



## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by I.Z.  
AICAC File No.: AC-01-30**

**PANEL:** Ms. Yvonne Tavares, Chairperson  
Ms. Barbara Miller  
Ms. Deborah Stewart

**APPEARANCES:** The Appellant, I.H., was represented by Mr. Gordon Katelnikoff;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

**HEARING DATE:** April 23, 2004

**ISSUE(S):** Entitlement to Income Replacement Indemnity benefits beyond April 23, 2000.

**RELEVANT SECTIONS:** Sections 110(1)(a) and 110(2)(b) 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, I.Z., was involved in a motor vehicle accident on August 5, 1999, when his vehicle was rear-ended and pushed into the vehicle in front of him. As a result of this accident, the Appellant sustained a sore chest from the seatbelt and a sore mid and lower back.

At the time of the motor vehicle accident, the Appellant was employed as a baggage door installer with [text deleted]. He had been off work since July 7, 1999 due to a Workers

Compensation Board claim, with pain in his neck and left shoulder. His claim with the Workers Compensation Board ended on September 15, 1999.

The Appellant attended for chiropractic treatments of his motor vehicle accident-related injuries with Dr. Frederick. However, due to his delayed recovery from these injuries, Dr. Frederick recommended that the Appellant would benefit from a work hardening program. MPIC adopted Dr. Frederick's advice and arranged for an assessment at the Wellness Institute. The Wellness Institute intake assessment report dated November 23, 1999 concluded that the Appellant's condition probably did not meet the demands of his employment and that he would benefit from an exercise program. MPIC's case manager then arranged for the Appellant to participate in a rehabilitation program and a work hardening program at the Wellness Institute.

The Appellant successfully completed the work hardening program on March 3, 2000. In a report dated March 3, 2000, Mr. Jeff Wach, the physiotherapist that had been working with the Appellant at the Wellness Institute, advised that:

As you are aware, [I.Z.] has completed his work hardening program effective today, Mar. 3/00. He has demonstrated physical and functional abilities consistent with the physical demands of his job, and no further rehabilitation programming appears to be indicated. . .

In a report dated March 6, 2000, Dr. MacKay provided the following opinion with respect to the Appellant's condition, based upon his examination of the Appellant on February 28, 2000:

It appears that [I.Z.] continues to experience mechanical neck and low back pain.

I reviewed the program [I.Z.] had been provided with at the Wellness Institute, in particular the progress he made through the program. It is noted that [I.Z.] had almost reached his occupational level of function. It appears that his symptoms prevented him from reaching his final goal.

At the present time there is insufficient objective medical evidence indicating that [I.Z.] is unable to perform his occupational duties. [I.Z.'s] subjective complaints seem to be the main barrier to his return to his previous occupation.

It is my understanding based on the information obtained from his chart and from his therapist that [I.Z.'s] rehabilitation program prior to his discharge was performed at the Wellness Institute. It is also my understanding that [I.Z.] was educated with regard to a home-based rehabilitation program that he could perform independently following his discharge from the program at the Wellness Institute.

It is my opinion that continuation with the rehabilitation program at the Wellness Institute would not likely result in any significant change in the future. It is also my opinion that the prognosis for [I.Z.] returning to his occupational duties will depend solely on his compliance with his home exercise program and his willingness to work through his symptoms as he gradually increases his activity tolerance.

I do not think that any further diagnostic interventions would shed any further light as to the origin of [I.Z.'s] persistent symptoms or lead to a change in his treatment course.

Based upon the medical reports of Dr. MacKay and Jeff Wach, MPIC's case manager wrote to the Appellant on April 10, 2000 to advise him that, effective April 23, 2000, his income replacement indemnity ('IRI') benefits would be terminated, as he had regained the ability to return to his pre-accident employment.

The Appellant sought an internal review from that decision. In his decision dated December 5, 2000, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer noted the following reasons for his decision:

***1. Section 110(1)(a) of the MPIC Act***

Section 110(1)(a) of the Act provides that Income Replacement Indemnity ceases when the claimant is "able to hold the employment that he . . . held at the time of the accident." In point of fact, [I.Z.] was *not* working at [text deleted] when he had his motor vehicle accident. He was on WCB benefits at the time. The case manager broadly construed Section 110(1)(a). He interpreted it to mean that [I.Z.] actually had to be able to return to the job he did at [text deleted] prior to his most recent WCB claim. Only then would Section 110(1)(a) apply to end his entitlement to IRI. That is an interpretation of the provision very much to [I.Z.'s] advantage.

On December 3, 1999, the Wellness Institute completed a physical demands analysis for the job that [I.Z.] had at [text deleted]. The detailed information received from the Wellness Institute on October 31, 2000 shows that [I.Z.] met or exceeded all of those physical demands by March 2000. Section 110(1)(a) sets up an objective test to determine entitlement to IRI. The objective evidence shows that [I.Z.] was able to return to work. Therefore, the case manager was correct in terminating his entitlement to IRI.

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I accept the objective evidence provided by the various reports from the Wellness Institute. I do not accept Dr. Shah's contributions as even providing contrary evidence. All Dr. Shah has done is repeat subjective complaints whereas Section 110(1)(a) calls for an objective assessment. In addition, Dr. Shah's description of [I.Z.'s] condition is impossible to square with the account given by both the Wellness Institute and Dr. Frederick months earlier. Since the evidence shows that [I.Z.] was able to return to his pre-accident work by March of 2000, the case manager was justified in applying Section 110(1)(a) to terminate his IRI as of April 2000.

The Internal Review Officer also found that it would have been justifiable to terminate the Appellant's IRI pursuant to ss. 160(c) and (f) of the MPIC Act, due to the Appellant's refusal to return to his pre-accident occupation and due to his preventing and delaying his own recovery. Additionally, the Internal Review Officer concluded that the Appellant was not entitled to an extension of IRI benefits pursuant to ss. 110(2) of the MPIC Act, since it was the Appellant who refused to return to his former employment at [text deleted].

The Appellant has now appealed from that decision to this Commission. The issue which requires determination in this appeal is whether the Appellant is entitled to IRI benefits beyond April 23, 2000.

The relevant sections of the MPIC Act are as follows:

**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;

**Temporary continuation of I.R.I. after victim regains capacity**

**110(2)** Notwithstanding clauses (1)(a) to (c), a full-time earner or a part-time earner who lost his or her employment because of the accident is entitled to continue to receive the income replacement indemnity from the day the victim regains the ability to hold the employment, for the following period of time:

(b) 90 days, if entitlement to an income replacement indemnity lasted for more than 180 days but not more than one year.

Although the Internal Review Officer also cited ss. 160(c) and (f) of the MPIC Act as grounds for termination of the Appellant's IRI benefits, these sections were not argued by either counsel for the Appellant, nor counsel for MPIC. Based upon the arguments presented to the Commission, the Commission did not consider it necessary to invoke ss. 160(c) or (f) in order to determine the issues posed in the current appeal.

At the appeal hearing, counsel for the Appellant submitted that as a result of the August 5, 1999 accident, the Appellant sustained injuries which have prevented him from returning to his pre-accident occupation. He notes that despite the Appellant's desire to return to his pre-accident employment with [text deleted], his various injuries precluded his return to work. Counsel for the Appellant relies on the reports of the Appellant's family physician, Dr. Shah, who felt that the Appellant was only capable of returning to work on modified duties. Counsel for the Appellant maintains that the termination of benefits pursuant to ss. 110(1)(a) of the MPIC Act was not justified since the Appellant was not able to hold the pre-accident employment as at April 23, 2000.

In the alternative, counsel for the Appellant submits that the Appellant lost his employment with

[text deleted] because of the accident and is therefore entitled to a continuation of IRI benefits pursuant to ss. 110(2)(b). In support of this position, counsel for the Appellant relies upon the letter dated July 3, 2000 from [text deleted] which advised as follows:

[text deleted] is unable to accommodate the restrictions as stated by [I.Z.'s] physician (Dr. B. Shah) as per correspondence dated May 2, 2000.

We look forward to [I.Z.'s] return to work when he has fully recovered and is able to perform his pre-injury duties.

Since the restrictions on the Appellant's capabilities resulted from the injuries he sustained in the motor vehicle accident, counsel for the Appellant submits that, at a minimum, the Appellant is entitled to receive a further 90 days of IRI benefits, beyond April 23, 2000.

Counsel for MPIC submits that the Appellant has not established an entitlement to IRI benefits beyond April 23, 2000, arising out of the August 5, 1999 motor vehicle accident. In support of his submission, counsel for MPIC notes that:

- Dr. Frederick, the Appellant's chiropractor, considered the Appellant to be very nearly ready to return to work within three weeks after the accident, although he felt that the Appellant did not seem anxious to do so.
- The Wellness Institute report dated March 3, 2000 concluded that the Appellant was fit to return to his pre-accident employment. Notwithstanding the Appellant's many subjective complaints, and his protestations that he remained disabled, there was no objective evidence to support the position of the Appellant.
- The Appellant began seeing a new physician, Dr. Shah, in February 2002. The Appellant appears to have actively misled Dr. Shah regarding his post-accident rehabilitation and level of function.
- The Appellant then effectively sabotaged any prospect of returning to his pre-accident employment by grossly misstating the level of his functional abilities at the

conclusion of the Wellness Institute work hardening program.

- Based on the [text deleted] physical demands analysis dated December 3, 1999 and the Wellness Institute narrative report dated October 31, 2000, the Appellant met or exceeded all work demands when he was discharged from the Wellness Institute in early March 2000.

Based upon the foregoing factors, counsel for MPIC maintains that the Appellant was able to hold his pre-accident employment as at April 23, 2000, when his IRI benefits were terminated. Counsel for MPIC also insists that the Internal Review Officer's findings and conclusions with respect to the Appellant's loss of employment with [text deleted] should be accepted. Counsel for MPIC reiterates that the Appellant effectively sabotaged any prospect of returning to his pre-accident employment by misstating the level of his functional abilities. Accordingly, counsel for MPIC submits that the appeal should be dismissed and the Internal Review decision dated December 5, 2000 confirmed.

**DISPOSITION:**

After a careful review of all of the evidence, both oral and documentary, we find, on a balance of probabilities, that the Appellant was capable of holding his pre-accident employment as at April 23, 2000. We also conclude that the Appellant has failed to establish, on a balance of probabilities, that he lost his pre-accident employment because of the accident. Accordingly we find that there is no entitlement to a continuation of IRI benefits pursuant to ss. 110(2).

We find that the Appellant has not established, on a balance of probabilities, that he was unable to hold his pre-accident employment beyond April 23, 2000, due to injuries related to the motor vehicle accident of April 5, 1999. Despite the opinion of the Appellant's family physician, Dr.

Shah, and the Appellant's subjective concerns, we find that there is a lack of objective medical evidence to connect the Appellant's ongoing pain complaints to the motor vehicle accident of August 5, 1999. Moreover, we are not convinced, on a balance of probabilities, that the Appellant's subjective pain complaints prevented him from holding the employment which he held at the time of the accident from April 23, 2000 and thereafter. Rather, we prefer the objective evidence set out in the reports from the Wellness Institute, that the Appellant met or exceeded all work demands when he was discharged from the Wellness Institute in early March 2000. As a result, we find that the Appellant was fit to return to his pre-accident employment as of April 23, 2000. Having made the determination that the Appellant was capable of returning to work on April 23, 2000, we also conclude that it was the Appellant's own actions which lead to the loss of his employment with [text deleted] and not the injuries sustained in the motor vehicle accident.

Accordingly, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer dated December 5, 2000.

Dated at Winnipeg this 14<sup>th</sup> day of May, 2004.

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**YVONNE TAVARES**

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**BARBARA MILLER**

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**DEBORAH STEWART**