Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-89

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Yvonne Tavares** **Mr. Wilson MacLennan**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf accompanied by [text deleted]** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Keith Addison**
HEARING DATE:	**May 8th, 2001**
ISSUE(S):	**Whether termination of IRI benefits premature.**
RELEVANT SECTIONS:	**Section 110(1)(a) of the MPIC Act**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

The Appellant, [text deleted], was injured in a motor vehicle accident ('MVA') on June 23rd, 1999, when the vehicle he was travelling in hit another vehicle which had left a stop sign before it was safe to do so. The Appellant sustained an injury to his lower back as a result of the MVA, and was completely off work for approximately one month, before returning to work on a reduced hours basis.

[The Appellant] is self-employed as a tile setter. Prior to the MVA, he worked 40-50 hours per week. His job requires frequent squatting, bending, walking on rough terrain, as well as continuous kneeling, reaching and twisting. He is also required to lift and carry up to 35 pounds on a frequent basis with occasionally having to lift 50 pounds. Upon his return to work, the Appellant was able to manage the requirements of his position by modifying his tasks and restricting himself to light duties (this was also done with the concurrence of his doctor, [text deleted]).

On September 29th and 30th, 1999, the Appellant was assessed by [rehab clinic] in order to increase his tolerance for full-time performance of job duties. In a report dated October 7th, 1999, the physiotherapist and occupational therapist who completed the assessment recommended that [the Appellant] undergo three weeks of physiotherapy treatment (heat, stretches, spray and stretch, and acupuncture to decrease irritability of trigger points), followed by six weeks of Work Hardening programming to coincide with part-time work.

[The Appellant] attended the multi-disciplinary Occupational Therapy and Physiotherapy Work Hardening Program for six weeks from November 15th to December 22nd, 1999. According to a Work Hardening Discharge Summary dated December 29th, 1999, on completion of the program, [the Appellant] demonstrated improvement in the areas of active range of motion, strength, positional endurance, lifting, carrying, pushing/pulling, overall work tolerance, quality of movement and body mechanics. The report concluded that [the Appellant's] work capabilities matched the critical demands of the identified

goals, to return to work as a tile setter, according to material lifting requirements. However, it noted that while [the Appellant] indicated that he was capable of completing all activities, participating in same for longer than 4-5 hours, caused a significant increase in pain. Recommendations were that, on physician's approval, [the Appellant] return to working 5 hours per day at his previous position, with an increase in daily time by 1 hour each consecutive week.

Based on this report, [text deleted], Case Manager, wrote to the Appellant on January 11th, 2000, to set out the graduated return to work program and confirm his participation as recommended by both [rehab clinic] and [Appellant's doctor]. By the week of January 17th, 2000, it was anticipated that [the Appellant] would return to a normal work schedule of 8 hours per day. The letter therefore advised that,

> ".....in the absence of any objective evidence supporting functional restrictions or limitations preventing you from working as a full-time tile setter, as of January 14th, 2000, your Income Replacement Indemnity entitlement will be at a conclusion based on the graduated return to work plan. As indicated in our conversation, Manitoba Public Insurance will continue to top up your Income Replacement Indemnity benefits up to and including January 14th, 2000. For your information and reference, we quote Section 110(1)(a) of the Manitoba Public Insurance Corporation Act which reads as follows:
>
> **Events that end entitlement to IRI**
>
> 110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident."

On February 18, 2000, the Appellant filed an Application for Review of that decision on the basis that his back pain was continuing and that he was unable to return to full hours

as scheduled - working beyond 5 hours per day was very difficult unless he took pain medication.

In response to a request from the Internal Review Officer, [Appellant's doctor] provided a narrative report dated April 12th, 2000. In his report, he commented that,

> "[The Appellant] was able to return to work on a graduated hours basis towards the end of December 1999. On January 20th, 2000, he attempted to return to work on a full-time basis with regular duties but suffered an immediate exacerbation of his low back pain. He presented at my office on January 25th, 2000, complaining of severe low back pain and limitation of back movement. He claimed that he was unable to continue his duties at work and requested further assistance with management of his back pain. I prescribed some analgesic medications for him and advised him to remain off work until the back pain had settled down. On examining him during the visit of January 25th, 2000, I noted marked restriction of lumbar movement with guarding. Forward flexion was to mid-thigh level and he was capable of little or no extension. He exhibited marked para-lumbar tenderness with muscle spasm. Neurological examination and root tension signs were negative."

In an Inter-departmental Memorandum to file, [text deleted], the Internal Review Officer noted that,

> "On May 24th, 2000, I had the Internal Review Hearing with [the Appellant]. He poses some difficulty because it would appear that there was some wishful thinking leading up to the termination of IRI benefits. Clearly the medical reports and the Work Hardening Discharge Summary indicate that he was still having problems of some significance and while it was hoped that he would be able to return to work, there certainly was no guarantee of that."

Despite the foregoing reservations noted by the Internal Review Officer, in his decision dated May 31st, 2000, he proceeded to uphold the Claims' decision on the basis that following the Corporation's decision to terminate benefits, [the Appellant] resumed working on a full-time basis, despite ongoing significant pain and discomfort.

[The Appellant] has now appealed to this Commission regarding the termination of his income replacement indemnity ('IRI') benefits as of January 15th, 2000.

At the hearing of his appeal, the Appellant testified that once the work hardening program was completed, he called his adjuster and advised her that he still was not physically capable of working an eight hour day, working beyond 4 - 5 hours per day, still significantly increased his pain. The Appellant gave further evidence that the adjuster disregarded his condition and his complaints, and told him that his only recourse was to appeal her decision. Without any other source of income, the Appellant submitted that he forced himself to return to work because of financial obligations, often relying on pain medication in order to endure the ongoing physical pain.

Counsel for MPIC submitted that the Internal Review decision should be upheld since [the Appellant] did in fact return to his employment after the work hardening program and accordingly, any entitlement to IRI ceased pursuant to ss. 110(1)(a) of the MPIC Act.

Throughout the hearing of this matter, [the Appellant] presented himself in a very forthright and honest manner. The Commission found [the Appellant] to be a credible individual, without any tendency to malinger. Based upon the Appellant's own testimony and the report of [Appellant's doctor] dated April 12, 2000, we find that the Appellant was not able to work 8 hours per day upon completion of the graduated return to work program in mid-January, 2000 and that he should have been granted a longer period of

time to adjust to the demands of an 8-hour day. Accordingly, his IRI should not have been terminated outright as of January 15, 2000, rather he should have continued to receive top-up IRI benefits until his functional status had been further restored.

The lack of further consideration given to [the Appellant's] claim by his adjuster is cause for concern. The adjuster's decision of January 11, 2000, had indicated that, ".....in the absence of any objective evidence supporting functional restrictions or limitations preventing you from working as a full-time tile setter, as of January 14th, 2000, your Income Replacement Indemnity entitlement will be at a conclusion…" It is unfortunate that the adjuster did not follow up with [Appellant's doctor] at the time that the Appellant complained to her of his inability to work at full capacity. [Appellant's doctor] certainly could have provided objective evidence supporting functional restrictions preventing the Appellant from working as a full-time tile setter, based upon his examination of the Appellant on January 25, 2000, and as set out in his report dated April 12, 2000.

The prospective termination of benefits in this type of situation was improper for the very reasons which occurred here. The Appellant was left with no alternative but to return to work and to severely medicate so as to mask his pain and risk further injury. As this Commission has commented previously, the issuing of prospective decisions, without additional follow-up, is not a practice that should continue.

Notwithstanding this Commission's finding that the Appellant's IRI benefits were prematurely terminated, we are nevertheless bound by the provisions of the MPIC Act

and the remedies contained therein. The fact that the Appellant did return to his employment after his benefits ceased would normally conclude his entitlement to IRI benefits pursuant to ss. 110(1)(a) of the Act. However, the Appellant testified that he did suffer a loss of income in the first few months after his IRI benefits were terminated, as he was unable to work on a full-time basis. Therefore, this Commission orders that [the Appellant's] claim be referred back to MPIC for a determination of top-up Income Replacement Indemnity payments to [the Appellant] for any shortfall in income from his regular full-time earnings, commencing January 15, 2000 and continuing for such time as [the Appellant] was unable to resume full-time work as a result of the injuries sustained in the MVA.

Dated this 1st day of June, 2001.

MEL MYERS, Q.C.

YVONNE TAVARES

WILSON MACLENNAN