

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by E.D.
AICAC File No.: AC-05-92**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Paul Johnston
Ms Linda Newton

APPEARANCES: The Appellant, E.D., was represented by Ms Marcelle Marion of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: May 27, 2008

ISSUE(S): Whether the Appellant's Personal Injury Protection Plan Benefits were properly suspended between June 15, 2004 and November 3, 2004 pursuant to Section 160(c) of The Manitoba Public Insurance Corporation Act

RELEVANT SECTIONS: Section 160(c) 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, E.D., was involved in a motor vehicle accident on November 14, 2003. As a result of the motor vehicle accident, the Appellant complained of right-sided low back pain which occasionally radiated into the right upper leg. He also reported difficulty using the right shoulder as he had decreased range of motion and pain in the right shoulder. Due to the bodily injuries which the Appellant sustained in this accident, he 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 employed as a health care aide with the [text deleted] (the '[text deleted]') and with the [text deleted]. Due to the injuries which the Appellant sustained in the motor vehicle accident, he was unable to return to his employment. As a result, the Appellant became entitled to income replacement indemnity ('IRI') benefits based upon his two positions as a health care aide.

In a letter dated June 15, 2004, MPIC's case manager wrote to the Appellant to advise that his PIPP benefits were being terminated effective June 14, 2004 due to the Appellant's non-compliance with a return to work program. Specifically, the case manager noted that:

Throughout the duration of our involvement with you, you have demonstrated an unwillingness to comply with your return to work plan. Despite numerous attempts to contact you to discuss your concerns and organize a return to work plan, you have made no further attempt to contact us in this regard.

As you have not personally responded to our requests of April 30 and June 1, 2004, it is apparent that you do not wish to be compliant with your obligation to comply with your return to work plan.

After advising you of the importance of your involvement in this program, you have chosen, without valid reason, not to comply with your return to work program. Because of your actions, your entitlement to Income Replacement Indemnity and all other benefits will end effective June 14, 2004.

The Appellant sought an Internal Review of that decision. In a decision dated May 2, 2005, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. In his decision, the Internal Review Officer determined that:

The Case Manager's decision of June 15, 2004 to suspend [E.D.'s] benefits reflects [E.D.'s] unwillingness to even commence a gradual return to work program which would have seen him to return to work on a limited basis at the easiest of his two employments. In the face of the totality of the evidence in the file, I find that your client's failure to return to his workplace as arranged to be "without valid reason" and therefore I am dismissing the Application for Review and upholding Mr. Owen's decision of June 15, 2004. . . .

After considering all of the information in [E.D.'s] file, I am unable to accept that [E.D] has provided any valid excuse for failing to commence a gradual return to work program which was arranged with considerable effort on the part of the Case Manager. Your client's unwillingness to return to work is reflective throughout the totality of the events and reflects non-compliance on his part sufficient enough to invoke Section 160(c) of the Act.

The Internal Review Officer did note that the Appellant had returned to work at the [text deleted] on a gradual basis in November 2004 and directed the case manager to consider whether the Appellant was entitled to further PIPP benefits beyond November 3, 2004. The Internal Review Officer thereby substituted a suspension of PIPP benefits (from June 15, 2004 to November 3, 2004) for the outright termination of benefits as of June 14, 2004.

The Appellant has now appealed from the Internal Review decision of May 2, 2005 to this Commission. The issue which requires determination in this appeal is whether the Appellant's PIPP benefits were properly suspended between June 15, 2004 and November 3, 2004 pursuant to Section 160(c) of the MPIC Act.

Relevant Statutory Provisions

Section 160(c) of the MPIC Act provides that:

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

- (c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;

Facts and Background

The facts leading to the Appellant's suspension of benefits may be summarized as follows:

- The Initial Health Care Report of Mr. Stephen Leung, physiotherapist, dated November 28, 2003, indicated that E.D. had right shoulder and low back symptoms. In that form, Mr. Leung felt that a likely return to work date was December 8, 2003.
- The Initial Health Care Report of Dr. Podolsky, dated December 1, 2003, indicated that E.D. was capable of "full function with symptoms".
- In a fax dated January 14, 2004, Mr. Leung recommended that the Appellant return to work on a part-time basis (start with 3-4 hours per day) and doing light duty or supernumerary only. He advised that the Appellant should refrain from heavy lifting and overhead lifting to avoid aggravating the shoulder and back injury. The physiotherapist also noted that E.D. was still symptomatic in his right shoulder and lower back and was currently consulting a physician specialist for advice on management.
- In a report dated January 21, 2004, Dr. Baydock indicated that "*Based upon my clinical review of E.D. as well as review of the x-ray results you had sent, I believe the most likely causes of his pain are mechanical low back and a right rotator cuff tendinopathy.*"
- On February 2, 2004, Dr. Lockman provided a Medical Certificate indicating that the Appellant would not be able to return to work from February 2, 2004 to February 26, 2004.
- In a Health Care Provider Progress Report dated February 25, 2004, Mr. Leung indicated that the Appellant was capable of participating in a gradual return to work program.
- On February 25, 2004, Dr. Lockman, the Appellant's Family Physician, provided a Medical Certificate authorizing the Appellant's absence from work from February 25, 2004 to March 14, 2004.

- Dr. Baydock provided a Modified Duty form dated February 27, 2004 wherein he indicated that the Appellant should commence working four (4) hours per day (every other day) with restrictions.
- On March 1, 2004, E.D. commenced receiving chiropractic treatment from Dr. Yurkiw. In an Initial Health Care Report dated March 8, 2004, Dr. Yurkiw advised that the Appellant was capable of working modified duties.
- On or about March 29, 2004, the [text deleted] advised that they would not be able to accommodate a gradual return to work program for the Appellant.
- Dr. Yurkiw completed a Modified Duty Report form based upon his examination of the Appellant of April 12, 2004. In that form, Dr. Yurkiw indicated that E.D. was capable of modified work from April 12, 2004 to May 12, 2004. That modified work program, with restrictions was indicated to be based upon a daily attendance of a maximum of four (4) hours per day, lasting four (4) to six (6) weeks.
- In accordance with the medical information received, a modified return to work program was arranged for the Appellant with the [text deleted] for the period April 13, 2004 to May 31, 2004.
- The case manager, a representative from the [text deleted] and the Appellant met on April 14, 2004 in order to discuss the Appellant's return to work program. The Appellant was advised that he was an extra at work and that if he was unable to do some of his duties that he not do them. He was also told that if he needed to take a break, he could. He was also advised that he was not to be used as staff replacement and a copy of his job duties was to be posted so that everyone was aware of what his duties would be. His scheduled return to work was April 24, 25, 27 & 29, from 3:00 to 7:00 p.m., and then his hours were to increase to six (6) hours per day on May 4, 6, 8 & 9, from 3:00 to 9:00 p.m.

- An independent medical examination by Dr. Lesiuk (a Physical Medicine Rehabilitation Specialist) was then arranged for the Appellant. As part of the independent medical examination a thorough medical history and physical examination took place.
- In a fax dated April 19, 2004, the Appellant advised the case manager that he did not agree with one of the job duties set out by [text deleted] as it was too vague and general. He again reiterated that it was impossible for him to lift, move, pull or push any weight more than ten (10) pounds either by himself or with the help of another person. He also advised that he could not stand for more than half an hour continuously since his back was not strong enough. In that fax, the Appellant further indicated that he would prefer to go back to work with the [text deleted] as he could work more hours with them since they had a lot of respite schedules which did not involve much strain either to his shoulder or his back. Lastly, the Appellant indicated that as far as the [text deleted] was concerned, he would work his regular April schedule, being April 24 & 25, and on May 8, 9, 22 & 23 for four (4) hour shifts.
- On April 26, 2004, the [text deleted] confirmed that E.D. did not attend for work as scheduled on April 24 and 25.
- In a letter dated April 30, 2004, the case manager outlined various conversations he had with the Appellant and warned him of the consequences of his continued failure to cooperate with the gradual return to work program as follows:

On April 13, 2004, you met with [S.B.] from [text deleted] and Tamara Wright from Manitoba Public Insurance. A Gradual Return to Work plan was arranged during the meeting. You were expected to return to work at the [text deleted] on April 24 and April 25 from 3:00pm to 7:00pm.

On April 25, you left a message on my voice mail explaining that you were sick on the weekend and you were unable to attend work. When I contacted you on April 29, you told me that you had gone to Dr. Yurkiw, DC on April 23 complaining of increased back pain. You said you were not given a note from Dr. Yurkiw stating that you were unfit to return to work on the weekend.

On April 28, I had contacted Dr. Yurkiw. Dr. Yurkiw confirmed that you had complained of an increase in your back pain. However, he was not aware that you did not return to work and he stated he did not advise you that you were unfit for your return to work.

During our telephone discussion, you disagreed with what Dr. Yurkiw had told me. You said you would talk to Dr. Yurkiw and request a note from him regarding your ability to return to work on April 24 and April 25.

As I explained during our telephone conversation, Manitoba Public Insurance's obligation is to advise you, assist you and ensure that you are informed of and receive compensation when you are entitled. MPI will encourage and facilitate your return to your employment where possible and to encourage a maximum level of function and independence. However, your return to work plan requires your attendance, cooperation and full participation to be of any success.

If you are unable to return to work as expected, you should contact me immediately and attend your caregiver for a medical examination. A medical note advising your condition and inability to return to work is required.

- On April 30, 2007, a note was provided from Dr. Yurkiw advising that the Appellant would be incapacitated for a period of seven (7) days from April 30th to May 7th, 2004 due to illness or injury.
- A further Modified Duty Report form was provided by Dr. Yurkiw wherein he indicated that the Appellant was able to return to modified work from May 12th to June 12th with restrictions at four (4) hours per day, five (5) days per week.
- In his report dated May 24, 2004 based upon his independent medical examination of the Appellant, Dr. Lesiuk indicated that he would expect that the Appellant would likely have at least a light level work capacity currently.
- In a letter dated June 1, 2004, the case manager once again warned the Appellant of the consequences of him not participating in the gradual return to work program made available by MPIC with the [text deleted].

- As previously noted, MPIC's case manager wrote to the Appellant on June 15, 2004 to advise him that his benefits were being suspended under Section 160 of the MPIC Act due to the Appellant's non-compliance with the gradual return to work program.

Submissions of the Appellant

The Claimant Adviser, on behalf of the Appellant, submits that the Appellant was justified in refusing to return to his employment because he feared re-injury if he returned to work. She argues that the return to work plan arranged by MPIC was premature. Due to the Appellant's ongoing complaints of pain, she maintains that the Appellant required more time to rehabilitate before implementing the return to work program. The Claimant Adviser further submits that the Appellant's medical caregivers were overly optimistic about the Appellant's condition and did not give adequate consideration to the Appellant's complaints and the extent of the injury he sustained in the motor vehicle accident. Accordingly, the Claimant Adviser submits that the Appellant had a valid reason for refusing to return to his former employment and not participating in the gradual return to work program arranged by MPIC. As a result, she maintains that the suspension of PIPP benefits from June 15, 2004 to November 3, 2004 should be rescinded.

Submissions of MPIC

Counsel for MPIC submits that the suspension of the Appellant's benefits effective June 14, 2004 was appropriate in the circumstances of this case. He maintains that the Appellant's conduct was purposely evasive and illusive throughout the duration of his claim. Counsel for MPIC argues that despite medical clearance to participate in the gradual return to work program, the Appellant purposely refused without a valid reason. Counsel for MPIC argues that the

Appellant had an unfounded fear of returning to work, since all of his caregivers had agreed to a gradual return to work program as a means of reintegrating the Appellant into the workplace. As a result, counsel for MPIC submits that, taking into account the Appellant's entire history, the case manager had no alternative but to suspend the Appellant's benefits. Accordingly, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review decision of May 2, 2005 confirmed.

Discussion

Upon a careful review of all of the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Adviser and of counsel for MPIC, the Commission finds that the suspension of the Appellant's PIPP benefits between June 15, 2004 and November 3, 2004 was appropriate.

Pursuant to Section 160(c) of the MPIC Act, MPIC may suspend an indemnity, where a person without valid reason refuses to return to his former employment. We find that the Appellant did not provide a valid reason for refusing to return to his former employment with the [text deleted] on April 24 and 25, 2004 and on May 8 and 9, 2004. All of his medical caregivers had approved the gradual return to work program and were in favour of his participation in such a program. Additionally, his employer, the [text deleted], was very supportive of his involvement in such a program and was willing to accommodate his return to work in whatever manner was required. The Appellant's refusal to return to work at the [text deleted] was unsupported and we find that his fear of re-injury was unfounded as well. Accordingly, we find that the suspension of benefits from June 15, 2004 to November 3, 2004 was appropriate in the circumstances of this case.

As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated May 2, 2005 is hereby confirmed.

Dated at Winnipeg this 23rd day of July, 2008.

YVONNE TAVARES

PAUL JOHNSTON

LINDA NEWTON