four week period at [Rehab Facility #2] is supported by the report from [Rehab Facility #2].

The [Rehab Facility #2] reports noted that:

1. The Appellant's pain level had increased in the March 4, 2011 report, was unchanged in the March 11, 2011 report and in the March 18, 2011 report the pain level had increased.
2. The [Rehab Facility #2's] Work Hardening Program Discharge Report showed that the Appellant reported lower back pain with the testing in respect of flexibility.
3. The report further showed that for Isoinertial testing produced "right knee pains" with "Repetitive Squat testing".
4. In respect of the Epic Lifting Capacity, the Appellant reported lower back pains and fatigue in his quadriceps.
5. The Appellant reported low back with all testing and low back and right hip pain with stooping and walking.
6. [Rehab Facility #2's Doctor] stated in his report:

"[The Appellant] initially did not reported (sic) any increases in his pain with the prescribed exercises. He began to report pain in his final weeks in program...During his final weeks, he used heat for his lower back on an occasional basis to help with his increased pains (sic) levels."

The Commission finds that the Appellant was a credible witness who did not exaggerate his pain levels in testifying before the Commission. The Commission notes [Appellant's Occupational

Therapist's] report of December 13, 2010 wherein she stated in reply to a question on whether the Appellant's reports of pain and disability were reliable:

“Overall test findings, in combination with clinical observations, suggest the presence of fully reliable reports of pain and disability.”

[Appellant's Occupational Therapist] further stated in her report that the Appellant was subjected to a series of tests designed to assess the reliability of pain and disability reports of pain. These tests clearly indicated the following:

“Placebo Testing

Various placebo pain tests were conducted to further evaluate the reliability of [the Appellant's] subjective (verbal) reports. He did not complain of inappropriate pain upon any placebo tests.

Pain Scales

Various pain scales were implemented with [the Appellant] to evaluate both the consistency and reliability of his subjective (verbal) reports. Subjective ratings of pain matched well with distraction-based clinical observations. Repetitive movement reports matched well with clinical observations.”

As a result of a series of tests to determine the Appellant's reliability, [Appellant's Occupational Therapist] concluded that:

“Results of reliability check testing indicated a reliable profile. The client perceives himself as meeting the physical requirements for Light strength work, according to Department of Labor standards.”

The Commission further notes that an examination of the physiotherapy reports of [Appellant's Physiotherapist #3], [Appellant's Physiotherapist #1] and [Appellant's Physiotherapist #2] do not indicate that the Appellant exaggerated his pain levels during the course of his physiotherapy treatments.

The Commission finds that the Appellant testified in a clear and unequivocal fashion and answered all the questions put to him without any hesitation. The Appellant's testimony is consistent with the essential facts in this appeal that he was injured as a result of the motor vehicle accident and suffered an injury to his neck and back and was unable to return to work as a warehouse helper/half-ton truck driver.

The Appellant's testimony is corroborated by the reports from [Appellant's Occupational Therapist] who determined that he was credible. As well, the reports from [Appellant's Physiotherapist #3] and [Appellant's Physiotherapist #1] do not indicate that the Appellant exaggerated his back pain and his inability to return to work as a truck driver.

On review of all the medical reports and the testimony of the Appellant, the Commission concludes that it cannot give weight to the report from [Rehab Facility #2] that the Appellant was capable of returning to his determined employment as a short haul truck driver. The Commission therefore rejects the decision of the Internal Review Officer who relied on the flawed [Rehab Facility #2] report to dismiss the Appellant's Application for Review.

The Commission therefore accepts the Appellant's testimony that he suffered a back injury as a result of the motor vehicle accident and was unable to return to work during the period March 28, 2011 to April 12, 2012. For these reasons, the Commission finds that the Appellant has established on a balance of probabilities that he was unable to work at his determined employment as a truck driver during the period March 28, 2011 to April 12, 2012. As a result the Appellant is entitled to IRI benefits during that period of time.

Dated at Winnipeg this 24th day of April, 2013.

MEL MYERS

PAUL JOHNSTON

DR. CHANDULAL SHAH