

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-89**

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: November 8, 2007

ISSUE(S): Entitlement to Income Replacement Indemnity benefits from November 27, 2005 to December 17, 2005

RELEVANT SECTIONS: Section 81(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94

AICAC 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 November 27, 2005. He attended at [Hospital] Emergency Department on the night of the accident with complaints of left arm and bi-lateral leg pain, as well as a laceration to the left side of his mouth. He was sent home with a prescription for Tylenol.

Sometime later, on December 28, 2005, the Appellant attended at his family doctor. He saw the family doctor again on January 10, 2006, when he was provided with a sickness certificate advising of his inability to work from November 27, 2005 to December 17, 2005.

The Appellant's case manager, by letter dated January 23, 2006, indicated that there was no medical information on file, as the Appellant had not attended a medical facility until December 28, 2006. Accordingly, the case manager found there was a lack of objective medical evidence on file to substantiate his time missed from work due to injuries sustained in the accident and that he was not entitled to IRI benefits.

The Appellant sought internal review of this case manager's decision. On March 28, 2006, an Internal Review Officer for MPIC reviewed the Appellant's file, including a report from [MPIC's Doctor], the Medical Director of MPIC's Health Care Services, dated March 16, 2006. [MPIC's Doctor] indicated there was insufficient evidence describing impairment which would be expected to be associated with an occupational disability.

The Internal Review Officer found she was "unable to conclude that your motor vehicle accident injuries rendered you entirely or substantially unable to perform the essential duties of your employment. The medical documentation on your file lacks objective substantiation in support of your claim for IRI following the motor vehicle accident of November 27, 2005." The case manager's decision was confirmed.

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 hearing into his appeal. He described the motor vehicle accident as a severe collision. At the time of the accident, he was employed full-time at [text deleted] as a line cook.

As a result of the accident, he suffered an injury to his left elbow and ankle. His left elbow was sprained or bruised and in a sling and his left ankle was sprained such that he had a hard time walking. He testified that even three (3) weeks after the accident he was still limping a bit, although he was not on crutches at any time.

He testified that he saw a doctor at the [Hospital]. He had difficulty standing and putting weight on his ankle and moving around.

These injuries prevented him from working at his job as a line cook. He could not move around well on his ankle, and because of his arm injury, he could not carry groceries and supplies, or even move a plate around to put up an order. All of the duties of his job, which included cooking and food preparation involved the movement of his arms, and he could not do his duties during that period of time.

Even when he returned to work, some three (3) weeks after the accident, he had to modify his duties somewhat, doing side preparation, etc.

During those three (3) weeks, the Appellant testified that he was for the most part at home in [text deleted] and not able to do much. Even driving to and from work would have been difficult for him. He even saw his family doctor on December 28th and told him about the accident.

The Appellant was asked, on cross-examination, why he had not contacted MPIC for benefits until he had already returned to work. The Appellant indicated that he had been at home for the three (3) weeks following the accident and had not been aware that he could actually make a claim for Income Replacement Indemnity ('IRI') benefits with MPIC, until one of his bosses at work asked him, upon his return, if he had filed such a claim.

The Appellant submitted that he had been unable to perform the duties of his employment at [text deleted] during the three (3) week period following the accident, as a result of his motor vehicle injuries.

Submission for MPIC

Counsel for MPIC submitted that the medical evidence on file did not make mention of the Appellant's left arm being placed in a sling. However, he did not question the Appellant regarding this fact upon cross-examination.

Counsel noted that the x-rays of the ankle, knee, elbow and forearm were essentially normal, although there was some soft tissue swelling of the left ankle.

Counsel submitted that although the Appellant has provided details of his medical attendances and work situation, these were not corroborated by any documentary evidence. For an entitlement to IRI benefits under Section 81 of the MPIC Act to exist, the claimant must show, that he has been "unable to continue" the employment he held at the time of the accident. The Appellant must show, on a balance of probabilities, that he was unable to hold employment.

Counsel submitted that if the Commission does find that the Appellant has met this onus, the calculation of any IRI benefits owing to the Appellant should be submitted back to the case manager for calculation.

Discussion

MPIC Act:

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;

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.

As counsel for MPIC points out, the onus is on the Appellant to show, on a balance of probabilities, that he was unable to hold employment during the period in question. The Commission must determine whether the Appellant is entirely or substantially unable to perform the essential duties of his occupation.

Although there is not a great deal of documentary evidence on the file to support the Appellant's position, we accept his assertion that he did not pursue an application for IRI benefits because he was unaware of that entitlement until he returned to work.

We also accept the Appellant's evidence that, having regard to the nature of his occupation as a cook, he was unable, as a result of injuries from the accident, such as the injury to his left elbow and ankle, to safely and adequately perform the duties for which he was responsible in the

preparation, cooking and plating of food in the restaurant. We also accept his evidence that he was unable to stand on his feet and work as a cook for the duration of a shift.

The Commission found the Appellant to be a credible witness in this regard and finds that through his testimony, he has established, on a balance of probabilities, that he was entitled to IRI benefits for the period in question.

The Commission will allow the Appellant's appeal, and substitute the foregoing for the decision of the Internal Review Officer dated March 28, 2006.

The Commission orders that the Appellant shall receive IRI benefits from the period November 27th to December 17th, 2005, and refers the amount of compensation back to the Appellant's case manager for a calculation of IRI benefits, with interest, pursuant to Section 163 of the MPIC Act.

Dated at Winnipeg this 28th day of November, 2007.

LAURA DIAMOND