



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by E.B.
AICAC File No.: AC-02-39**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Wendy Sol
Mr. Paul Johnston

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

HEARING DATE: May 11, 2004

ISSUE(S): Entitlement to Income Replacement Indemnity benefits

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

E.B. (hereinafter referred to as the "Appellant") was involved in a motor vehicle accident on February 17, 2000. The impact of the accident activated her vehicle's airbag, which resulted in injuries to her neck and hand. The Appellant was treated by various caregivers in respect of these injuries.

At the time of the accident the Appellant was employed as a clerk at [text deleted]. As a result of circumstances unrelated to the motor vehicle accident the Appellant was unable to continue in that employment following the motor vehicle accident. On March 11, 2000, however, she

commenced full-time employment as a waitress at [text deleted] in [text deleted], Manitoba. The Appellant continued to work at her employment at [text deleted] on a full-time basis until she was laid-off on May 9, 2001. However, the Appellant took the position that her lay-off occurred solely on account of her inability to carry out her employment due to injuries to the middle, index and ring fingers of her left hand and as a result she sought Income Replacement Indemnity ('IRI') benefits.

The case manager referred the Appellant's medical file to a physiatrist, Dr. Marshall Stitz, who is employed as a medical consultant with MPIC's Health Care Services. Dr. Stitz provided an Inter-Departmental Memorandum dated October 24, 2001 to the case manager wherein Dr. Stitz indicated that, as a result of the motor vehicle accident on February 17, 2000, the Appellant did sustain an injury to her right hand that resulted in limitation of motion of the right, middle and ring fingers (third and fourth digits). Dr. Stitz noted that the Appellant was right hand dominant and stated:

According to the information supplied, [E.B.] was capable of working full time for over one year after the motor vehicle collision. She was employed as a waitress at a restaurant in [text deleted], Manitoba. While the information submitted supports that she continued to have symptoms and restricted motion, there is no medical information on file indicating that there has been any deterioration in her condition. [E.B.] demonstrated that she was capable of working as a waitress for over one year and there is no information currently on file indicating otherwise. Specifically there is no medical information indicating progression/deterioration in her condition. (underlining added)

Based on Dr. Stitz's medical opinion the case manager wrote to the Appellant on November 5, 2001 and stated that MPIC was unable to provide the Appellant with IRI benefits. The Appellant made Application for Review of the case manager's decision.

Internal Review

The Internal Review hearing took place on March 6, 2002 and the Appellant attended at the hearing together with her counsel, Mr. Harvey Pollock. The Internal Review Officer, in a letter

dated March 11, 2002 to the Appellant, rejected the Application for Review and confirmed the decision of the case manager. In arriving at his decision the case manager stated:

. . . . Your file was reviewed by the Manitoba Public Insurance Corporation Medical Consultant Dr. Stitz on August 1, 2001 at which time he felt that as you had performed your duties for 15 months following the accident and there was no evidence to suggest your condition had worsened. Accordingly, he felt you were still capable of maintaining your regular duties.

The Internal Review Officer, like the case manager, quoted Dr. Stitz's opinion as set out in his Inter-Departmental Memorandum and stated:

On the basis of the above, I see no reason to interfere with Mr. Ross' decision of November 5, 2001. It has not been established that you were unable to carry out the substantial duties of your employment subsequent to May 9, 2001 due to injuries arising from your accident. The fact that you have ongoing symptoms does not equate to disability. Your Application for Review is hereby dismissed.

Appeal

The Appellant filed a Notice of Appeal dated April 8, 2002:

That I am unable to hold or engage in or perform the essential duties of employment that I was engaged in at the time of the accident due to the injuries suffered to my right hand and fingers.

The relevant provisions in respect of this appeal are:

Section 81(1)(a) of the MPIC Act:

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;

Section 8 of Manitoba Regulation 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 represented herself without counsel and Mr. Morley

Hoffman represented MPIC. The Appellant testified that:

1. as a result of the motor vehicle accident she suffered a significant injury to her right hand which rendered her physically incapable of performing her occupation of a waitress.
2. as a result of the motor vehicle accident the Appellant's family physician prescribed the rigid wrist and hand splint which she wore for approximately 3 ½ weeks after the motor vehicle accident.
3. notwithstanding her physical disability she was forced, due to economic necessity, to find employment and did so on March 11, 2000 at the [text deleted] in [text deleted], Manitoba.
4. while carrying out her duties as a waitress:
 - (a) she experienced pain in her right wrist, third and fourth fingers of her right hand;
 - (b) due to a loss of feeling in these fingers she would on occasion suffer burns to these fingers when she carried plates of food.
5. with enormous difficulty and great pain she continued to work in this capacity until she was laid-off her employment on May 9, 2001.
6. the only reason she continued to work after the motor vehicle accident was because she needed the money to survive and did not wish to be unemployed and on welfare.
7. she only applied for IRI benefits after she was laid off from her employment as a waitress.

MPIC's legal counsel cross-examined the Appellant and challenged the Appellant's testimony as to the degree of difficulty she had in working as a waitress. MPIC's legal counsel suggested that since the Appellant had worked for a period of fourteen months performing all of her duties as a

waitress subsequent to the motor vehicle accident that she was capable of doing the essential duties of the position.

The Appellant, in her submission, stated that she was not able to perform all her duties as a waitress and reiterated her position that she had extreme difficulty and suffered a great deal of pain when she worked as a waitress. She further asserted that she was not capable of carrying out the essential duties of a waitress due to the injuries she sustained in the motor vehicle accident and that she was entitled to IRI benefits.

MPIC's legal counsel in his submission indicated that the Appellant was capable of carrying out the essential duties of her employment as a waitress and relied on the medical opinion of Dr. Stitz who had opined that the Appellant had demonstrated that she was capable of working as a waitress for over one year, and that there was no information currently on her medical file which indicated to the contrary. MPIC's legal counsel therefore submitted that the appeal should be dismissed.

At the conclusion of the submissions the appeal hearing was adjourned and the Commission panel met to consider its decision. The Commission panel decided that they wished to obtain an independent assessment as to whether the Appellant could physically perform her occupation as a waitress at the truck stop as of February 17, 2000 (the date of the motor vehicle accident). At the request of the Commission Ms. Heather Howdle agreed to conduct such an assessment.

The Commission provided Ms. Howdle with 43 documents from the material filed at the proceedings together with copies of Section 81(1)(a) and Section 8 of Manitoba Regulation 37/94 together with a copy of the Internal Review Officer's decision dated March 11, 2002. The

Commission's letters to Ms. Howdle dated June 2, 2004 and June 15, 2004 were provided to both parties. Ms. Howdle provided a report to the Commission dated July 14, 2004 and stated:

In summary, it is my opinion, based on my review of the Medical information on file and my examination of [E.B.] that she was not physically capable of performing the occupation of a waitress on February 17, 2000 the date of the MVA or for 3 ½ weeks after the MVA. Her family physician prescribed a rigid wrist and hand splint for her to wear for approximately 3 ½ weeks post accident.

At 3 ½ weeks after the February 17, 2000, accident (effective March 13 2000) she demonstrated the capability to perform the full duties of the job as a waitress at the [text deleted] in [text deleted], Manitoba, with modifications to her right grip and experiencing pain in the fingers of her right hand; for duties such as carrying hot soup containers to the self-serve counter, food plates, coffee cups, coffee pot and the inability to carry as many dishes from the dishwasher compared to the other workers. She reports her work was completed despite experiencing pain in her right wrist, hand and 3rd and 4th fingers on her right hand, and despite her inability to feel heat properly and burning her fingers on many occasions. She continued working for 14 months performing all the duties of her waitressing job, up to approximately May 13, 2001, when she reports she was unfairly dismissed from her job.

The client's present physical abilities as of July 7, 2004 are in the **Sedentary – Light** level of Job Demands (Appendix A chart) consistent with her duties as a clerk at the [text deleted] store. She demonstrated the ability to lift and pour a full pail of water with a palmar grip of the right hand (15 lbs).

The client's present level of abilities would also be consistent with her duties as a waitress if the lifting demands were \leq 15 lbs. In my opinion, the client did not exhibit good function of her right 3rd and 4th finger since the accident of February 17, 2000. It has improved minimally since then and there were no personal care grids performed until September 26th, 2001 and no Occupational Therapy consult at the workplace to my knowledge to try and minimize difficulty with workplace tasks.

A copy of Ms. Howdle's report was provided to both the Appellant and MPIC's legal counsel and both were requested to provide their written comments, if any, to the Commission.

On August 4, 2004 MPIC's legal counsel wrote to the Commission and stated:

Further to the report of Heather Howdle, dated July 14, 2004, we suggest that her report supports our position. Ms. Howdle concluded that by March 13, 2000, [E.B.] demonstrated the capability to perform the full duties of a waitress, with some modifications as needed. Indeed, she worked as such for 14 months.

Accordingly, we submit the decision of the Internal Review Officer be confirmed.

In a telephone discussion with the Commission's Director of Appeals, the Appellant indicated that she did not agree with Ms. Howdle's report. She further informed the Director of Appeals that she was not a complainer and that she had carried out the duties of a waitress with great difficulty.

Discussion

The Commission, after a careful review of the Appellant's testimony, all of the documentary evidence, and in particular Dr. Stitz's Inter-Departmental Memorandum to MPIC dated October 24, 2001, and Ms. Heather Howdle's report dated July 14, 2004, determines that the Appellant has not established, on a balance of probabilities, that she was unable to perform the occupation of a waitress on November 5, 2001 at the restaurant in [text deleted], Manitoba. The Commission acknowledges that although the Appellant had some difficulty in carrying out some of her duties as a waitress at the [text deleted], Manitoba restaurant she was able to carry out the essential duties of a waitress during the course of this employment. The Commission notes that approximately 3 ½ weeks after the motor vehicle accident (February 17, 2000) the Appellant commenced working at the [text deleted], Manitoba restaurant and continued in this employment for a period of approximately 14 months until she was laid-off. This conduct is inconsistent with the Appellant's position that she was unable to substantially perform the essential duties of her employment as a waitress.

The Appellant submitted that she was financially compelled to seek employment and that is why she started working as a waitress, approximately four weeks after the motor vehicle accident. The Commission notes, however, that there was nothing to prevent the Appellant from making an Application for Compensation from MPIC after her motor vehicle accident. The Appellant

applied for compensation from MPIC in respect of her motor vehicle accident injuries only after she was laid off, which was a period of 14 ½ months after this accident.

The Commission, in arriving at its conclusion, considered the statements of A.W., dated October 18, 2003, and M.P., dated October 18, 2003, and both these statements corroborate the Appellant's testimony as to the difficulties the Appellant had in carrying out such activities as feeding herself, doing household chores and getting dressed, and the pain the Appellant appeared to suffer while carrying out these activities. The Commission agrees that the Appellant did experience some difficulty in performing some of her duties as a waitress but having regard to the medical opinion of Dr. Stitz and the independent assessment by Ms. Heather Howdle concludes that the Appellant was substantially able to perform the essential duties of her employment as a waitress.

Dr. Stitz, a physiatrist, conducted a paper review of the Appellant's medical file and concluded that the Appellant demonstrated that she was capable of working as a waitress for over one year after the motor vehicle accident had occurred and that there was no medical information which indicated anything to the contrary to Dr. Stitz.

The report of Ms. Heather Howdle, dated July 14, 2004, concluded that the Appellant could physically perform the occupation of a waitress on November 5, 2001. Ms. Howdle met with the Appellant, interviewed her, carried out a physical examination of her and conducted a number of physical tests on the Appellant. Ms. Howdle's conclusion was that 3 ½ weeks after the motor vehicle accident, which occurred on February 17, 2000, the Appellant was capable of being employed as a waitress.

Decision

For these reasons the Commission concludes that MPIC correctly applied Section 81(1)(a) and Section 8 of Manitoba Regulation 37/94 in determining that the Appellant could substantially perform the essential duties of a waitress at the [text deleted], Manitoba restaurant on or about March 13, 2000. The Commission therefore finds that the Appellant has not established, on a balance of probabilities, that she was unable to substantially perform the essential duties of a waitress at the [text deleted], Manitoba restaurant on or about March 13, 2000. As a result, the Commission dismisses the Appellant's appeal and confirms the decision of the Internal Review Officer dated March 11, 2002.

Dated at Winnipeg this 24th day of September, 2004.

MEL MYERS, Q.C.

WENDY SOL

PAUL JOHNSTON