



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by D.M.
AICAC File No.: AC-00-130

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Laura Diamond
Ms. Barbara Miller

APPEARANCES: The Appellant, D.M., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Morley Hoffman.

HEARING DATE: September 17, 2003

ISSUE(S): Entitlement to Income Replacement Indemnity benefits
between the period January 15, 1998 to March 31, 1998

RELEVANT SECTIONS: Section 81(1)(a) of the Manitoba Public Insurance
Corporation Act ("MPIC Act") and Section 8 of Manitoba
Regulation 37/94

**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 accident giving rise to this appeal occurred on January 25, 1997. D.M. (hereinafter referred to as the "Appellant"), was shoveling snow on the boulevard in front of his home when a north-bound truck lost control and struck him from behind.

At the time of the accident the Appellant was self-employed as a groundskeeper/maintenance person with [text deleted] which, at the time of the accident included snow removal as well as

maintenance of an ice skating ring, which involved him moving heavy water pipes. As a result of the injuries sustained in the motor vehicle accident surgery was performed on the Appellant's leg and wrist on January 28, 1997 and it involved the installation of hardware. Subsequent to the surgery, the Appellant was referred for physiotherapy, which was undertaken at the Par Health Services facility where he underwent a Work Hardening Program.

A Work Hardening Discharge Summary was completed by Par Health Services, dated October 31, 1997. This report indicated that the Appellant was capable of returning to work as a general labourer/groundskeeper. On November 3, 1997 MPIC wrote to the Appellant and advised him that in view of the report from Par Health Services the Appellant was functionally able to hold employment as a general labourer. As a result, Income Replacement Indemnity ("IRI") benefits, which the Appellant had been receiving subsequent to the accident, were terminated effective January 15, 1998.

Upon receipt of that report the Appellant made application to MPIC for an internal review of the decision to terminate his IRI benefits. The Internal Review Officer issued a decision, dated October 19, 2000, confirming the decision of MPIC to terminate the Appellant's IRI benefits on January 15, 1998 and dismissed the Appellant's Application for Review. The Appellant filed a Notice of Appeal with the Commission in respect to the Internal Review Officer's decision which dismissed his Application for Review.

Subsequent to the Internal Review decision, and prior to the hearing of this appeal, the Commission received a report from a physiotherapist, Mr. Brent Winstone, which was undated, a copy of which was forwarded to MPIC.

Appeal

This appeal is governed by the following provisions of the MPIC Act.

Full-Time Earners

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment;

M.R. 37/94

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

At the appeal hearing the Appellant testified that he was unable, due to the motor vehicle accident injuries to his left wrist and left leg, to return to work on October 17, 1997. He further testified that as a result of the injury to his left forearm he did not have sufficient strength in his wrist to return to work as a groundskeeper. He also testified that he had very little strength in his left leg as a result of a broken femur which made it physically difficult for him to work as a groundskeeper. The Appellant asserted that the physiotherapy he received at Par Health Services had failed to return him physically to the condition he was in prior to the motor vehicle accident on October 17, 1997 and that the physiotherapy should have been continued until he reached his pre-accident status. The Appellant further testified that it was not until the end of March 1998 that he was capable of returning to work and that he was therefore entitled to IRI benefits between January 15, 1998 the date MPIC terminated his IRI benefits and March 30, 1998 when he was able to return to work.

The Appellant further testified that he was aware that there were a number of medical reports from Dr. MacKay, Dr. Tan and Dr. Balageorge which supported the decision of Par Health Services in their Discharge Summary Report dated October 31, 1997 which indicated that the

Appellant was physically capable of returning to work on October 17, 1997. He further testified that he was unable to find a medical practitioner who could provide him with a medical report to support his position that he was not physically capable of returning to work on October 17, 1997. He testified that he was only able to obtain a report from Mr. Winstone, who he saw sometime after he filed his Notice of Appeal on October 30, 2000.

Mr. Winstone in his report, which is undated, indicates that he reviewed the Discharge Summary Report of Par Health Services dated October 30, 1997 and noted that that report indicated that the Appellant's left hand grip-strength was one-half of his grip-strength in his right hand. Mr. Winstone also noted that the Appellant's left leg was also tested by Par Health Services with a Biodex machine which indicated a 57 to 73% deficit of his left leg compared to his right leg. Mr. Winstone reported that after his discussions with the Appellant, and examining the medical reports, that the Work Hardening Program performed by Par Health Services was not sufficient for the Appellant to return to work as a pipefitter.

The Appellant testified at the hearing that it was never his intention after the motor vehicle accident to return to work as a general labourer but intended to commence an apprenticeship plumbing program in order to become a certified plumber/pipefitter. He testified that he had informed the physiotherapist at Par Health Services of his intentions and also indicated his intentions to Mr. Winstone. The Appellant testified at the date of the hearing that he had in fact entered the apprenticeship program and had completed or was in the process of completing this program.

The Appellant asserted that the physical demands of a groundskeeper were similar to that of a plumber and, therefore, the Commission should accept Mr. Winstone's report and reject the

opinion of the physiotherapist at Par Health Services that he was physically capable of returning to work on October 17, 1997. The Appellant concluded his testimony by indicating that having regard to the opinion of Mr. Winstone, the physiotherapist, and having regard to his own testimony, MPIC prematurely terminated his IRI benefits on January 15, 1998.

Legal counsel for MPIC submitted that the onus was upon the Appellant to establish, on the balance of probabilities, that he was unable to continue his full time employment as a result of the injuries he sustained in the motor vehicle accident. MPIC's legal counsel referred to Section 8 of Manitoba Regulation 37/94 which indicated that the employment referred to in Section 81(1)(a) of the Act was employment that the Appellant performed at the time of the accident and was not some other employment. As a result MPIC's legal counsel urged the Commission to disregard Mr. Winstone's report because it indicated that the Work Hardening Program was not sufficient for the Appellant's employment as a pipefitter and that Mr. Winstone's report did not deal with the Appellant's physical ability to return to work as a groundskeeper.

MPIC's legal counsel also asserted that the report of Par Health Services discharging the Appellant from the Work Hardening Program, the medical opinions of Dr. Tan, Dr. Balageorge and Dr. MacKay corroborated the opinion of the physiotherapist at Par Health Services in the Discharge Summary Report dated October 31, 1997 that the Appellant was physically capable of returning to work on October 17, 1997. MPIC's legal counsel therefore concluded that the Appellant did not establish, on the balance of probabilities, that pursuant to Section 81(1)(a) of the Act, MPIC prematurely terminated his IRI benefits.

The Commission was impressed with the testimony and submissions of the Appellant and recognized that he sustained very serious injuries as a result of the motor vehicle accident.

However, after a careful review of all of the documentary evidence the Commission received, and after hearing the testimony of the Appellant and the submissions of both the Appellant and MPIC's legal counsel, the Commission determines that the Appellant has not satisfied the Commission, on the balance of probabilities, that the injuries he sustained in the motor vehicle accident prevented him from returning to work on January 15, 1998.

Mr. Winstone, the physiotherapist, saw the Appellant several years after the motor vehicle accident took place and, therefore, was not in the best position to assess the Appellant's ability to return to work on January 15, 1998. However, the physiotherapist at Par Health Services who personally treated the Appellant during the Work Hardening Program, asserted in a Discharge Summary Report, dated October 31, 1997, that the Appellant was capable of physically returning to work on January 15, 1998. The physiotherapist's opinion is confirmed by the orthopedic specialist, Dr. Balageorge, who operated on the Appellant and who saw him on several occasions after the operation, and by the Appellant's personal physician, Dr. Tan. Under these circumstances, the Commission gives greater weight to the opinions of the physiotherapist at Par Health Services, and the opinions of Dr. Balageorge and Dr. Tan than it does to the opinion of Mr. Winstone, the physiotherapist.

The Commission finds that MPIC correctly applied the provisions of Sections 81(1)(a) of the Act and Section 8 of Manitoba Regulation 37/94 when it terminated the IRI benefits to the Appellant on January 15, 1998.

Therefore, by authority of Section 184(1) of the MPIC Act, the Commission orders that:

- A. for the reasons set forth herein, and for the reasons set forth in the decision of MPIC's Internal Review Officer, bearing date October 19, 2000 (a copy of which is annexed

hereto and intended to form part of this decision), the Appellant's appeal must be dismissed; and

B. the Internal Review Officer's decision be, therefore, confirmed.

Dated at Winnipeg this 24th day of September, 2003.

MEL MYERS, Q.C.

LAURA DIAMOND

BARBARA MILLER