

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by B. P.
AICAC File No.: AC-05-37

PANEL: Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Ms Diane Beresford

APPEARANCES: The Appellant, B.P., represented by Ms Virginia Hnytka of the Claimant Adviser Office;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.

HEARING DATE: June 19, 2007

ISSUE(S):

1. Did the Appellant provide a reasonable excuse for failing to apply for a review of the case manager's decision of 11 Mar 03 and, if so, is she entitled to the inclusion for the lost employment opportunity with W. J. Christie & Co. in the Income Replacement Indemnity calculation;
2. Entitlement to further Income Replacement Indemnity benefits beyond 29 May 04.

RELEVANT SECTIONS: Sections 83(1)(a), 110(1)(a)(c), and 172(1)(2) of *The Manitoba Public Insurance Corporation 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 was injured in a motor vehicle accident on December 15, 2002. She sustained various injuries, including soft tissue injuries.

At the time of the accident the Appellant was two (2) months pregnant and was a nurse working part time hours. As her pregnancy progressed, symptoms of lower back pain, neck and hip pain, and headaches increased in frequency. She attended a rehabilitation program for physiotherapy treatments, but after the delivery of her child in [text deleted], her back pain continued.

The Appellant was in receipt of Income Replacement Indemnity (IRI) benefits until May 29, 2004. These benefits were based upon her employment income as a nurse, and did not take into account caretaking duties which she indicated she was scheduled to have taken over with [text deleted] effective January 1, 2003.

The letter setting out the Appellant's entitlement to IRI was dated March 11, 2003, but the Appellant did not seek an Internal Review of this decision until over a year and half following that date, missing the 60 day limitation period under Section 172 of the Act in which a claimant may apply for a review of a decision.

On January 24, 2005, an Internal Review Officer for MPIC found that the Appellant had not provided a reasonable excuse for her failure to file for a review of the IRI calculation within the 60 day limitation. The Internal Review Officer also found that the caretaker's job at [text deleted] was not a lost employment opportunity for the Appellant, as the caretaking employment was really a joint endeavour with her husband and herself and continued to be so.

The Internal Review decision also upheld a decision of the Appellant's case manager dated June 22, 2004 in which the case manager found that the medical information reviewed did not support a causal relationship between the Appellant's current signs and symptoms and the motor vehicle accident of December 15, 2002, thereby terminating her entitlement to IRI effective May 29,

2004. The Internal Review Officer found that the Appellant's continuing back pain after May 29, 2004 was caused by the Appellant's pregnancy and delivery and a causal relationship between her back problems and the motor vehicle accident was not probable.

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

From May 29, 2004 to August 25, 2004 the Appellant was visiting her parents in [text deleted]. Accordingly, the Notice of Appeal in this matter indicated that the Appellant is seeking IRI benefits from August 26, 2004 to December 18, 2004.

A. Reasonable Excuse

Evidence and Submission for the Appellant

Both the Appellant and her husband gave evidence at the hearing. They described the events which occurred following the motor vehicle accident, including the Appellant's attendance at her family doctor, obstetrician, and physiotherapist. They described their attempts to fill out the MPIC claim forms and deal with the Appellant's case manager in English (although their first language is [text deleted]). They described their meetings with their case manager, as well as calls to the case manager and to the MPIC customer service centre for assistance in filling out the claim and application for benefit forms. They indicated that, as the Appellant was feeling sick, worried and emotional, her husband took responsibility for many of the dealings with MPIC.

It was submitted on behalf of the Appellant that when she and her husband realized that the income from the prospective [text deleted] employment had not been included in her IRI calculation, they brought this to the attention of their case manager. The case manager took copies of the information they had dealing with this issue. However, in later conversation, she

told them that this income could not be included in the IRI calculations because “*that was the law*”. According to the Appellant and her husband, the case manager told them that while the Appellant could “*appeal*” the calculation of her income from her nursing duties, the [text deleted] employment could not be included. The Appellant and her husband testified that they relied on this advice of the case manager, and as they had no disagreement with the calculation of the lost nursing income, they did not seek a review. This misunderstanding was confirmed, they indicated, by similar information they received when they made telephone calls to the customer service centre of MPIC.

It was not until later, they indicated, when the Appellant was filing an appeal with regard to the termination of her IRI benefits, that they fully understood the review and appeal process and understood that they could file an appeal with regard to the issue of the [text deleted] prospective employment

Submission for MPIC

Counsel for MPIC took the position that the Appellant was more than a year and half out of time in filing her application, and although the Corporation may extend the limitation period if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within the time period, a reasonable excuse was not provided by the Appellant. She was provided with letters in writing and her case manager spoke to her regarding this matter, yet she did not seek a timely review. Therefore, counsel for MPIC submitted that the Appellant was not entitled to have this decision reviewed.

Discussion

Application for review of claim by corporation

172(1) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

Corporation may extend time

172(2) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.

The panel has reviewed the material on file and the evidence and submission of the Appellant, along with the submission of counsel for MPIC. The panel finds that the Appellant did have a reasonable excuse for her failure to seek an Internal Review within the statutory time limits.

The panel has considered the evidence of the Appellant and her husband regarding the confusing composition of the MPIC application form, and the fact that they tried to get help with filling it out. In particular, the Appellant's husband phoned her case manager, who was unavailable, and was transferred to another case manager with the customer service department.

Over the phone, he inquired how they should deal with prospective employment, and was told that if she was not yet working for that employer they should put "*not applicable*" in the box beside the other employer. He also understood that since the Appellant was not unemployed, they should fill in "*n/a*" in the section entitled "*your prospective employment*". The Appellant complied.

In later discussions with the case manager, when the Appellant and her husband asked about her prospective employment with [text deleted], they were told that the law would not cover this prospective employment and they could not appeal it. They were told that they should look at

the calculation letter when it came and if they disagreed with the calculations they could appeal that.

The letter of March 11, 2003 was reviewed by the Appellant. She found the calculations dealing with her nursing job to be correct. The letter did not make any mention of the potential [text deleted] employment. As the Appellant found the calculations to be correct, she did not appeal this letter or seek an Internal Review of the decision.

When the case manager called the Appellant to schedule an appointment to review the 180 day determination calculation in May of 2003, the Appellant's husband again mentioned the potential employment with [text deleted]. The case manager instructed the couple to get together the necessary paperwork regarding this and to provide it to her when they met. The meeting, originally scheduled for May, was cancelled and was rescheduled for June. At that meeting, the Appellant presented the case manager with a letter from [text deleted] dated May 31, 2003 which confirmed her prospective employment. The case manager took that letter and other documents to copy. She indicated that she would make copies, review the file and advise the Appellant when it was time to come and pick up her copies of the documents.

The case manager then telephoned the Appellant to advise that only the higher income (from her nursing job) could be considered, and that the [text deleted] prospective employment could not be a part of the claim. She advised the Appellant that she could come and pick up her documents.

Once again, when the letter calculating the 180 day determination was issued, on December 1, 2003, the Appellant did not take issue with the calculations and did not seek a review.

In June 2004, the Appellant was assigned a new case manager. She issued a letter, on June 22, 2004, which terminated the Appellant's IRI benefits. Because the Appellant was out of town at that time, time limits for reviewing the decision were waived, and the letter was re-issued on October 8, 2004.

The new case manager explained to the Appellant, in relation to the October 8, 2004 letter, the various levels of review and appeal, and processes which the Appellant would need to follow to seek an Internal Review or an Appeal of the decision, if she wished, to the Commission.

It was at this point that the Appellant and her husband began to understand the process which was available regarding Internal Reviews and Appeals.

The Commission recognizes that there were potential language difficulties throughout this process. The panel accepts the testimony of the Appellant and her husband as credible, and finds that they did not have a clear understanding of the processes available for review and appeal until much later.

Once the Appellant and her husband understood their appeal rights, they sought to appeal not only the termination of the Appellant's IRI benefits, but also the termination of her physiotherapy benefits (no longer at issue), and the failure to include the prospective [text deleted] employment in the calculation of IRI benefits.

A lengthy period of time elapsed between the decision to exclude the [text deleted] employment and the Application for Review, and the panel recognizes that this may be a longer period than normally seen in such situations. However, the exacerbating factors of the language barrier and the misinformation, miscommunication and misunderstanding which occurred between the Appellant and her husband and MPIC's case managers, along with the frustrated efforts to pursue the prospective employment issue, leads the panel to conclude that the Appellant has provided a reasonable excuse for failing to file within the time limits set out in the legislation for an Application for Review.

Accordingly, we exercise our discretion to relieve against this time limit and allow the Appellant's appeal on this issue to be heard on the merits.

B. Lost Employment Opportunity

Evidence and Submission for the Appellant

Both the Appellant and her husband testified regarding the details and duties of the prospective employment with [text deleted].

The Appellant submitted letters from the employer, who indicated that while the Appellant's husband had been performing this employment in the past, an offer had been made and accepted for the Appellant to assume these duties in January of 2003.

The Appellant and her husband both explained that the plan was for the Appellant to assume the job responsibilities of caretaker when she completed her fifteen (15) weeks of maternity leave. This would allow her husband to collect parental leave benefits without having any deductions made in regard to the caretaker employment.

Evidence was heard, both on direct and cross examination, that the Appellant did assist her husband with caretaking duties prior to this time. Circumstances (which included living in a shared household) entailed that the Appellant would answer the phone and undertake small duties such as showing apartments, when her husband was not around. However the testimony established that the bulk of the job responsibilities were born by, and the duties performed by, the Appellant's husband.

Evidence was heard that the Appellant took over the caretaker's job in 2005 and performed it on her own, while her husband was out of the country. The evidence was that he trained her for these duties. However, this occurred long after the period in issue under this appeal.

Counsel for the Appellant submitted that the letter from [text deleted] is clear regarding who was working for them at what point in time. She submitted it was clear that in the mind of the employer, this was a one person job. As a married couple living in the same household, they may have assisted each other with the duties, but it was clear that it was the responsibility of the Appellant's husband to do the work prior to the motor vehicle accident. The Appellant would have taken over these duties in January of 2003, had it not been for the motor vehicle accident.

Submission for MPIC

Counsel for MPIC submitted that although the letter from the prospective employer, [text deleted] stated that she would have started employment on January 1, 2003, the Appellant's initial Application for Compensation under the Personal Injury Protection Plan, listed [text deleted] as the principle employer. With respect to prospective employment, "n/a" was written in that area and the Appellant did not fill out any of the details in that area of the application. This Application for Compensation was dated December 31, 2002; only one (1) day prior to the alleged start of the new employment.

The prospective employer indicated that the Appellant's husband had previously been the caretaker of the building, with the Appellant scheduled to take over the payments in January 2003, even though the Appellant and her husband had previously worked together on showing suites and answering phone calls etc. It was submitted that the proposed new employment of the Appellant was simply a question of putting her name on the contract legally, while the husband would continue and did continue to do most of the work. She submitted that the Appellant was

not entitled to the inclusion for the alleged lost employment opportunity with the [text deleted] in the IRI calculation.

Discussion

Entitlement to I.R.I. for first 180 days

83(1) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:

- (a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;

The onus is on the Appellant to show, on the balance of probabilities, that the [text deleted] employment is employment that she would have held if the accident had not occurred.

The difficult question before the Commission is whether the Appellant would have performed the caretaking duties and responsibilities, in spite of her husband's presence, beginning in January 2003, had the motor vehicle accident not occurred.

While we cannot ignore the letter from [text deleted], the potential employer, neither can we ignore the evidence of both witnesses regarding the division of the caretaking duties in past. We find that although there is written evidence of an employment offer to the Appellant, given the way the duties were previously shared, we find that there is not sufficient or compelling evidence to persuade us that the Appellant would have been primarily responsible for assuming the duties of caretaker at that time. There is not sufficient evidence before the panel to convince us that the division of duties would in fact have changed, and that the Appellant would have performed even a majority of the caretaker duties.

Therefore, we find that the Appellant has not met the onus of showing, on a balance of probabilities, that the caretaking job was a position of employment which she would have held during the relevant period, if the accident had not occurred.

C. Entitlement to Income Replacement Indemnity Benefits Beyond May 29, 2004

Evidence and Submission for the Appellant

The Appellant testified regarding the difficulties she had following the motor vehicle accident. She gave evidence regarding the pregnancy and delivery of her child in 2003, and regarding the later pregnancy and delivery of her second child. The Appellant testified that she had no difficulties and was working her full hours prior to the motor vehicle accident. She also testified that she was able to work her full hours during her second pregnancy.

Counsel for the Appellant submitted that the Appellant was pregnant at the time of the motor vehicle accident, and that MPIC, as her insurer, must take her as it found her. She reviewed evidence from the Appellant's family physician, physiotherapist, treating neurologist and obstetrician. All were of the opinion that the Appellant's difficulties and inability to work were related to her motor vehicle accident injuries.

Counsel for the Appellant relied upon the opinions of Dr. Choptiany, her general practitioner, Dr. Gomori, the neurologist, and Dr. McCarthy, her obstetrician.

On March 1, 2006 Dr. Choptiany reported that the Appellant had been complaining of ongoing lower back pain since the time of her motor vehicle accident and was symptomatic prior to the birth of her child in August 2003. He stated it was his belief that her physical condition was a complication of the motor vehicle accident and not of her pregnancy, stating that he continued to

support Dr. Gomori and Dr. McCarthy's opinion which were similar to his.

In a report dated September 15, 2004, Dr. Gomori concluded:

In my opinion, this woman may have a mild L5 root compression as a cause of her sciatica and she would definitely benefit from physiotherapy. The issue of causation cannot be resolved as both the pregnancy or the motor vehicle accident itself could have triggered her back problems...She should have been given the benefit of the doubt that the accident may have been instrumental in contributing to her back pain. One cannot say that pregnancy could not have been contributing, but getting her back to the workforce should be the prime objective here...

In a report dated June 26, 2006, Dr. Gomori stated:

When I made my comment that either the pregnancy or the motor vehicle accident could have caused her symptoms, the opinions were based on an examination two years following the accident. It is now an additional two years that have passed and I would not expect pregnancy related issues to be still an issue this far down the line...

The above paragraph also indicates that the problems post partum are usually several months in duration rather than years, or four years as in this situation.

As mentioned in my previous correspondence, entitlement for physiotherapy is quite a reasonable option. In answer to question one on top of page two of your May 4 letter, I would state that on the balance of probabilities [B.P.] might have had these hip and back pains during pregnancy but if it were not for the MVA, those symptoms would have subsided long ago. Of all women who go through pregnancy, most do not have pains four years down the line.

In answer to the next question, on the balance of probability, the pregnancy certainly could have aggravated the symptoms but that would have been only on a temporary basis and by now, four years later, she would be back to baseline pain that would have resulted from the motor vehicle accident alone without invoking the pregnancy as a complicating factor...

Dr. McCarthy provided a report dated December 2, 2004.

I am writing to you regarding [B.P.] whom I saw for her pregnancy in 2002/2003.

She saw me before and after her motor vehicle accident on December 15/02.

Shortly after the accident she was complaining of back pain which was musculoskeletal in nature. I do not feel that this pain was fully a complication of pregnancy. She complained of this pain after her motor vehicle accident and not before.

In my opinion, I feel that this pain could be a complication from the motor vehicle accident.

Submission for MPIC

Counsel for MPIC submitted that the Appellant's inability to work during the period in question, in particular from August 26 to December 18, 2004, was really due to back pain and symptoms resulting from her pregnancy and delivery and not from the motor vehicle accident. Counsel relied on opinions provided by Dr. Craton of the MPIC Health Care Services team. Dr. Craton reviewed the Appellant's file, as well as the opinions of her caregivers.

In a lengthy opinion dated March 1, 2004, Dr. Craton noted that it was not until July 4, 2003 that the Appellant was described as having weak L5 and S1 myotomes on the left. He stated:

The presence of this newly documented two levels of myotomal weakness would not be probably related to the collision in question. The development of these at a latter stage of her pregnancy would more probably be associated with that pregnancy. The patient was described as having instability of her left sacroiliac joint. Previously, the sacroiliac joint had been described as being hypomobile. This instability would not probably be related to the trauma in question which was associated with hypomobility, but more likely due to the patient's pregnancy which is commonly associated with pelvic hypermobility preparing the patient for the delivery of the fetus.

In regard to weakness of L4, L5 and S1 myotomes at the patient's examination in September 2003, after the delivery of her baby in August 2003, Dr. Craton stated:

This weakness was not present in April 2003, but was present subsequent to the delivery. The patient's cervical spine decreased in terms of its range of motion and the patient developed weakness of the C7 and T1 myotomes with alteration of cervical rotation. Prior to her delivery, the patient had a rotation of C2 on 3. This obviously changed subsequent to her delivering.

There appears to be a myriad of physical findings which are different subsequent to the patient's delivery which are not probably related to the collision in question.

Dr. Craton concluded that:

The continuing changing findings of myotomal weakness cannot be probably related to a remote episode of motor vehicle collision-related trauma.

On June 10, 2004, Dr. Craton provided a follow-up opinion which stated:

... given the evolution of her neurologic symptoms, and the intercurrent pregnancy, it is my opinion that these physical conditions are not probably related to the collision in question. The patient's condition appears to have changed substantially during the evolution of her pregnancy. With a single episode of motor vehicle collision-related trauma, one expects the opposite, on the balance of probability.

In a further medical opinion dated January 6, 2005, Dr. Craton, in conjunction with Dr. Saran, reviewed evidence from Dr. Gomori, neurologist, and from Dr. McCarthy, the Appellant's obstetrician. They concluded that the new evidence provided did not change their opinion that the Appellant's physical condition was probably not related to the collision in question, according to the medical evidence on file.

Finally, Dr. Craton provided an Inter-departmental Memorandum dated June 15, 2007 wherein he reviewed his prior opinion on the matter as well as an additional report from Dr. Gomori. He indicated that Dr. Gomori stated that there was little in the way of objective findings when he examined the Appellant in June 2006 and stated the medical evidence did not change his opinion regarding the probable cause of the Appellant's concerns.

Discussion

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:

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.

The onus is on the Appellant to show, on a balance of probabilities, that she was precluded from continuing her employment as a result of motor vehicle accident related injuries.

The panel is of the view that the weight of evidence supports the Appellant's position that she was unable to work from August 26, 2004 to December 18, 2004, as a result of injuries sustained in the motor vehicle accident. The evidence from the Appellant, as well as the supportive evidence from her family physician, physiotherapist, neurologist and obstetrician, lead the panel to conclude that the Appellant has met the onus of showing, on a balance of probabilities, that the injuries which prevented her from working during that period resulted from her motor vehicle accident.

The Appellant had no difficulties and was working full hours prior to the motor vehicle accident. It was the view of her neurologist that back pain from pregnancy would not have continued as long as it did and that the motor vehicle accident was the more likely cause of these persistent symptoms. It was the view of her obstetrician that the pain was a complication of the motor vehicle accident. During her second pregnancy, when she was not involved in a motor vehicle accident, she was able to work full hours.

On a balance of probabilities the panel finds that all of this evidence meets the onus upon the Appellant of establishing that her injuries from the motor vehicle accident prevented her from

work during the period from August 26, 2004 to December 18, 2004, and her appeal is allowed on this ground.

Conclusion

- A.** The Commission finds that, for the reasons set out above, the Internal Review Officer erred in her decision dated January 24, 2005 when she found that the Appellant did not have a reasonable excuse for failing to apply for a review of the case manager's decision of March 11, 2003 within time limits. The Commission finds that the Appellant has provided such a reasonable excuse.
- B.** However, the Commission finds that the Appellant has failed to establish that she should be entitled to the inclusion of a lost employment opportunity with [text deleted] in the calculation of her IRI benefits and accordingly, the Internal Review Officer's decision regarding that issue is hereby confirmed.
- C.** The Commission further finds that, for the reasons set out above, the Internal Review Officer erred in her decision dated January 24, 2005 when she terminated the Appellant's IRI payments on May 29, 2004, when she found there was a lack of a causal relationship between the Appellant's back problems and the motor vehicle accident. As a result, the appeal is

allowed and the Internal Review Officer's decision on that issue is rescinded. The Appellant shall be entitled to IRI benefits, with interest, from August 26, 2004 to December 18, 2004.

Dated at Winnipeg this 15th day of August, 2007.

LAURA DIAMOND

NEIL COHEN

DIANE BERESFORD