

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by B. H. M.  
AICAC File No.: AC-04-158**

**PANEL:** Ms Yvonne Tavares, Chairperson  
Mr. Guy Joubert  
Mr. Paul Johnston

**APPEARANCES:** The Appellant, B. H. M., was represented by Ms Virginia Hnytka of the Claimant Adviser Office;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka and Ms Leanne Zabudsky.

**HEARING DATE:** October 3, 4 & 5, 2006

**ISSUE(S):** Entitlement to Income Replacement Indemnity benefits beyond July 1, 2002

**RELEVANT SECTIONS:** Section 110(1)(a) of the 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, B.H.M., was involved in a motor vehicle accident on August 7, 2000, when he made an unsafe left turn in front of another vehicle, thereby causing a collision. Following the accident, the Appellant complained of posterior neck pain, back pain, shaking/tingling and numbness in his hands and feet and dizziness on occasion. As a result of these injuries, the Appellant became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was employed as a heavy equipment operator. Since he was unable to continue working due to the injuries sustained in the motor vehicle accident, he became entitled to Income Replacement Indemnity ('IRI') benefits.

In a decision dated May 30, 2002, MPIC's case manager advised the Appellant that his entitlement to IRI benefits would cease effective July 1, 2002, since she had determined that he was now capable of holding the employment which he held at the time of the accident.

The Appellant disagreed with the case manager and sought an internal review of that decision. The Internal Review decision dated August 4, 2004 confirmed the case manager's decision and dismissed the Appellant's Application for Review.

The Appellant has now appealed from the Internal Review decision dated August 4, 2004 to this Commission. The issue which requires determination in this appeal is whether the Appellant is entitled to IRI benefits beyond July 1, 2002.

### **Preliminary Issue**

Prior to the commencement of this hearing, the Claimant Adviser Office requested an adjournment of the hearing in order to obtain a copy of the RCMP Report from the scene of the accident. The Claimant Adviser wanted to review the report in order to determine whether the Appellant was unconscious at the scene of the accident. If the report confirmed that the Appellant had sustained a loss of consciousness and had therefore likely sustained a concussion as a result of the motor vehicle accident, the Claimant Adviser would provide that new medical information to Dr. Gill, a clinical psychologist and neuropsychologist who had previously

assessed the Appellant, in order to determine whether that new information would change his opinion and assessment of the Appellant's condition.

The Commission determined that the hearing would proceed as scheduled and it would reconsider the Claimant Adviser's request for an adjournment upon the completion of oral testimony, prior to final arguments being heard. At this stage of the hearing, the Claimant Adviser did reiterate her request for the adjournment in order to obtain the RCMP Report. Counsel for MPIC opposed the adjournment.

Upon a careful consideration of the Claimant Adviser's request for an adjournment, the Commission determined that it would not grant any further adjournments of this matter.

As noted in the Notice of Hearing, adjournments will only be granted under unusual circumstances of a compelling nature. The Commission does not consider the reason for the adjournment request as either compelling or unavoidable, which would warrant the considerable waste of time, preparation and inconvenience to all parties involved. The Commission determined that the request to obtain the RCMP Report was speculative at best and not arguably relevant to the issues before it. Dr. Gill in his report of July 3, 2001 considered whether the Appellant had sustained a concussion at the time of the motor vehicle accident. He noted that, *"[B.H.M.'s] deficits are not simply attributable to a possible concussion, since the test results are far more severe than from a mild head injury, particularly with no documented loss of consciousness"*. Dr. Shelton noted the following with respect to the Appellant's neurological examination in his report of February 14, 2002:

The findings on exam relate primarily to a neck injury. This likely is soft tissue injury and I can find no evidence of neurologic complications. His tremor is consistent with an enhanced physiologic tremor such as may be seen with stimulant medication withdrawal

state or medications. I see that his neurologic investigations have been normal. CT scan of the head is unremarkable. I find nothing on examination to suggest a significant closed head injury.

Dr. Tang-Wai, in his report of November 2002 noted the following with respect to his examination of the Appellant:

Just as in December 2001, he has remained neurologically normal on examination. I also note that he was assessed by another neurologist (Dr. Paul Shelton) in Winnipeg on January 14, 2002 and he found no neurological deficits either. I note that he had a normal head CT scan and CT scan of the cervical spine in June 2001. It is my view that he requires no further neurological studies at this time unless, while under your observation, his future clinical course should suggest otherwise. Because he complains of having a tinnitus and claims that he is now deaf on the left and almost deaf on the right during examination, although this is not consistent with the fact that he can hear normal conversational voice, you should obtain an opinion from an ENT specialist.

The foregoing medical reports are persuasive evidence of the lack of any neurological deficit for this Appellant and we are not convinced that the fact of whether there was a documented loss of consciousness would have changed these findings. As a result, the Claimant Adviser's request for an adjournment was denied.

#### **Entitlement to IRI benefits**

The Claimant Adviser submits that the Appellant is not able to hold the employment which he held at the time of the motor vehicle accident. She notes that he has unsuccessfully attempted to return to his employment as a heavy equipment operator and is no longer able to meet the job demands of that position. She argues that his inability to return to his employment as a heavy equipment operator is due to the cognitive difficulties he now experiences, which she attributes to the motor vehicle accident. The Claimant Adviser contends that the Appellant's cognitive difficulties are related to the motor vehicle accident since:

1. the Appellant's cognitive difficulties commenced shortly after the motor vehicle accident, and are temporally connected to the motor vehicle accident;
2. it is probable that the Appellant sustained a significant head injury in the accident since he was traveling at highway speeds when his vehicle collided with the other vehicle; and
3. there is no evidence that alcohol abuse can account for his cognitive dysfunction.

As a result, the Claimant Adviser maintains that the Appellant is not able to hold the employment which he held at the time of the motor vehicle accident and was not capable of returning to that employment as of July 1, 2002, due to the cognitive difficulties he experiences, which difficulties were caused by the motor vehicle accident of August 7, 2000. Therefore, she submits that the Appellant's IRI benefits should be reinstated effective July 1, 2002.

Counsel for MPIC submits that there is no evidence that there is actually anything wrong with the Appellant. He notes that none of the numerous medical investigations which have been undertaken have determined a cause for the Appellant's vague and unspecific complaints. He relies on Dr. Baydock's review dated June 22, 2004, wherein Dr. Baydock comments that:

In reviewing the medical documentation on file, no specific diagnosis had been determined to account for the claimant's symptomatology. Extensive investigations including imaging studies, functional tests such as the ABR and ENG studies were inconclusive with regards to the causes for the claimant's dizziness and tinnitus. Without a specific diagnosis to account for the symptoms, a probable cause and effect relationship cannot be determined. For a probable relationship to occur, a specific effect (a diagnosis) must be able to be related to in a cause (in this case the collision) by a biologically plausible association. As this is not the case here, I cannot make a probable cause and effect relationship. Although there may appear to be a temporal relationship between the collision and development of these symptoms, reports of "dizziness" are common in the general population and can stem from numerous causes which may be related to a traumatic event or other conditions that cannot be directly related to any trauma.

Additionally, counsel for MPIC submits that if the Appellant has cognitive difficulties, these are not causally connected to the motor vehicle accident. Rather, he contends that the Appellant's previous use of alcohol may account for his cognitive deficits. Irregardless, counsel for MPIC maintains that the onus rests on the Appellant to establish an entitlement to IRI beyond July 1, 2002, and he has failed to satisfy the onus required in the circumstances of this case. As a result, counsel for MPIC maintains that the Appellant's appeal should be dismissed and the Internal Review decision dated August 4, 2004 confirmed.

### **Relevant Sections of the MPIC Act**

Section 110(1)(a) of the MPIC Act provides as follows:

#### **Events that end entitlement to I.R.I.**

**110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;

Section 8 of Manitoba Regulation 37/94 provides that:

#### **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.

### **Discussion**

In order to establish that his IRI benefits were prematurely terminated and to establish an ongoing entitlement to IRI, the Appellant must establish, on a balance of probabilities, that:

1. he has a medical condition which renders him entirely or substantially unable to perform the essential duties of his employment; and
2. the condition is causally related to a motor vehicle accident.

Upon a review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant has not established, on a balance of probabilities, that he was unable to hold the employment which he held at the time of the motor vehicle accident beyond July 1, 2002, due to a physical or mental injury caused by the motor vehicle accident of August 7, 2000.

Despite the numerous medical investigations undertaken by the Appellant, including medical examinations and evaluations by Dr. Tang-Wai, Dr. Shelton, Dr. Hoy, Dr. Franke and Dr. Theodore, the evidence failed to establish that there was a condition or a diagnosis which could account for the Appellant's symptomatology. As a result, we find that the Appellant has not established, on a balance of probabilities, that he has a medical condition which renders him entirely or substantially unable to perform the essential duties of his employment.

Given the vague, unspecific and subjective symptoms of which the Appellant complained, we cannot attribute that symptomatology to the motor vehicle accident of August 7, 2000. Moreover, Dr. Gill, who conducted a detailed neuropsychological assessment of the Appellant, and was of the opinion that the Appellant would not be safe to resume his employment as a heavy equipment operator, could not attribute all of the Appellant's impairments to a mild head injury that the Appellant could have sustained in the motor vehicle accident. As a result, we find that the Appellant has not established, on a balance of probabilities, that his condition is causally related to the motor vehicle accident of August 7, 2000.

As a result, the Appellant's appeal is dismissed and the Internal Review decision dated August 4, 2004 is hereby confirmed.

Dated at Winnipeg this 8<sup>th</sup> day of December, 2006.

---

**YVONNE TAVARES**

---

**GUY JOUBERT**

---

**PAUL JOHNSTON**