



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by G.H.
AICAC File No.: AC-03-186**

PANEL: Mr. Mel Myers, Q.C., Chairman
The Honourable Mr. Wilfred De Graves
Mr. Robert Malazdrewich

APPEARANCES: The Appellant, G.H., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: August 3, 2005

ISSUE(S): Suspension of Appellant's Personal Injury Protection Plan
('PIPP') benefits

RELEVANT SECTIONS: Section 160(f) and (g) of The Manitoba Public Insurance
Corporation Act ('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

G.H. (hereinafter referred to as the 'Appellant') was involved in a vehicle/pedestrian accident on March 6, 2002 and suffered injuries as a result of this accident. The Appellant was unable to return to his pre-accident employment due to the injuries he sustained in the accident and was in receipt of PIPP benefits. MPIC established a work hardening program to be administered by the Associated Rehabilitation Consultants of Canada, Ltd. ('ARCC') to assist the Appellant to return to his employment. The program commenced on September 1, 2003 and was to continue for a period of six (6) weeks.

On October 3, 2003 ARCC wrote to MPIC and informed them that the Appellant was discharged from the work hardening program on that date. In their letter to MPIC they stated that the Appellant was observed making inappropriate comments to both the rehabilitation staff as well as claimants who were participating in this program. ARCC further stated in this letter that the Appellant had been destructive in respect of the equipment in the facility and that the Appellant, on numerous occasions, was not participating in the program.

A senior case manager with MPIC met with the Appellant on October 6, 2003 and reviewed ARCC's complaints with the Appellant, and advised him that although MPIC was justified in terminating the Appellant's PIPP benefits, there would be a suspension of his Income Replacement Indemnity ('IRI') benefits for two (2) weeks. The senior case manager wrote to the Appellant on the same day confirming the two (2) week suspension and provided the following reasons for the two (2) week suspension:

On September 24, 2003, I received a call from Associated Rehab Consultants of Canada that you had not attended. You reported that you had overslept. I subsequently provided you with a decision letter dated September 24, 2003 which indicated that you had been late or left early for the program on six occasions without explanation. On September 24, 2003, you had missed the program completely. I reiterated that for the program to be successfully (sic) you would need to:

1. Attend daily for your program despite your symptoms and pain complaints.
2. Comply with the instruction provided by the treatment professionals.
3. Participate fully in the program.

....

On September 29, 2003, I was informed that you made inappropriate comments to the staff at Associated Rehab Consultants of Canada. I provided you with a decision letter of that same date indicating that should ARCC terminate your program for your behaviour, I would have no choice to terminate your benefits completely.

On October 3, 2003, you were discharged from the work hardening program for inappropriate comments, lack of participation and behaviour. While my previous decision letters indicated that I would terminate all your benefits, I have decided to suspend your income payments for two weeks. As we discussed, I am trying to arrange for your entry into another program.

The Appellant made an Application for Review of the case manager's decision on October 17, 2003. The Internal Review hearing took place on November 4, 2003. On November 14, 2003 the Internal Review Officer wrote to the Appellant confirming the case manager's decision and dismissing the Appellant's Application for Review. In his decision, the Internal Review Officer rejected the Appellant's explanation as to his conduct which had resulted in a two (2) week suspension.

The Appellant filed a Notice of Appeal dated December 1, 2003.

Appeal

The relevant provisions of this appeal are:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

.....

(f) without valid reason, prevents or delays recovery by his or her activities;

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation; or

The appeal hearing took place on August 3, 2005. The Appellant appeared on his own behalf and Mr. Terry Kumka appeared on behalf of MPIC. At the appeal hearing the Appellant testified under oath and challenged the reasons provided by the case manager to suspend his income payments for two (2) weeks as follows:

Absences from Work Hardening Program

The Appellant testified that:

1. he had not left the ARCC program early on six (6) occasions without explanation.

2. on several occasions he was unable to attend the program due to migraine headaches and so advised the ARCC instructors.
3. on several occasions he had to leave the program in order to attend doctors appointments.
4. on one occasion he had to attend a funeral and therefore could not attend the program.

The Appellant did acknowledge that he had slept in on one occasion and, as a result, came late to the program and on another occasion he was absent and did not provide any explanation.

Inappropriate comments

In respect of the allegation relating to inappropriate comments made by the Appellant to a staff instructor at ARCC, the Appellant testified that on one (1) occasion he had made an inappropriate comment to the instructor and when he was informed by the instructor that the comments were inappropriate he apologized and denied making further inappropriate comments to this instructor on any other occasion.

Complaints

The Appellant testified that:

1. he had not been disruptive to other claimants by approaching them during their rehabilitation and did not make inappropriate comments to them.
2. he had complained to the ARCC instructors and to other claimants as to the manner in which he had been treated by the ARCC instructors.

3. his complaints related to the harsh treatment he received from instructors who placed a great deal of pressure on him to perform the various exercises which he had difficulty in doing and which caused him a great deal of pain.
4. his complaints in respect of the conduct of ARCC's instructors were agreed to by other claimants who were participating in this program.

Equipment

The Appellant testified that he had not been destructive with the equipment as alleged by ARCC in their Discharge Report.

The Appellant was cross-examined by MPIC's legal counsel, and strongly denied the allegations of improper conduct by him in respect of his attendance at the program, inappropriate conduct, complaints to ARCC instructors and other claimants and destructive behaviour in respect of equipment. In cross-examination his testimony was consistent with the testimony he gave in examination-in-chief. In his testimony in cross-examination, he related that he was not treated sensitively or respectfully by ARCC instructors who had constantly pressured him to perform exercises that he was unable to do or which caused him a great deal of pain. He further testified that notwithstanding his complaints he at all times attempted, to the best of his ability, to participate in the rehabilitation program.

The Appellant, in his testimony, further stated that:

1. after he was discharged from the ARCC program on October 3, 2003 MPIC suspended his IRI payments for two (2) weeks, which he felt was unjustified;
2. subsequently MPIC arranged for him to continue with his rehabilitation program with Ms Heather Howdle, a physiotherapist;

3. he commenced this program on October 20, 2003 and he continued with this program until the middle of November 2003 without incident;
4. while he attended this program he was treated fairly and successfully completed this program.
5. if he had been treated in the same fashion by the instructors at ARCC he would not have complained to these instructors and to the other claimants.

At the conclusion of the Appellant's testimony MPIC's legal counsel indicated he was not intending to call any witnesses in support of MPIC's position.

The Appellant made a brief submission reiterating his complaints as to the manner in which he was treated by the ARCC instructors and further submitted that there was no valid reason for MPIC suspending his IRI payments for two (2) weeks and requested that the two (2) payments be reinstated and provided to him.

In his submission MPIC's legal counsel reviewed the decisions of the case manager and the Internal Review Officer and submitted that:

1. the case manager, having regard to the Appellant's conduct, was justified in suspending his PIPP benefits for two (2) weeks.
2. the Internal Review Officer properly rejected the Appellant's explanation in respect of his misconduct;
3. for these reasons the Commission should reject the Appellant's position and confirm the decision of the Internal Review Officer.

At the conclusion of the submissions by both parties the Commission panel recessed for a short period of time. After reconvening the appeal hearing the panel advised MPIC's legal counsel that it wished to receive from MPIC all of the relevant documents in its possession relating to the Appellant's participation in the rehabilitation program conducted by Ms Heather Howdle.

MPIC's legal counsel objected to the request by the Commission panel and submitted that the documents requested would not be relevant in this appeal. The Commission panel, however, indicated that the Appellant's credibility was a central issue in the appeal and the Commission wished to determine whether the Appellant's testimony in this respect relating to his participation in the rehabilitation program administered by Ms Heather Howdle was consistent with the documentation MPIC received from Ms Heather Howdle. As a result, the Commission adjourned the proceedings and requested MPIC's legal counsel to provide this documentation.

On August 11, 2005 Mr. Kumka wrote to the Commission enclosing all of the relevant documents involved in the Appellant's attendance at the Heather Howdle Physiotherapy Clinic and stated:

As indicated at the conclusion of the Hearing, it remains the position of MPI that the evidence before the Commission relating to the claimant's involvement at ARC justifies the two week suspension of benefits imposed by the Case Manager and upheld by the Internal Review Officer. Having been advised that his benefits were suspended, his subsequent involvement in the Heather Howdle program cannot be viewed to be determinative or relevant to the issue before the Commission and should not form the basis of any decision with respect thereto.

The Commission provided the Appellant with a copy of Mr. Kumka's correspondence and requested he provide any comments with respect to this information.

On August 23, 2005 the Appellant wrote to the Commission and stated:

Well I read the file papers from MPI today. As you can see I did my very best at Heather Howdles. I enjoyed myself at Heather's place because I was not pushed like a dog. I worked at my pace which was much easier on me.

I'm very upset with MPI that they did not send me to Heather's in the first place. I'm pretty sure if I was sent to Heather's place when this all started we would not have to go through this stuff right now.

.....

But once again I liked it a lot at Heather Howdles compare to A.R.C.C. The way I see it when people need Re-Hab they should be sent to Heather's not A.R.C.C. If I could do it again I would go back to Heather's place, in a snap of a finger.

Discussion

The Commission has examined the documentation provided by MPIC from Heather Howdle Physiotherapy and Consulting and notes that in Ms Howdle's report, dated November 17, 2003, the Appellant attended on sixteen (16) occasions, did not cancel or did not fail to show at any of these visits. The report further indicates the Appellant missed three (3) days due to medical appointments and that proper notification was received. The report indicates that the Appellant was very co-operative and the focus was on eccentric training and endurance.

This report further indicates that in Ms Howdle's opinion the Appellant, as of November 17, 2003, was fit to return to work as a furniture mover if the weight that he is lifting is distributed between more than one person, i.e. the weight that he is responsible for is approximately sixty (60 lbs) pounds of weight or force.

The Commission finds that upon examining this report the Appellant was extremely happy with the work hardening/conditioning activities that took place at Heather Howdle's Physiotherapy clinic and was able to successfully complete the rehabilitation program that was established by Ms Howdle. The Commission further finds that the Appellant's testimony in respect of his

participation in the rehabilitation program administered by Ms Heather Howdle is consistent with the documentation in Ms Howdle's report dated November 17, 2003.

The Commission notes that the primary reasons for the suspension of the Appellant's PIPP benefits for a period of two (2) weeks related to participation in the program, his inappropriate comments to an ARCC instructor, his complaints to the ARCC instructor and to other claimants and the destructive manner in which he dealt with ARCC's equipment.

Appellant's participation in the program

The Commission notes that the case manager's findings that the Appellant later left early from the ARCC rehabilitation program on six (6) occasions without explanation is inconsistent with ARCC's Work Hardening Discharge Report dated October 17, 2003 which states:

Attendance

September 5, 2003 (Cancelled due to migraines)

September 8, 2003 (left at 11:30 for doctor's appointment and did not return)

September 19, 2003 (late – claimant had doctor's appointment and came in at 10:30)

September 22, 2003 (Claimant came in late, claimant slept in and was approximately 1 hour late for program)

September 23, 2003 (Claimant attended a funeral, and therefore did not attend program)

September 24, 2003 (Claimant did not attend program)

An examination of ARCC's Discharge Report indicates that only on two (2) occasions did the Appellant fail to provide a reasonable explanation for not attending ARCC's program. On September 22, 2003 the Appellant was late because he slept in. On September 24, 2003 he did not attend the program and provided no explanation. The Commission, however, finds that on each other occasion, as set out in this report, the Appellant had a reasonable explanation for not participating in ARCC's program. On three (3) separate occasions the Appellant left or was late because he had to attend doctors appointments. On one (1) occasion he did not attend because he had migraine headaches. On one other occasion he left early to attend a funeral.

The Commission finds, based on ARCC's Discharge Report, the Appellant's participation in ARCC's program was on the whole not unreasonable and was inconsistent with the case manager's conclusion in this respect. For these reasons the Commission accepts the Appellant's testimony in respect of his participation in ARCC's rehabilitation program and rejects the case manager's findings in this respect.

Inappropriate comments

The Appellant, in his testimony, rejected the allegation that he inappropriately made comments to the ARCC instructor on three (3) occasions. He testified that he made an inappropriate comment on one (1) occasion and when he was advised that the comments were inappropriate he apologized and never made any further inappropriate comments.

The Commission notes that the Appellant provided this explanation under oath in both his examination-in-chief and cross-examination and was consistent throughout his testimony. MPIC did not call any witnesses to rebut this testimony. The Appellant's testimony in respect of this issue was unchallenged and is accepted by the Commission.

Complaints

In respect of the third reason for the suspension of the payments, the Appellant testified under oath that he did not act in an inappropriate or disruptive fashion in dealing with ARCC instructors or with any other claimants. The Commission notes that MPIC did not call any instructors or claimants to rebut the testimony of the Appellant in respect to this issue. The Appellant's testimony, therefore, was not challenged directly by any witnesses and the Commission accepts the Appellant's testimony in this regard.

Equipment

The Appellant's testimony that he had not acted inappropriately in respect of ARCC's equipment was given under oath and was not rebutted by any testimony from ARCC instructors or claimants. Again, the Appellant's testimony remains unchallenged in this respect and is accepted by the Commission.

It was open for MPIC to have called witnesses in respect of each of the reasons why MPIC suspended the Appellant's PIPP benefits for two (2) weeks and to rebut the Appellant's testimony and MPIC failed to do so. On the other hand, the Appellant in his examination-in-chief and cross-examination maintained his position and his testimony was consistent throughout.

The Commission notes that the Internal Review Officer rejected the Appellant's explanation in respect of the allegations relating to his misconduct and confirmed the case manager's decision to suspend the Appellant's PIPP benefits for a period of two (2) weeks. For these reasons the Commission finds that the Appellant's credibility in respect of his testimony relating to his participation at the Heather Howdle facility was critical to the determination of this appeal. The Commission notes that the Appellant in his testimony stated he had no problems at the Heather Howdle Physiotherapy clinic and this testimony is supported by the documentary evidence which was filed in these proceedings. A review of the documentation does not indicate that the Appellant had any problems with participating in the program, or failing to attend the program, or attending the program late, or leaving the program early, or acting inappropriately to other participants of the program or to staff or that he abused any of the equipment. The Appellant testified that he successfully completed the program administered by Heather Howdle. In the

Commission's view this documentary evidence corroborates the Appellant's testimony in respect of his participation in the Work Hardening Program at the Heather Howdle Physiotherapy clinic.

The Commission finds:

1. the Appellant was a credible witness who testified under oath in a clear and unequivocal fashion as to the manner in which he participated in the rehabilitation program at ARCC;
2. the Appellant's testimony as to his participation in the rehabilitation program administered by Heather Howdle is corroborated by the documentary evidence provided to the Commission by MPIC;
3. MPIC could have called a number of witnesses to rebut the testimony of the Appellant and failed to do so;
4. the Appellant's testimony in respect of the issues in this appeal was unchallenged;
5. for these reasons the Commission accepts the Appellant's testimony on all issues in dispute between MPIC and himself.

Decision

The Commission therefore determines that the Appellant has established, on a balance of probabilities, that he did not violate Section 160(f) and (g) of the Act and, as a result, the Commission determines that the Appellant did not:

1. without valid reason prevent recovery from his motor vehicle accident injuries by his activities;
2. without valid reason fail to follow or participate in a rehabilitation program made available to him by MPIC.

For the reasons set out herein the Commission allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated November 14, 2003.

Dated at Winnipeg this 19th day of October, 2005.

MEL MYERS, Q.C.

HONOURABLE WILFRED DE GRAVES

ROBERT MALAZDREWICH