



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by J.K.

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

APPEARANCES: The Appellant, J.K., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC')
was represented by Mr. Mark O'Neill

HEARING DATE: April 30, 2003

ISSUE(S): Entitlement to Income Replacement Indemnity
benefits beyond February 4, 2002

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance
Corporation Act (the "MPIC Act")

**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, J.K. was involved in a motor vehicle accident on September 9, 2001, while operating a shuttle bus. The Appellant was employed as a Shuttle Bus Driver by [text deleted] and, at the time of the accident, was fully stopped to pick up a passenger, when the bus was rear-ended by another bus. As a result of this collision, the Appellant's right knee hit the motor cover and was bruised. The Appellant did not suffer a loss of consciousness and no bleeding was sustained immediately following the accident but he started experiencing neck and back tightness.

As a result of the injuries which he sustained in the accident, the Appellant attended upon a chiropractor for treatment. The Appellant's chiropractor, Dr. Mestdagh, provided an initial medical report to MPIC dated September 21, 2001. The report indicated that the Appellant was complaining about headaches, nausea, neck pain, back pain, sore stiff muscles and joints. The Appellant was also examined and treated by his physician, Dr. E. Dubois, who provided a medical report to MPIC dated September 28, 2001. In this report, the Appellant complained of low back pain, headaches and neck pain. Dr. Dubois' diagnosis indicated a whiplash injury graded at Grade 1 with mechanical back pain also graded at Grade 1. Dr. Dubois stated in her report that the Appellant could work modified duties at four hours per day avoiding any prolonged standing and heavy lifting. Dr. Dubois recommended that the Appellant take Advil and Amitriptyline for pain control and recommended back exercises.

Effective September 25, 2001, the Appellant returned to work on a gradual return to work basis at two hours per day. In order to assist with his rehabilitation, MPIC referred the Appellant to the Associated Rehabilitation Consultants of Canada Ltd. ("ARCC") for an assessment.

In a report to MPIC dated October 26, 2001, Dr. Hoy of ARCC indicated that the Appellant had diagnoses of obesity and myofascial pain syndrome affecting the cervical, bilateral shoulder and lumbosacral musculature. Dr. Hoy also indicated in his assessment that the Appellant could work at a sedentary capacity but was not capable of resuming his pre-collision occupation at full-time, full duties without restrictions. Dr. Hoy recommended a work-hardening program lasting eight weeks which could be interspersed with a modified duty work program.

A [text deleted] modified Return to Work Program sheet was completed by Dr. Hoy on January 18, 2002. At that time, Dr. Hoy indicated that the Appellant was able to lift 50 pounds, carry 20 pounds, push and pull 40 kg and was able to bend and walk without restrictions but should only stand for a period of approximately one hour. Supportive chiropractic care was recommended at a frequency of two to three times per week for four to six weeks. Dr. Hoy concluded that the Appellant had completed an eight-week work-hardening program and demonstrated appropriate postural tolerances for a return to work with symptoms.

In a Discharge Report dated January 22, 2003, the ARCC rehabilitation team indicated that the Appellant was functionally able to return to his pre-collision occupation at full-time, full duties without restriction. The Appellant continued to have ongoing reports of pain and ARCC recommended that the Appellant continue to be treated by a chiropractor at a frequency of one or two times per week for the subsequent four to six weeks to control the pain. It was also advised that the Appellant should continue his home exercise program as outlined by the ARCC treatment team during his work-hardening program.

On February 1, 2002, MPIC wrote to the Appellant indicating that the medical information MPIC had received supported the Appellant's ability to return to work on January 16th, 2002, and as a result the Appellant was no longer entitled to IRI benefits as of that date.

On February 7, 2002, the Appellant made an Application for Review of the decision by MPIC to terminate IRI benefits he had been receiving.

Dr. Mestdagh provided a report to MPIC dated January 28, 2002, in which he indicated that the Appellant has had minimal change since October 26, 2001, and his condition probably worsened. Dr. Mestdagh also stated that the worsening of the Appellant's condition developed during treatment at ARCC. Dr. Mestdagh, in a further letter to MPIC dated April 2, 2002, reiterated the Appellant's complaints and that the Appellant was attending his office for treatment in excess of his original estimate of monthly visits.

On March 22, 2002, Dr. Mestdagh provided a chiropractic Treatment Plan Report to MPIC wherein Dr. Mestdagh indicated that the Appellant was progressing fairly well but was still having ongoing problems with neck and back pain and was suffering from stress for which he was being treated by his medical doctor. Dr. Mestdagh recommended that the Appellant receive six chiropractic treatments in April and five chiropractic treatments in May.

On March 17, 2002, the Internal Review Officer wrote to Dr. Hoy requesting clarification of his discharge report dated January 22, 2002.

In a report dated May 17, 2002, Dr. Mestdagh indicated to MPIC that the Appellant's neck and upper back problems appeared manageable but his low back pain continued to be a concern. Dr. Mestdagh further indicated that in March and May the Appellant was not working, the Appellant's mood appeared to be altered and he may be falling into a depression.

In a letter dated June 11, 2002, Dr. Hoy responded to the request for clarification by the Internal Review Officer and stated that during the Appellant's work-hardening program, the Appellant demonstrated greater than reasonable sitting tolerance to substantiate his return to his occupational full-time duties. Dr. Hoy confirmed that it was the Clinic's opinion that the Appellant demonstrated a sitting tolerance that allowed him to safely return to his pre-accident employment at full-time, full duties without restriction.

Dr. Brad Baydock, a medical consultant with MPIC Health Care Services, was requested by the Internal Review Officer to review the file to determine whether Dr. Baydock agreed with Dr. Hoy's opinion that the Appellant was able to return to work and would be able to drive for a period of ten hours each day with appropriate breaks for the [text deleted]. Dr. Baydock was provided with all of the medical reports including two separate surveillance videotapes which had been prepared on behalf of MPIC.

Dr. Baydock provided a report to MPIC dated July 11, 2002 wherein he stated:

Based on my review of the submitted medical documentation including the surveillance videotapes, it is my opinion that the claimant would likely be functionally able to return to his occupation as a shuttle bus driver without restrictions, on a balance of medical probabilities. Although the claimant has ongoing pain consistently documented throughout the file, it is my opinion, that the objective medical information on file provided by ARCC and the submitted videotapes indicate that the claimant did not have a significant medical impairment that would lead to employment disability.

The Internal Review Officer, in her decision dated July 31, 2002, reviewed all of the medical reports from ARCC, Dr. Mestdagh, Dr. Baydock and as well the surveillance information. The Internal Review Officer stated:

Dr. Baydock reviewed those reports and also reviewed the videotapes as I stated above, and on page 5 of his opinion he outlines the observations from those videotapes. He noted that you drove three different vehicles over that period of time and that you had no problem entering or exiting the vehicles. He also stated that you demonstrate an ability to nearly fully rotate your cervical spine and there was full forward flexion at the lumbar spine to approximately 90 degrees with no obvious pain or impairment.

As a result of all of this information, Dr. Baydock draws the conclusion that Dr. Mestdagh had advised that you were not ready to return to employment however the reasons for this inability to return to work appeared to be on subjective pain reports. Dr. Baydock concludes by saying ..."Although the claimant has ongoing pain consistently documented throughout the file, it is my opinion, that the objective medical information on file provided by ARCC and the submitted videotapes indicate that the claimant did not have a significant medical impairment that would lead to employment disability."

After my full review of the information, I agree with Dr. Baydock, the surveillance information, and Dr. Hoy's report. Dr. Mestdagh's reliance on your subjective complaints of pain and Dr. Baydock's thorough review of the file have caused me to form the opinion that you were capable of performing your full duties without restriction January 16, 2002. As a result, I am confirming your Case Manager's decision letter of February 4, 2002. However, I am reinstating your Income Replacement Indemnity benefits to be payable to you until February 4, 2002 being the date of your Case Manager's official notification of the decision.

The Appellant has now appealed the decision of the Internal Review Officer, dated July 31, 2002, to this Commission. The Appellant maintains that he was unable to return to work as of January 16, 2002 as determined by ARCC. In support of his position, the Appellant provided a report from Dr. Stambrook, a psychologist. Dr. Stambrook had assessed the Appellant and provided a report dated August 26, 2002 and concluded that the Appellant was not capable of returning to work.

Upon receipt of Dr. Stambrook's report, the Internal Review Officer requested that a member of the Health Care Services Team review Dr. Stambrook's opinion in respect to the Appellant's ability to return to work from a psychological perspective.

On November 5th, 2002, Dr. Andrew Jones, Psychological Consultant, Health Care Services provided a report to the Internal Review Officer. Dr. Jones had the opportunity of reviewing Dr. Stambrook's recent report as well as Dr. Baydock's report of July 11, 2002. Dr. Jones in his report states:

According to Dr. Stambrook the claimant has no history of depression or psychiatric treatment. The claimant did report during the assessment, however, that he had "significant sleep disturbance, problems with concentration, sadness and was feeling very distressed". Dr. Stambrook reported that the claimant presented as "settled, stable and had good range of affect. He was pleasant, interactive and engaging". He had the claimant complete a personality inventory (MMPI-2) which produced a valid profile that demonstrated a "significantly elevated Conversion V which indicates somatic reactivity to stress and the fact that pain, discomfort and physical functioning are very significant focuses in his every day life and the way he engaged people at this point."

Diagnostically, Dr. Stambrook indicates that the claimant was suffering from "residual depressive symptoms" which he described as being "in the mild range". He notes as well that the claimant "seems to be developing a Pain Disorder with Physical and Psychological Perpetuating Factors. This seems to be the most significant factor interfering with his employability at this time as the severity of his mood disturbance did not seem to be the major factor in regards to returning to work".

Dr. Stambrook states that "I did not see J.K. fit to return to work as a shuttle bus driver, and feel that any time frame here will be dictated by the physical nature of his assessment". Dr. Stambrook notes that the claimant has musculoskeletal and radicular pain symptoms and suggests that these symptoms are "suspicious of some nerve root irritation". It is reported by Dr. Baydock (in reference to a report by Dr. Mestdagh of January 28, 2002) that the claimant has "pre-existing bone disease" and that "his condition was aggravated with prolonged sitting". Dr. Baydock also noted that "at 320 pounds, the patient's size is a modifying factor for aggravating his injury and provided additional stress when sitting".

Dr. Stambrook offers some recommendations in his report which include a review of the claimant's medication, further physical examination, cognitive behavioral pain management as well as vocational rehabilitation. In terms of the pain management, Dr. Mestdagh's report of June 14, 2002 notes that the claimant is making progress in therapy and that his symptoms are less severe. Further chiropractic treatment is recommended. Thus, the claimant is receiving effective physical treatment for his pain. In terms of vocational rehabilitation, Dr. Baydock indicates that according to video surveillance of the claimant, he "was able to operate three separate types of motor vehicles, without apparent functional deficit". This evidence would suggest that vocational rehabilitation is not necessary for the claimant.

Dr. Jones concludes:

Based on the submitted medical documentation, it is my opinion that the claimant does not have a psychological condition that would prevent him from returning to his job as a shuttle bus driver. According to Dr. Stambrook's report, the claimant's depressive symptoms are "mild" and "residual" in nature. Dr. Stambrook suggests that it is the claimant's physical concerns which prevent him from returning to work. As noted by Dr. Baydock, however, the claimant is physically able to do his job despite his subjective pain concerns that appear to be related to a pre-existing condition and is aggravated by the claimant's obesity.

Appeal

This appeal is governed by Section 110(1)(a) of the MPIC Act which 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;

In his testimony the Appellant indicated that as a result of the motor vehicle accident, he was unable to continue to work as a Shuttle Bus Driver for [text deleted], that he had received chiropractic treatment, had attended a work-hardening program but had not recovered to his pre-employment status and therefore was not capable of returning to work. He advised that his lower back problem was exacerbated during the program at ARCC, and that his lower back was never in as much pain as it was upon discharge from ARCC. Due to this exacerbation of his low back pain, he was not able to return to his previous employment. The Appellant submitted that having regard to the reports of Dr. Mestdagh and Dr. Stambrook, and having regard to his own testimony, the appeal should be granted.

The Commission was informed by the Appellant during the course of the proceedings that, pursuant to Dr. Stambrook's advice, he had seen Dr. Stitz for an assessment. The

Commission adjourned the appeal hearing and requested a medical report from Dr. Stitz with respect to the following questions:

1. What was the Appellant's current diagnosis?
2. Did the Appellant's low back complaints prevent him from returning to work as a Shuttle Bus Driver beyond February 4, 2002?
3. Whether in Dr. Stitz's opinion, the Appellant's current low back complaints were related to the motor vehicle accident of September 9, 2001?

Dr. Stitz, in his report dated May 30, 2003, indicates that the Appellant presented with lower back pain associated with radiation into the right lower limb. The symptoms and physical examination were suggestive of a radicular process ("pinched nerve"). In respect of the question whether the Appellant's low back complaints prevented him from returning to work as a Shuttle Bus Driver on February 4, 2002, Dr. Stitz replied that it was difficult from him to provide specific information in respect of the Appellant's status one year prior to the date that he had met with him. However, Dr. Stitz did state that, "At the present time, there are no physical findings that would absolutely preclude him from attempting return to work as a shuttle bus driver." Dr. Stitz also commented that although J.K. reported that he was not able to return to his previous duties due to his symptoms, he did not place any medical restrictions on J.K.

Dr. Stitz indicated that the Appellant complains that he is not able to return to work. Dr. Stitz further indicated that there were no physical findings that would have been associated with medical restrictions in February of 2002. He further states that at the time of his assessment on March 31st, 2003, there were no physical findings that would absolutely preclude the Appellant from attempting to return to work as a Shuttle Bus

Driver. Dr. Stitz also stated that the Appellant was not able to return to his previous duties due to the symptoms that he describes, which are associated with limitation of tolerance. Dr. Stitz further asserted that at the time he examined the Appellant, he did not place any medical restrictions on the Appellant's return to work.

In reply to the question as to whether, in his opinion, the Appellant's current low back complaints related to the motor vehicle accident of September 9, 2001, Dr. Stitz indicated that the only information available to him at the time of his examination of the Appellant was the history reported by the Appellant to him. Dr. Stitz indicates that based on this information he does conclude that there was a connection between the injury the Appellant sustained in the motor vehicle accident and the onset of lower back pain. However, in respect of the radicular symptoms that the Appellant complains about, Dr. Stitz is of the view that these symptoms were not connected to the motor vehicle accident.

Discussion

Having regard to all of the medical evidence submitted to the Commission, the testimony of the Appellant and the submissions from both the Appellant and counsel for MPIC, the Commission determines that, on a balance of probabilities, the Appellant has not established that the injuries that he sustained in the motor vehicle accident prevented him from returning to work after February 4, 2002.

The Commission notes that Dr. Hoy, who conducted the work-hardening program in respect to the Appellant, was in the best position to determine whether or not the Appellant was capable of returning to work. He had an opportunity of seeing the

Appellant on a number of occasions and assessing his progress through the work-hardening program.

Dr. Hoy's medical opinion that the Appellant was capable of returning to work after February 4, 2002, on a full-time basis is confirmed by Dr. Baydock who conducted a paper review of the entire medical file.

Dr. Stambrook opined that the Appellant appeared to be developing a Pain Disorder with Physical and Psychological Perpetuating Factors. The Pain Disorder seemed to be the most significant factor interfering with the Appellant's employability, since the severity of his mood disturbance did not seem to be the major factor in regards to returning to work. According to Dr. Stambrook's report, the Appellant's depressive symptoms were "mild" and "residual" in nature. Dr. Stambrook concludes that the Appellant's physical concerns prevented him from returning to work, rather than any psychological concerns.

According to Dr. Stitz, who examined the Appellant in regards to his radicular signs, "these symptoms were not present immediately following the collision and based on his history, began while receiving treatment in or around January 2002. At that time, he felt a "pop" in his lower back associated with an increase in low back pain and onset of radicular pain into his right leg. In my opinion, based on the temporal relationship and mechanism described, the motor vehicle collision of September 2001 is not the medically probably direct cause of exacerbation of low back pain and onset of radicular symptoms. It would appear that the activity in or around January 2002 has a more medically probably causal relationship."

On the basis of the foregoing medical opinions we conclude that the Appellant had progressed to a stage where he was capable of returning to work on a full-time basis as a shuttle bus driver as of January 16, 2002. The treatment of his low back problems connected to the accident had progressed to the point where he had regained the appropriate tolerance for a return to work, albeit with ongoing supportive chiropractic care. As a result, MPIC appropriately terminated the Appellant's IRI benefits pursuant to subsection 110(1)(a) of the MPIC Act. We find that the exacerbation of his low back pain and onset of radicular symptoms was not causally connected to the motor vehicle accident of September 2001, and accordingly there is no entitlement to PIPP benefits as a result of these symptoms.

For these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer dated July 31, 2002.

Dated at Winnipeg this day of 2003.

MEL MYERS, Q.C.

YVONNE TAVARES

JEFF PALAMAR