



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by N.J.D.
AICAC File No.: AC-04-92**

PANEL: Ms Laura Diamond, Chairperson
Ms Wendy Sol
Mr. Neil Cohen

APPEARANCES: The Appellant, N.J.D., appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: November 17, 2005 and December 12, 2005

ISSUE(S): Whether the Appellant is capable of performing her pre-
accident occupational duties as of June 24, 2003.

RELEVANT SECTIONS: Section 81(1)(a) 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

The Appellant, N.J.D., was injured in a motor vehicle accident on January 12, 2000. Prior to her accident, the Appellant was employed as an Office Clerk on a full-time basis. As a result of injuries arising from the accident she was in receipt of Income Replacement Indemnity ('IRI') benefits until June 24, 2003. As a result of a decision of her case manager dated June 24, 2003, the Appellant's IRI benefits were discontinued. A member of MPIC's Health Care Services Team had found that there was no physical functional impairment identified preventing the Appellant from performing her pre-collision occupation as an Office Clerk on a full-time basis.

The Appellant sought internal review of this decision, and on May 3, 2004, an Internal Review Officer for MPIC confirmed the case manager's decision, finding that there was no physical or psychological reason why the Appellant could not return to her pre-accident occupational duties, and ending her IRI benefits as of July 6, 2004.

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

Evidence of the Appellant

The Appellant testified at the hearing, as did her husband and her family physician, Dr. Mohammed.

Dr. Mohammed testified that the Appellant's condition following the motor vehicle accident, was very different than her physical condition had been prior to that. He found the Appellant's condition to be abnormal for a woman her age. He described the treatments and medications which he had tried to help with the Appellant's pain, noting that he had referred the patient to Dr. Arneja, who indicated that the Appellant suffered from symptoms of chronic pain syndrome. He also described the disc herniation which was discovered following a CT scan performed on the Appellant. He also noted Drs. Hoy and Lindsey's diagnosis of a chronic pain disorder and the possibility of a reactive depression secondary to pain and panic disorder. He indicated that he would like to receive the opinion of another chronic pain specialist and was hoping to have the Appellant seen in the pain clinic in this regard.

He noted that he saw the Appellant on a regular basis, sometimes every day, and so was very aware of her condition and the difficulties which the motor vehicle accident had caused.

On cross-examination by counsel for MPIC, Dr. Mohammed indicated that he did not have a great deal of knowledge regarding “abnormal illness behaviour”, and the attendant Waddell signs used to test for such behaviours. Although at one point reports from Associated Rehabilitation Consultants of Canada, Ltd. (‘ARCC’) had recommended that the Appellant receive psychological treatment for these issues, Dr. Mohammed did not recall this and had not followed up on this suggestion. He confirmed that he had encouraged the Appellant to participate in a graduated return to work program which involved a couple of hours of work twice a week. He also confirmed that he was not aware that the Appellant had been seeking treatment from the Misericordia Hospital and from another physician, Dr. Mien, for house calls, at the same time that he was treating the Appellant.

The Appellant described the motor vehicle accident and noted that her neck had been bent forward at the time of impact. She believes that this was one of the causes of the symptoms she experienced as a result. The symptoms included excruciating muscle spasm, a constant burning in her neck and a burning, numbing feeling in her right arm, shoulder and hand. She stated that she has suffered five (5) years of constant pain. She did not feel that she could have handled a full-time position at any point.

The Appellant noted that she had tried many different treatments, including hydrotherapy, physiotherapy, and medication, with no success. She indicated that although it was suggested, following her assessment at ARCC, that she pursue therapy with Dr. Lindsey, a Psychologist, but this did not occur, and she does not know why.

The Appellant described her job as an Office Clerk (or Loan Officer) as a sedentary, non-difficult job. However, because any movement of her neck caused her pain, and she could not

predict when she would have a good day or a bad day, she could not pursue any employment. As a result of being unable to attend at her job, she was fired from it.

On cross-examination, counsel for MPIC questioned the Appellant extensively regarding her lack of attendance and lack of co-operation at both the ARCC rehabilitation assessment program and the graduated return to work volunteer placement established for her at the [text deleted]. The Appellant indicated that sometimes she just did not feel well enough to attend, and other times there were other tasks, such as attending for dental treatment, or attending to her children, which required her attention and prevented her from attending.

The Appellant's husband also gave evidence as to the changes in his wife and in the dynamics of his family which had occurred following the motor vehicle accident. He indicated that his wife was completely changed, and that she no longer worked or socialized or spent time at the cabin with her children as she used to. She used to be able to garden and shovel snow etc. and now she just sits on the couch and cries.

Evidence for MPIC

The panel heard evidence from Dr. Michael MacKay, of MPIC's Health Care Services Team. Dr. MacKay had reviewed the medical reports on file and provided opinions to MPIC regarding the Appellant's condition. He explained the difficulty in attributing the Appellant's disc herniation to the motor vehicle accident. Without a clear indication of the connection between the disc herniation and the motor vehicle accident immediately following the accident, it was difficult to say that it was the motor vehicle accident which caused the herniation, and not other, degenerative changes.

He also noted that the findings of the physiotherapist, Ms Howdle, on her assessment of the Appellant showed a lack of any residual nerve root involvement which might help to identify the herniated disc as the source of the Appellant's pain.

Dr. MacKay also was of the view that the Appellant suffered from chronic pain behaviour or abnormal illness behaviour. He noted significant discrepancies between her subjective reported pain complaints and the objective clinical findings of her caregivers and those who assessed her. He noted that her cervical ranges of motion were extremely low and that he rarely sees such little range of motion in a clinical setting, aside from patients who have fused spines. The results of the Appellant's scores on the Vernon-Myer neck pain and disability index, with the Appellant putting herself in the "crippled" category, and the findings of the physiotherapist Heather Howdle, that the Appellant demonstrated "chronic pain behaviour and 4/5 positive Waddell signs" supported Dr. MacKay's conclusion that the Appellant suffered from abnormal pain behaviour and that she was not unable to work as a result of physical limitations of function caused by the motor vehicle accident.

Submissions

The Appellant took the position that the injuries she suffered in the motor vehicle accident, as a result of her neck being bent forward at the time of impact, had resulted in her suffering from five (5) years of constant pain. She was physically healthy before the motor vehicle accident, but as a result of the accident suffered, and continues to suffer, from excruciating muscle spasm, constant burning neck pain and a burning, numbing feeling in her right arm, shoulder and hand. She sought various types of care, with no success and was so limited by her pain that on bad days, which she could not predict, she was unable to do much more than sit on the couch and cry.

She had been healthy before the accident and the motor vehicle accident had caused her to lose her employment. As such, she should continue to be entitled to IRI benefits.

Counsel for MPIC noted that it has been over five (5) years since the accident of January 12, 2000. He noted that in this Appeal, the circumstances of the accident, as well as other factors were relevant. The accident was of a minor nature, causing a total of \$104 in damage to the vehicles. This created a discrepancy between the type of accident which occurred and the nature and extent of the Appellant's claim of disabilities.

He submitted that a good deal of time has passed since the motor vehicle accident, during which the Appellant was unable or unwilling to participate in a graduated return to work program of even the lightest order. He submitted that it was possible that she was not motivated to do so.

He reviewed the evidence of the Appellant's caregivers and of Dr. MacKay. He noted that Dr. Mohammed was not even aware of the Appellant's use of several different physicians during the same time period, and sometimes on the same day, which the Appellant admitted on cross-examination.

The conclusion which the panel must reach, when putting together all of the evidence, is that the Appellant has exhibited abnormal illness behaviour, and has not met the onus upon her of establishing, on a balance of probabilities, that she is unable to work as a result of injuries sustained in the motor vehicle accident.

The evidence falls short of establishing that the Appellant should be entitled to benefits more than three (3) years after the date of the accident. Dr. MacKay undertook a careful review of the

file and the assessments of all the caregivers. He was of the opinion that a herniated disc of this nature would not result in the levels of pain described by the Appellant, or in a complete disability from employment. It was his conclusion that the Appellant was not prevented from working as a result of disabilities sustained in the motor vehicle accident. Accordingly, the panel should find that the Appellant is not entitled to further IRI benefits.

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 to show, on a balance of probabilities, that, as of June 23, 2004, she was unable, as a result of injuries sustained in the motor vehicle accident, to work at her employment.

After reviewing the documentary evidence on the file and the testimony of the witnesses, the panel is of the view that the Appellant has not met the onus upon her of showing, on a balance of probabilities, that she was unable to work as a result of the accident. In reaching this conclusion, the panel has considered a variety of factors including:

- The sedentary nature of the Appellant's job as an office clerk
- The discrepancies noted by Dr. MacKay between the Appellant's reported symptoms and the minor nature of the motor vehicle accident and initial injuries reported
- The finding of the physiotherapist, Heather Howdle, that the Appellant demonstrated "chronic pain behaviour and 4/5 positive Waddell signs"
- Dr. Hoy's finding in the ARCC assessment of the Appellant of a Vernon-Myer score of neck pain and disability index which revealed that the Appellant perceived her disability

to be in the “crippled” category. Dr. Hoy’s findings regarding the Appellant’s cervical range of motion (flexion 5%, extension, side-bending and rotation 0%) were so low that Dr. MacKay testified that he rarely sees such little range of movement in a clinical setting, outside of patients with fused spines

- The findings of the physiotherapist, Heather Howdle, that her measurements showed no neurological atrophy of the Appellant’s arms, that the Appellant’s examination was limited by her reports of pain most evident during active range of motion and minimized on passive range of motion, and that there were not clinical findings suggestive of any residual nerve root that would provide or be causing the amount of pain reported by the Appellant
- The nature of the motor vehicle accident, including its lack of severity and limited (\$104) damage to the motor vehicles involved
- The Appellant’s inability or lack of motivation to want to participate or even try the graduated return to work volunteer placement arranged for her, in spite of Dr. Mohammad’s encouragement and support of this program. The evidence showed a lack of compliance by the Appellant with both the ARCC work hardening assessment program and the [text deleted] graduated return to work volunteer placement
- Although the Appellant suggested she was suffering from depression which contributed to her condition, there is no medical evidence on the file establishing that the Appellant suffered from a diagnosed condition of clinical depression as a result of the motor vehicle accident. The reports of Dr. Lindsay, Clinical Psychologist, dated March 14, 2003, and of Dr. Andrew Jones, Consulting Clinical Psychologist, dated October 11, 2005 support this conclusion
- The Appellant and Dr. Mohammad were of the view that the Appellant’s herniated disc found on the CT scan provides an explanation for the Appellant’s pain complaints

following the accident. However, it was Dr. MacKay's evidence that it is difficult to make a conclusive determination that the disc herniation resulted from the motor vehicle accident, and not from degenerative changes, without a clear indication of such a connection immediately following the accident. Further, it was Dr. MacKay's opinion that a herniated disc of this nature would not normally result in the levels of pain described by the Appellant or a complete disability from employment. Dr. MacKay noted Ms Howdle's finding of a lack of any residual nerve root involvement which might help to identify the herniated disc as a source of the Appellant's pain. Rather, it was Dr. MacKay's opinion that the Appellant showed signs of chronic pain behaviour or abnormal illness behaviour, due primarily to the discrepancy between her subjective reported pain complaints and the objective clinical findings. This was supported by evidence of the Appellant's repeated attendance at different physicians such as Dr. Mohammad, Dr. Mein and the Misericordia Urgent Care facility, during the same time period (and sometimes on the same day), as well as her failure to disclose or discuss these attendances to her family physician, Dr. Mohammad

All of these factors, combined with the extensive period of time (over three years) which passed while the Appellant was in receipt of IRI benefits and receiving various treatments without any improvement in her condition, lead the panel to the view that it is not reasonable to conclude that the Appellant continued to be disabled from performing her sedentary, light job as a result of the motor vehicle accident.

We are of the view that the Appellant has not met the onus of showing, on a balance of probabilities that she was unable, as a result of injuries sustained in the motor vehicle accident, to return to employment as an office clerk, on June 23, 2004.

As a result, and for these reasons, the appeal is dismissed and the decision of the Internal Review Officer dated May 3, 2004 is hereby confirmed.

Dated at Winnipeg this 24th day of January, 2006.

LAURA DIAMOND

WENDY SOL

NEIL COHEN