



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by D.A.A.
AICAC File No.: AC-03-54**

PANEL: Ms. Yvonne Tavares, Chairperson
Ms. Barbara Miller
Mr. Bill Joyce

APPEARANCES: The Appellant, D.A.A., was represented by Mr. Norman Cuddy;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

HEARING DATE: July 9, 2004

ISSUE(S): Entitlement to Income Replacement Indemnity benefits beyond March 4, 2001.

RELEVANT SECTIONS: Section 110(1)(c) 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, D.A.A., was involved in a motor vehicle collision on December 20, 1999. As a result of the injuries which she sustained in that motor vehicle accident, the Appellant became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act. The Appellant is appealing the Internal Review decision dated December 31, 2002 with respect to her entitlement to Income Replacement Indemnity ('IRI') benefits beyond March 4, 2001.

On December 20, 1999, the Appellant was driving her vehicle when a half-ton truck pulled out in front of her. She was hit on the passenger side of her vehicle by the truck and the collision caused her vehicle to hit a fire hydrant in front of the grill of the car. As a result of the motor vehicle accident, the Appellant sustained severe bruising to her legs, severe pain in the tailbone region, as well as a decrease in the strength of her left leg.

At the time of the motor vehicle accident, the Appellant was employed as a temp office worker for [text deleted]. She was also collecting Employment Insurance benefits. After the motor vehicle accident the Appellant was able to continue working (with a break during the Christmas holidays) until January 11, 2000, when her contract ended. Then, due to the injuries she sustained in the motor vehicle accident, she was unable to return to work. As a result of the Appellant's inability to return to work, she became entitled to IRI benefits in accordance with ss. 83(1)(a) of the MPIC Act. Subsection 83(1)(a) of the MPIC Act provides as follows:

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.

The Appellant attended upon Dr. Albi, a family physician, approximately one month after the accident. Dr. Albi's Initial Health Care Report indicated that the Appellant's symptoms consisted of mid-low back pain, occasional parasthesia of the right anterior thigh, rib pain (left greater than right), fatigue, morning stiffness and aching in her right third finger. Dr. Albi referred the Appellant for physiotherapy treatments, to Dr. Sharif, orthopaedic surgeon, and to Dr. Arneja, physiatrist.

In his report dated April 25, 2000, Dr. Sharif concluded the following with respect to the Appellant's condition:

- 1) My clinical assessment of her present condition has been enumerated above. I feel that [D.A.A.] slowly recovering from her severe contusions to the left hemipelvis, left hemithorax and left flank. So far, all relevant radiological assessments have failed to demonstrate any base line fractures.
- 2) I feel that [D.A.A.] would benefit from continuing with her course of physiotherapy and hydrotherapy. Additionally, she maybe helped with an occasional course of mild oral analgesics and muscle relaxant, as supervised by her treating Family Physician, Dr. F. Albi.
- 3) Details of her previous examinations by her treating Orthopaedic Surgeon, Dr. R. G. Gerrie, M.D., F.R.C.S.(C), and myself are enclosed. Based on my previous assessment eight year ago, I feel that her condition is gradually deteriorating. This could well be due to passing years as well as the impact of her recent motor vehicle accident. I feel that Dr. K. S. Jolly maybe in a better position to compare her pre and post road traffic accident condition as he had the opportunity of examining her regularly subsequent to my assessment in 1992.
- 4) [D.A.A.] is responding reasonably well to her present modality of conservative management. Her prognosis from the recent road traffic accident, I feel to be reasonably favourable.
- 5) In due course, I am hoping that with her present therapy [D.A.A.] will be able to resume her pre accident level of managerial work. This may take a further period of three to six months. The exact timing for her return to work is, however, presently uncertain particularly in the light of her post poliomyelitis syndrome.

In a letter dated August 10, 2000, MPIC's case manager wrote to the Appellant to advise her of the 180-day determination process as follows:

As directed by Section 84(1) in accordance with Section 106(1) and 106(2) of the Manitoba Public Insurance Corporation Act, we have completed a 180-day determination of your Income Replacement Indemnity benefits. The 180-day determination is to provide you with the best case scenario of what your potential earnings would be for full-time employment given your past work history, your education, training, physical and intellectual aptitudes. The above-noted Regulations will be quoted in an appendix at the end of the letter.

At the time of the motor vehicle accident, [text deleted] confirmed a promised job at the CR2 level at \$[text deleted] per hour from February 28 until May 26, 2000. Your potential earnings for 52 weeks at this same job would be \$[text deleted]. Based on the above, we have therefore determined your employment to be that of a clerical person at the CR2 level.

We then apply an adjustment factor to take into consideration your presence in the workforce for a five year period preceding the accident, the adjustment factor was 33.101 %, leaving your determined income at \$[text deleted]. As per Section 84(1), the Income Replacement Indemnity shall not be less than the Income Replacement Indemnity the temporary earner or part-time earner was receiving during the first 180 days of the accident. Therefore, your Income Replacement Indemnity will increase to \$[text deleted]. Your bi-weekly indemnity will now be \$[text deleted].

In his report dated February 18, 2001, Dr. Arneja reported the following with respect to the Appellant's condition:

Question #1 - whether [D.A.A.] has reached her preaccident status.

When I saw her in the ACF Medicine at St. Boniface General Hospital on the 2nd of June, 2000, she had multiple trigger points of several muscles with restriction of movements of the spines and hips with persistent pain and until October 26, 2000 she underwent local injection of several trigger points of the affected muscles with good pain relief and improvement in the mobility of the spines and the hips. I think she has made significant improvement in her soft tissue pain syndrome and her response to the treatment has plateaued and does not require any further formal physiotherapy or local injection therapy treatments. I did not examine her immediately after the accident or before the accident and it is very hard to say whether she has reached her preaccident status or not but I will say that she has made significant improvement in her functional level which should be further supported by the functional capacity evaluation and her soft tissue trigger points have resolved.

Question #2 - whether or not [D.A.A.] will be able to return to her preaccident occupation as a secretary.

She can return to her preaccident occupation as a secretary from March 1, 2001 which does not require lifting of heavy objects more than 15 to 20 pounds and does not require any repetitive bending and twisting activities of her spine. This should be further supported by a functional capacity evaluation which will give us more objective evidence of her functional status.

A Physical Demands Analysis was subsequently undertaken of the Appellant's position and duties at the [text deleted]. The Physical Demands Analysis was conducted by Ms. Michele Gibb, an occupational therapist with Transitions Rehabilitation Consulting Services. In her report dated May 4, 2001, the Ms. Gibb recorded the following with respect to the requirements of the Appellant's position:

Job Summary:

Work is performed in a sitting position for periods of time using small muscle groups in the hands and arms. Work has minimal physical demands but is repetitive. There are constant time and productivity pressures. Eye focus for prolonged periods is required.

Employees are responsible for selecting and sorting T1 returns for further stages of processing and verifying and making the necessary changes to the identification area of the T1 returns.

The employee is required to have basic knowledge of the general organization, mission objectives, procedure systems and policies of [text deleted] and knowledge of taxation operations manual related to the selection of returns.

Use of a calculator is required

Duties:

Retrieving bundles of twenty-five returns (bundles weigh 1-4 kg) from filing bay attached to the employee's desk on either the right or left side.

Returns are placed on the desktop and the employee looks through returns for certain items (pulling these out and placing in appropriate tray) and for information verification and formatting.

Once sorted, bundles are taken to designated review boxes within the office. Employees control frequency of trips/weight carried. The employer indicated that employees are encouraged to make more frequent trips to minimize prolonged sitting demands. The employer indicated that accommodations could be made for employees who are unable to meet the walking demands of the position (a control clerk will be assigned to do this task).

In a letter dated May 30, 2001, MPIC's case manager advised the Appellant that:

On February 18, 2001, Dr. Arneja provided a medical report confirming that you could return to your pre-accident occupation as of March 1, 2001 with a restriction which does not require lifting of heavy objects more than 15-20 lbs. and does not require any repetitive bending/twisting activities of your spine.

On May 4, 2001, Michele Gibb completed a Physical Demands Analysis and provided a report which confirmed the employer would make accommodations for providing the bundles to the employee's work station and could also provide a control clerk for employees who are unable to meet the walking demands of the CR2 position.

We contacted the [text deleted] and they confirmed that they had again offered you the CR2 level position in March of 2001 which you declined indicating that you were still unable to work due to injuries sustained in your accident of December 20, 1999.

[Text deleted] provided a letter confirming a start date as no later than March 5, 2001 at a salary level of \$[text deleted] for a term until May 25, 2001.

In the absence of any other medical substantiation of any objective functional impairment, which would preclude your immediate return to work, your entitlement to Income Replacement Indemnity benefits will conclude on March 4, 2001. A cheque for Income Replacement Indemnity benefits to March 4, 2001 will be sent under separate cover.

The Appellant sought an internal review of that decision. In support of her review application, the Appellant submitted a further report from Dr. Arneja, dated September 16, 2002. In this report, Dr. Arneja opined that:

SUMMARY: [D.A.A.] has pre-existing poliomyelitis as a child and this affected mainly her right lower extremity and right torso muscles. She has undergone several surgical procedures including corrective surgery for deformities of both feet, lengthening of the Achilles tendon and excision of the callosities from both feet. She was managing with difficulties but reasonably well and was able to continue her full-time job and do most of activities of daily living and was functioning well until the accident of December 20, 1999, in which she suffered soft tissue injuries complicated by regional myofascial triggers points of several muscles in the back, right hip, buttock and thigh. This was complicated by persistent pain with contractures of the hip joints and the knee joints. Due to disuse and pain, she developed further weakness of the affected muscles leading to reduced endurance for any light to medium level of activities and work. The ongoing pain and reduced functional capabilities has caused sleep disturbances and reduced energy level leading to reduced functional capabilities and inability to return to her pre-injury occupation.

FURTHER TREATMENT AND RECOMMENDATIONS:

She would benefit by team management approach including assessment by a physiotherapist, treatment with various heat modalities including hydrotherapy, range of motion, stretching and strengthening exercises to improve motor strength and endurance of the affected muscles. She should also be assessed by the psychologist for assessment and how she is coping with her pain and dysfunctional status. On completion of physiotherapy and psychological assessment and counseling, a functional capacity evaluation should be done and on the basis of her functional capabilities, recommendation should be made to return to gainful employment.

Dr. Arneja also elaborated on his two reports (February 18, 2001 and September 16, 2002) in a letter dated November 20, 2002, where he notes that:

I would like you to review my report of February 18th 2001 to Miss M. Smith, on page 7, Question #2 – whether or not [D.A.A.] will be able to return to her pre-accident occupation as a secretary. My answer was as follows: “She can return to her pre-accident occupation as a secretary from March 1st, 2001 which does not require lifting of heavy objects more than 15 to 20 pounds and does not require any repetitive bending and twisting activities of her spine. This should be further supported by a functional capacity evaluation which will give us more objective evidence of her functional status.”

Just to clarify, you have missed in your letter the last two lines in which I also included that this should be further supported by a functional capacity evaluation which will give us more objective evidence of her functional status.

After my report of February 18th, 2001, [D.A.A.] was reviewed on several occasions including March 30th, 2001, April 6th, 2001, July 6th, 2001, June 14th, 2002, September 6th, 2002 and October 25th, 2002. On these visits she presented with symptoms of persistent thoracolumbar pain, right hip, leg and foot pain, with signs of trigger points of the soft tissues, contractures of the hips, back, knee, weakness and reduced sitting, standing and working tolerance. She all the time stated that she cannot sit or stand or do any activities for more than half to one hour. On the basis of these visits, I recommended in my report of September 16th, 2002 that she would benefit by a team management approach including assessment by a physiotherapist, treatment with various heat modalities including hydrotherapy, range of motion, stretching and strengthening exercises to improve motor strength and endurance of the affected muscles. She should also be assessed by the psychologist for assessment on how she is coping with her pain and dysfunctional status. On completion of physiotherapy and psychological assessment and counseling, a functional capacity evaluation should be done and on the basis of her functional capabilities, recommendations should be made to return to gainful employment.

The file was subsequently referred to MPIC’s Health Care Services Team for review. In his Inter-Departmental Memorandum dated December 17, 2002, Dr. Michael McKay, Medical Consultant to MPIC’s Health Care Services Team, advised that:

COMMENTS:

The information indicates that [D.A.A.] had chronic fatigue syndrome and post-polio syndrome prior to the incident in question. It is noted that she was capable of performing sedentary occupational duties with no restrictions in place.

The information on file indicates that [D.A.A.] developed various soft tissue symptoms as a result of the incident in question. There is no documentation of [D.A.A.] enhancing

a pre-existing condition, sustaining an acute bony and/or neurologic injury or developing a significant impairment of musculoskeletal function as a result of the incident in question. It is documented that she was able to continue with her occupational duties until the end of her contract (i.e. January 11, 2000). The file does not contain any medical documentation outlining an assessment performed on [D.A.A.] within the first six weeks following the incident in question. This would lead me to conclude that the symptoms she developed as a result of the incident in question were not significant. The information does not identify [D.A.A.] as developing a medical condition as a result of the incident in question that would not improve with the passage of time. There is no documentation of [D.A.A.] being exposed to other types of physical activities that might have adversely affected her recovery from the soft tissue injuries she sustained secondary to the incident in question.

....

Based on the information obtained from Dr. Arneja, it appears that [D.A.A.'s] condition improved with the treatment program he provided to her (i.e. trigger point injections as well as various exercises). It is noted that Dr. Arneja was of the opinion that [D.A.A.] should be encouraged to return to work as of October 2000. In his February 18, 2001 report, it is noted that [D.A.A.] had made significant improvement as far as her soft tissue pain and level of function. Dr. Arneja was of the opinion that [D.A.A.] was able to return to sedentary work providing she was not required to lift greater than 15-20 pounds or perform repetitive bending or twisting activities involving the spine. He indicated this should be supported by a Functional Capacity Evaluation.

....

It is my opinion that the medical evidence indicates that [D.A.A.'s] condition improved to the extent that she was able to return to work as of October 2000. It is noted in the file that [D.A.A.] was deemed capable of returning to her work duties as of March 2001 and it is my opinion that the file does not contain medical documentation that would contradict this statement.

The Internal Review Officer in his decision dated December 31, 2002 confirmed the case manager's decision and dismissed the Appellant's Application for Review. In his decision, the Internal Review Officer determined that:

When I enlisted the help of our medical consultants I requested that they review all of the medical information available with a view to determining whether or not you were able to return to such sedentary employment as of March 2001. Dr. MacKay's conclusion is that you were probably able to return to such work as early as October 2000. Clearly, therefore, you must have been able to do so by March 2001. That means that the May 31st, 2001 decision is well-founded and that it should be confirmed on this Review.

Subsequently, the Internal Review Officer received a further letter from Dr. Arneja, clarifying his earlier reports. In his letter dated January 3, 2003, Dr. Arneja comments that:

1. Are you saying that you were unable to express an opinion concerning [D.A.A.'s] ability to return to work in the absence of functional capacity evaluation?

Answer: As you are aware, [D.A.A.] was doing two jobs before the motor vehicle accident of December 20th, 1999. These jobs were working as a secretary and doing seasonal work with [text deleted] which required lifting the returns, up to 20 pounds, and this job particularly was repetitive and heavy work. On the basis of her subjective complaints and my objective assessment on several occasions including the last visit of February 9th, 2001, I made the following recommendations for your reference. You should review my letter of the 18th of February, 2001, page six, paragraph two and page seven - answer to question #2 in which I stated that she can return to her preaccident occupation as a secretary from March 1st, 2001 which did not require lifting of heavy objects of more than 15-20 pounds and does not require any repetitive bending and twisting activities of her spine. Her seasonal work with [text deleted] required lifting the returns, up to and at times more than 20 pounds and this was repetitive work and subjectively she stated that she would not be able to return to seasonal work with [text deleted]. My position is very clear regarding her returning to sedentary work as a secretary, but subjectively she stated that she would not be able to do her seasonal work with [text deleted] so on that basis I stated that she should undergo functional capacity evaluation which will give us more objective evidence of her functional status. I will argue with the statement in your letter of November 25th, 2002 in which you have stated that "that would mean that the opinion you did express was worthless since there was no functional capacity evaluation." My opinion was not worthless, my opinion was very clear regarding her returning to work as a secretary, but not returning to seasonal work with [text deleted] which she stated that she would not be able to do so I wanted objective evidence to confirm her functional capabilities and on that basis I recommended functional capacity evaluation.

The Appellant has now appealed the Internal Review decision dated December 31, 2002 to this Commission. The issue which requires determination on this appeal is whether the Appellant was able to hold the determined employment from March 4, 2001. (At the hearing of the appeal, counsel for the Appellant confirmed that the second issue dealt with by the Internal Review Officer, namely the entitlement to an extension of IRI benefits pursuant to ss. 110(2) of the MPIC Act was not being appealed to the Commission).

The relevant sections of the MPIC Act and Regulations are as follows:

Subsection 110(1)(c) of the MPIC Act:

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:

....

(c) the victim is able to hold an employment determined for the victim under section 106;

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, counsel for the Appellant submitted that since the motor vehicle accident, the Appellant has not attained the level of physical functioning which would enable her to hold the determined employment. Relying on the Appellant's testimony at the hearing, her counsel maintains that the repetitive bending, twisting and stretching required of the clerical position with [text deleted] was not possible for her to perform as of March 2001, or since. The clerical position also required the Appellant to sit all day, which she was unable to tolerate; nor could she stand for any length of time or walk any significant distance. Counsel for the Appellant maintains that these physical limitations would have prevented the Appellant from holding the clerical position with [text deleted] as of March 4, 2001 and thereafter.

With regards to Dr. Arneja's opinions that the Appellant was ready to return to work as of March 1, 2001, counsel for the Appellant argues that Dr. Arneja misunderstood the nature of the Appellant's job at Revenue Canada, and the nature of secretarial work. He insists that Dr. Arneja was overly optimistic with regards to the Appellant's functional status. Counsel for the

Appellant maintains that the Appellant simply could not carry out the duties required of the clerical position, given her reduced functional status and the ongoing deterioration in her condition.

Counsel for the Appellant further submits that the motor vehicle accident was a material cause of the Appellant's inability to return to work and her pre-accident level of functioning. He maintains that although she was suffering with chronic fatigue syndrome prior to the motor vehicle accident, she was managing. However, counsel for the Appellant maintains that the injuries sustained by the Appellant in this accident have prevented her from resuming her pre-accident level of functioning. Therefore, he submits that these injuries play a contributing role in her inability to return to work and accordingly, she is entitled to ongoing receipt of IRI benefits from MPIC.

Counsel for MPIC submits that the objective evidence on the Appellant's file demonstrates that she was capable of holding the determined employment as of March 4, 2001, and accordingly, her IRI benefits were properly terminated. Counsel for MPIC argues that the medical evidence on the Appellant's file, and particularly Dr. Arneja's opinion, establishes that the Appellant was capable of returning to work in the determined clerical position as of March 4, 2001. Counsel for MPIC maintains that the Appellant refuses to return to work due to subjective concerns - her own perception of her abilities is flawed, and this misperception prevents her from returning to work. However, he insists that the Appellant hasn't established that she couldn't perform the determined employment in March 2001, and accordingly, counsel for MPIC submits that the decision of the Internal Review Officer dated December 31, 2002, should be upheld and the Appellant's appeal dismissed.

Discussion

After a careful review of all of the evidence, both oral and documentary, we are unable to conclude, on a balance of probabilities, that the injuries sustained by the Appellant in the motor vehicle accident of December 20, 1999, prevented her from holding the determined clerical employment from March 4, 2001 and thereafter.

Dr. Arneja's opinion, which is clarified in his letter dated January 3, 2003, was definite that the Appellant could return to a sedentary occupation, which did not require lifting of more than 15-20 lbs. and did not require any repetitive bending or twisting activities of her spine, as of March 1, 2001. The Physical Demands Analysis conducted by Transitions Rehabilitation Consulting Services determined that:

1. the lifting requirements of the clerical position were within the limits set by Dr. Arneja;
2. the work had minimal physical demands, although repetitive;
3. bending and twisting were insignificant, although occasional reaching was required; and
4. an employee could be accommodated with respect to the walking demands of the position.

Upon a consideration of the restrictions imposed by Dr. Arneja, and the demands of the clerical position, we find that the Appellant should have been capable of holding the determined employment as of March 4, 2001.

Further, we find that the Appellant has failed to establish that her ongoing problems were caused by the motor vehicle accident of December 20, 1999. Rather, we accept the opinions expressed by Dr. McKay in his Inter-Departmental Memorandum dated December 17, 2002, that:

The file does not contain documentation indicating that [D.A.A.'s] pre-existing

conditions were enhanced. The medical evidence does indicate that [D.A.A.'s] condition improved significantly and therefore it is reasonable to conclude that the exacerbations she sustained resolved, in all probability.

.....

It is my opinion that the medical evidence indicates that [D.A.A.'s] condition improved to the extent that she was able to return to work as of October 2000. It is noted in the file that [D.A.A.] was deemed capable of returning to her work duties as of March 2001 and it is my opinion that the file does not contain medical documentation that would contradict this statement.

Based on my review of [D.A.A.'s] file, it is my opinion that her reported functional limitations are a byproduct of her pre-existing medical conditions, in all probability.

As a result we find that the Appellant has not established that she was unable to hold the determined employment as of March 4, 2001, due to injuries sustained in the motor vehicle accident of December 20, 1999. Accordingly, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer dated December 31, 2002.

Dated at Winnipeg this 23rd day of November, 2004.

YVONNE TAVARES

BARBARA MILLER

BILL JOYCE