



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by M.E.D.
AICAC File No.: AC-03-75**

- PANEL:** Ms Yvonne Tavares, Chairperson
The Honourable Mr. Armand Dureault
Mr. Paul Johnston
- APPEARANCES:** The Appellant, M.E.D. was represented by Mr. Harvey Diamond;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.
- HEARING DATE:** March 29, 30 and 31, 2005 and April 1, 2005
- ISSUE(S):**
1. Entitlement to Income Replacement Indemnity benefits; and
 2. Entitlement to reimbursement of physiotherapy treatment expenses beyond November 5, 2001.
- RELEVANT SECTIONS:** Sections 81(1), 105 and 136(1)(a) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act') and Section 8 of Manitoba Regulation 37/94 and Section 5 of Manitoba Regulation 40/94.

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

The Appellant, M.E.D., was involved in a motor vehicle accident on August 30, 2000. She was a passenger in a car being driven by her husband, R.D. While they were making a left turn, an oncoming vehicle impacted the passenger side centre of their vehicle in a t-bone type collision. 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 April 23, 2003 with respect to the following two issues:

1. Entitlement to Income Replacement Indemnity benefits; and
2. Entitlement to reimbursement of physiotherapy treatment expenses beyond November 5, 2001.

1. Entitlement to Income Replacement Indemnity benefits

At the time of the motor vehicle accident, the Appellant was employed by [text deleted] as a call centre representative. She was however on a medical leave of absence from her job, having undergone posterior canal occlusion surgery for a vestibular condition on April 12, 2000. At the time of the motor vehicle accident, she was still recovering from her surgery and had not yet returned to work.

Based on her ongoing inability to return to her employment duties, the Appellant applied for Income Replacement Indemnity ('IRI') benefits pursuant to Section 81(1)(a) of the MPIC Act, which provides that:

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.

MPIC's case manager, in a decision dated April 20, 2001, denied the Appellant's claim for IRI benefits on the basis that her inability to return to her occupation in the call centre was unrelated to the motor vehicle accident. The case manager also advised that the Appellant's pre-existing medical condition had not been enhanced by the motor vehicle accident, and therefore there was no entitlement to IRI benefits.

The Appellant sought an internal review of that decision. The Internal Review decision dated April 23, 2003 confirmed the case manager's decision and denied the Appellant's claim for IRI benefits, on the basis that:

1. If [M.E.D.] was in fact unable to return to her pre-accident occupation, the inability did not result from her motor vehicle accident of August 30, 2000.
2. In any event, Section 105 applied to preclude [M.E.D.] from receiving IRI.
3. Alternatively, medical evidence, including a recent opinion from Dr. Garber, failed to support the claimed inability to do the pre-accident occupation.

It is from this decision that the Appellant has now appealed to the Commission.

At the hearing of this matter, counsel for the Appellant submitted that the injuries sustained by the Appellant in the motor vehicle accident of August 30, 2000 prevented her from returning to her employment duties in the call centre and as a result she was entitled to IRI benefits in accordance with the MPIC Act. Counsel for the Appellant maintains that at the time of the motor vehicle accident, the Appellant was recovering from her surgery of April 12, 2000, albeit slowly, and if not for the motor vehicle accident, the surgery would have been successful and the Appellant would have returned to work in due course.

Contrary to the conclusions reached by the Internal Review Officer, counsel for the Appellant insists that the Appellant did sustain a traumatic head injury in the motor vehicle accident. He argues that the evidence clearly shows that the Appellant struck the left side of her head against the right side of her husband's head in the aftermath of the collision. In support of this position, counsel for the Appellant notes the following:

- The considerable trauma sustained by M.E.D., the Appellant's husband, to the right side of his head, which would indicate a substantial impact with the left side of the Appellant's head.

- The report of Mr. Greg Cann, an accident reconstructionist, which concludes that in a t-bone crash similar to that experienced by the Appellant, there will be incidents of contact between the driver and front passenger. The blow to the right side of R.D.'s head was the result of contact with a blunt, rigid object, not unlike the Appellant's head. Pain, discomfort and injury to the left side of the Appellant's head would follow.
- The paramedic's report, which indicates that injuries were sustained by the Appellant to the left side of her head.
- The triage record at the hospital emergency department, which notes "*Has headaches. Ø numbness/Ø tingling, Ø noticeable trauma*" indicating that the Appellant was complaining of pain to her head immediately following the accident.
- Dr. Horvath's Initial Health Care Report, which notes "*Headache and pain to right chest, pain to left temple*" indicating once again that the Appellant was complaining of pain to her head immediately after the accident.

Based on the foregoing, counsel for the Appellant concludes that, on the balance of probabilities, the Appellant must have struck her head against her husband's head, resulting in a significant injury to the left side of her head.

Counsel for the Appellant submits that this blow to the left side of the Appellant's head likely exacerbated her pre-existing condition, since the area of injury coincided with the area of the Appellant's surgery (i.e. the left side of her head). He notes that after the motor vehicle accident, the Appellant's symptoms of ear pressure and tinnitus increased and no further improvement in her condition was realized. He contends that the motor vehicle accident was devastating for the Appellant. Her symptoms became worse, she developed more vertiginous symptoms, which she didn't have prior to the motor vehicle accident and he advises that she will not recover from her

vestibular condition at this point. Counsel for the Appellant attributes the Appellant's lack of improvement and the worsening of her condition to the motor vehicle accident.

In further support of his position, counsel for the Appellant relies on Dr. Garber's reports. Dr. Garber, an ear, nose and throat specialist had treated the Appellant for her benign paroxysmal positional vertigo since February 1999 and had performed the posterior canal occlusion surgery on April 12, 2000. Dr. Garber, in his reports, opined that the motor vehicle accident had an impact on the Appellant's recovery. Counsel for the Appellant notes that Dr. Garber, in his letter of September 23, 2003, indicated that the type of surgery which the Appellant underwent had a very high success rate – approximately ninety-five to ninety-six (95-96%) percent of patients post-posterior canal occlusion had reduction in their benign paroxysmal positional vertigo. Counsel for the Appellant also notes that Dr. Garber opined that the likelihood of the surgery ultimately being successful, based upon the recovery attained by the Appellant as at August 30, 2000, would have been seventy-five to eighty (75-80%) percent. Even though the optimum period for recovery from this surgical procedure was four to six (4-6) weeks, Dr. Garber was still reasonably optimistic in August 2000 that the Appellant would have recovered to the extent that she would have been able to return to work. Counsel for the Appellant also notes that Dr. Garber, in his report of April 21, 2004 indicated that the Appellant's symptomatology changed drastically after the motor vehicle accident of August 30, 2000.

Counsel for the Appellant submits that Dr. Garber's opinions respecting the Appellant's condition and her eventual recovery should be preferred to those of Dr. MacKay, MPIC's medical consultant. He notes that Dr. Garber is a specialist in the treatment of vestibular problems, such as that from which the Appellant suffers. He insists that as the Appellant's treating specialist, Dr. Garber was in the best position to comment on the Appellant's condition.

Based upon Dr. Garber's reports and his testimony before the Commission, counsel for the Appellant argues that the motor vehicle accident prevented her from recovering from the surgery and worsened her condition. Counsel for the Appellant submits that prior to the accident, the Appellant was making a slow, but sustained recovery. The accident resulted in an impact to the left side of her head, which aggravated a pre-existing condition, that not only halted her recovery, but caused her condition to retrogress. Counsel for the Appellant maintains that if not for the accident of August 30, 2000, the Appellant would have recovered to the extent that she would have been able to go back to work as a call centre representative with MPIC. Accordingly, counsel for the Appellant maintains that the Appellant is entitled to IRI benefits as a result of the motor vehicle accident of August 30, 2000.

Counsel for MPIC submits that the Appellant is not entitled to IRI benefits pursuant to Section 81(1) of the MPIC Act, since her inability to hold employment is not related to the motor vehicle accident of August 30, 2000. Rather, he insists that the preponderance of the evidence leads to the conclusion that the Appellant was not recovering from her surgery, and her vestibular condition was not improving, at the time of the motor vehicle accident. As a result, counsel for MPIC maintains that Section 105 of the MPIC Act is applicable to the Appellant, since she was not regularly employable at the time of the motor vehicle accident. Section 105 of the MPIC Act provides that:

No entitlement to I.R.I. or retirement income

105 Notwithstanding sections 81 to 103, a victim who is regularly incapable before the accident of holding employment for any reason except age is not entitled to an income replacement indemnity or a retirement income.

In support of his position, counsel for MPIC notes that:

- Optimal recovery from the type of surgery undertaken by the Appellant in April 2000 would be expected within four to six (4-6) weeks. He maintains that it was evident by

August 2000 that the Appellant's surgery was not successful.

- The Appellant's benign paroxysmal positional vertigo was an intractable disease process which was getting worse. The surgery in April 2000 was unsuccessful and had in fact created more problems for the Appellant (including increased dizziness and ear pressure). Since that time, the Appellant had further surgeries and procedures, in October 2001 and April 2002, which were not related to the motor vehicle accident, but rather related to the deteriorating condition of her benign paroxysmal positional vertigo.
- Dr. Frohlich's opinion, expressed in his report of December 21, 2004, that:
 - 1) It is my opinion that on a balance of probabilities, [M.E.D.] was regularly incapable of holding employment as at the date of the accident of August 30, 2000 on account of her pre-existing condition. I base this opinion on the medical evidence that was available to me in the file.
 - 2) It is my opinion that the medical evidence in the file does not establish on the balance probabilities that [M.E.D.] sustained a head injury in the accident that would have prevented her from returning to her pre-accident employment.
 - 3) It is my opinion that the medical evidence does establish that [M.E.D.'s] head was likely exposed to some degree of trauma during the accident of August 30, 2000. The medical evidence does not seem to support that she sustained a significant enough left-sided head trauma to prevent her from returning to her pre-accident employment.
- Dr. Garber, in his testimony before the Commission, agreed with Dr. Frohlich's opinions, set out in his report of December 21, 2004.
- Contrary to the position advanced by counsel for the Appellant, the paramedic's report and the triage report simply illustrate head pain. Based on these reports, there are no objective signs of trauma or significant injury to the left side of the Appellant's head.
- There was no evidence that the Appellant was in the process of returning to work at the time of the motor vehicle accident. In fact, she had applied for long term disability benefits prior to the motor vehicle accident, indicating her inability to return to work.

As a result, counsel for MPIC submits that the Appellant's condition was not enhanced by the motor vehicle accident of August 30, 2000. Counsel for MPIC refers to Section 8 of Manitoba Regulation 37/94 which provides that:

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.

Counsel for MPIC maintains that since the Appellant's inability to hold employment was not caused by a physical injury related to the motor vehicle accident, there is no entitlement to IRI benefits. Counsel for MPIC also submits that, in any event, Section 105 of the MPIC Act would apply to the Appellant's situation so as to preclude her entitlement to IRI benefits. He claims that due to the Appellant's pre-existing condition and her lack of recovery from her April 2000 surgery, her condition had deteriorated to the point where she would have been regularly incapable of holding employment even if she hadn't been involved in the motor vehicle accident of August 30, 2000. Accordingly, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review decision dated April 23, 2003 confirmed.

Upon a careful review of all of the evidence made available to it, both oral and documentary, the Commission finds that Section 105 of the MPIC Act is applicable to the Appellant's situation so as to preclude any entitlement to IRI benefits.

At the time of the motor vehicle accident, the Appellant was not capable of employment due to the ongoing recovery process from her surgery. Upon a careful consideration of the totality of the evidence before us, we find that the Appellant would not have sufficiently recovered from the surgery, or her underlying conditions, including the benign paroxysmal positional vertigo, to

allow a return to employment of any kind, at any point in the future. Although the Appellant and her caregivers were still reasonably optimistic in August 2000 of further recovery in her condition, we were not convinced, on a balance of probabilities, of this fact.

At the time of the motor vehicle accident, the Appellant was four and one-half (4½) months post-surgery, with very little improvement noted. The period for optimal recovery, being four to six (4-6) weeks post-surgery, having long since passed. Further, both Dr. Garber and Dr. Frohlich agreed that the subsequent surgical procedures undertaken by the Appellant in October 2001 and April 2002 were not as a result of injuries sustained in the motor vehicle accident of August 30, 2000. But rather, that these surgical procedures were carried out as a result of her chronic left-sided vestibular disorder. We are therefore persuaded that the Appellant's pre-existing condition was not materially affected by the motor vehicle accident, was not improving, and would have rendered her unable to return to any employment.

Additionally, the Appellant's own actions in August 2000, prior to the motor vehicle accident, also support the conclusion that she considered herself permanently disabled. She had applied for a Canada Pension Plan disability pension and for long term disability benefits through her employer, indicating that she was not capable of any employment. We find these events indicative of the Appellant's own belief that she would not be returning to the workforce. As a result, the Commission finds that the Appellant was regularly incapable before the accident of holding employment and therefore is not entitled to IRI benefits pursuant to Section 105 of the MPIC Act.

2. Entitlement to reimbursement of physiotherapy treatment expenses beyond November 5, 2001

The Internal Review decision dated April 23, 2003 amended the case manager's decision of November 5, 2001, allowing reimbursement of the Appellant's expenses for physiotherapy treatments for the period December 2000 up to and including November 5, 2001. The Appellant has appealed from that decision to this Commission seeking, reimbursement of her physiotherapy expenses beyond November 5, 2001.

At the appeal hearing, counsel for the Appellant submitted that the Appellant should be reimbursed for her expenses incurred for physiotherapy treatments since November 5, 2001. He argues that physiotherapy treatments were beneficial for the Appellant and helped her cope with the musculoskeletal pain caused by the motor vehicle accident of August 30, 2000. Counsel for the Appellant therefore concludes that since the physiotherapy treatments were helpful for the Appellant, providing her with relief from her pain complaints, they should be reimbursed by MPIC.

In order to qualify for funding under the Personal Injury Protection Plan contained in the MPIC Act and Regulations, expenses must be incurred by a victim because of the accident, and must be medically required. The relevant sections of the MPIC Act and Regulations are as follows:

Section 136(1)(a) of the MPIC Act provides that:

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

(a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care.

Section 5(a) of Manitoba Regulation 40/94 provides that:

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

(a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician.

Upon a careful review of all of the evidence on the Appellant's file, the Commission is unable to conclude that physiotherapy treatment was medically required for treatment of the Appellant's accident related injuries, beyond November 5, 2001. There was insufficient medical evidence presented to this Commission, respecting the therapeutic requirement for physiotherapy care for this Appellant, continuing for over one year post-accident. As a result, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that physiotherapy treatments beyond November 5, 2001, were medically required as a result of injuries sustained in the motor vehicle accident of August 30, 2000.

Dated at Winnipeg this 6th day of May, 2005.

YVONNE TAVARES

HONOURABLE ARMAND DUREAULT

PAUL JOHNSTON