

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by L. D. L.
AICAC File No.: AC-04-190**

PANEL: Ms Yvonne Tavares, Chairperson
Dr. Patrick Doyle
Mr. Neil Cohen

APPEARANCES: The Appellant, L. D. L., was represented by Ms Marla Garinger Niekamp of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATES: March 5, 2007 and May 3, 2007

ISSUE(S): Entitlement to Income Replacement Indemnity benefits beyond June 15, 2003

RELEVANT SECTIONS: Section 110(1)(f) 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, L.D.L. was involved in a motor vehicle accident on December 8, 2002, when she rear-ended another vehicle which had stopped suddenly in front of her. As a result of the motor vehicle accident, the Appellant sustained injuries to her neck, right shoulder, upper back, knees, hips, ankles, and right foot. Due to the injuries which the Appellant sustained in the accident, she became entitled to Personal Injury Protection Plan ('PIPP') benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was collecting Employment Insurance (“EI”) benefits through Human Resources Development Canada (“HRDC”). As a result, she was classified as a non-earner for the purposes of determining her IRI entitlement under PIPP. As a non-earner, her entitlement to IRI benefits was based upon ninety percent of her EI benefits in accordance with Section 85(1)(b) and Section 85(3)(b) of the MPIC Act, which provide that:

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

85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

(b) he or she is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

...

85(3) The corporation shall determine the income replacement indemnity for a non-earner on the following basis:

(b) under clause (1)(b), the benefit that would have been paid to the non-earner.

The Appellant has a past history of injury to her upper back and right shoulder which occurred in November 1994 when she slipped in a puddle of water. She was diagnosed with a mild cervical right radiculopathy, but she returned to full-time work within a few months of the injury, with eventual complete resolution of symptoms. In April 2002, the Appellant suffered a sprain to her left ankle when she slipped on a small roller at work. In July 2002, she sprained her right ankle when stepping off the edge of a sidewalk. Subsequent x-ray reports did not reveal fractures to either ankle or to either foot. On August 2, 2002, the Appellant underwent a cheilectomy by Dr. Trepman to her left 1st MP joint for hallux rigidus. The right 1st MP joint was similarly affected, but to a lesser extent and was essentially pain free. On October 18, 2002, the Appellant

stated that the pain in her left had been resolved by 98%, while Dr. Trepman found the surgical incision to be well healed.

Following the motor vehicle accident, the Appellant attended upon Dr. Nemeth, who referred her to physiotherapy under the care of Mr. R. Gall. Mr. Gall's December 24, 2002 report notes that the Appellant's clinical presentation was in keeping with a sprain/strain involving the right shoulder, lower back, and left knee. Dr. Nemeth's examination of December 9, 2002 noted that the Appellant had clinical findings in keeping with patellofemoral strain, rotator cuff strain, lumbar strain, and ankle sprain. Examination revealed tenderness upon palpation of the lateral right ankle, and left knee patellofemoral crepitation.

Dr. Nemeth documented that the Appellant's condition had improved as of January 8, 2003 and that her ankle examination was good. Dr. Nemeth was of the opinion that the Appellant was fit for light work. In Mr. Gall's February 18, 2003 report, he notes that the Appellant's condition was improving and she was able to perform modified work duties. However, following the February 18, 2003 physiotherapy session, Dr. Nemeth outlined in his clinical notes that the Appellant's condition deteriorated, in that she was noted to have a loss of function and motion.

In Dr. Nemeth's March 19, 2003 report, he notes that the Appellant had a significant aggravation of her right shoulder and low back symptoms (following the February 18, 2003 physiotherapy session). Dr. Nemeth noted that based on discussion with the treating physiotherapist, a cause could not be determined that would account for the deterioration. Dr. Nemeth was of the opinion that the Appellant had had an idiosyncratic reaction to appropriately applied treatment and that she exhibited significant functional overlay. The Appellant subsequently discontinued the physiotherapy but became emotionally upset with her overall slow progress in improvement and

felt that she was not receiving adequate medical help from Dr. Nemeth. A subsequent assessment of the Appellant by Dr. Philips, psychologist, did not disclose any significant psychological disturbance.

In Dr. Chernish's June 2003 report, he reports that the Appellant reported difficulties with her right shoulder pain and numbness. Dr. Chernish was concerned that the numbness might be as a result of an injury to the axillary nerve and referred the Appellant to Dr. Gomori for assessment.

The Appellant was seen for a third party medical examination by Dr. Hillel M. Sommer on June 2, 2003. In his report of the same date, he documents that the Appellant presented with clinical findings in keeping with possible right rotator cuff tendinopathy and right foot/ankle pain of unknown origin. Dr. Sommer was of the opinion that it was not medically probable that a causal link existed between the right shoulder condition and the motor vehicle accident. Dr. Sommer was of the opinion that a cause/effect relationship could not be established between the Appellant's right ankle and foot symptoms since a diagnosis had not been made that would account for her symptoms. Dr. Sommers was also of the opinion that the Appellant could perform light to medium work.

Subsequently, Dr. Gomori did assess the Appellant for problems with her right shoulder. In his report dated August 19, 2003, Dr. Gomori found that the Appellant suffered from an axillary nerve injury resulting in a relatively subtle sensory loss. Dr. Gomori was of the opinion that this type of injury occurs following a traumatic dislocation, fracture involving the surgical neck and/or blunt trauma to the shoulder. Dr. Gomori was of the opinion that nerve conduction studies could easily be normal and might not show any objective evidence of an abnormality. It

was his opinion that the Appellant was unable to perform physical labour but that she was capable of performing sedentary work.

In a decision dated June 19, 2003, MPIC's case manager advised the Appellant that her IRI benefits would cease as of June 15, 2003. This decision was based upon the independent medical examination report of Dr. Sommer, wherein Dr. Sommer opined that the Appellant was capable of at least light to medium work. Therefore, the case manager determined that since the Appellant was capable of gainful employment, she would re-qualify for EI benefits and thus her entitlement to IRI benefits ceased in accordance with sub-section 110(1)(f) of the MPIC Act.

The Appellant sought an Internal Review of that decision. In a decision dated July 30, 2004, the Internal Review Officer dismissed the Appellant's Application for Review and upheld the case manager's decision of June 19, 2003. The Internal Review Officer found that:

Once you were found able to work in some meaningful capacity by Dr. Sommer, your entitlement to IRI ended because at that point, you could not be said to have been deprived of EI benefits as a result of the motor vehicle accident. Section 85 of the Act indicates that the entitlement to IRI must end at this time.

The Appellant has now appealed from the Internal Review Decision dated July 30, 2004 to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to IRI benefits beyond June 15, 2003.

Upon a review of all the evidence made available to, both oral and documentary, the Commission finds that the Appellant has not established that she was deprived of a benefit under the *Employment Insurance Act* (Canada) beyond June 15, 2003 as a result of the injuries sustained in the motor vehicle accident of December 8, 2002. We base our findings upon on the

following factors:

1. The opinion of Dr. Gomori set out in his letter of August 19, 2003, that the Appellant could definitely do a sedentary job which did not involve physical activity with her hands;
2. The opinion of Dr. Sommer set out in his report dated June 2, 2003 that the Appellant was capable of at least light to medium work; and
3. The Appellant failed to present any corroborating evidence regarding her inability to reactivate her EI claim with HRDC. Since the Appellant had the onus of establishing that she was deprived of EI benefits as a result of the motor vehicle accident, it was incumbent upon her to provide supporting confirmation regarding her inability to qualify for a reinstatement of her EI benefits. The Appellant's testimony regarding this matter was insufficient to meet the onus of proof required in the circumstances.

Based upon the foregoing, we find that the Appellant was able to work as of June 15, 2003 and therefore would have qualified for EI benefits. Accordingly, she was no longer deprived of a benefit under the EI Act because of injuries sustained in the motor vehicle accident and her entitlement to IRI was properly terminated as of June 15, 2003. As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated July 30, 2004, is therefore confirmed.

Dated at Winnipeg this 16th day of August, 2007.

YVONNE TAVARES

DR. PATRICK DOYLE

NEIL COHEN