

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by H. B.
AICAC File No.: AC-04-151

PANEL: Ms. Laura Diamond, Chairperson
Mr. Robert Malazdrewich
Mr. Les Marks

APPEARANCES: The Appellant, H. B., was represented by Mr. Bob Tyre of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: August 15, 2007

ISSUE(S):

- 1. Whether Personal Injury Protection Plan benefits were properly suspended effective October 3, 2004 pursuant to Section 160(f) and (g) of the MPIC Act.**
- 2. Whether Income Replacement Indemnity benefits were properly suspended for one day (August 31, 2004) pursuant to Section 160(e), (f) and (g) of the MPIC Act.**
- 3. Whether Personal Injury Protection Plan benefits were properly terminated pursuant to Section 160(f) and (g) of the MPIC Act.**

RELEVANT SECTIONS: Sections 160(e), (f) and (g) 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 was injured in a motor vehicle accident on March 6, 2004. As a result of his injuries, he was in receipt of Income Replacement Indemnity ('IRI') benefits.

In August 2004, the Appellant began a work hardening program at the Wellness Institute, which was arranged for and financed by MPIC.

Some difficulties arose regarding the Appellant's compliance with the rehabilitation program at the Wellness Institute, and specifically with his attendance.

As a result of these problems, the Appellant's IRI benefits were suspended for one (1) day, on August 31, 2004, for failure to follow or participate in the rehabilitation program. The Appellant had advised the Wellness Institute staff that he would be attending Traffic Court at 10:00 in the morning, on this day, but MPIC maintained that he was expected to attend at the Wellness Institute in the afternoon. He did not attend or call advising that he would not be in.

On November 8, 2004, an Internal Review Officer for MPIC upheld the one (1) day suspension, finding that the Appellant did not have a valid reason for failing to comply with his rehabilitation program.

The Appellant's benefits were then terminated by MPIC effective October 3, 2004, again for a continued refusal to co-operate or participate with his rehabilitation program.

On November 4, 2004, an Internal Review Officer for MPIC reviewed the issues of non-compliance, unco-operative behaviour and poor attendance in the rehabilitation program, but concluded that she would substitute a suspension for the Appellant's termination of IRI benefits. The Internal Review officer indicated that the Appellant's IRI benefits would be reinstated

(although not retroactively) the day he re-entered a rehabilitation program either at the Wellness Institute or another facility.

Following the Internal Review decision of November 4, 2004, the Appellant advised his case manager that he would be prepared to re-enter the program at the Wellness Centre. Attempts were made to schedule an appointment for the Appellant to see the staff psychologist at the Wellness Centre, a condition which the facility had imposed for the Appellant's re-entering the program. Following difficulties with scheduling his appointment, and with communications between the Appellant and the Wellness Institute staff, the Wellness Institute informed the Appellant's case manager that they were no longer willing to accept him there for programming. As a result, the Appellant's case manager concluded that he was not complying with his rehabilitation obligations under Section 160 of the MPIC Act and, because of his recent actions, concluded he was not entitled to Personal Injury Protection Plan ('PIPP') benefits.

On May 30, 2005, an Internal Review Officer for MPIC concluded that the Appellant had demonstrated his unwillingness to comply and co-operate with his program by cancelling his first appointment, not calling the Wellness Institute to reschedule the time for his second appointment, and being verbally abusive to staff. The Internal Review Officer concluded that notwithstanding past warnings and suspensions of benefits, the Appellant had continued to be unco-operative, verbally abusive and non-compliant with his directed rehabilitation plan, which had been compromised. The Internal Review Officer found that the case manager was correct in finally terminating the Appellant's entitlement to PIPP benefits on March 17, 2005.

It is from these three (3) decisions of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant

Both the Appellant and his wife testified at the hearing into the Appellant's appeal.

They described previous dealings they had with MPIC as a result of the Appellant's wife's involvement in a previous motor vehicle accident. This had resulted in feelings of mistrust of MPIC on their part, some stemming from difficulties which arose when trying to make childcare arrangements for the couple's young son.

The Appellant and his wife explained some of the special needs which their son had and some of the difficulties in finding appropriate child care for him, so that they could attend at work or at rehabilitation programs.

The Appellant described his dealings with MPIC and with Victor Andras, an independent vocational specialist arranged by MPIC to assist with his case. After the Appellant began his program at the Wellness, he began to have difficulty in reaching Mr. Andras, and found it difficult to obtain assistance from his case manager. Issues arose regarding the child care arrangements for his son while the Appellant was attending the Wellness Institute Program.

However, the Appellant testified that after beginning the Wellness program, he only missed a few days, due to child care issues or illness, and that these were not a problem.

However, a few days before his August 31st traffic court appointment, he went to talk to one (1) of the workers at the Wellness, to indicate that he had to go to traffic court that day at 10:00 a.m.

He indicated that he did not give her a specific time when he would return to the Wellness, but told her that if he was done quickly enough he would most likely return to the Wellness afterwards.

The Appellant testified that he sat in the Courtroom all day and was not called for his turn until about 1:30 p.m. He testified that he did not get out of the Courthouse until 3:00 p.m., and since the Wellness Program runs from 9:00 to 4:00, he felt it would be almost impossible for him to get there in time to do any activities that day. He did not return to Wellness that day.

He was surprised to later find that, because the Wellness staff indicated they had expected him to attend that afternoon, his IRI benefits had been suspended for a full day.

It was submitted on behalf of the Appellant that he had dealt with the absence appropriately by speaking to the Wellness worker ahead of time, and that the Internal Review Officer had erred by supporting a one (1) day suspension for this unavoidable absence which had been anticipated and discussed with program staff.

The Appellant also described an incident which began on September 10, 2004 when he arrived late at the Wellness Centre as a result of a telephone conversation he had been having with Victor Andras that morning. When he did arrive at the Institute, he was not feeling well, and was suffering from a lot of back pain. The Wellness staff treated him with a heating pad, but when he returned to the Institute after lunch he was still having pain. He could not participate in his activities so the staff agreed that he should go home, suggesting that perhaps he might feel better if he walked a few laps before he left. However, the Appellant's ride was waiting for him and so he left without walking those laps.

A misunderstanding appears to have then occurred between the Appellant, the Wellness Institute staff and his case manager, and the Appellant was left with the impression that he would be suspended from IRI benefits for one (1) day, as a result of his leaving early on September 10th. The Appellant became very emotional as a result of this; he became very upset about being accused of shirking the program and misrepresenting facts. He testified that due to a combination of lack of sleep, mistrust, and financial pressures, he became very upset. He had a very loud discussion with a therapist at the Wellness Centre, and expressed his frustration.

As a result, the Wellness staff ended his program at the Wellness Institute, and imposed a requirement that he meet with psychiatric or a psychological staff at the Institute for an assessment.

The Appellant met with Dr. Grygo, a psychological associate, and Dr. Slusky, a registered psychologist with the Wellness Institute. They identified the Appellant as having issues with frustration tolerance and mistrust of others. In spite of the initial attempts to manage those issues and for the Appellant to resume his program on September 21st, the participants were not able to schedule the Appellant's re-entrance into the program at that time. The Appellant testified that he had apologized to the staff at the Wellness for his conduct, which was a result of headaches and lack of sleep.

These events resulted in the termination of the Appellant's IRI benefits for non-compliance and non-attendance. However, this termination was eventually replaced by a suspension at the Internal Review level on November 4, 2004. The reinstatement of the Appellant's IRI benefits

was made conditional upon his re-entering a rehabilitation program either at the Wellness Institute or another facility.

The Appellant testified that following this decision, his case manager did not contact him to arrange for re-entry into the program. However, he eventually contacted his case manager in February of 2005. They arranged for him to meet with Dr. Grygo again. He was assigned an appointment to see Dr. Grygo at a 11:00 a.m. The Appellant testified that 11:00 a.m. was not suitable for him as he had to take care of his son at that time, and so he spoke with a lady at the Wellness Centre and made an appointment for 9:00 a.m. on March 17th. He stated that he wrote it in his calendar, but was later told by the Centre that no such appointment existed. He indicated that at that point, he lost his temper on the phone with the Wellness staff member. He indicated that this was due to his overall mood of frustration and anger, compounded by his lack of sleep, headaches, pain and financial worries about his family. He felt that he was doing everything he could to try and make the Wellness Program work and yet obstacles were being thrown out at every turn. The result was a termination of his benefits for non-compliance.

Counsel for the Appellant submitted that MPIC had been made aware at the start of the program of the barriers to the Appellant's success. They chose to ignore those barriers, which caused the Appellant to fail at the program. The one (1) day suspension on August 31st was inappropriate, given the Appellant's prior notice to the Wellness staff of his upcoming absence and the reasons for it.

MPIC was aware of the difficulties which the Appellant and his wife had in the past with MPIC, and the difficulties that they had with child care for their son. His proposals for improvement in

child care arrangements were rejected by MPIC. Victor Andras, who the Appellant viewed as the individual responsible for his program, ceased being responsive to the Appellant's needs.

The Appellant's frustration, exacerbated by his worry over child care issues, his headaches, poor sleep patterns, etcetera resulted in misunderstandings between him, MPIC and the Wellness Institute. It was submitted that MPIC's failure to take all these problems into consideration was the reason the Appellant failed in his efforts at the Rehabilitation Program and the Internal Review Officer failed to take this into consideration in her decisions. Counsel submitted that the suspensions and termination should be overturned, and the Appellant compensated with benefits reinstated.

Evidence and Submission for MPIC

The Commission heard evidence from Shauna Bourbonniere, an occupational therapist at the Wellness Institute. She described her contact with the Appellant throughout his involvement in the program, beginning with assessments and arrangements in July of 2004, until his termination from the program in September. She described some of the difficulties which were encountered with arranging child care, ultimately resulting in the Appellant's child being booked into the Wellness Day Care Centre. She reviewed his attendance records and confirmed the Appellant's evidence regarding the misunderstanding which occurred when the Appellant went home early on September 10th, with the agreement of the Wellness Staff.

Ms Bourbonniere also described the altercation which occurred when the Appellant became upset, following this incident, that he might be docked pay for that date. This led to the Wellness staff deciding that it would be necessary to arrange for psychological intervention and assistance in the Appellant's program. Following his meetings with Dr. Grygo, the Appellant indicated

that, while he would attend the exercise portion of his program, he had no intention of meeting with any of the therapists responsible for his program, such as the physiotherapist, Dr. Grygo, or Ms Bourbonniere. He just wanted to attend at the Centre and do his exercises, without any assessment or therapeutic supervision.

When she attempted to discuss the importance of complying with the whole program and meeting with all of the therapists, the Appellant yelled at her, and hung up on her in the middle of their telephone conversation.

As a result, staff at the Wellness Institute concluded that they could no longer tolerate the Appellant's behaviour and he could no longer participate in the program.

Ms Bourbonniere was contacted by MPIC in early November and asked whether the Appellant could have another chance at attending the rehabilitation program at the Wellness Institute. It was decided that Dr. Grygo would be asked to assess the Appellant and to advise whether it was appropriate for him to re-enter the program, perhaps under a set of strict rules.

Ms Bourbonniere next heard from MPIC in February of 2005 when his case manager requested an appointment for the Appellant to attend at the Wellness Institute and for the Institute to advise of any conditions which might be placed upon the Appellant for attending the Institute.

Ms Bourbonniere wrote to the case manager on March 1, 2005 confirming that a psychological assessment had been scheduled for the Appellant on March 10, 2005 at 11:00 a.m., to re-assess the Appellant and determine his appropriateness for the work hardening program.

However, the Appellant contacted the program secretary on March 7, 2005 advising that the appointment time of 11:00 a.m. was not convenient for him. She provided him with a list of times for March 17, 2005, and advised, by a letter to his case manager dated March 9, 2005, that the Appellant had stated he would get back to her. However, the letter indicated that no return phone call was received selecting a time for the appointment.

Then, on March 15, 2005, the Appellant called the program secretary to confirm an appointment on March 17th at 9:00 a.m. When she advised him that another client had been booked during that time, he became irate, according to the “integrated progress note” dated March 15, 2005.

As a result, the Administrative Secretary of the Program at the Wellness Institute wrote to the Appellant’s case manager on March 15, 2005, indicating that “as per [H.B.’s] telephone conversation today at 2:40 p.m. with the Wellness Rehab front desk secretary, we are no longer willing to accept him here for programming.”

According to Ms Bourbonniere, it had become obvious to the Wellness staff that things had not changed and that the Appellant was still angry and upset, which was not a healthy attitude for participation in the rehabilitation program. Although she indicated that the Wellness staff had tried to accommodate the Appellant as best they could, and had treated him no differently than their other clients, the Appellant’s non-compliance with the Institute’s directives and difficulty in dealing with staff in a calm manner, precluded his continued participation in the program.

Counsel for MPIC submitted that the onus is on the Appellant to show that some mistake has been made in regard to the refusal to provide him with further benefits. It was submitted that this onus had not been met.

The Appellant received ample warnings that he must comply with the conditions of the rehabilitation program set out for him. Child care arrangements were made for his child, but the Appellant still failed to meet his obligations under the program.

The first suspension, for one (1) day on August 31st was meant, counsel submitted, to bring home to the Appellant the importance of his participating and complying with the rehabilitation program. The file evidence does not support the Appellant's contentions that he had advised the Wellness staff that he would be away until 3:00 p.m. He had indicated that his traffic court appointment was a morning matter and it was understood that he would be away for that portion of the day.

Counsel submitted that the rehabilitation program was supposed to be like a job. When the Appellant missed a whole day of the program without good reason, he was docked a whole day's pay, as a result of his whole pattern of non-compliance before that date. This was intended, counsel argued, to send a message of deterrence to the Appellant, like a written warning.

In regard to the Appellant's termination, then suspension, in September, counsel submitted that the Appellant had exhibited not just poor attendance, but also abusive behaviour to the staff. As a result, intervention from the Institute's psychological team was necessitated.

Then, when the Appellant was given a second chance by the Internal Review Officer, in November of 2004, he did nothing, for approximately seven (7) to nine (9) weeks. Finally, in February, he made it clear that he would be willing to return to the Wellness Centre. He then "cancelled" an appointment in order to pick up his child at lunch at school. Counsel submitted

that this was not a particularly valid reason for cancellation, since, if the Wellness Institute Program is supposed to be like a job, the Appellant would not necessarily be able to pick up his son every lunch time.

The evidence from the Wellness Centre does not confirm the Appellant's contention that he had made an appointment for 9:00 a.m. Rather, their evidence was that he had been provided with a list of possible appointment times, but had failed to choose or confirm one. Then, when the appointment time he desired was not available, he reacted badly. His behaviour was contrary to compliance with a rehabilitation program.

Counsel submitted that the evidence does not support the alleged barriers which counsel for the Appellant cited. The Wellness Institute provided a good program with a psychological component, and the staff worked as a team with the Appellant and with MPIC and their representative, to facilitate the Appellant's recovery and rehabilitation. But the Appellant refused to go along with this program. He has nobody to blame for the suspension and termination of his benefits but himself. The Appellant has not met the onus upon him of showing that the Internal Review Officer made an error either in suspending or ultimately terminating his IRI benefits for non-participation in the rehabilitation program.

Discussion

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

...

- (e) without valid reason, refuses, does not follow, or is not available for, medical treatment recommended by a medical practitioner and the corporation;
- (f) without valid reason, prevents or delays recovery by his or her activities;
- (g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation; or

The onus is on the Appellant to show that the Internal Review Officer erred in concluding that he had, without valid reason, refused to follow medical treatment recommended by a medical practitioner and the corporation, prevented or delayed recovery by his or her activities, and failed to follow or participate in the rehabilitation program made available by the Corporation.

The panel has reviewed the evidence and arguments submitted by both parties. The panel agrees with counsel for MPIC that the Internal Review Officer was correct in his decisions of November 4, 2004 and May 30, 2005, in upholding first the suspension, and then the termination of the Appellant's IRI benefits for failure to comply with the rehabilitation program at the Wellness Institute. Our review of the evidence leads us to agree with the Internal Review Officer that the Appellant in September of 2004, and again in February and March of 2005, demonstrated his unwillingness to comply and co-operate by cancelling appointments, failing to call the Institute to reschedule appointments in a timely manner, and being verbally abusive to staff. Notwithstanding his past warnings and suspension, the Appellant continued to be unco-operative, verbally abusive, and non-compliant with this directed rehabilitation plan, compromising the success of his rehabilitation.

Accordingly, the Internal Review decisions of November 4, 2004 and May 30, 2005 are hereby confirmed and the Appellant's appeal dismissed on those grounds.

However, we have reviewed the evidence regarding the Appellant's failure to attend at the program on August 31, 2004, which was dealt with in the Internal Review decision dated November 8, 2004. Our review of the evidence leads us to conclude that the Appellant was not expected to attend at the Wellness Institute on the morning of August 31, 2004. He had advised

a staff member of his obligation to attend at traffic court that morning, and had been given permission from the staff to be absent from the program that morning.

The panel agrees with the Internal Review decision that the Appellant had been expected to attend at the Wellness Institute that afternoon, and that he had neither attended, nor called the Centre to advise that he would not be in.

Accordingly, the panel is of the view that the Appellant's IRI benefits should only have been suspended for one-half (1/2) day on August 31, 2004. Accordingly, the Appellant's appeal from the decision of the Internal Review Officer dated November 8, 2004, upholding the Appellant's suspension of IRI benefits for one (1) day on August 31, 2004, is allowed, and a suspension of benefits for one-half (1/2) day, for the afternoon of August 31, 2004, hereby substituted therefore. The Appellant will be entitled to receive one-half (1/2) day of IRI benefits.

Dated at Winnipeg this 9th day of October, 2007.

LAURA DIAMOND

ROBERT MALAZDREWICH

LES MARKS