

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by J. B.
AICAC File No.: AC-06-82**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Leona Barrett
Ms Deborah Stewart

APPEARANCES: The Appellant, J.B., was represented by Ms Lesley Tough;
Manitoba Public Insurance Corporation (“MPIC”) was
represented by Mr. Morley Hoffman.

HEARING DATE: March 17 and 18, 2009

ISSUE(S): Entitlement to further Income Replacement Indemnity
benefits beyond February 3, 2003.

RELEVANT SECTIONS: Section 81 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, J.B., was involved in a motor vehicle accident on May 22, 1999, when his vehicle rear-ended another vehicle. As a result of this accident, the Appellant sought treatment from his chiropractor, Dr. I.L. Schledewitz, for symptoms involving the right hip, buttock and lower back pain, mild neck pain and mid-back pain. Dr. Schledewitz treated the Appellant from July 1999 to November 2000 for approximately 101 chiropractic treatments. Also during this timeframe, the Appellant received eight treatments from an athletic therapist and 18 rehabilitation therapy sessions with Russell Thorne from Back to Health. Mr. Thorne also attended the Appellant’s

work and home to modify the Appellant's activities of daily living and modify his ergonomic situations.

The Appellant was subsequently referred to Dr. Neil Craton for assessment of right shoulder discomfort. Dr. Craton's diagnosis was that the Appellant had rotator cuff impingement. Dr. Craton found that there was a probable cause/effect relationship between the Appellant's cervicothoracic and shoulder difficulties and the collision of May 22, 1999. Dr. Craton noted that the Appellant did have some evidence of physical impairment, mostly with regard to cervicothoracic pain and difficulties with rotator cuff impingement. Dr. Craton opined that the Appellant did not suffer from any significant physical impairment which would prohibit him from doing the relatively sedentary work of a real estate agent.

At the time of the motor vehicle accident, the Appellant was self-employed as a real estate agent. The Appellant's job consisted of listing and marketing property, assisting buyers and selling property. The job also included marketing his services, promotional work, presentations to sellers and prospects, which included meeting with clients at their residence or at another location, and research work that would be done in his home, using his computer and research library. On or about February 2001, the Appellant reported to MPIC that due to the injuries which he sustained in the motor vehicle accident, he was having increasing difficulty carrying on his work duties because of his ongoing pain and discomfort.

In a letter dated February 22, 2001, Dr. Schledewitz provided his opinion that the Appellant had been unable to work in a full capacity since late August 1999 and that he was presently not capable of working in a full capacity. Additionally, in a letter dated March 3, 2001, Dr. Craton provided his opinion that given his multiple musculoskeletal complaints, sleep disturbance and

rehabilitative regime, the Appellant would have had difficulty performing his full duties as a real estate agent. Dr. Craton stated that this would have been the case from October 2000 to the present.

In a letter dated June 20, 2001, MPIC's case manager wrote to the Appellant to advise that his claim for income replacement indemnity ("IRI") benefits had been accepted. This decision was based upon a review of the medical information in its totality, which supported that the Appellant was unable to continue his employment as a realtor in a full capacity due to injuries sustained in the motor vehicle accident. Based on the Appellant's ongoing ability to work as a realtor in a reduced capacity, he became entitled to receive top-up IRI payments to a full-time position.

Subsequently, arrangements were made for the Appellant to undergo a rehabilitation assessment with Associated Rehabilitation Consultants of Canada Ltd. ("ARCC"). In a report dated July 30, 2001, Dr. Conrad Hoy, Medical Director of ARCC, concluded the following:

Conclusions

Diagnoses

The diagnoses are listed in rank order, with most prominent difficulties listed first.

1. Myofascial Pain Syndrome – Cervical – Mild to Moderate Severity
2. Myofascial Pain Syndrome – Bilateral Shoulder – Mild to Moderate Severity
3. Myofascial Pain Syndrome – Lumbosacral – Mild to Moderate Severity
4. Myofascial Pain Syndrome – Gluteal – Mild to Moderate Severity
5. Resolving right rotator cuff tendinopathy

The subjective complaints are consistent with the objective findings. Symptom magnification was not evident.

Prognosis

The claimant's prognosis for complete resolution of pain complaints is fair. The painful condition has now been present for approximately 2 years and has been resistant to treatment. The claimant has **not yet** reached his Maximal Medical Improvement (MMI) from a physical point of view. It is medically probable that the

claimant will achieve further symptomatic reduction with physical treatment and rehabilitative interventions.

The claimant's prognosis for complete restoration of function is good.

The overall prognosis is good.

Work Capacity

The claimant has at least a "Light to Medium" work capacity as defined in the following table, *Physical Demand Characteristics of Work*. I am of the opinion that in his present condition the claimant is **not yet** capable of resuming his pre-accident occupation full time, full duties, without restrictions. In my opinion the claimant will be able to perform his pre-accident occupation full time, full duties, without restrictions with appropriate physical treatment and rehabilitative interventions."

Dr. Hoy recommended an eight week reconditioning program followed by four weeks of a graduated return to work program in order to return the Appellant to full-time work.

On August 3, 2001, an Occupational Therapy Work Capacity Evaluation was completed by Ms Giesela Davidson, an occupational therapist. The evaluation of the Appellant's work tolerances as a realtor was completed over three assessment days, July 31, August 1 & 2, 2001. In her report, Ms Davidson concluded that the Appellant demonstrated the ability to perform the duties of his job as a realtor for up to approximately 7 hours per day without a significant deterioration in his physical status or pain level.

In a letter dated February 28, 2002, Dr. Hoy, Medical Director of ARCC, advised that there was no medical reason that the Appellant had presented with that would require restricting return to his full function in his work environment. He concluded that there was no reason to restrict the Appellant from returning to his occupation as a real estate agent full-time hours, full-duties.

The Appellant's file was subsequently reviewed by Dr. M. Cosman, medical consultant to MPIC Health Care Services team, in order to provide an opinion as to the Appellant's capacity to perform his pre-accident duties as a realtor. In his Inter-departmental memorandum of January 14, 2003, Dr. Cosman noted the following:

IMPRESSION

In light of:

- i. The fit between the physiatrist's July 30, 2001 assessment of J.B. having at least a "light to medium work capacity" and the nature of J.B. job demands, as reported on page 6 of the August 15, 2001 Intake Assessment; and
- ii. The Occupational Therapy Work Capacity Evaluation of July 30, August 1 and 2, 2001, which determined that J.B. had the ability to perform his duties as a realtor for 6.5, 8, and 8 hours on three consecutive days without a significant deterioration in his physical status or pain levels; leading to the recommendation that he gradually increase his work hours over the following six to eight weeks up to full-time work.

It is concluded that J.B. likely had the functional capacity to perform his pre-accident duties in early August 2001.

To the extent pain was the basis for J.B.'s reported workplace limitations in summer 2001, it is noted that J.B. had a long pre-existing history of same, as noted at a January 21, 1999 rheumatologic assessment. In any case, the diagnoses cited by the physiatrist in his July 30, 2001 report did not suggest the presence of ongoing structural pathology emanating from the May, 1999 MVA to account for the reported symptoms. Nor would the non specific condition of myofascial pain syndrome have contraindicated or obviated a return to pre-accident duties. This view is corroborated by the results of the July 30, August 1 and 2, 2001 Occupational Therapy Work Capacity Evaluation.

In so far as J.B. subsequently underwent a reconditioning program, with measurable functional improvements to normal in many parameters up to September 27, 2001, it is also concluded that with respect to the May 1999 accident, J.B. had the functional capacity to perform his usual pre-accident duties as a realtor by September 27, 2001.

Notwithstanding the above analysis, in relation to the May 1999 accident, J.B. was fit to perform his pre-accident duties by February 28, 2002, as per the opinion of the treating physiatrist, certified athletic therapist and internal case facilitator.

An October 20, 2002 report from the sports medicine physician and December 11, 2002 report from the treating physiatrist lend support to J.B.'s fitness for work in relation to the May 1999 accident.

In a letter dated February 3, 2003, MPIC's case manager wrote to the Appellant to advise that since the medical information on his file supported that he was now fit to perform his pre-accident occupational duties, there was no further entitlement to IRI benefits beyond February 3, 2003. As a result, the Appellant's IRI benefits were terminated in accordance with Section 110(1)(a) of the MPIC Act. In order to provide the Appellant with further notice of the end of his entitlement to IRI benefits, IRI benefits were paid inclusive to February 9, 2003.

The Appellant sought an Internal Review of that decision. In a decision dated March 9, 2006, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found that the Appellant's motor vehicle accident-related injuries did not prevent him from performing his full-time duties as a realtor and as a result, he was not entitled to any further IRI benefits beyond February 9, 2003.

The Appellant has now appealed from that decision to this Commission. The issue which requires determination in this appeal is whether the Appellant was capable of returning to full-time employment as a real estate agent as of February 3, 2003.

Appellant's Submission:

Counsel for the Appellant submits that the foundation of the Internal Review decision is not strong enough to support the contention that the Appellant is suffering from a pre-existing condition which accounts for his inability to work. Counsel for the Appellant argues that the Appellant's evidence was credible and reliable. He did not have any symptoms in the three months prior to the motor vehicle accident and was pain free during that time. However, she notes that his pain is currently disabling him from working. Counsel for the Appellant maintains

that the Appellant's pre-existing conditions made him susceptible to develop chronic pain, but that the chronic pain arises as a result of the motor vehicle accident. Therefore, counsel for the Appellant argues that the Appellant is entitled to ongoing IRI benefits since his inability to work relates to the chronic pain which developed as a result of the motor vehicle accident-related injuries.

Counsel for the Appellant also urges the Commission to rely upon the various reports of Dr. Hoy, who is supportive of the Appellant's claim. In his report dated May 1, 2006, Dr. Hoy reported the following:

J.B. wanted me to also address an apparent error that I made in a February 28, 2006 correspondence. In that letter I made mention that he is able to conduct "almost full and normal duties", with respect to his job as a Real Estate Agent. I would like to now clarify that this is in no way to imply that he is doing all of his usual job duties, and working normal job hours. J.B. has consistently and reliably reported to me that he is not working full job duties, and not doing full job hours. My statement in the February 28, 2006 letter was referring to the fact that he continues to work as a Real Estate Agent, conducting many of the essential duties in order to complete those tasks. He has done so with some assistance from other parties, and also changing his work patterns so as not to aggravate his musculoskeletal condition.

In a report dated December 18, 2007, Dr. Hoy provided clarification on the Appellant's issue of fibromyalgia and myofascial pain as follows:

1. My diagnosis of myofascial pain syndrome is a different diagnosis than fibromyalgia. The two diagnoses are similar, but myofascial pain is usual more localized to one body area such as a neck or shoulder, and fibromyalgia represents a "whole-body" pain problem. My impression of J.B. has not been that he has a whole-body pain problem.

...

3. Regarding the occupational disability it was my opinion that there was no medical reason to restrict J.B. from his work environment, this is based upon several issues. First, Dr. Cosman has noted that there is no pathology (objective evidence) that someone with fibromyalgia or myofascial pain syndrome has something wrong with them that medically necessitates that they have reduced work abilities. As such, many

people return to work with resolving shoulder pains (myofascial or otherwise), and this helps them to recover physically and resume their usual life activities and patterns.

4. Dr. G. Thomson (rheumatologist) diagnosed J.B. with fibromyalgia based upon his presentation to that doctor at that time. During the time that I have seen J.B. his pains have not been widespread, in a “whole body” distribution as in fibromyalgia. The injections have been to the shoulders (right more than left), consistent with a history of myofascial pain syndrome. It is my impression that I have been injecting for a diagnosis of myofascial pain syndrome, and not fibromyalgia. Fibromyalgia does not respond to trigger point injections.

Based upon the findings and opinion of Dr. Hoy, counsel for the Appellant submits that the evidence supports that the Appellant has myofascial pain syndrome which is related to his motor vehicle accident of May 22, 1999 and which prevents him from performing his occupational duties as a real estate agent on a full-time basis. She argues that the medical information on the Appellant’s file, and particularly the reports of his treating physician, Dr. Hoy, are supportive of the Appellant’s ongoing and continuing myofascial pain syndrome. As a result, counsel for the Appellant maintains that the Appellant’s appeal should be allowed, and that his IRI benefits should be reinstated effective February 9, 2003.

MPIC Submission:

Counsel for MPIC submits that the preponderance of evidence on this appeal file supports the decision that the Appellant could work as of February 3, 2003 and that any inability to work beyond that date was unrelated to the motor vehicle accident. Counsel for MPIC argues that by that date, the Appellant’s shoulder impingement had resolved, in accordance with Dr. Craton’s reports. He maintains that any further shoulder problems were related to the Appellant’s pre-existing condition. Counsel for MPIC claims that by February 3, 2003, the Appellant had recovered from the motor vehicle accident-related injuries and any ongoing problems were

related to either his pre-motor vehicle accident fibromyalgia or his post-motor vehicle accident myofascial pain syndrome (which was not related to the motor vehicle accident).

In support of this position, Counsel for MPIC relies on the Inter-departmental memoranda of Dr. Cosman. Dr. Cosman opined that the evidence respecting the Appellant's ongoing conditions is more consistent with his pre-existing conditions. Counsel for MPIC also notes that both Dr. Hoy and Dr. Craton have indicated that there is no reason that the Appellant could not work as a real estate agent. Counsel for MPIC also relies on the report of the occupational therapist which indicates that the Appellant could work.

In summary, counsel for MPIC argues that there is very little evidence supporting the Appellant's position that his ongoing inability to work is related to his motor vehicle accident of May 22, 1999. Counsel for MPIC therefore submits that the Appellant has not met the onus of proof in this case to establish that the decision to terminate IRI benefits as of February 3, 2003 was in error. As a result, counsel for MPIC maintains that the Appellant is not entitled to ongoing IRI benefits beyond February 9, 2003. Accordingly, he submits that the Appellant's appeal should be dismissed and the Internal Review decision of March 9, 2006 should be confirmed.

Decision:

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that the Appellant has not established, on a balance of probabilities, an entitlement to IRI benefits beyond February 9, 2003.

Reasons for Decision:

The Commission accepts the opinion of Dr. Cosman, as set out in his Inter-departmental memorandum dated January 14, 2003, wherein Dr. Cosman concludes that:

IMPRESSION

In light of:

- i. The fit between the physiatrist's July 30, 2001 assessment of J.B. having at least a "light to medium work capacity" and the nature of J.B. job demands, as reported on page 6 of the August 15, 2001 Intake Assessment; and
- ii. The Occupational Therapy Work Capacity Evaluation of July 30, August 1 and 2, 2001, which determined that J.B. had the ability to perform his duties as a realtor for 6.5, 8, and 8 hours on three consecutive days without a significant deterioration in his physical status or pain levels; leading to the recommendation that he gradually increase his work hours over the following six to eight weeks up to full-time work.

It is concluded that J.B. likely had the functional capacity to perform his pre-accident duties in early August 2001.

To the extent pain was the basis for J.B.'s reported workplace limitations in summer 2001, it is noted that J.B. had a long pre-existing history of same, as noted at a January 21, 1999 rheumatologic assessment. In any case, the diagnoses cited by the physiatrist in his July 30, 2001 report did not suggest the presence of ongoing structural pathology emanating from the May, 1999 MVA to account for the reported symptoms. Nor would the non specific condition of myofascial pain syndrome have contraindicated or obviated a return to pre-accident duties. This view is corroborated by the results of the July 30, August 1 and 2, 2001 Occupational Therapy Work Capacity Evaluation.

In so far as J.B. subsequently underwent a reconditioning program, with measurable functional improvements to normal in many parameters up to September 27, 2001, it is also concluded that with respect to the May 1999 accident, J.B. had the functional capacity to perform his usual pre-accident duties as a realtor by September 27, 2001.

Notwithstanding the above analysis, in relation to the May 1999 accident, J.B. was fit to perform his pre-accident duties by February 28, 2002, as per the opinion of the treating physiatrist, certified athletic therapist and internal case facilitator.

An October 20, 2002 report from the sports medicine physician and December 11, 2002 report from the treating physiatrist lend support to J.B.'s fitness for work in relation to the May 1999 accident.

As noted by Dr. Cosman, the reports from the Appellant's treating practitioners, including Dr. Craton, Dr. Hoy and Ms Giesela Davidson, the occupational therapist who had the opportunity to

assess the Appellant over three days, all conclude that the Appellant is capable of resuming his occupational duties and there is no medical reason why the Appellant cannot return to work. Based on these medical opinions, the Commission finds that the Appellant has not established that he cannot return to work due to a medical reason.

Additionally, based upon our review of all of the evidence before us, the Commission finds that the Appellant's course over time is more consistent with his pre-existing diffuse and chronic pain condition than it is with a strain that he may have experienced as a result of the motor vehicle accident of May 27, 1999. As a result, we find that the condition which prevents him from working is not related to the motor vehicle accident, on a balance of probabilities, but rather to his significant history of pre-existing pain complaints.

As a result, we find that the Appellant's appeal should be dismissed and the Internal Review Decision dated March 9, 2006 confirmed.

Dated at Winnipeg this 22nd day of June, 2009.

YVONNE TAVARES

LEONA BARRETT

DEBORAH STEWART