

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-04-119**

**PANEL:** Ms Laura Diamond, Chairperson  
Ms Mary Lynn Brooks  
Mr. Les Marks

**APPEARANCES:** The Appellant, [text deleted], was represented by [text deleted];  
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.

**HEARING DATE:** April 1, 2008

**ISSUE(S):** Entitlement to Income Replacement Indemnity Benefits beyond January 25, 2004

**RELEVANT SECTIONS:** Section 110(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 August 13, 2003. At the time of the accident, the Appellant was employed as a Licensed Practical Nurse ('LPN') at [text deleted] Hospital and [text deleted]. She also did some work for a nursing agency, [text deleted].

Following the motor vehicle accident, the Appellant was unable to perform her duties as an LPN, and was in receipt of Income Replacement Indemnity ('IRI') benefits.

On September 22, 2003, the Appellant started a gradual return to work program at [text deleted] Hospital. However, she indicated she could not return to her full duties as an LPN due to her right shoulder and lower back pain. Following a neurological assessment by [Appellant's Neurologist] and reports from MPIC's Health Care Services Team, MPIC concluded that there were no objective impairments preventing the Appellant from returning to her employment. Her case manager wrote to her on January 9, 2004 indicating that she no longer had an impairment of physical function arising from the motor vehicle accident that would prevent her from performing her occupational duties as an LPN and that her entitlement to IRI would end as of January 25, 2004.

The Appellant sought internal review of the case manager's decision.

On April 16, 2004, an Internal Review Officer for MPIC reviewed the Appellant's file. He reviewed the medical evidence and concluded that there was no objective evidence of an impairment that would preclude the Appellant from returning to work at her full duties as an LPN. Based upon [MPIC's Doctor's] report from MPIC's Health Care Services Team, the Internal Review Officer added that the only proviso was that the Appellant should not lift patients. However, the Internal Review Officer noted that lifting and positioning had already been removed from the Appellant's job requirements and so, he concluded that the Appellant was able to hold the employment she held at the time of the accident.

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 her appeal. She described the physical duties of her nursing jobs at [text deleted] Hospital, [text deleted] and [text deleted]. These jobs involved distributing medications to patients, assisting with blood transfusions, taking vital signs, bathing patients in bed, turning patients in bed, helping patients to use the washroom with walkers and helping to transfer patients, including through the use of a hooyer lift. She described the range of weight and size of the patients as well as the weight of the cart that she would have to push in order to give patients their medications.

The Appellant also described the accidents and the injuries she sustained to her lower back, right upper back and neck as well as her arms. She described her treatment with her family doctor, physiotherapy and chiropractic treatment. The Appellant also described her attempts to return to work, and the pain it caused her. This included pain in her right shoulder and neck as well as migraines.

She also described her concern over her condition and her desire to make sure there was no neurological problems, leading to her examination by [Appellant's Neurologist].

The Appellant explained that her return to work program involved a modified nursing job at the [text deleted] Hospital. A buddy system was implemented for this graduated return to work program. She performed modified duties with the assistance of another nurse.

Difficulties arose with her employer, who would not allow her to return to work without restrictions and ultimately filled her job with another worker. This led to negotiations between the employer and the Appellant's union, on her behalf.

Counsel for the Appellant submitted that the Appellant was a hard worker with no previous injuries prior to the motor vehicle accident. He referred to the significant damage which had occurred to the Appellant's motor vehicle, and noted that, by the Appellant's description of the accident, she had also fallen a couple of times in trying to exit the motor vehicle.

Counsel noted that the Appellant's employment involved a great deal of physical demands. The evidence of the Appellant, as well as letters from her employers, established that the Appellant was not able to go back to work without restrictions on the actual job duties. The notes from her physicians indicated an inability to lift, and particularly, to lift patients.

Counsel also emphasized that there was a clear misunderstanding on the part of the Internal Review Officer when he stated that lifting and positioning had been removed from her job requirements. He stressed that this was only under the terms of the graduated return to work program which involved a modification of her job duties. Her regular job duties certainly included patient lifting and positioning, as well as other heavy duties such as pushing a medicine cart.

Although [Appellant's Neurologist] did not find that the Appellant had any neurological problems, counsel relied on reports from her chiropractor and other treating therapists and physicians such as [Appellant's Doctor #1], [Appellant's Doctor #2] and [Appellant's Psychiatrist], which established that the Appellant was not ready to return to work in January of 2004.

In addition, her employer at [text deleted] took the position that the hospital would not let her come back to work without a doctor's report saying that she could perform all of her duties. Finally, with the help of her union, her employer was persuaded to take her back to work.

However, counsel emphasized that prior to the Appellant's reinstatement at her job at [hospital], and [Appellant's Psychiatrist's] letter of October 2007 wherein he reported that she could now do her job, the Appellant was not able to perform her job without restrictions and, therefore, was not able to perform the essential duties of her position.

Counsel submitted that the Appellant should be entitled to receive IRI benefits from January 2004 until her reinstatement at [text deleted] Hospital, which was retroactive to March 2007. He suggested that the calculation of IRI be referred back to the Appellant's case manager for calculation of her IRI, less any amounts she had earned during the period, from other employment and/or from [text deleted] Hospital.

### **Submission for MPIC**

Counsel for MPIC reviewed [Appellant's Neurologist's] report dated December 5, 2003 where he noted that he did not find any objective findings relating the Appellant's symptoms to the motor vehicle accident.

She also relied on the opinion of [MPIC's Doctor], of MPIC's Health Care Services Team, dated December 23, 2003. [MPIC's Doctor] concluded that there was no objective functional impairment present likely to prevent the Appellant from returning to work full time.

Counsel noted that even [Appellant's Chiropractor], in a report dated January 27, 2004, stated that while the Appellant could not return to work full time duties, she could work on a supernumerary basis and could return to full duties 9/2/2004.

Counsel also relied upon a report prepared by [Independent Chiropractor] who provided an independent assessment of the Appellant, on August 16, 2004. In [Independent Chiropractor's] view, the Appellant did not show any physical impairment that could be reasonable or directly attributed to the accident of August 13, 2003.

[MPIC's Doctor] reported again on May 2, 2006. He opined that:

“As time progressed from the collision, it appeared that the claimant's degree of suffering as well as her physical findings and degrees of disability increased. This process of events would not be consistent with the known direct effects of trauma.

He also referred to [Independent Chiropractor's] report, noting that the Appellant's listed degree of pain and self-limitation was caused by her pain avoidance.

[MPIC's Doctor] reported again, after reviewing further material, on April 5, 2007. He stated:

. . . I previously indicated that I was unable to quantify the exact risk of patient injury based upon the information present on file. Notwithstanding the lack of quantification, it was my concern that if a patient risk was potentially present with heavy lifting that this should be limited in her job requirements at that time. Based upon this, I made a recommendation that a Return to Work with modified duties would be appropriate on April 1, 2004. My review of May 2, 2006 did not alter this opinion. The newly submitted medical information would also not alter this opinion.

[MPIC's Doctor] reported again on February 14, 2003 and stated:

. . . the claimant's reported disability was based solely upon her perceived symptoms and fear of invoking symptoms with performing physical activity.

Accordingly, counsel for MPIC submitted that the Appellant was not entitled to further IRI benefits beyond January 24, 2004 and that the decision of the Internal Review Officer and case manager should be confirmed.

### **Discussion**

#### **Events that end entitlement to I.R.I.**

**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;

#### **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 she was not able to hold her employment, and was substantially unable to perform the essential duties of her job, as a result of the motor vehicle accident.

Counsel for MPIC confirmed at the appeal hearing that causation was not in issue between the parties. Rather, MPIC continued to take the position, as set out in the Internal Review decision dated April 16, 2004, that the Appellant was, pursuant to Section 110 of the MPIC Act and Section 8 of the Regulations, able, from January 25, 2004 onwards, to perform the substantial duties of her job as a nurse.

The panel has reviewed the evidence and submission of the parties, including the medical reports on file and the testimony of the Appellant.

The Appellant complained of pain in her right shoulder and upper back and neck within a few days of the motor vehicle accident, by August 19, 2003. This pain continued, although the Appellant was agreeable to attempting a graduated return to work program, which began in September of 2003. This graduated return to work program involved a significant modification of the Appellant's duties. A buddy system was employed whereby the Appellant was partnered with another nurse or health care aide and was not to do tasks related to lifting. This was a temporary modification of the regular job duties of the Appellant's position as a general duty Licensed Practical Nurse, designed to rehabilitate the Appellant and ease her back into her duties through assistance from her co-workers.

However, even with these modified duties, the Appellant continued to experience difficulty with her job during the graduated return to work program. The Appellant's return to work was not successful, as she continued to have pain and difficulty.

The [Appellant's Neurologist] could find no signs of objective impairment, and concluded that the Appellant was ready to go back to her job. Accordingly, MPIC concluded the Appellant was ready to return to work and discontinued her IRI benefits.

However, the Appellant continued to have difficulty and to seek treatment. She saw [Appellant's Chiropractor], who reported ongoing pain and difficulty in the Appellant's neck, right shoulder and upper back. The Appellant testified that treatment for these areas had been delayed, and that she felt they had been getting worse.

The Appellant also saw [Appellant's Doctor #2] who referred her to [Appellant's Doctor #1] for cortisone injections and to [Appellant's Physiatrist] for trigger point injections.

[Appellant's Chiropractor] raised concerns in his reports regarding the Appellant's ability to perform duties requiring lifting, bending, pushing or pulling.

[Appellant's Doctor #2] stated that he did not believe the Appellant was capable of resuming her pre-motor vehicle accident employment, and that although attempting a graduated return to work was in her best interests, there was no position available. He recommended a multi-disciplinary approach.

[MPIC's Doctor], although finding no objective functional impairments, agreed with [Appellant's Chiropractor], in part, accepting restrictions on lifting patients as part of the Appellant's return to her job. The Internal Review decision accepted [MPIC's Doctor's] opinion that there was no functional impairment. As for the restriction on lifting, he concluded that these duties had already been removed from the Appellant's job.

The panel, however, is of the view that the Internal Review Officer erred in concluding that lifting had been removed from the requirements of the job. This conclusion was based upon the duties involved in the Appellant's modified graduated return to work program. The job requirements of a regular general duty Licensed Practical Nurse do require the lifting and positioning of patients.

Even throughout the Appellant's continuing treatment with [Appellant's Physiatrist], he continued to impose substantial restrictions upon the Appellant's ability to return to work.

On May 4, 2006, [Appellant's Physiatrist] stated:

Re: Trial of return to work

[The Appellant] can return to her job so long as she is not doing the activity of direct bedside nursing. This includes no pulling, pushing, lifting, reaching or positioning of patients. No lifting and handling of weights more than 5 kg is to be done. She can pass out medication and she is also able to do administrative activity. She can start at 4 hours per day. The increase in time and activity will be reassessed in 3 weeks.

[Appellant's Physiatrist] reported again on October 20, 2006, after reviewing the results of a Functional Capacity Evaluation and Work Job Description with the Appellant. He stated:

. . . I agree that she is fit for sedentary work as outlined by the functional assessment.

I feel [the Appellant] could return to work according to her physical ability assessment with the elimination of:

- ❖ Ambulatory care
- ❖ Bathing
- ❖ Circulation:
  - Assist with deep-breathing and positioning
  - Applying and administering warm and cold
    - ◆ Tepid sponge bath
- ❖ Using accessories and equipment that minimize adverse effects of mobility

Based upon the Appellant's evidence, the duties of a general duty Licensed Practical Nurse include lifting and hanging blood, pushing a medicine cart, helping with baths and patient turns, helping patients to the bathroom and other activities of daily living, helping with walkers, transfers and the assisted transfers of patients.

According to the [Appellant's Physiatrist], and her treating chiropractor, as well as [Appellant's Doctor #2], these were all tasks which the Appellant could not perform at the time her IRI benefits were discontinued. As a result, her employers refused to allow her to work at her previous positions until clearance from her caregivers was obtained, allowing her to perform these tasks. This did not occur until October 30, 2007.

On that date, [Appellant's Psychiatrist] reported:

[The Appellant] can return to work as an LPN without restrictions. As she has been off work for a prolonged period of time, she needs to return on a graduated basis starting 2 hours for 2 weeks, 4 hours for 2 weeks, 6 hours for 2 weeks then full time. Shadowing for the first 2 segments (2 hours and 4 hours) would be recommended.

The panel finds that the Internal Review Officer erred in finding that the Appellant was able to substantially perform the essential duties of her job, and that some of the disputed duties had already been removed from her job description. The question is not whether duties such as these were part of the work requirements under the modified graduated return to work program, but rather they were part of her regular duties as a general duty nurse. The panel finds that they were.

The panel finds that the Appellant has met the onus upon her to show, based upon restrictions imposed by her numerous caregivers, and accepted, at least in part, by [MPIC's Doctor], that the Appellant was not able to fulfill the substantial requirements of her job. In particular, she was restricted from duties involving lifting, and as a result, she was not able to perform the essential duties of her job.

The Appellant was under similar restrictions throughout her treatment and was not cleared by her physicians to return to her full job duties without restrictions, until October 30, 2007, the date when [Appellant's Psychiatrist] stated that the Appellant could return to work as an LPN without restrictions.

Accordingly, the panel finds that the Appellant was entitled to IRI benefits from January 25, 2004 until October 30, 2007, with interest.

The Appellant's appeal is allowed and the decision of the Internal Review Officer dated April 16, 2004 overturned.

The calculation of the amounts that the Appellant is entitled to receive from MPIC as IRI benefits for this period shall be referred to the Appellant's case manager for determination. The Commission will retain jurisdiction in the event that the parties are unable to agree upon the amount of IRI benefits to which the Appellant is entitled.

Dated at Winnipeg this 8<sup>th</sup> day of May, 2008.

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**LAURA DIAMOND**

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**MARY LYNN BROOKS**

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**LES MARKS**