



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by A.A.

AICAC File No.: AC-01-83

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Laura Diamond
Mr. Wilson MacLennan

APPEARANCES: The Appellant, A.A., appeared on her own behalf together with her representative J.M.; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: May 1, 2002 and June 30, 2004

ISSUE(S):

1. Classification of the Appellant as a temporary earner;
2. Entitlement to Income Replacement Indemnity benefits after January 31, 2000;
3. The capacity of the Appellant to return to her pre-accident employment within 180 days following the motor vehicle accident;
4. Entitlement to 180-day determination.

RELEVANT SECTIONS: Sections 70(1), 83(1)(a), 84(1) and 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 6 and 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

A.A. (hereinafter referred to as the "Appellant") was involved in a motor vehicle accident on January 10, 2000 and suffered injuries to her face, neck and knees. The Appellant had commenced employment with [text deleted] on September 16, 1999 as a cleaner. Since the

motor vehicle accident the Appellant has not returned to her pre-accident employment work as a cleaner and was in receipt of Income Replacement Indemnity ('IRI') benefits.

While employed with [text deleted] it was quite common for the Appellant to have the assistance of her husband, and occasionally her children, in carrying out her cleaning activities. The Appellant and her family were recent immigrants to Canada from [text deleted] and the Appellant was fluent in the [text deleted] language but was not fluent in the English language at the time of the motor vehicle accident.

On May 17, 2000, [D.B.], the Operations Manager of [text deleted] (hereinafter referred to as '[text deleted]'), wrote to MPIC's case manager and informed her of a purported discussion he had with the Appellant and her husband at her workplace at the beginning of January 2000. In this letter [D.B.] stated:

As requested by you, the above employee was employed by [text deleted] from September 16, 1999 to January 9, 2000. Around the beginning of January they informed me that due to being on part time only, they would have to terminate their job as it was not enough money for their commitments. They were going to go on welfare. I believe they said this around the end of January.

Unfortunately, on their way out to their employment site at [text deleted], on [text deleted] they were involved in an accident and could not work that evening as they were injured.

The MPIC case manager wrote to the Appellant in a letter dated June 23, 2000 and advised her that since she had been classified as a temporary earner, pursuant to the provisions of Section 70 of the Act, the Appellant was only entitled to IRI benefits for the period she was actually working during the first 180-days following the motor vehicle accident. The case manager further stated that the Appellant's employer had advised the case manager that the Appellant would be leaving her employment at the end of January 2000 since the amount of money the

Appellant was receiving was not sufficient to meet her requirements and that she would be collecting Welfare benefits starting at the end of January 2000. As a result of being so advised, the case manager informed the Appellant that pursuant to Section 83(1) of the Act the Appellant was no longer entitled to receive IRI benefits after the end of January 2000. The case manager further informed the Appellant that IRI benefits had been paid to the Appellant up to and including April 16, 2000 but thereafter IRI benefits would cease.

On September 21, 2000 the MPIC case manager again wrote to the Appellant in respect of her entitlement to IRI benefits after the 181st day of the motor vehicle accident. Section 110(1)(a) of the Act provides that entitlement to IRI ceases when the Appellant was able to return to her pre-accident employment.

In this letter the case manager advised the Appellant that:

1. no further IRI benefits would be paid to the Appellant because the medical information received by MPIC from Dr. Chernish indicated that the Appellant would be capable of a return-to-work program working modified duties as an office cleaner.
2. on July 17, 2000 MPIC received a further medical report from Dr. Chernish in respect of his examination of the Appellant of July 10, 2000 which indicates that there were no physical findings that would restrict the Appellant from returning to work as an office cleaner.
3. a medical review was conducted by MPIC's Health Services Team. Based on the medical information provided, the medical review determined there was nothing physical nor any objective findings related to the motor vehicle accident that would have precluded the Appellant from returning to work as an office cleaner.

4. MPIC had determined that since the Appellant would have been capable of returning to work before the 181st day following the motor vehicle accident, she was not entitled to a 180-day determination under the Act.
5. although the Appellant received IRI benefits from January 18, 2000 to April 16, 2000 on the basis that she had been employed at [text deleted], MPIC had determined that this constituted an overpayment of 11 weeks and 4 days, but MPIC was not seeking to recover this overpayment from the Appellant.

Internal Review Officer's Decision

The Appellant applied for an Internal Review of the case manager's decision. On April 24, 2001 the Internal Review Officer wrote to the Appellant confirming the decisions of the case manager and stated:

1. You were a temporary employee at the date of your motor vehicle accident on January 10, 2000.
2. Your entitlement to Income Replacement Indemnity ("IRI") benefits following that accident ended on January 31, 2000.
3. You were overpaid IRI benefits following February 1, 2000, in the amount of \$[text deleted], but the Corporation will not seek to recover that amount from you.
4. The medical evidence indicates that you were fit to return to your pre-accident work as an office cleaner within the 180 days following your motor vehicle accident. Consequently, you are not entitled to a 180-day determination of employment. Accordingly, you are not entitled to receive IRI thereafter either.

As a result of the decision of the Internal Review Office, the Appellant filed a Notice of Appeal.

Appeal

The appeal hearing took place on May 1, 2002 and June 30, 2004. The Appellant was represented by J.M., and Mr. Dean Scaletta appeared on behalf of MPIC.

1. Entitlement to Income Replacement Indemnity benefits for the first 180 days

The relevant provisions in respect of this issue are as follows:

Definitions

70(1) In this Part,

"**temporary earner**" means a victim who, at the time of the accident, holds a regular employment on a temporary basis, but does not include a minor or a student;

Entitlement to I.R.I. for first 180 days

83(1) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:

(a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;

M.R. 37/94

Meaning of temporary employment

6 A person holds a regular employment on a temporary basis where the person

- (a) has held the employment for less than one year before the day of the accident;
- (b) during the course of the employment, has been employed for not less than 28 hours per week, not including overtime hours; and
- (c) is not covered by clause 4(b).

At the appeal hearing the Appellant did not challenge her status as a temporary earner and did not pursue this aspect of her appeal. The Commission notes that the effect of being classified as a temporary earner limited the Appellant's entitlement to IRI during the first 180-days after the accident to those periods of time when, but for the accident, she "would have held" remunerative employment.

At the appeal hearing MPIC called as a witness D.B., who had been the Operations Manager at [text deleted]., on January 9, 2000. D.B. testified that:

1. on January 9, 2000 he saw the Appellant and her husband while they were at work and he had a discussion with the Appellant's husband who is able to speak English
2. while he was speaking to Mr. A. in English, the Appellant at the same time was speaking in [text deleted] to a fellow employee.

3. during the course of his discussion with Mr. A., he was informed by Mr. A. that the Appellant intended to quit her job as she was not earning enough money and she would start collecting Welfare benefits at the end of January 2000.
4. he was aware at the time of his discussion with Mr. A. that the Appellant did not understand the English language.
5. he was not able to state that the Appellant overheard his discussion with Mr. A.
6. he never confirmed with the Appellant that it was her intention to quit work at the end of January 2000 in order to collect Welfare benefits.

The Appellant testified at the hearing that:

1. she never intended to quit her employment at the end of January and go on Welfare and never advised D.B. of such an intention.
2. it was contrary to her values to receive Welfare benefits when she was capable of working.
3. the only reason why she was unable to continue to work after the motor vehicle accident was due to the injuries she sustained in the accident and not because she intended to quit her employment.

The Commission notes that D.B., in his letter to the case manager dated May 17, 2000, did not indicate that the Appellant had informed him that she would be quitting work and going on Welfare but stated “they informed me”. The Commission determines that the discussion between D.B. and Mr. A. constitutes hearsay evidence. Although Mr. A.’s comments may reflect his state of mind at the time of his discussion with D.B., these comments cannot be attributed to the Appellant.

Unfortunately, the case manager, prior to writing a letter to the Appellant terminating her IRI, failed to contact the Appellant and determine the accuracy of D.B.'s statements. The Commission finds that the case manager wrote to the Appellant in a letter dated June 23, 2000, terminating the Appellant's IRI, and in error stated:

Your employer has advised us that you informed him that you would be leaving his employment at the end of January 2000 since the amount of money you were receiving from the employment was not sufficient to meet your requirements. You further advised your employer that you would be collecting Welfare benefits starting the end of January 2000. (underlining added)

At the appeal hearing D.B. in his testimony acknowledged that the discussion he had on January 9th, 2000 was with the Appellant's husband and not with the Appellant in respect of the Appellant's intentions relating to her employment and that he never spoke directly to the Appellant in respect of her termination of employment as an office cleaner.

The Commission finds that the Appellant is a credible witness, who testified in a straightforward manner, without equivocation, and we accept her testimony and reject the hearsay evidence that the MPIC case manager relied upon when terminating the Appellant's IRI. Accordingly, the Commission determines that MPIC erred when they terminated the Appellant's IRI benefits effective April 16, 2000. The Commission is satisfied that, but for the accident, the Appellant would have continued to work for [text deleted] as an office cleaner during the first 180-days after the accident.

2. Income Replacement Indemnity benefits after the 181st day

The relevant provisions of the Act in respect of this appeal are:

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;

Manitoba Regulation 37/94

Meaning of temporary employment

- 6** A person holds a regular employment on a temporary basis where the person
- (d) has held the employment for less than one year before the day of the accident;
 - (e) during the course of the employment, has been employed for not less than 28 hours per week, not including overtime hours; and
 - (f) is not covered by clause 4(b).

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.

The Commission, on review of the totality of the medical evidence, is satisfied that the Appellant failed to establish, on a balance of probabilities, that the Appellant was entitled to IRI benefits for the period after the 181st day after the motor vehicle accident because she was unable to perform her previous employment as an office cleaner due to injuries caused by the motor vehicle accident.

Dr. Chernish saw the Appellant on April 12, 2000 and on July 17, 2000. In his report dated July 17, 2000 (a period approximately around the 180-day mark) he did not find any physical findings that would restrict the Appellant from her usual duties as an office cleaner.

Dr. MacKay, MPIC's Medical Consultant, after reviewing Dr. Chernish's medical report of July 17, 2000, in an Inter-Departmental Memorandum to MPIC dated September 18, 2000, stated that as of July 17, 2000, in his opinion, the medical evidence indicated that the Appellant was physically capable of returning to work as an office cleaner.

Dr. Chernish referred the Appellant to Dr. Hillel Sommer, a physiatrist, who saw her on September 26, 2000 in respect of her neck pain. Dr. Sommer in his report to Dr. Chernish dated September 26, 2000, indicated that he noted a restriction in the Appellant's range of motion, and that a gentle stroking of the neck area resulted in marked discomfort. A review of the CT scan and MRI findings indicated a high intensity at C3 on MRI of uncertain significance. Dr. Sommer stated that "*The possibility of a neoplasm and metastases was raised.*"

He further stated:

I advised her that I have no explanation for her musculoskeletal symptoms. They do not appear to be organic to me. However, organic pathology cannot be ruled out given her heightened reactivity to pain. In view of her marked anemia and the uncertain significance of the lesion on MRI, I think a full medical workup is in order. One also might give consideration to a bone scan. If in fact this is a metastatic lesion, a bone scan ought to be revealing.

Dr. Sommer in his report to MPIC dated November 20, 2001 stated, in respect of his assessment of the Appellant on September 26, 2000, that he was unable to identify a physical impairment. As a result he indicated to MPIC that he could not establish her fitness for work, with the need for any restrictions or limitations, on medical grounds.

On March 26, 2002 Dr. MacKay, MPIC's Medical Consultant, reviewed a number of medical reports that were provided to him in order to determine whether or not these reports contained medical evidence which would impact on his opinion outlined in his memorandum to MPIC dated September 18, 2000. After reviewing the MRI performed on the Appellant on August 23, 2000, Dr. Dhillon's (chiropractor) report dated July 30, 2001, Dr. Sommer's reports dated September 26, 2000 and November 20, 2001, and Dr. Dominique's report dated May 9, 2001, Dr. MacKay determined that a diagnostic condition to explain the ongoing symptoms has not yet

been identified. He stated the symptoms might be from degenerative changes (shown on the radiology reports), but it is “not medically possible to establish a cause/effect relationship” between the accident and the changes. It is probable, he stated, that the changes pre-dated the accident (in light of the x-rays taken immediately after the accident).

Dr. MacKay further stated there was very little in the way of objective findings which would translate into an occupational impairment. He further stated that anemia could cause symptoms similar to those being complained of. He concluded his report by stating that the claimant’s perceived limitation of function appears to be based on subjective symptoms and not objective evidence.

Dr. Dhillon, a chiropractor who has been treating the Appellant for some period of time, in a report to MPIC dated November 12, 2002, indicated that the Appellant still presents with her chief complaint being left sided neck pain and left upper back pain.

Dr. Scott-Herridge, a chiropractor, in an Initial Health Care Report to MPIC dated July 23, 2003, stated the Appellant was still complaining of neck, mid-back and left arm pain, with headaches and intermittent dizziness. She is apparently working “modified duties” with “no lifting/pushing/carrying for 4 months”. Dr. Scott-Herridge, in a further report dated October 3, 2003, noted no changes in the Appellant’s condition or her work capacity.

Dr. MacKay, in an Inter-Departmental Memorandum to MPIC dated April 15, 2004, reviewed a further number of medical reports for the purpose of determining whether or not it would result in a change in his medical opinion as to the Appellant’s capacity to return to her occupational duties as an office cleaner. Dr. MacKay, in his memorandum, states:

From an objective standpoint, the above-noted reports do not indicate [A.A.] has an impairment of physical function that would prevent her from performing the demands of a cleaner. The reports do not clearly identify the cause of [A.A.'s] symptoms but based on the tests performed her symptoms are not the result of a neurologic lesion, in all probability. It is once again noted that [A.A.] has degenerative changes involving the C4-5 level and this might account for some of her symptoms. Information obtained from the above-noted reports does not establish a cause/effect relationship between the degenerative changes involving the cervical spine and the incident in question. (underlining added)

From an objective standpoint [A.A.] has been identified as having full cervical range of motion in the presence of pain as of October 28, 2002. In other words [A.A.] does not have an impairment of cervical function that in turn would preclude her from performing her occupational duties.

It is noted in the reports that [A.A.] was able to return to work in some capacity. In other words she is not totally disabled from all forms of occupation. Since [A.A.] has not been identified as having a physical impairment of function from an objective standpoint, it is assumed that the limitations the health care professionals placed on [A.A.] were to assist her in minimizing symptoms as she returns to her work duties. (underlining added)

Dr. MacKay further indicated that the information he obtained from a number of the reports he reviewed did not lead him to change his opinion as it relates to the Appellant's capacity to perform her occupational duties as an office cleaner.

Appeal Hearing

At the appeal hearing the Appellant testified that, as a result of the motor vehicle accident, she sustained injuries which prevented her from returning to work as an office cleaner and, therefore, she was entitled to IRI benefits after the 181st day of the accident.

In reply MPIC's legal counsel however submitted that the Appellant has not established, on a balance of probabilities, that her inability to perform her pre-accident employment as an office cleaner was due to any injuries she sustained in the motor vehicle accident. As a result, MPIC

was correct in not providing IRI benefits to the Appellant after the 181st day of the motor vehicle accident.

The Commission accepts the medical opinion of Dr. MacKay who, after reviewing all of the medical reports on several occasions, concluded that there was no connection between the injuries the Appellant sustained in the motor vehicle accident and the Appellant's inability to return to work as an office cleaner approximately 180-days after the occurrence of the motor vehicle accident. The Commission, after reviewing all of the medical evidence, and after considering the testimony of the Appellant, agrees with the submission of MPIC's legal counsel that the Appellant has not established, on the balance of probabilities, that her medical complaints which prevented her from working as an office cleaner are related to any injuries she sustained in the motor vehicle accident.

Decision

The Commission therefore determines that MPIC correctly interpreted Section 110(1)(a) of the Act and Section 8 of Manitoba Regulation 37/94 that the Appellant's entitlement to IRI benefits ceased when the Appellant was capable of returning to her pre-accident employment.

Entitlement to 180-day Determination

The relevant provision of the Act in respect of this appeal is:

Entitlement to I.R.I. after first 180 days

84(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

The Appellant asserted that MPIC was obligated, from the 181st day after the accident, to determine her employment as a temporary earner. Section 84(1) requires MPIC to make such a determination if the temporary worker is not able, because of the accident, to hold the employment at that time. As indicated earlier in this decision, Dr. Chernish had examined the Appellant on April 12 and July 17, 2000, and in his report dated July 17, 2000 (a period approximately around the 180 day mark), he did not find any physical findings that would restrict the Appellant from her usual duties as an office cleaner.

Dr. MacKay, MPIC's Medical Consultant, after reviewing Dr. Chernish's medical report of July 17, 2000, in an Inter-Departmental Memorandum to MPIC dated September 18, 2000, stated that as of July 17, 2000, in his opinion, the medical evidence indicated that the Appellant was physically capable of returning to work as an office cleaner.

The Commission finds that MPIC correctly concluded, based on the medical reports of Dr. Chernish and Dr. MacKay, that the motor vehicle accident injuries the Appellant sustained did not prevent her from returning to her pre-accident employment as an office cleaner from the 181st day after the accident. The Commission therefore determines that the Appellant has failed to establish, on a balance of probabilities, that MPIC was required to conduct a 180-day determination of the Appellant's employment pursuant to Section 84(1) of the MPIC Act.

In summary, the Commission therefore finds that:

1. MPIC is directed to pay the Appellant IRI benefits during the first 180 days following the motor vehicle accident, from the date these benefits were terminated on April 16, 2000 until July 9, 2000, together with interest;

2. MPIC is not required to pay the Appellant any IRI benefits after July 9, 2000;
3. MPIC is not required to conduct a 180 day determination of the Appellant's employment.

Dated at Winnipeg this 5th day of August, 2004.

MEL MYERS, Q.C.

LAURA DIAMOND

WILSON MACLENNAN