

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by L.R.
AICAC File No. AC-00-142**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Yvonne Tavares
Mr. Jeff Palamar

APPEARANCES: The Appellant, L.R., was represented by Ms. Shirley Van Schie;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

HEARING DATE: May 17, 2002

ISSUE(S):

1. Entitlement to Income Replacement Indemnity ('IRI') benefits beyond March 25, 2000; and
2. Entitlement to reimbursement of chiropractic treatments beyond March 17, 2000.

RELEVANT SECTION: Sections 83(1) and 136(1) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act') and Section 5(a) of Manitoba Regulation 40/94.

MAIC 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, L.R., was involved in a motor vehicle accident on May 22, 1999, and sustained soft tissue injuries to her neck, back, shoulders and right hip. Prior to the accident, the Appellant had been employed as of May 14, 1999, in a term position with [Text deleted] and was unable to continue that employment as a result of the injuries sustained in the motor vehicle accident. The Appellant did not return to the workforce until June 2001.

Due to the inability of the Appellant to continue employment after the accident, she qualified for IRI benefits.

MPIC received the following medical reports in respect of the Appellant.

1. The treating physician, Dr. Grace, provided a report to MPIC dated December 17, 1999, in which he indicated that he initially saw the Appellant on May 25, 1999, three days after the motor vehicle accident, where she was complaining of a sore back, neck and shoulder areas, as well as pain in her right hip. Dr. Grace's diagnosis at that time was a soft tissue injury to her neck and lower back. Dr. Grace further indicated that, as of the date of the report, the Appellant's back and neck pain were persisting, and it was likely that she would have trouble doing any bending or crouching in a work situation. He further stated that she would have also have trouble sitting or standing for any long periods of time, as in a sedentary desk job position.
2. Dr. Mestdagh, who was providing chiropractic services to the Appellant as a result of the injuries she sustained in her accident, provided a report to MPIC, dated January 14, 2000, wherein he stated:

With regards to working capacity, I understand that she does qualify for maternity leave until the end of March. Based on her current presentation, I do believe that she will be capable of performing a sedentary position by the end of March, in whatever workplace she chooses.
3. Dr. Engel, a physiatrist, who saw the Appellant upon referral from Dr. Grace, provided a report to Dr. Grace dated February 9, 2000, outlining his clinical findings. Dr. Engel noted a tenderness on palpation of muscles over the cervical and lumbar regions and suspected that she had chronic muscular pain. Dr. Engel was of the opinion that the Appellant should engage in aerobic exercises. The Appellant informed Dr. Engel that she was very concerned about returning to work in April. Dr. Engel further stated:

She has already tried weight lifting exercises with physiotherapy last spring. She could certainly do them again, but there is no guarantees that she will be pain free by then, although I think, has a relatively good prognosis. I did not want to dampen down her spirits to return to work. I do want her to return to work and try to support herself and her young baby.

MPIC terminated the reimbursement of the cost of chiropractic treatments on March 17, 2000, and terminated IRI benefits on March 25, 2000, based on Dr. Mestdagh's report dated January 14, 2000. As a result, the Appellant made application to MPIC to review the case manager's decision.

MPIC received the following two reports from Dr. Grace:

1. In a brief report dated April 12, 2000, Dr. Grace stated: "*The above named patient [i.e., L.R.] remains very symptomatic from the injuries sustained in her MVA of May 1999. She doesn't seem to be ready to return to her usual employment.*"
2. On May 11, 2000, Dr. Grace provided a further brief report wherein he stated: "*Has ongoing pain in her upper back and neck related to her MVA May 22 '99.*"

Internal Review Officer's Decision dated June 19, 2000

The Internal Review Officer met with the Appellant on May 29, 2000, and, although he agreed with the decision of the case manager to confirm the termination of IRI effective March 25, 2000, he was concerned as to the quality of the medical evidence to support the case manager's decision.

The Internal Review Officer stated in his decision dated June 19, 2000, that:

DISCUSSION & RATIONALE FOR DECISION

You expressed concerns about the reliability of the opinion of Dr. Mestdagh regarding your work capabilities because, out of the many times you attended at his office, he saw you personally on only a handful of occasions.

I myself was concerned about the prospective nature of the opinion. The opinion being expressed in early January, 2000 was that you should be able to return to work in late March, 2000, but there is nothing after late March, 2000 to confirm that the prognosis was correct. In my view, either a current report should have been obtained from Dr. Mestdagh, or an independent examination should have been arranged.

I would suggest that the following measures be taken before a final decision on your entitlement to IRI after March 25, 2000 is made by MPI:

1. Obtain a short narrative report from Dr. Mestdagh, based upon a current examination assessment, setting out his opinion regarding your ability to work at a sedentary position as at March 25, 2000 and at the present time;
2. In the alternative, or even in addition to the above, arrange for an independent assessment by a qualified practitioner (physiotherapist, physician, chiropractor, occupational therapist, etc) to confirm your present ability to work at a sedentary position; and
3. Obtain a detailed narrative report from Dr. Grace asking him to explain the basis for the opinion stated in his April 12, 2000 note to the effect that you were not able to work at that time. He should also be asked to comment on your ability to work at the present time.

As a result of the concerns raised by the Internal Review Officer, MPIC obtained a report from Dr. Mestdagh, dated June 30, 2000, which states as follows: *“For your information, L.R. was treated on a regular basis until March 17, 2000. At that time, we informed her that she was fit to return to work. We have not seen her since that date.”*

MPIC also received the following reports:

1. Dr. Grace, in his report to MPIC dated July 5, 2000, disagrees with the opinion of the chiropractor, Dr. Mestdagh, and states:
 - 1) Since December of 1999 L.R. has been seen five times, on the 6th of January, March 14th, April 4th, May 11th and June 27th.

2) At the time of these visits in addition to other unrelated complaints L.R. was noted to have tenderness of both her upper trapezius and shoulders, much more so on the right than on the left side. She did demonstrate full and normal range of motion of her C-spine as well as her right shoulder.

.....

4) According to the note written on April 12th, 2000 that I had written to you I stated that the patient was very symptomatic with regard to her injuries and I felt that these symptoms were related to the motor vehicle accident of May of 1999. As is often the case with soft tissue injuries the physical findings that I have described (objective findings) are not impressive however L.R.'s symptoms are such that I felt that she would be unable to return to her previous level of employment. L.R. reports numbness in her right hand even with moderate use and increasing spasms and pain across her neck and right shoulder after moderate use especially for the days following any increase in her physical activities.

For your information when L.R. tried to do some receptionist type duties as a favour to a friend of her's over the course of several hours in March 2000 it lead to significant increasing amount of pain and spasms in her shoulder for several days afterwards.

5) As I stated before L.R. remains quite symptomatic with regard to her injuries in terms of pain and spasming in the muscles around her neck and right shoulder. Moderate physical activity seems to cause a significant increase in her subjective symptoms.

6) As I have stated previously the physical findings (objective signs) are quite minimal however the patient's subjective symptoms are quite significant. Unfortunately in the case of soft tissue injuries there is often this discrepancy between objective signs and subjective symptoms.

2. At the request of MPIC, the Appellant was assessed by Ms. Marte Bachynski, occupational therapist, on July 6 and July 13, 2000. Ms. Bachynski provided a report to MPIC on July 13, 2000, in which she stated:

RETURN TO WORK BARRIERS:

Physical

- cervical, trapezius ridge & interscapular complaints appeared to be aggravated by tasks demanding positional endurance for neck flexion, particularly in combination with Rt. Hand use/typing. Although she would be expected to manage many types of sedentary or light work, such as phone reception with headset, inventory or ledger work, her tolerance

for work involving continuous keyboarding or numeric pad calculations were likely aggravate [*sic*] complaints.

CONCLUSIONS & RECOMMENDATIONS:

1. The client functions in her daily life, and it is possible that she would manage sedentary work, albeit with symptoms. Providing her with an opportunity to return to work gradually with physiotherapy support, would give her the benefit of an opportunity to apply positional strategies & stretches in the workplace, to manage ongoing mechanical & myofascial complaints. Because of circumstantial barriers, work re-entry should be time-limited.

3. Dr. Michael MacKay, medical consultant with MPIC's Health Care Services department, provided a report dated July 30, 2000, wherein he indicated that Dr. Engel's recommendation was consistent with Dr. Mestdagh's. He further notes that Ms. Bachynski's opinion was that the Appellant could possibly manage sedentary work, albeit with symptoms, and that in Ms. Bachynski's view, the Appellant should return to work on a gradual basis, in conjunction with physiotherapy support. In respect to Dr. Grace's reports, Dr. MacKay is of the view that there is insufficient objective evidence present in these reports to support Dr. Grace's opinion that there existed an occupational disability which prevented the Appellant from carrying out sedentary work beyond February 9, 2000, let alone March 25, 2000. As a result, Dr. MacKay concluded that, in his opinion, the decision to end the Appellant's IRI entitlement as of March 25, 2000, was supported by the majority of the medical evidence contained on the file.

The case manager, in a letter to the Appellant dated September 7, 2000, indicated that she had reviewed all the medical reports, including Dr. MacKay's report dated July 30, 2000, and again determined that IRI benefits would not be extended beyond March 25, 2000, and that no further coverage would be extended for chiropractic treatments unless further treatment was

recommended. As a result, the Appellant made Application for Review of the case manager's decision.

Internal Review Officer's Decision dated November 20, 2000

The Internal Review Officer rejected the Application for Review in his decision dated November 20, 2000, and confirmed the decision of the case manager dated September 7, 2000.

In arriving at his decision, the Internal Review Officer relied primarily on Dr. Mestdagh's report dated June 30, 2000, and found support in both Dr. Engel's report and in Ms. Marte Bachynski's Functional Capacity Evaluation report. The Internal Review Officer accepted the findings in the report issued by Dr. MacKay, dated July 30, 2000, and rejected the medical reports of Dr. Grace.

Appeal Hearing

The appeal of the above matter was heard by the Commission on May 17, 2002.

The two issues on appeal were:

- (a) the entitlement to IRI benefits beyond March 25, 2000;
- (b) reimbursement of the cost of chiropractic treatments after March 17, 2000, in the amount of approximately \$100.00.

The Commission considered the following medical reports, as well as the testimony of the Appellant and the correspondence of M.B.

1. Dr. Mestdagh's Report

Dr. Mestdagh, in a short report dated June 30, 2000, indicates that after his last treatment of the Appellant on March 17, 2000, she was fit to return to work. However, the Internal Review

Officer, in adopting Dr. Mestdagh's report, fails to deal with the concerns he raised in his original internal review decision dated June 19, 2000, wherein he stated:

I would suggest that the following measures be taken before a final decision on your entitlement to IRI after March 25, 2000 is made by MPI:

1. Obtain a short narrative report from Dr. Mestdagh, based upon a current examination assessment, setting out his opinion regarding your ability to work at a sedentary position as at March 25, 2000 and at the present time;

It does not appear that Dr. Mestdagh, in his subsequent narrative report dated June 30, 2000, provided a current examination assessment but merely reiterated his initial assessment dated January 14, 2000. In this subsequent report, Dr. Mestdagh states: *"For your information, L.R. was treated on a regular basis until March 17, 2000. At that time, we informed her that she was fit to return to work. We have not seen her since that time."*

2. Dr. Engel's Report

In respect of Dr. Engel's report, the Internal Review Officer states: *"In fact, Dr. Engel had concluded back in February, 2000 that you were capable of returning to work."* However, an examination of Dr. Engel's report dated February 9, 2000, does not indicate that the Appellant was capable of returning to work. Dr. Engel suspected that, at that time, she had chronic muscular pain, that the Appellant was concerned about returning to work in April, that she could try weight lifting exercises through physiotherapy again, that there was no guarantee that she would be pain free by then, and he thought that she had a relatively good prognosis.

Dr. Engel further stated: *"I did not want to dampen down her spirits to return to work. I do want her to return to work and try to support herself and her young baby."* One can infer from these comments that Dr. Engel was attempting to be supportive of the Appellant and wished to

encourage her to attempt to return to work. However, there is no clear assertion by Dr. Engel that the Appellant was, in fact, capable of returning to work on February 9, 2000.

In a subsequent report by Dr. Grace, dated January 11, 2002, he states: “*She saw Dr. Engel in February 2000 who felt that her problem was related to chronic muscle pain. He told her at the time that she would hopefully be able to return to work in April 2000.” [underlining added]*

It should be noted, however, that Dr. Engel is clearly suggesting in his report that the Appellant’s return to work should include weight lifting exercises through physiotherapy. MPIC did not accept this suggestion by Dr. Engel and did not offer to reimburse the Appellant for undertaking physiotherapy treatment after they received Dr. Engel’s report of February 2000.

3. Dr. MacKay’s Report – July 30, 2000

Dr. MacKay reviewed the reports of Dr. Mestdagh and Dr. Engel, the Functional Capacity Evaluation performed by Ms. Bachynski, and the medical reports of Dr. Grace. Dr. MacKay concluded that the medical reports of Dr. Grace did not provide any objective evidence identifying a condition which developed as a result of the collision in question which would, in turn, impair the Appellant’s function to a level where she was unable to perform sedentary work. Dr. MacKay concluded that a majority of the medical evidence supported MPIC’s decision to terminate IRI at the end of March 2000.

4. Dr. Grace’s Reports

Dr. Grace, who initially examined and treated the Appellant shortly after the motor vehicle accident, and who saw the Appellant personally on several occasions prior to the end of March 2000, was in the best position to assess the Appellant’s capacity to return to work at that time. As of July 5, 2000, Dr. Grace had seen the Appellant on six occasions since the motor vehicle

accident and, in each of his medical reports, he is consistent in his view that the Appellant was not physically capable of returning to work at the beginning of April 2000. In a report dated January 11, 2002, which Dr. Grace provided to the Appellant's legal counsel, Dr. Grace states:

By the summer of 1999 the patient was cut off of physiotherapy treatments apparently because her adjusters said that she was off work secondary to complications of the pregnancy and not relating to her motor vehicle accident. After the baby was born in the fall of 1999 she stated that she had trouble caring for the infant because lifting and carrying of the baby caused significant pain in her back and neck. She saw Dr. Engel in February 2000 who felt that her problem was related to chronic muscle pain. He told her at the time that she would hopefully be able to return to work in April 2000. Unfortunately when she returned to work on a casual basis doing very light secretarial work, she suffered significant increase in her pain and was unable to care for her baby for several days afterwards. *[underlining added]*

She was apparently cut off for MPIC benefits as well as her chiropractic treatments in March of the year 2000. Soon thereafter she complained of increasing pain which she attributed to a lack of chiropractic treatments. She was however, at that time, doing exercises at home. By the spring of the year 2001 she was having good days and bad days. She was continuing to do her exercises. It was suggested to her by her lawyer that she seek a psychiatric evaluation regarding her chronic pain, however this was not covered by Manitoba Health Services and the patient could not afford to have an independent psychiatric exam unless it was covered by Health Services. She did return to the workforce in July 2001.

At the present time her diagnosis continues to be that of chronic pain relating to muscle strain. Plans for the future will include continuing exercises as well as possible revisiting physiotherapy. Her long-term prognosis should be good with hopefully a full eventual recovery.

Regarding of whether or not she could have returned to work earlier. It is quite likely that had she done a program of gradual return to work with more intensive physiotherapy in the summer of 2000, she quite likely would have returned to work quickly and at this point would likely be less symptomatic and more capable of full time employment. *[underlining added]*

Dr. Grace's comments that there should be a program established to permit the Appellant to return to work accompanied by physiotherapy treatments is consistent with the opinion of Dr. Engel and with the assessment made by the occupational therapist, Ms. Bachynski.

5. Ms. Marte Bachynski's Report

Dr. Grace's medical opinion is supported by the assessment made by the occupational therapist, Ms. Marte Bachynski, who assessed the Appellant on July 6 and July 13, 2000. In her report, Ms. Bachynski indicated:

RETURN TO WORK BARRIERS:

Physical

- cervical, trapezius ridge & interscapular complaints appeared to be aggravated by tasks demanding positional endurance for neck flexion, particular in combination with Rt. Hand use/typing. Although she would be expected to manage many types of sedentary or light work, such as phone reception with headset, inventory or ledger work, her tolerance for work involving continuous keyboarding or numeric pad calculations were likely aggravate [*sic*] complaints.

CONCLUSIONS & RECOMMENDATIONS:

1. The client functions in her daily life, and it is possible that she would manage sedentary work, albeit with symptoms. Providing her with an opportunity to return to work gradually with physiotherapy support, would give her the benefit of an opportunity to apply positional strategies & stretches in the workplace, to manage ongoing mechanical & myofascial complaints. Because of circumstantial barriers, work re-entry should be time-limited. [*underlining added*]

6. M.B.'s Letter

The Appellant's incapacity to return to work in the month of March 2000 is corroborated by a letter from M.B., manager of [Text deleted], dated April 17, 2001, wherein he indicates that the Appellant volunteered to work at his business in March 2000 in preparation for a return to work.

The duties she performed were standard office duties: filing, typing, and answering phones, dealing with customers and some inventory. We noticed she was having trouble performing these tasks for any real length of time. Her typing was very slow and she would have to take breaks frequently. Her handwriting for messages and work orders would start out okay but as the message went on her writing became harder to read. When taking customer parts she would occasionally drop them, (likely [*sic*] none were damaged).

When we first agreed to this arrangement we were considering offering her a position with our company. By the end of the third day we had to tell her it was not working out, and we would not be able to hire her until her doctor gave her a clean bill of health.

7. The Appellant's Testimony

The Appellant testified at the hearing and was cross-examined by counsel for MPIC. She testified that in the spring of 2000, she was anxious to return to work and attempted to do so on a voluntary basis at [Text deleted] in March 2000. However, due to her pain, she was unable to continue working beyond three days and had to terminate this work. After the termination of the IRI benefits and chiropractic treatments, the Appellant continued to do her home exercise program but could not afford to continue with either chiropractic or physiotherapy treatments.

She further testified that she returned to school two days per week, three hours per day, at the end of September 2000 in order to upgrade her qualifications so she could enter the nursing program at Red River College.

Decision

The Commission finds that the Appellant's chronic pain, resulting from injuries sustained in the accident, prevented her from returning to work on either a full-time or part-time basis in the spring of 2000 for the following reasons:

1. The Commission rejects the Internal Review Officer's reliance on Dr. Mestdagh's report dated June 30, 2000. This report did not resolve the initial concerns raised by the Internal Review Officer in his internal review decision dated June 19, 2000, in respect of Dr. Mestdagh's medical opinion. The Internal Review Officer had requested that the case manager obtain the current examination assessment from Dr. Mestdagh. However, Dr. Mestdagh's report dated June 30, 2000, did not constitute a current examination

assessment and, as a result, the Commission does not give a great deal of weight to this report.

2. The Commission rejects the Internal Review Officer's finding that Dr. Engel concluded that the Appellant was capable of returning to work in February 2000. The Commission accepts Dr. Grace's comments in his report dated January 11, 2002, wherein he stated: *"She saw Dr. Engel in February 2000 who felt that her problem was related to chronic muscle pain. He told her at the time that she would hopefully be able to return to work in April 2000."*
3. The Internal Review Officer gave little weight to the medical opinions of Dr. Grace and preferred the medical opinions of Dr. MacKay. In his decision dated November 20, 2000, the Internal Review Officer stated:

The review prepared by Dr. MacKay dated July 30, 2000 provides a balanced assessment of all of the new reports. He concludes that the new information simply does not support an ongoing work-related disability. I agree with that conclusion.

The Commission disagrees with the findings of the Internal Review Officer and gives greater weight to the medical opinion of Dr. Grace than to the medical opinion of Dr. MacKay. Dr. Grace, who was the treating physician, saw the Appellant shortly after the accident, personally interviewed her and physically examined her. He met with the Appellant on six occasions and provided consistent reports that she was incapable of returning to work. Dr. Grace's medical opinion was corroborated by Ms. Bachynski, the testimony of the Appellant, and the written comments of M.B., the manager of [Text deleted].

4. Dr. MacKay, unlike Dr. Grace, never had the opportunity to physically examine or interview the Appellant and thus conducted a paper review of the medical reports

provided to him by MPIC. As a result, Dr. MacKay never had the opportunity to assess the credibility of the Appellant in respect of her physical complaints. It should further be noted that, in his report to the case manager dated July 30, 2000, Dr. MacKay relies on the report of Dr. Mestdagh dated June 30, 2000, which report never resolved the concerns of the Internal Review Officer who desired to obtain a current assessment from Dr. Mestdagh but never received one.

5. The Commission rejects Dr. MacKay's conclusion that there was insufficient objective evidence presented by Dr. Grace in his reports which would support the existence of an occupational disability of any type on March 25, 2000.
6. The Internal Review Officer, in arriving at his decision dated November 20, 2000, appears to ignore the Appellant's complaints that due to her pain, she was unable to work beyond March 25, 2000. The Commission finds that the Appellant wished to improve her education and qualifications in order to improve her employment opportunities and wished to return to work as quickly as possible to support herself and her child. The Appellant testified in a straightforward and consistent fashion, and the Commission believes her submissions that she was incapable of returning to work on March 25, 2000. The testimony of the Appellant is corroborated by the medical opinions of Dr. Grace, Ms. Bachynski and the letter from M.B., manager of [Text deleted].

The Commission concludes that the Appellant has established, on the balance of probabilities, and having regard to her own testimony, the medical reports of Dr. Grace, Ms. Bachynski, and the comments of M.B., the manager of [Text deleted], that she was not capable of returning to work on March 25, 2000, when her IRI was terminated. The Commission, therefore, finds that MPIC prematurely terminated the IRI payments to the Appellant on March 25, 2000.

The Commission notes that the Appellant returned to school at the end of September 2000 and was taking classes on several days during the week. The Commission determines that since the Appellant was capable of attending school at the end of September 2000, she was capable of returning to work at that time. As a result, the Commission directs that the decision of the Internal Review Officer, dated November 20, 2000, be rescinded and that IRI payments continue until October 1, 2000, together with interest at the appropriate rate to the date of payment.

The Appellant has requested reimbursement of the cost of chiropractic treatments after March 17, 2000, in the amount of approximately \$100.00. Dr. Mestdagh, in his initial report dated January 14, 2000, determined that the Appellant no longer required chiropractic treatments after March 17, 2000. The Commission finds, on the balance of probabilities, that as of March 17, 2000, the Appellant had reached maximum therapeutic benefit from chiropractic treatments, and that these treatments were not medically required after March 17, 2000. As a result, the Commission dismisses the appeal in respect of this issue.

The Commission rejects the Appellant's request for reimbursement of the cost of physiotherapy treatments or that MPIC be required to pay for any further physiotherapy treatments. There was no evidence presented by the Appellant to the Commission to establish that she had paid for physiotherapy treatments that required reimbursement.

Conclusion

The Commission, therefore, determines:

1. that the Appellant is entitled to IRI benefits from March 25, 2000, until October 1, 2000, and that the decision of the Internal Review Officer, dated November 20, 2000, be rescinded and that IRI benefits be paid until October 1, 2000, together with interest at the appropriate rate of payment; and
2. that the Appellant's appeal in respect of chiropractic treatments be dismissed and the decision of the Internal Review Officer, dated November 20, 2000, be confirmed in respect to the termination of chiropractic treatments.

Dated at Winnipeg this 31st day of July, 2002.

MEL MYERS, Q.C.

YVONNE TAVARES

JEFF PALAMAR

[Ed. Note: The note "[Text deleted]" indicates the removal of information which may identify individuals.]