Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by K.K.
AICAC File No.: AC-04-54

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Mary Lynn Brooks** **Mr. Robert Malazdrewich**
APPEARANCES:	**The Appellant, K.K., was represented by Mr. Don Woloshyn, who participated by teleconference call;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**May 11, 2006**
ISSUE(S):	**1. Was MPIC correct in determining the Appellant's entitlement to Income Replacement Indemnity benefits from 08 Jun 02 in accordance with the relapse Sections of the MPIC Act (S. 117(1)(a) and 117(3);** **2. Was the determination of the Appellant as a "Clerk" proper;** **3. Whether the Appellant is able to perform the duties of the determined employment;** **4. Was the determined employment income proper;** **5. Was Income Replacement Indemnity benefits properly terminated as of 02 Mar 03.**
RELEVANT SECTIONS:	**Sections 84(1), 84(2), 106(1) and 117(3) of The Manitoba Public Insurance Corporation Act (the '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, K.K., was injured in a motor vehicle accident on January 13, 1995. She suffered injury to her right arm, right wrist, left arm, right buttock, neck and back.

At the time of the accident the Appellant was employed as a term data entry clerk with the [text deleted]. As a result of the injuries she sustained in the accident, she was unable to return to work, and was in receipt of Income Replacement Indemnity ('IRI') benefits until on or about June 27, 1995 when she returned to work.

The Appellant was off work again between July 15, 2001 and March 10, 2002. During that period she received Employment Insurance sick benefits and regular Employment Insurance benefits. Then, on March 11, 2002, she commenced a gradual return to work program with her employer. Her duties were modified, as she was unable to perform the duties of a data entry clerk, and she was assigned duties as a general duties clerk. The Appellant was unable to increase her hours of work due to the chronic pain in her right wrist, and remained unable to fulfill the duties of a data entry clerk. She was laid off from her employment on June 7, 2002.

The Appellant claimed IRI benefits from MPIC, alleging that she would have been rehired by her employer as a term employee, but that the employer had laid her off because she was unable to work full time as a data entry clerk due to the pain in her wrist.

MPIC denied the Appellant IRI benefits and ultimately, the Appellant appealed to the Commission. The Commission issued a decision on September 15, 2003, which held that MPIC had incorrectly denied IRI benefits to the Appellant pursuant to Section 83(1) and 86(1) of the Act. The Commission found:

> The Commission is satisfied on the balance of probabilities that at the time the Appellant was laid off from her employment on June 7, 2002 there was work available for her as there was for other employees who performed similar jobs and who were rehired on term contracts and were not laid off by their employer. The Commission finds that, on the balance of probabilities, the Appellant would have continued to be employed by the [text

> deleted] but for the pain to her right wrist which prevented her from working full time regular hours as a data entry clerk. The Commission therefore determines that the Appellant has established on a balance of probabilities that the injuries the Appellant sustained to her right wrist while stepping off a City of Winnipeg bus on January 13, 1995 prevented the Appellant from continuing to work full time regular hours as a term data entry clerk with the [text deleted]. As a result, the Appellant is entitled to IRI benefits pursuant to Sections 85(1)(a) and 86(1) of the Act from June 7, 2002, being the date the Appellant was laid off from her employment with the [text deleted].

The Commission ordered:

> (ii) that MPIC pay to the Appellant IRI benefits from the date the Appellant was laid off from her employment with the [text deleted] as a data entry clerk from June 7, 2002, together with interest to date of payment.

On January 5, 2004, the Appellant's case manager wrote to her setting out her IRI entitlement from June 8, 2002. The case manager stated that the Appellant had suffered a relapse more than two (2) years after the end of the last period for which she received IRI compensation and that, in accordance with Section 117(1)(a) and 117(3) of the Act the Appellant was entitled to compensation as if the relapse were a second accident. As a temporary earner, the Corporation determined an employment for the Appellant as of the 181st day following her "relapse date of June 8, 2002". The case manager stated:

> As per Section 106(1) and 106(2) of the Manitoba Public Insurance Corporation Act (attached), Manitoba Public Insurance shall determine employment for you based on your education, training, work experience, physical and intellectual abilities prior to the date of relapse (as explained in paragraph 4). In regards to your past employment history and work experience consideration is given to the job held at the time of the date of relapse and jobs held in the five (5) year reference period prior to June 8, 2002.
>
> Based on the information on file, your determined employment falls in the category of a "Clerk", the employment that you held at the relapse date.

The case manager determined that as the Appellant had been performing the duties of a clerk since March 3, 2003, her entitlement to IRI would end on March 2, 2003.

The Appellant sought an Internal Review of this decision. On March 18, 2004, an Internal Review Officer for MPIC upheld the case manager's decision. The Internal Review Officer also took the position that the Appellant was and should be determined as a "Clerk" which was the employment that she was holding as at the relapse date of her relapse. He stated:

> The National Occupational Classification includes numerous positions including Administrative Clerks, Data Entry Clerks and Receptionists and Switchboard Operators under the classification of General Office Clerks. Given your extensive employment from the date of the accident up until the determination, it was appropriate, in my view, to determine you in the category of a Clerk. While the medical evidence may cast some doubt on your ability to be employed as a Data Entry Clerk, that reservation does not extend, in my view, to the essential duties required of a Clerk as set out in the National Occupational Classification. That fact you may experience difficulties from time to time in your present position is not determinative of the issue as to whether you are capable of carrying out the essential duties of your determined position.

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

Submissions

It was the submission of the Appellant that the appropriate determination for her employment was that of data entry clerk. Prior to the accident, and following her return to employment, until 2001, the Appellant had been employed as a data entry clerk. When her injuries from the accident prevented her from continuing to perform the duties of a data entry clerk, her employer accommodated her by assigning her the duties of a general duties clerk. Her employer confirmed, in the letter dated March 14, 2005 that the Appellant was placed on a graduated return to work plan from March 15th to April 26, 2002:

> During the period in question, [K.K.] was accommodated with alternate duties, as she was unable to perform her substantive job as a Data Entry Operator, DA CON 01. Medical certificates indicated that [K.K.] must avoid repetitive wrist movements. Therefore, [K.K.] was accommodated with alternate clerical duties. As the pay structure is similar between both positions, [K.K.] remained under the DA CON 01 classification while performing clerical duties.

> . . .
>
> [K.K.'s] term was not extended beyond June 7, 2004 due to lack of work in the clerical duties she was performing. If she were able to perform the duties of her substantive data entry operator position, her term would have been extended further.

Accordingly, the Appellant took the position that the appropriate employment to be determined for her under Section 106 should be that of data entry clerk and that her IRI benefit entitlement arising from the Commission's previous decision of September 15, 2003 should be calculated upon that basis.

Counsel for MPIC submitted that pursuant to the statute, the Appellant's relapse was to be treated as a second accident. This was the only logical way of dealing with the reinstatement of the Appellant's benefits after so many years. This led to the determination of the Appellant as a clerk under the National Occupation Classification as general office clerk.

It was the submission of counsel for MPIC that, at the time of the Appellant's relapse and entitlement to IRI benefits in June 2002, the facts establish that the Appellant was unable to do the job of data entry clerk. Section 106 required the case manager to consider the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident. Counsel for MPIC submitted that "immediately before the accident" means immediately before the date of the second accident, which was June 2002, by virtue of the Appellant's relapse. He submitted that Section 106 does not direct the Corporation to look at the abilities of the Appellant prior to the motor vehicle accident, in the case of a relapse. As the Appellant's physical ability immediately before the accident (the relapse in this case) was that

she was not able to do data entry work but could do general clerical work, the determined job of "clerk" was a valid and proper determination under Section 106.

Discussion

Entitlement to I.R.I. after first 180 days
84(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

Where victim held several employments
84(2) If the temporary earner or part-time earner held more than one employment immediately before the accident, the corporation shall determine only one employment under section 106.

Factors for determining an employment
106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

Relapse after more than two years
117(3) A victim who suffers a relapse more than two years after the times referred to in clauses (1)(a) and (b) is entitled to compensation as if the relapse were a second accident.

The onus is on the Appellant to establish, on a balance of probabilities, that she is entitled to receive IRI benefits based upon a determined employment of data entry clerk.

In its decision of September 15, 2003, the previous panel of the Commission determined that the Appellant's relevant date of loss was the date she was laid off from her employment with the [text deleted] as a data entry clerk from June 7, 2002 and ordered MPIC to pay IRI benefits from that date.

However, it is the opinion of this panel that the Commission's decision did not determine June 7, 2002 to be the date that the Appellant suffered a relapse of her injuries, or the date that her injuries prevented her from performing the essential duties of her position as a data entry clerk. Rather, the Commission's decision identified the date, June 7, 2002, as the date when the Appellant's symptoms prevented her from earning income. The Appellant's relapse of symptoms began well before she was laid off by her employer on June 7, 2002.

During the period from July 2001 through June 2002, the Appellant's relapse of her injuries prevented her, to varying degree, from performing her duties as a data entry clerk. However, during this period, she was in receipt of Employment Insurance sick and regular benefits, and was accommodated by her employer with modified duties, on a graduated return to work program, while still classified and paid by her employer as a data entry clerk.

The Commission, at page 2 of its Reasons for Decision dated September 15, 2003, stated:

> The Appellant received Employment Insurance sick benefits and regular Employment Insurance benefits between July 15, 2001 and March 10, 2002. On March 11, 2002 the Appellant commenced a gradual return to work program with [text deleted] until June 7, 2002 when she was laid off. In the month of April 2002 the Appellant advised her employer that she was unable to increase her hours of work due to the chronic pain in her right wrist and the Appellant asserts that as a result thereof she was laid off from her employment on June 7, 2002.

The Commission, at that time, agreed with the Appellant's submission and upheld her appeal, holding that she was entitled to IRI benefits. The date she began to suffer economic loss as a result of the relapse, which had occurred prior to that date, was, as determined by the Commission, June 7, 2002. This was not the date of the Appellant's relapse, or second accident, as argued by counsel for MPIC, but rather, the date which the Commission determined on the

facts, that the Appellant began to suffer a loss of income as a result of her relapse, which led to her entitlement to IRI benefits:

> The Commission was impressed with the testimony of the Appellant who testified in a direct, straightforward manner and answered all the questions that were asked of her by MPIC's counsel and the Commission without equivocation. The Commission is satisfied the Appellant is an honest, hard working person who wished to continue to work on a full time regular basis as a data entry clerk with the Federal Government but had been unable to do so because of her right wrist pain. The Commission accepts the Appellant's testimony that the Appellant suffered an injury to her right wrist as a result of stepping off a City of Winnipeg bus on January 13, 1995 and as a result was unable to work regular hours in her employment with the [text deleted] during the months of March and April 2002. The Commission further accepts the Appellant's testimony that due to her inability to work on a full time basis the Federal Government did not renew her current term contract as a data entry clerk and laid her off on June 7, 2002.

The panel finds that the Internal Review Officer erred in selecting June 7, 2002 as the relevant date on which to base a consideration of the Appellant's "physical abilities immediately before the accident" in the assessment of determined employment under Section 106(1). The panel does not agree with the submission of counsel for MPIC that the Appellant's determined job should be that of a general duties clerk because "immediately before the accident", using a relapse accident date of June 7, 2002, the Appellant was not physically able to do data entry work. The panel has reviewed the facts in this case, along with the statute and the previous decision of the Commission, and we find that the Appellant's physical ability during the period immediately prior to June 7, 2002 is not the appropriate determining factor for consideration in determining employment for the Appellant under Section 106 of the Act.

Further, the panel is of the view that while the case manager and Internal Review Officer attempted to take into consideration the physical abilities of the Appellant in arriving at MPIC's determination under Section 106, they failed to consider the other factors set out in Section 106(1). These factors include the education, training, work experience and intellectual abilities

of the victim immediately before the accident. The panel is of the view that all of these factors should also be considered in determining an employment for the Appellant under Section 106(1). The case manager's decision of January 5, 2004 listed all the factors set out for consideration under Section 106:

> As per Section 106(1) and 106(2) of the Manitoba Public Insurance Corporation Act (attached), Manitoba Public Insurance shall determine employment for you based on your education, training, work experience, physical and intellectual abilities prior to the date of relapse (as explained in paragraph 4). In regards to your past employment history and work experience consideration is given to the job held at the time of the date of relapse and jobs held in the five (5) year reference period prior to June 8, 2002.

However, it does not appear that the case manager or Internal Review Officer actually applied these factors to the determination of the Appellant's employment.

Instead, what it appears that MPIC has done in calculating the Appellant's determined employment is to select one factor, the job with which the Appellant was accommodated by her employer due to the relapse of her injuries, and to use that as the sole factor in determining her employment under Section 106.

The panel is of the view that when all of the factors listed in Section 106 are considered together with the Appellant's physical ability prior to her relapse, the appropriate employment to be determined for the Appellant is that of data entry clerk. This is the job she held and performed prior to her accident in January 1995, and to which she returned in June of 1995, performing this job until a relapse of her symptoms prevented her from continuing to work at the position. Her education, training, work experience and physical and intellectual abilities lead to a determination of data entry clerk as the appropriate employment to be used in calculating her entitlement to IRI benefits.

Accordingly, we find that MPIC's determination of the Appellant's employment as "clerk" was not proper. The Appellant should have been determined as a "data entry clerk". As she was not able to perform the duties of a data entry clerk, her IRI benefits should not have been terminated on March 2, 2003.

The decision of MPIC's Internal Review Officer dated March 15, 2004 is therefore rescinded. The Appellant shall be entitled to IRI benefits in accordance with the MPIC Act, calculated on the basis of her determined employment of data entry clerk from June 7, 2002, together with interest to date of payment. The Commission will retain jurisdiction in this matter and if the parties are unable to agree on the amount of compensation either party may refer this matter back to the Commission for determination.

Dated at Winnipeg this 22nd day of June, 2006.

LAURA DIAMOND

MARY LYNN BROOKS

ROBERT MALAZDREWICH