

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by A.O.
AICAC File No.: AC-07-99**

PANEL: Ms Laura Diamond, Chairperson
Ms Linda Newton
Mr. Sheldon Claman

APPEARANCES: The Appellant, A.O., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Morley Hoffman.

HEARING DATE: July 23, 2008

ISSUE(S): Entitlement to Income Replacement Indemnity benefits while
off work for a period of four weeks while pursuing a course
of athletic therapy

RELEVANT SECTIONS: Section 81(1) 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 February 9, 2006. This resulted in his missing work as a taxi driver on February 9, 10 & 11, 2006.

The Appellant returned to work but continued with athletic therapy treatment for his injuries. His athletic therapist then recommended that he stop working for a temporary period of four (4) weeks, in order to facilitate athletic therapy treatment.

In a decision dated May 1, 2007, the Appellant's case manager concluded that he was not entitled to an Income Replacement Indemnity ('IRI') benefit for this four (4) week period. On June 12, 2007, an Internal Review Officer for MPIC upheld the case manager's decision and concluded that while there may be some benefit in the Appellant absenting himself from the workplace while he received this treatment, the evidence fell short in establishing, on a balance of probabilities, that such a step was medically required. He upheld the case manager's decision.

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

Evidence and Submission for the Appellant

The Appellant testified at the appeal hearing. He indicated that although he did return to work driving a taxi, he was working less hours and still suffering pain that he had not experienced prior to the motor vehicle accident. He noted that the medical evidence supported his position that driving a taxi, including lifting luggage, was placing stress upon his body.

The Appellant noted that a letter written by his physician, Dr. Mohammed, dated February 7, 2008, indicated that although the Appellant used to work twelve (12) to thirteen (13) hours per day following the accident, afterwards, the most he could work was eight (8) hours per day. On some rare occasions, when he is feeling better, he can drive for ten (10) to eleven (11) hours. He submitted that it was Dr. Mohammed's opinion that his back was not yet fully recovered and that he still suffered from a sprained neck and chronic back pain.

The Appellant's athletic therapist, George Matos, provided a letter dated April 16, 2007. He described the stresses which driving a taxi cab places upon the body.

. . . There are many stresses placed on the body (the core) during driving, especially when making left or right hand turns, the erector spinae, quadratus lumboru, obliques, rectus abdominus, multifidus, and other smaller muscles must all work in unison to stabilize the spine. If these muscles are not trained and given the opportunity to recover, the end-result are hypertonic muscle with the inability to properly stabilize the spine and surrounding joints.

Mr. Matos reported the Appellant's continued pain and discomfort in the lumbosacral and left hip area and recommended that the Appellant be allowed four (4) weeks off work to allow full benefits of athletic therapy treatments to be received, without the repeated aggravation of a continued seated position.

Mr. Matos provided a further report dated February 11, 2008. In conclusion he noted:

As a result from these findings based on the Motor Vehicle Accident of February 9, 2006 [A.O.] has sustained musculoskeletal trauma in particular strain to erector spinae at the thoraco-lumbar area, quadratus lumborum, glute medius and glute maximum. [A.O.] also presents with signs and symptoms indicative of disco-genic in nature.

It is my belief [A.O.] had not yet received the full benefits of Athletic Therapy and can still benefit from continued treatment. The continuous operation of his taxi cab has hindered [A.O.] and his body's ability to rehabilitate from injuries sustained in the above mentioned MVA.

Submission for MPIC

Counsel for MPIC submitted that there was no need for the Appellant to take one (1) month off to complete the athletic therapy as suggested.

He referred to an opinion provided by Dr. Fougere, medical consultant with MPIC's Health Care Services Team dated March 5, 2008.

According to Dr. Fougere, it is important that the Appellant learn to self-manage while maintaining full time work. She indicated that there was no real explanation as to how driving a taxi would hinder the Appellant's condition. According to Dr. Fougere, the Appellant had demonstrated that he was capable of performing full time taxi duties and no pathology had been identified which would prevent encouraging the claimant to return to full baseline function. Although symptoms might persist, the Appellant should not let such symptoms get in the way of his recovery.

Accepting that waxing and waning pain is a characteristic of [A.O.'s] condition, a proactive approach to addressing this issue would be to implement self-management strategies to counteract symptoms, as much as possible, in order to maintain full working function. For example, Michael Hutton, athletic therapist, in his March 6, 2006 report, noted that the claimant complained of neck and lower back pain. Mr. Hutton noted that the claimant found position changes, such as changing from prolonged seated position to a standing position or walking, helped to alleviate his pain and altered sensation. This is an example of a self-management strategy. . . .

Counsel for MPIC submitted that the decision of the Manitoba Court of Appeal in *Pelchat v. Manitoba Public Insurance Corporation*, 2007 MBCA 52 established that IRI benefits are limited to those individuals who are unable to work full time. Thus, they are not payable to the Appellant because he is able to work full time, although he now wants to receive IRI benefits while attending full time athletic therapy.

Counsel for MPIC submitted that on the whole, the medical evidence does not support a need for the Appellant to take a whole month off to receive athletic therapy.

Discussion

The relevant section of the MPIC Act and Regulations in this appeal are:

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner 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.

Manitoba Regulation 37/94

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 he is unable to work as a result of the motor vehicle accident. In this case, the onus is on the Appellant to show that he cannot work due to a medical requirement for him to take four (4) weeks off work in order to pursue a course of athletic therapy.

The panel has reviewed Dr. Fougere's report of March 5, 2008 wherein she recommends the Appellant continue with full time work while adopting self-management strategies to address his pain and symptoms. The panel recognizes that this is one recommended treatment approach.

However, we also recognize that Dr. Fougere was limited to a review of the documents and reports on the Appellant's file. On the other hand, the Appellant's athletic therapist, Mr. Matos,

had the opportunity to examine the Appellant, assess both his injuries and credibility, and assess the effects of the treatments which he had undergone. As a result, it was his professional opinion that the treatment and exercises which the Appellant was following, including performing his stretches three (3) to four (4) times within a work day, were not sufficiently assisting with his recovery. It was Mr. Matos' view that the Appellant's work was interfering with his recovery and was adversely affecting the natural history of his condition.

In his report dated April 16, 2007, he stated:

In conversation after treatment sessions, [A.O.] reports feeling increasing in range of motion along with less sensation of pain and discomfort. On following visits, [A.O.] reports stiffness after a full day of work driving his taxicab. Although a home program has been provided including stretches to be performed throughout his workday, both subjectively and objectively [A.O.] presents with continued pain and discomfort at the lumbosacral and left hip area.

As a result, Mr. Matos recommended a different, alternative approach to rehabilitation for this particular patient.

This evaluation prompts my suggestion to allow [A.O.] 4 weeks from work to allow full benefits of Athletic Therapy treatments to be received without the repeated aggravation of a continued seated position as in driving his taxicab. At the end of the four weeks [A.O.] will undergo a re-evaluation to determine progression.

The athletic therapist confirmed this view following a subsequent assessment conducted on October 11, 2007, and reported on February 11, 2008.

It is my belief [A.O.] has not yet received the full benefits of Athletic Therapy and can still benefit from continued treatment. The continuous operation of his taxi cab has hindered [A.O.] and his body's ability to rehabilitate from injuries sustained in the above mentioned MVA.

Counsel for MPIC has submitted that IRI benefits cannot be available to this Appellant as he is capable of working full time, and that according to the decision of the Court of Appeal in *Pelchat*, (supra), IRI benefits are limited to claimants who are unable to work full time.

However, in this case, the Appellant is not seeking part-time IRI benefits while continuing to work, in order to enable him to attend athletic therapy appointments during his workday, as was the case in *Pelchat*.

Rather, the Appellant is seeking to implement the treatment plan of his caregiver, who is of the view that driving a taxi was impeding his recovery and “his body’s ability to rehabilitate from injuries sustained in the above-mentioned MVA”.

The panel accepts the evidence and opinion of Mr. Matos, who, as the Appellant’s caregiver, had the opportunity to examine him, assess his ability to work and formulate a treatment plan appropriate for him and his injuries. The panel accepts his evidence regarding the negative effects of driving a taxi upon the Appellant’s condition and recovery from his injuries. Mr. Matos was of the view that the Appellant should not work during a four (4) week treatment period. Accordingly, the Commission allows the Appellant’s appeal and finds that the Appellant is entitled to receive IRI benefits for a period of four (4) weeks so that he can stop working for a temporary period and attend for athletic therapy treatments to facilitate his recovery from injuries sustained in the motor vehicle accident.

The decision of the Internal Review Officer dated February 12, 2007 is hereby overturned and the foregoing substituted therefore.

The Commission will retain jurisdiction in the event that the parties are unable to determine the quantum of benefits to which the Appellant shall be entitled.

Dated at Winnipeg this 16th day of September, 2008.

LAURA DIAMOND

LINDA NEWTON

SHELDON CLAMAN