



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by B."A."Y.
AICAC File No.: AC-04-160**

PANEL: Ms Laura Diamond
Ms Mary Lynn Brooks
Ms Deborah Stewart

APPEARANCES: The Appellant, B.Y., was represented by Mr. Ken Kaltornyk;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Morley Hoffman.

HEARING DATE: December 6, 2005

ISSUE(S): Entitlement to Income Replacement Indemnity ('IRI')
benefits as a result of the accident of October 27, 2003.

RELEVANT SECTIONS: Section 81(1) 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 EMOVING PERSONAL
IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

Reasons For Decision

The Appellant was injured in a motor vehicle accident on October 27, 2003. At the time of the accident she was employed full time as a "nanny", providing child care to two preschool children.

Following the motor vehicle accident, the Appellant continued to work full time at her job as a nanny until November 13, 2003, when she resigned from her position. The Appellant sought IRI benefits from MPIC. The Appellant's case manager found that the medical information on the

file supported the Appellant's return to the employment she held at the time of the accident and that therefore there was no entitlement to IRI benefits.

The Appellant sought an internal review of this decision. On August 19, 2004, an Internal Review Officer for MPIC found that there was no physical or psychological reason directly related to the motor vehicle accident that prevented the Appellant from performing her occupational duties as a nanny. The Internal Review Officer reviewed a memorandum from Dr. Michael MacKay, Medical Consultant with Manitoba Public Insurance, who was of the view that the Appellant was capable of performing her occupational duties after her motor vehicle accident. The Internal Review Officer concluded that there was no physical impairment of function or restrictions that would have prevented her from performing her duties as a nanny, as it was only subjective feelings of pain that would have prevented her from performing those duties.

The Internal Review Officer also reviewed reports from the Appellant's psychiatrist, and from Dr. Andrew Jones, Psychological Consultant to MPIC's Health Care Services Team. Dr. Jones concluded that the Appellant's decision to leave her employment was a result of a strained work relationship which caused stress for the Appellant. The subsequent deterioration in her mood was not directly related to the motor vehicle accident. The Internal Review Officer agreed with this conclusion and found the Appellant was not entitled to IRI benefits.

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

Appellant's Evidence

The panel heard testimony from the Appellant and from her best friend, A.H.

The Appellant described her job duties as including looking after the children and driving them back and forth to school and extra-curricular activities. She also had other duties which she described as light housekeeping, and from time to time would be assigned other heavier cleaning duties. She was also involved in laundry and meal preparation for the children.

The Appellant testified that, after the accident, she suffered from increased physical problems with her neck, back and shoulders. She told her employer that she would not be able to do any vacuuming, and was advised that this was not a problem, as the employer also employed a cleaning lady. The Appellant had some difficulty going up and down stairs and performing more physical duties such as changing beds etc, but modified her duties and continued to attend work on a full time basis. She testified that she did not have a great deal of difficulty caring for the children and attending to meal preparation and light housekeeping of that nature, although she could not lift and carry the children.

The Appellant admitted that she had been experiencing difficulties with her employer for some time, over the issue of remuneration and, in particular, with regard to compensation for gas and mileage on the car she used while performing her duties as a nanny.

The Appellant also testified that, although she had a previous history of depression, her mood deteriorated after the accident, as a result of the pain she was suffering. In spite of modifying her duties at work, she found could not continue, and she resigned on November 13, 2003.

The Appellant's best friend, A.H., testified that she was very close with the Appellant and in daily contact with her. She testified that the Appellant loved her job and the children she cared

for and that she was of the view that the Appellant had resigned from her job because of the pain she suffered as a result of her injuries from the motor vehicle accident.

Evidence of MPIC

C.B., the Appellant's employer (the children's father), testified at the hearing. He described the Appellant's duties and stated that her primary duty was child care and supervision of the children. He noted that driving the children to school and their activities was a very important component of the job. In his view, light housekeeping duties which were assigned to the Appellant to fill in her time while the children were at school and programs, were secondary in importance to the Appellant's child care obligations.

C.B. also described a dispute which he described as an "evolving issue" with the Appellant, regarding compensation for mileage on her vehicle. He explained that the Appellant wanted to be paid a higher wage, or to be compensated for mileage, and that her employers, after discussing the issue, had declined to provide this compensation. The employer sensed some dissatisfaction on the Appellant's part as a result and, accordingly, had begun the process of seeking a replacement nanny, in the event that the Appellant were to resign over this issue. At one point, the Appellant offered to stay until mid-December so that the employer could find a replacement, but this did not come to pass.

C.B. testified that he was aware of the motor vehicle accident, as his son had been in the car at the time, but that it had been presented by the Appellant to him and his wife as a minor event. He testified that he had been unaware of any medical issues arising for the Appellant as a result of the motor vehicle accident, until he received a telephone call from MPIC making inquiries, after the Appellant had already resigned.

C.B. testified that he and his wife had been satisfied with the Appellant's work. He stated that she was reliable and good with the children. He did not have concerns regarding the amount of housekeeping the Appellant was able to do, since the parents could handle that aspect themselves, with the assistance of their cleaning lady.

Submissions

The Appellant submitted that, contrary to Dr. MacKay's opinion, the symptoms of pain which she experienced were a disabling factor in her ability to perform her job. The medical evidence of the Appellant's physician, Dr. Bergman, established that the Appellant suffered from injuries to her back, neck and knee which prevented her from performing her duties as a nanny. She had difficulty lifting the children, traveling up and down the stairs, vacuuming and doing heavy cleaning. The Appellant attempted to continue with her duties, but found, by November 13, 2003, that the demands of the job were just too difficult for her following the accident.

It was submitted that the Appellant had no significant knee problems prior to the motor vehicle accident. However, since the accident, she had suffered an injury to her knee requiring surgery, which was a direct consequence of the motor vehicle accident. Knee surgery was performed on May 13, 2005. The Appellant reviewed evidence from the surgeon, Dr. Kayler, in regard to the condition of the knee. This knee injury alone, she submitted, was sufficiently disabling to prevent her from performing her job as a nanny.

It was submitted that regardless of the circumstances surrounding the Appellant's eventual resignation, the medical facts established that she could not have continued working, even with

her duties modified, beyond November 13, 2003, as a direct result of injuries she sustained in the motor vehicle accident.

Counsel for MPIC submitted that the issue before the panel was whether the Appellant could work as a nanny. He submitted that the car accident was of a minor nature, and noted that the Appellant was able to work at her job until November 13, 2003.

Reports on file from the Appellant's physiotherapist do not indicate that the Appellant's condition deteriorated between November 13, 2003 and January 10, 2004. Nor does this evidence suggest that the Appellant's injuries required her to quit her job.

It is the submission of counsel for MPIC that the Appellant quit her job for reasons completely unrelated to the motor vehicle accident. Although the motor vehicle accident may have caused some exacerbation of chronic pain symptoms from which the Appellant had previously suffered, there is no evidence that it caused physical problems which prevented her from working as a nanny. This was only a minor exacerbation resulting from a minor accident. The Appellant was in reasonable condition, with some difficulties, but that does not mean that she couldn't work. There was no medical evidence that her physical injuries prevented her from functioning in her work as a nanny, as indicated by Dr. MacKay. There was not even any medical evidence from the Appellant's physician, Dr. Bergman, saying that she had to be off work. Although Dr. Bergman's report of November 28, 2003 indicated that she was off work by that point, it did not say that she was required to be off work because she was unable to do her job as a nanny.

The psychological and psychiatric evidence on file also did not establish that the Appellant was unable to work as a result of the motor vehicle accident. Rather, this evidence disclosed that the

Appellant was depressed and in a bad mood as a result of conflict with her employer which, he submitted, caused her resignation from her job.

Counsel for MPIC questioned how the Appellant could have worked immediately following the accident, until mid-November, even offering at one point to stay until December until the employer found someone else, if she couldn't do the job. He submitted that there was no evidence from Dr. Buchik to suggest that the Appellant could not work as a nanny due to psychological impairment.

Counsel for MPIC also pointed to the evidence of C.B. who had indicated that there was no problem with the Appellant's performance of her job and that there had been no dispute over household duties. In fact, C.B. was not even aware that the Appellant had any medical difficulties arising from the motor vehicle accident until after the Appellant resigned. Counsel for MPIC submitted that this evidence should be accepted, as the employer had no motivation to tell other than the truth in this matter. He pointed to C.B.'s evidence that the employer's priority was looking after the children and that he was not aware of any medical difficulties which interfered with the Appellant's ability to do this job.

On the issue of the Appellant's knee surgery, counsel for MPIC submitted that there was not sufficient information on the file to connect this injury to the motor vehicle accident. He submitted that this is a matter that needs to be addressed by the case manager. The evidence currently does not suggest that the Appellant had serious knee problems immediately following the accident, and the knee injury did not appear to be an issue at that time. Accordingly, questions such as a possible degenerative condition of the knee and any pre-existing knee problems must be examined more fully by the case manager. However, there is not sufficient

evidence before the panel to establish that the Appellant's knee injury was a result of the motor vehicle accident or a reason for the Appellant's resignation from her job.

Discussion

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;

The onus is on the Appellant of showing that she was unable to continue her employment as a result of the motor vehicle accident. The panel is of the view that the Appellant has not met the onus of showing, on a balance of probabilities, that she was unable to continue her employment as a nanny on November 13, 2003, when she resigned from her position.

The medical evidence on file does not establish that the Appellant could not continue to perform at this job because of injuries from the accident.

Dr. Bergman's Initial Health Care Report, based on an examination of October 21, 2003, and dated January 9, 2004, indicated that the Appellant should work modified duties, restricting lifting, bending and vacuuming.

Dr. Bergman's handwritten note dated November 28, 2003 was completed after the Appellant resigned from her job and noted:

The above stated is off work due to medical reasons from November 13, 2003 . . .

This note does not address Dr. Bergman's analysis or opinion as to the Appellant's ability to work at her job as a nanny.

The physiotherapy report based on an examination of November 14, 2003, was also completed following the Appellant's resignation, but indicated that the Appellant could "maintain usual activities", with "limited standing, sitting, walking ability" and "limited ability to lift/carry."

The Appellant's psychiatrist, Dr. Buchik, provided several reports. Although Dr. Buchik noted, on June 30, 2004, that the Appellant's "increasing pain and fear of driving decreased her ability to cope with her demanding job", she did not provide an opinion that the Appellant was unable to continue her employment as a result of any psychiatric condition arising out of the accident.

The Appellant's evidence indicated that she continued to do her job, including driving, until the date of her resignation. She modified her housekeeping duties somewhat, but did not receive any complaints from her employer regarding dissatisfaction with her work or the modifications which she had made.

In fact, the Appellant's employer testified that her work with the children was good and that she had been a reliable employee. The employer indicated that child care and supervision was their first priority. Although the employer found it desirable for the Appellant to fill in her time with light housekeeping duties, this was not the most important aspect of her job. Although the employer encountered difficulties with the Appellant regarding issues of compensation (in particular with regard to motor vehicle maintenance and mileage), he indicated that he had never expressed any dissatisfaction with the Appellant's work after the accident. The employer had no complaints regarding any inability on the Appellant's part to complete housework tasks and he testified that he was not even aware that she had medical complaints arising from her motor

vehicle accident that were causing her any difficulty in performing her duties. In fact, he stated that the Appellant had presented the accident to her employers as a minor or minimal event.

Accordingly, the panel is of the view that the evidence does not establish, on a balance of probabilities, that the Appellant was unable to perform her job as a nanny. The Appellant has failed to meet the onus upon her of showing that the reason she resigned was due to an inability to perform the duties of a nanny, as a result of injuries arising from the motor vehicle accident. The evidence does not establish, on a balance of probabilities, that the Appellant was unable to continue in her employment as a result of the motor vehicle accident.

The panel heard evidence, and reviewed medical reports from Dr. Kayler, dated July 9, 2004 and July 21, 2005, regarding injury and surgery to the Appellant's left knee in 2005. It is not clear whether this injury and surgery were related to the motor vehicle accident of October 27, 2003. There is insufficient information on the file and insufficient evidence before the panel for us to address the issue of any causal connection between this knee injury and the motor vehicle accident, or to assess any effect that the knee injury may or may not have had on the Appellant's ability to work.

Accordingly, as suggested by counsel for MPIC, the panel is of the view that the issue of the Appellant's knee injury and any possible PIPP benefits which may arise as a result of that injury should be referred back to the Appellant's case manager for determination.

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 August 19, 2004. We direct that the

effects of the issue of the Appellant's knee injury be referred back to the Appellant's case manager for determination.

Dated at Winnipeg this 5th day of January, 2006.

LAURA DIAMOND

MARY LYNN BROOKS

DEBORAH STEWART