



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by E.D.
AICAC File No.: AC-04-134**

PANEL: Ms Laura Diamond, Chairperson
Ms Wendy Sol
The Honourable Mr. Armand Dureault

APPEARANCES: The Appellant, E.D., was represented by M.C.;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Kathy Kalinowsky.

HEARING DATE: November 10, 2005

ISSUE(S): Entitlement to Income Replacement Indemnity benefits

RELEVANT SECTIONS: Section 81(1) of The Manitoba Public Insurance 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

The Appellant, E.D., was injured in a motor vehicle accident on April 28, 2002.

As a result of injuries arising out of the accident, the Appellant was in receipt of Personal Injury Protection Plan benefits for chiropractic care and physiotherapy treatment.

At the time of the accident, the Appellant was self-employed as owner/operator of (text deleted).

He continued to work at this business following the accident. On September 6, 2002 the

Appellant indicated to MPIC that he was having difficulty performing some of the duties involved with his business and, as a result, was losing income. The Appellant sought Income Replacement Indemnity ('IRI') benefits in this regard.

The Appellant's case manager denied his request for IRI benefits, as the medical information on file did not support an inability to continue with his employment and, during his busy period in the summer of 2002, the Appellant had continued working full hours.

The Appellant sought an internal review of this decision. On May 13, 2004, an Internal Review Officer for MPIC found that the Appellant was not entitled to IRI benefits, as the medical information did not support an inability to continue with his employment. The Internal Review Officer noted that the Appellant continued to work on a full-time basis throughout the summer of 2002, the busiest time for his business, and that the Appellant was not entirely or substantially unable to perform the essential duties of his employment throughout that time.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Submissions

The Appellant submitted that his injuries from the accident caused him to slow down his working capacity and to take on less jobs during the busy summer period, resulting in a loss of income.

The panel heard testimony from the Appellant, as well as from his wife, who assisted in his business by answering the phone, taking bookings for jobs, and helping with the accounting records.

The panel also heard testimony from the Appellant's accountant, who indicated that the Appellant operated a labour intensive business, which generated most of its income during the spring and summer months. He compared financial statements for the business for the years 2000, 2001, 2002, and 2003 and indicated that during 2002, the year of the accident, the Appellant's business experienced a "definite drop in revenue" of approximately \$(text deleted). He explained that the business, having just moved from rented space to the Appellant's home and garage, saw a corresponding reduction in expenditures to compensate for this drop in revenue. However, the evidence was that the reduction in potential revenue resulted in a reduction in profits to the Appellant.

The Appellant and his wife both testified that it was the more lucrative work of repairing the double air conditioning unit on vans which caused the Appellant difficulty. It was painful for him to work underneath these vans on the air conditioning units, and as a result, his wife had to accept less bookings for the Appellant for this kind of work. The Appellant also described some difficulty with lifting the heavier equipment.

It was submitted by the Appellant that, as a small business owner, the injuries from the accident caused him a reduction in income, because he could not work at the same pace that he was able to prior to the accident.

Counsel for MPIC submitted that the Appellant was able to perform the essential duties of his job at the time in question. The onus is on the Appellant, she submitted, to show that he was entirely or substantially unable to perform these duties of his employment, and the Appellant has not met this onus.

Although counsel for MPIC questioned whether there was a causal link between the Appellant's description of his pain and the motor vehicle accident (as the medical records indicated a change in his physical symptoms occurring significantly after the motor vehicle accident), counsel for MPIC also submitted that the Appellant was able to substantially perform the duties of his employment.

She reviewed the medical evidence and noted that Dr. Leader, the Appellant's physician, in his Initial Health Care Report dated May 21, 2002, noted that the Appellant had complaints and symptoms of lower back pain, neck pain, upper back pain and arm and shoulder pain. However, he did not indicate that the Appellant was unable to work and listed his functional capacity as "full function with symptoms."

Follow-up reports, for example from July 16, 2002, identified "previous mva whiplash injuries some degenerative changes".

The Appellant's chiropractor, on August 6, 2002, noted a flare-up of lower back pain with left posterior thigh pain, and recommended continued chiropractic treatment. However, he did not state that the Appellant was unable to work or recommend that he stop working or decrease his working hours.

The only such reference is found in a report of the Appellant's physiotherapist, dated October 22, 2002, where he lists the Appellant's current work capacity as "work supernumerary" and notes the Appellant "Refuses some work on a/c/Refrigeration due to low back condition."

Counsel for MPIC referred to an Inter-Departmental Memorandum by Dr. Brad Baydock, Medical Consultant to MPIC's Health Care Services, dated October 5, 2005. Dr. Baydock reviewed the Appellant's medical records. He stated:

. . . In this case the chronological record indicated that a change in the claimant's back pain syndrome likely occurred a significant time following the motor vehicle collision; after an event which occurred in July of 2002.

When asked whether the Appellant's injuries from the motor vehicle accident would preclude the Appellant from returning to work, either wholly or substantially, throughout any period in 2002 or 2003, Dr. Baydock stated:

In my opinion, the conditions that developed subsequent to the motor vehicle collision did lead to impairments in cervical and thoracolumbar ranges of motion. It was, however, the opinion of the treating practitioner at that time that these limitations in range of motion would not likely affected the claimant's employability outside of the degree of discomfort that may have been present with these injuries. As was stated earlier, the medical impairments that would have likely led to disability were those that were documented affecting the claimant's lumbar spine around September of 2002. These impairments appeared to be related to a non-collision related condition that developed after the collision.

Dr. Baydock noted:

In reviewing the question regarding employability, the medical information on file indicated that the claimant continued to work subsequent to the motor vehicle collision. Immediately after the collision the magnitude of the collision force and the resultant physiological alterations would have been at their greatest. It was Dr. Leader's opinion that the (sic) despite the limitation in function identified in his initial examination, the claimant was able to work full duties with mild symptoms and would be limited only by his degree of pain. In the report from Mr. Ross, a functional impairment would have been present that would have affected the claimant's ability to perform work requiring being in a prolonged seated, squatting or stooping position. Jobs that required full forward flexion or repetitive flexion (sic) of the lumbar spine would have likely worsened his condition. Lifting and carrying heavy objects would also have affected his spinal condition. Thus, the claimant would have had a partial impairment in function that could have reasonably affected his ability to perform some of the duties outlined in the PDA on file (Item #9) subsequent to September 2002. However, for reasons outlined above, the development of these impairments would not bear a probable relationship to the motor vehicle collision, in this reviewer's opinion.

Discussion

The onus is on the Appellant to show that, as a result of the motor vehicle accident, he was unable to continue the employment he held at the time of the accident.

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;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

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.

Following the accident, Dr. Leader in his Initial Health Care Report dated May 21, 2002, listed the Appellant's symptoms of lower back pain, neck pain, upper back pain, and arm and shoulder pain. However, he did not indicate that the Appellant was unable to work. Although he noted that the Appellant "may have some difficulty with some work at times due to discomfort" he indicated that the Appellant's functional capacity was "full function with symptoms" and that his work capacity was to "work full duties".

The evidence from the witnesses was that although there were some duties which he may have avoided, as he found it too difficult to perform certain tasks, the Appellant did continue to work throughout the relevant period following the accident.

Upon reviewing all of the documentary evidence on the file, as well as the testimony of the

witnesses, the panel finds that the Appellant was overall able to perform the essential duties of his employment. Although there were some duties which he deliberately eliminated from his routine, the weight of the evidence shows that he was substantially able to perform the essential duties required of his business throughout the relevant period.

Accordingly, the panel finds that the Appellant has failed to meet the test set out under Section 8 of Manitoba Regulation 37/94 that as a result of the accident, the victim be “substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident”.

Having regard to the medical evidence on the file, we find that the Appellant has not met the onus of showing, on a balance of probabilities, that he was substantially unable to perform the essential duties of his employment following the motor vehicle accident. Therefore, we are of the opinion that he was not entitled to IRI benefits.

As a result, for these reasons, the Commission dismisses the Appellant’s appeal and confirms the decision of MPIC’s Internal Review Officer bearing date May 13, 2004.

Dated at Winnipeg this 1st day of December, 2005.

LAURA DIAMOND

WENDY SOL

HONOURABLE ARMAND DUREAULT