

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-209**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms Leona Barrett
Mr. Neil Cohen

APPEARANCES: The Appellant, [text deleted], was represented by Ms Darlene Hnatyshyn of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: November 27, 2009

ISSUE(S): Entitlement to Income Replacement Indemnity ("IRI") benefits beyond July 10, 2005

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('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

While operating his bicycle on July 31, 2004, [the Appellant] was struck by a motor vehicle and suffered the following multiple orthopaedic injuries:

1. a fracture to his C1 vertebra which was treated conservatively and determined to have healed by his neurosurgeon as of mid October 2004;
2. multiple fractures to his right lower leg and ankle requiring open reduction and internal fixation and a period of immobilization to heal;

3. a severe comminuted fracture of his right patella requiring surgical reduction and fixation.

Prior to the motor vehicle accident the Appellant was employed as a jack hammer operator by [text deleted] for approximately 18 years. By the month of February 2005, MPIC determined that the Appellant was capable of participating in a reconditioning and work hardening program at [rehab clinic] in preparation for his return to his pre-accident employment with [text deleted].

[MPIC's doctor], MPIC's medical consultant, in her interdepartmental memorandum to MPIC dated October 26, 2005, stated in respect of the Appellant:

“...At the time of his intake assessment at [rehab clinic] on February 14, 2005, he had residual symptom complaints including headache, neck pain, right ankle pain, right lower leg numbness and occasional sleep disturbance. The claimant underwent a detailed physical and psychological assessment in preparation for determining his appropriateness to embark on a conditioning and work hardening program. Neuro musculoskeletal examination revealed no previously undetected pathology or failure to heal.

Functionally, as captured by the Mini Functional Abilities Evaluation (a battery of standardized tests of physical effort) the claimant demonstrated a minimal loss of motion in some of the planes of neck movement and below average grip strength for his dominant right hand and left hand. Similarly, he demonstrated decreased pinch strength involving the thumb and index finger on both sides. For the majority of testing the claimant demonstrated average to above average effort compared to population normative data. While being tested, the claimant complained of left sided neck pain when asked to flex his neck to the right side and complained of low back pain with lumbar spine movement and exertional effort. The claimant was re-assessed in March, April and end May 2005.

A Physical Demands Analysis performed by [rehab clinic] on April 25, 2005 confirmed that the Appellant's duties as a construction worker corresponded to heavy physical effort. The April 28, 2005 Physical Demands Analysis report reflected that the Appellant spent 95% of his work day using a jack hammer and cleaning up the debris resulting from jack hammer work.

On April 27, 2005, [rehab clinic] issued a Work Hardening Program Discharge Report. This report reflected completion of the Appellant's nine week conditioning program and stated:

“[The Appellant] participated in an active rehabilitation program, where he completed various stretching, strengthening and core stabilization exercises on a daily basis. He was also required to perform approximately four (4) hours of work simulation tasks per day. [The Appellant] consistently completed all of the prescribed activities. Upon final objective testing he demonstrated the ability to lift 36 kgs from floor to shoulder level on an **occasional** basis and 32 kgs from floor to shoulder on a **frequent** basis. This would correlate to the ability to function at the **HEAVY** strength demand.

...[The Appellant] has provided a maximal effort throughout the rehabilitation program. As a result, his strength and overall function have significantly increased. Based on objective test results and his clinical presentation, [the Appellant] is capable of working at a **HEAVY** strength demand.

[The Appellant's] pre-MVA employment is classified at a **HEAVY** demand level. A gradual Return to Work Program, incorporating both full workdays as well as full days in an ongoing rehabilitation program may be most beneficial in facilitating a successful return to full time employment. A shared program between work and rehabilitation will benefit by providing [the Appellant] supportive care, ongoing strength training, and by building workday tolerance.

Based on clinical presentation and objective test results, [the Appellant] demonstrates the ability to perform stooping, crouching, walking and standing on a **constant** basis which exceeds the demands of his pre-MVA position.

Contact was made with [the Appellant's] employer, and confirmation was received that [text deleted] will accommodate such a program.” (underlining added)

[MPIC's doctor] further reported in her interdepartmental memorandum dated October 26, 2005:

“His April 29, 2005 status reflected his conditioning level after 9 weeks of program participation. By that time, the claimant was considered to have improved from an entry level of strength reflecting capability of performing medium strength level activities, to being able to perform heavy strength level activities, according to a standardized battery of tests as of April 20, 2005. The intent of the 9 week conditioning program was to prepare the claimant for return to heavy physical effort. This was based on the claimant's own description of his work duties described to correspond to heavy labor.”

On May 30, 2005 [rehab clinic] forwarded a further report to MPIC entitled Graduated Return to Work Program – Discharge Addendum. In this report [rehab clinic], under the heading “Overall Impressions”, stated:

“[The Appellant] has been participating in a gradual return to work program which was comprised of an increasing number of full work days at his pre-accident position, combined with full 7.5 hour days in a rehabilitation program. In essence, [the Appellant] was demonstrating the ability to tolerate full time work on a consistent basis. (underlining added)

...In the midst of his return to work program, [the Appellant] stated that he was experiencing some interpersonal conflict with his employer. [The Appellant] stated that this conflict was not related to his motor vehicle accident or subsequent injuries. As a result, [the Appellant] indicated that he may choose to leave his current employer and move to [text deleted], where he has family.

[The Appellant] has subsequently indicated that he will be moving to [text deleted] as of June 1, 2005. [The Appellant] is currently looking for employment in [text deleted]. He has requested to continue with the rehabilitation program at a facility in [text deleted] if possible.”

The Appellant did not complete the graduated return to work program because of a dispute with his employer and moved to [text deleted] to be close to his family. The Appellant reported to MPIC that he was continuing to have neck pain and ankle pain and that he intended to obtain further physiotherapy treatment in [text deleted].

Case Manager Decision:

On June 21, 2005 the case manager wrote to the Appellant and advised him:

“The medical information on your file supports your return to your pre-accident employment and therefore, entitlement to IRI will end.

I will list the highlights as follows:

- ❖ Your pre motor vehicle accident employment is classified at a heavy demand level. In a report provided by [rehab clinic] dated April 27, 2005, it was their recommendation that based on your clinical presentation and objective test results, that you demonstrated the ability to perform stooping, crouching, walking and standing on a constant basis which exceeds the demands of your pre accident position. A gradual return to work program, incorporating both full works days as well as full days in an ongoing rehabilitation program was provided to facilitate a successful return to full-time employment.
- ❖ In a report provided by [rehab clinic] dated May 30, 2005, it was their opinion that as you had been participating in a gradual return to work program which was comprised of an increasing number of full work days at your pre accident position, combined with full seven one-half hour days in a rehabilitation

program, that you were demonstrating the ability to tolerate full-time work on a consistent basis.

In order to facilitate a return to employment, Manitoba Public Insurance will continue your IRI benefits until July 10, 2005. During this time period, you are required to report any income earned from employment.

Effective July 11, 2005, as you would be able to hold the employment that you held at the time of the accident, this would end further entitlement to IRI benefits per Section 110(1)(a) of the Act..." (underlining added)

[Appellant's physiotherapist], a physiotherapist, saw the Appellant on June 14, 2005 and provided a Primary Health Care Report to MPIC dated July 18, 2005. In this report, the physiotherapist stated that the Appellant complained of pain to his neck, shoulder, arm, back, right knee/leg pain and right ankle/foot pain. The physiotherapist diagnosed active myofascial trigger points involving the upper fibres of the trapezius muscle.

MPIC requested a medical opinion from its medical consultant regarding the Appellant's ability to return to his pre-motor vehicle collision employment as of July 10, 2005. [MPIC's doctor] reported that she could find no relationship between the injuries sustained in the motor vehicle accident and the Appellant's presentation to the physiotherapist. [MPIC's doctor] stated that at the end of May the Appellant's

"Perception of disabling symptoms was at a minimum and in several assessment scores was 0 and the claimant was functioning at a high level of physical effort with minimal reported symptom exacerbation with the exception of discomfort involving his right ankle."

[MPIC's doctor] noted that the Appellant would have been able to return to his pre-motor vehicle accident occupation as of May 26, 2005, but as reported by [Appellant's physiotherapist], the Appellant had experienced a significant deterioration in his perception of his symptoms and psychological status. [MPIC's doctor] opined that this deterioration cannot be explained on the

basis of the motor vehicle accident. [MPIC's doctor] also indicated that something other than the Appellant's motor vehicle accident affected his status as of July 14, 2005.

Internal Review Officer's Decision:

On November 17, 2005 the Internal Review Officer issued a decision letter to the Appellant wherein she confirmed the decision of the case manager dated June 21, 2005 and dismissed the Appellant's application for review.

In arriving at her decision, the Internal Review Officer reviewed the reports from [rehab clinic] in respect of the Appellant's graduated return to work program as well as the extensive report provided by [MPIC's doctor]. The Internal Review Officer stated that she agreed with the medical opinion of [MPIC's doctor] and stated:

“...By May 26, 2005 you demonstrated the ability to work at your pre-accident occupation with minor complaints in your right ankle. Your symptoms on July 14, 2005 are inconsistent with that level of function and as you were not working, you would not have aggravated any previous motor vehicle accident injuries. As a result, it is my decision that you were capable of working as of May 26, 2005 even though your Income Replacement Indemnity benefits were extended to July 10, 2005. It is also my decision that your complaints on July 14, 2005 were not related to your motor vehicle accident of March 11, 2005 (sic).”

On December 2, 2005 the Appellant filed a Notice of Appeal.

On January 5, 2009 the physiotherapist, [Appellant's physiotherapist], wrote to the Claimant Adviser in response to a number of questions she had sent him for reply. In this letter, [Appellant's physiotherapist] stated:

“4. How would you explain [the Appellant's] apparent “notable deterioration in perceived musculoskeletal symptoms and in his psychological status” between May 26, 2005 and July 14, 2005?”

There is no explanation. Any attempts to do so without being present with him during the days between May 26, 2005 and July 14, 2005 would be pure speculation. I had

nothing to compare his July 14, 2005 “psychological status” to so I had no idea there had been a “notable deterioration”...

6. *In your opinion, on the balance of probabilities, was [the Appellant] able to return to his pre-MVA employment as a skilled heavy construction worker July 11, 2005?*

July 11, 2005 was 3 days prior to my assessment. On July 14, 2005 he had no critical losses in ROM or strength. His main issue was pain in the left shoulder girdle with referring symptoms into the neck and near the ear and eye. No specific lifting, carrying, pushing, or pulling assessments were performed. It was my impression that he could have returned to work but certain job demands would have provoked the MTP causing pain. Whether this pain would have been debilitating or cause him to be unsafe to himself or co-workers cannot be known. Acute MTP's* when aggravated by a sudden movement can be extremely painful causing loss of ability to complete a task. (underling added)

By the end of 10 treatments he was presenting with much less pain and was managing bicep curls with 65 lbs, triceps press downs with 85 lbs, lat pull downs with 65 lbs, and seated rows with 75 lbs. Headaches were reduced to one third of pre-treatment frequency and a taught myofascial band was still resent (sic) in upper trapezial fibres where direct stimulation caused pain but no referred symptom. At this point he was ready for a GRTW program to increase activity tolerance further. Additional MTP therapy may have been beneficial during a GRTW but this is difficult to know definitely.”

* MTP = Myofascial Trigger Point

Appeal:

The relevant provision of the MPIC Act states:

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;

The Appellant testified at the appeal hearing and stated:

1. that he had worked for approximately 18 years for [text deleted] as a jack hammer operator which was a heavy demand job;

2. that he had suffered significant injuries in the motor vehicle accident, and had difficulties in recovering from these injuries which had prevented him from returning to his pre-accident employment;
3. he was unhappy with the manner in which [rehab clinic] conducted the work hardening program as well as the graduated return to work program;
4. the pain in his right ankle had not been resolved by the work hardening program, and as a result he was not able to return to his pre-accident employment.

He further testified that:

1. For some time he had intended to leave his employment with [text deleted] to move to [text deleted] to be close to [text deleted] and their children.
2. As a result of the manner in which he was treated by [text deleted] he quit his employment prior to the conclusion of the graduated return to work program.
3. He acknowledged that he did not leave the employment with [text deleted] because he was unable to do the job of a jack hammer operator.
4. After he left his employment with [text deleted], he applied to a number of construction companies in [text deleted] for employment but was not successful in obtaining employment.
5. He would have accepted employment in the construction field if he had been offered such employment by a construction company.

During the course of his testimony, the Appellant testified that he was unable to return to his employment with [text deleted] as of July 10, 2005 because of the motor vehicle accident and as a result MPIC erred in terminating his IRI benefits. He requested that the Commission order MPIC to reinstate his IRI benefits effective July 10, 2005.

[text deleted] testified that:

1. She had known the Appellant for ten years and she was engaged to him and that they had two children, [text deleted].
2. They did not live together when the Appellant moved to [text deleted].
3. The Appellant's physical complaints prevented him from working.

MPIC called [MPIC's doctor] to testify. [MPIC's doctor] reviewed her interdepartmental memorandum dated October 26, 2005 and the report of the physiotherapist, [Appellant's physiotherapist] dated January 5, 2009. [MPIC's doctor] confirmed the comments that were set out in her report of October 26, 2005 and testified that she was unable to explain the Appellant's presentation to [Appellant's physiotherapist] on July 14, 2005 on the basis of the injuries the Appellant sustained in the motor vehicle accident. She further concluded that based on the [rehab clinic] reports the Appellant had successfully demonstrated his ability to return to his pre-motor vehicle collision occupation as of May 26, 2005 and he had undergone an assessment of his ability to achieve this goal. [MPIC's doctor] answered some questions from the Commission and was not cross-examined by the Claimant Adviser Office.

Discussion:

The Appellant testified at the hearing that he was extremely unhappy with the program at [rehab clinic] and had complained about this to [rehab clinic] and to his case manager. However, an examination of the [rehab clinic] weekly progress reports completed by the Appellant between the commencement of the work hardening program until May 26, 2005 contradict these complaints. An examination of these weekly progress reports indicated:

1. The Appellant continued to demonstrate an ability to complete all the activities as part of the program with respect to increased ankle pain.
2. The Appellant expressed optimum satisfaction with the work hardening program.
3. The Appellant was achieving the results he expected and the program was successful in teaching him to improve his effectiveness in dealing with injury problems.

The Appellant also testified that at the time he left the work hardening program he was unable to carry out the job of jack hammer operator. However, the Appellant also testified that when he left the job at [text deleted], he applied for a number of construction jobs and would have taken employment in the construction field if he had been offered such employment by a [text deleted] company. Working in the construction field is physically demanding and entails a heavy strength demand. The Appellant's testimony confirms that if he was physically capable of seeking employment in the construction field when he arrived in [text deleted] in the month of June 2005, he would have been physically capable of returning to work as a jack hammer operator at [text deleted] at that time.

It should be noted that the Appellant testified that he did not leave the return to work program because he was unable to do his pre-accident employment but because of a dispute he had with his employer. The Commission finds that this testimony supports MPIC's position that upon completion of the return to work program, the Appellant would have been physically capable of returning to his pre-accident employment.

When the Appellant arrived in [text deleted], he commenced receiving physiotherapy treatment from [Appellant's physiotherapist] in July 2005. [Appellant's physiotherapist] provided a written report to the Claimant Adviser indicating that he was unable to:

1. confirm that there was a causal connection between the Appellant's ankle complaints and the motor vehicle accident;
2. explain the sudden deterioration in the Appellant's condition after he left [text deleted] on July 11, 2005 and when he examined him on July 14, 2005.

The Commission notes that in [MPIC's doctor's] report dated October 26, 2005, she stated that the Appellant had successfully demonstrated his ability to return to his pre-motor vehicle accident occupation as of May 26, 2005 when he underwent an assessment of his ability to achieve this goal. She further reported that between May 26, 2005 and July 15, 2005, the Appellant apparently experienced deterioration in perceived musculoskeletal symptoms and in his psychological status. [MPIC's doctor] indicated she was unable to explain this deterioration on the basis of the motor vehicle collision and that factors other than the motor vehicle accident influenced the Appellant's presenting status to [Appellant's physiotherapist] on July 14, 2005.

The two [rehab clinic] reports and [MPIC's doctor's] review of these reports support MPIC's position that they correctly determined that the Appellant was physically capable of returning to work as of July 11, 2005. The two [rehab clinic] reports relating to the Appellant's work hardening program clearly demonstrated the Appellant was physically capable of returning to work as a jack hammer operator. [MPIC's doctor's] review of these reports confirmed that as of May 26, 2005 the Appellant was physically capable of returning to his work as a jack hammer operator. There was no medical evidence filed by the Claimant Adviser Officer to contradict the two [rehab clinic] reports and [MPIC's doctor's] review of these reports.

The Claimant Adviser Officer unsuccessfully attempted to rebut [MPIC's doctor's] medical opinion by filing a series of doctors' notes from various [text deleted] doctors which indicated

that the Appellant was unable to work. These notes were not doctors' narrative reports, but simply brief statements which indicated that for certain periods of time the Appellant was unable to work. These notes did not indicate the reasons why the Appellant was unable to work and nor did these reports indicate that the Appellant's absences from work were due to the motor vehicle accident. As a result, the Commission does not know whether these notes refer to the Appellant's inability to work because he had the flu (or sore throat, or a cold), or for any other reason not related to the motor vehicle accident. The Commission finds that these notes have no evidential value supporting the Appellant's position that he was physically incapable of returning to his pre-accident employment. It appears to the Commission it might have been more useful for the Claimant Adviser Office to have obtained the clinical notes of these various doctors in order to determine whether the Appellant's absences from work were related to the motor vehicle accident.

The Commission finds that:

1. the weekly summaries during the nine week work hardening program detail a series of responses from the Appellant indicating how satisfied he was with the work hardening program and contradicts the Appellant's criticism of the work hardening program;
2. the two [rehab clinic] reports demonstrate that the Appellant was physically capable of returning to his pre-accident employment as of July 11, 2005;
3. the medical opinion of [MPIC's doctor] that as of May 26, 2005, the Appellant was physically capable of returning to work was not challenged by any medical evidence;
4. the Appellant's testimony contradicts his position that he was physically incapable of returning to his pre-accident employment;

The onus was upon the Appellant to establish, on a balance of probabilities pursuant to Section 110(1)(a) of the Act that MPIC erred in terminating his IRI benefits on the grounds he was able to hold his pre-accident employment as of July 11, 2005. For the reasons set out herein, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that he was incapable of working as of July 11, 2005 due to the motor vehicle accident and that MPIC improperly terminated his IRI benefits. As a result the Appellant's appeal is dismissed and the Internal Review Officer's decision dated November 17, 2005 is confirmed.

Dated at Winnipeg this 15th day of December, 2009.

MEL MYERS, Q.C.

LEONA BARRETT

NEIL COHEN