

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-163**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Paul Johnston
Mr. Les Marks

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Ellery Strell;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman and Ms Alison Caldwell.

HEARING DATE: August 11 and 12, 2010

ISSUE(S): Entitlement to further Income Replacement Indemnity Benefits

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 PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant, [text deleted], has been involved in three separate motor vehicle accidents – on November 12, 2001, January 30, 2004 and January 22, 2007. The Appellant is appealing the following Internal Review Decisions with regards to the following issues:

1. Internal Review Decision dated August 1, 2003 with regard to her entitlement to income replacement indemnity ("IRI") benefits beyond April 12, 2002 as a result of the accident of November 12, 2001.

2. Internal Review Decision dated December 15, 2005 with regard to her entitlement to IRI benefits beyond October 24, 2004 as a result of the accident of January 30, 2004.
3. Internal Review Decision dated February 18, 2009 with regard to her entitlement to IRI benefits beyond July 31, 2007 as a result of the accident of January 22, 2007.

Facts and Background:

Accident of November 12, 2001 -

On November 12, 2001, the Appellant was driving eastbound on [text deleted] when her vehicle struck a curb on the passenger side and then knocked down a traffic light standard. As a result of this motor vehicle accident, the Appellant sustained bruising to her left hand, wrist and shoulder and experienced neck and lower back pain.

At the time of the accident, the Appellant was employed by [text deleted] as a casual worker and she was to start a job at [text deleted] on November 17, 2001. She was unable to return to her employment with [text deleted] following the accident or commence her employment with [text deleted] and thus qualified for IRI benefits.

The Appellant attended an independent medical examination with [Independent Doctor] on April 4, 2002. According to his report, the Appellant sustained soft tissue and musculoligamentous strain in multiple areas as a result of the accident of November 12, 2001. He also stated that the Appellant received bruising to the left hand as a result of this collision. [Independent Doctor] noted that the Appellant's recovery had been prolonged following the collision. He expected her injuries to have healed by approximately 12 weeks post-accident. [Independent Doctor] stated that, in his opinion, the Appellant's ongoing symptoms were not related to the motor vehicle collision. It was his opinion that she had "long since recovered" from the effects of the collision.

He also stated that the Appellant required no further treatment and that she would be able to perform all activities of daily living including meal preparation, light and heavy housecleaning, laundry activities and grocery shopping. [Independent Doctor] further stated that he expected no permanent impairment or sequelae from the collision.

In a letter dated April 11, 2002, MPIC's case manager wrote to the Appellant to advise her that based upon [Independent Doctor's] independent examination report, she was determined able to return to work as a homecare worker at [text deleted] and therefore her entitlement to IRI benefits ceased as of April 12, 2002. The Appellant's entitlement to IRI benefits arising from her position with [text deleted] also ceased as of April 12, 2002.

[Appellant's Neuropsychologist], [text deleted], provided a report to MPIC dated October 31, 2002 based upon his psychological review and meeting with the Appellant of September 11, 2002. [Appellant's Neuropsychologist] wrote that the Appellant presented with significant physical symptom focus that was complicated by [text deleted]. At the time that he saw her, [Appellant's Neuropsychologist] felt that she suffered from an Adjustment Disorder- related mood disturbance. [Appellant's Neuropsychologist] concluded that there was clearly a psychological overlay and contextual factors associated with the Appellant's accident. She had ongoing pain disorder. There was an accident relationship to this, but it was perpetuated by multiple factors, including inactivity, avoidance, fear and somatization. [Appellant's Neuropsychologist] concluded that this required very firm programming and teamwork to deal with.

[Appellant's Doctor #1] provided a report dated November 18, 2002 wherein she wrote that as of the motor vehicle accident of November 12, 2001 the Appellant was completely improved from

her previous accidents (accidents of 1994 and 1996) and was not using ongoing analgesics or other treatment. [Appellant's Doctor #1] concluded that her back pain was probably exacerbated and suggested that the Appellant see a psychologist for emotional treatment for motivation as suggested by [Appellant's Neuropsychologist].

The Appellant sought an Internal Review of the case manager's decision of April 11, 2002. In a decision dated August 1, 2003, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision that the Appellant ceased to be entitled to IRI benefits as of April 12, 2002.

In arriving at her decision, the Internal Review Officer relied upon [MPIC's Doctor], medical consultant to MPIC's Health Care Services Team, and his report dated July 17, 2003. In his report, [MPIC's Doctor] found that the Appellant did not have findings of significant functional limitations that could be found that were independent from pain-related limitations in motion. [MPIC's Doctor] noted that the Appellant had soft tissue injuries which, according to [Independent Doctor] and [Appellant's Doctor #2], were felt to have been present for a longer than expected period of time. Further he noted that it was [Appellant's Neuropsychologist's] opinion that the symptoms were prolonged due to an adjustment disorder and a pain disorder.

[MPIC's Doctor] found that the lack of independent objective physical findings would not allow him to conclude that the Appellant had a permanent or temporary impairment in function that would prevent her from returning to her pre-collision work environment. Additionally, [MPIC's Doctor] found that despite the psychological diagnosis provided, [Appellant's Neuropsychologist] did not indicate that the Appellant would be psychologically impaired from returning to work. [MPIC's Doctor] concluded that not only did the Appellant not have a

measurable impairment that would prevent her from returning to her work environment but that she would receive benefit from returning to a work environment in concert with further psychological and rehabilitative support.

The Internal Review Officer found that since the medical evidence on the Appellant's file indicated that the Appellant did not suffer a functional impairment that would prevent her from returning to work, she must confirm the case manager's decision regarding the Appellant's entitlement to IRI.

The Appellant has appealed this decision to the Commission. The issue which requires determination in regards to this appeal is whether the Appellant is entitled to further IRI benefits beyond April 12, 2002.

Accident of January 30, 2004 -

The Appellant was involved in a subsequent motor vehicle accident on January 30, 2004 when she lost control of her vehicle in a back lane and hit a pole. As a result of this motor vehicle accident, the Appellant sustained a sore low back, sore neck and a sore left shoulder.

The Appellant had returned to work as a cashier at a [text deleted] restaurant in August 2003 for approximately three months. This had been her first return to work following the accident of November 12, 2001. She had chosen not to return to home care as she felt that position was too strenuous for her. She quit the employment with [text deleted] due to the heavy lifting required in that position, which aggravated her low back pain. At the time of this accident, the Appellant and her husband were planning on opening a small [text deleted] restaurant. The restaurant had been scheduled to open on February 1, 2004, but the opening was delayed for one month due to

the injuries which the Appellant sustained in the January 30, 2004 motor vehicle accident. These injuries rendered the Appellant incapable of performing the essential duties of her job as an owner/operator of a small [text deleted] restaurant.

In a letter dated June 4, 2004, MPIC's case manager advised the Appellant that she qualified for IRI benefits as a non-earner with promised employment to have commenced February 1, 2004. As a non-earner, the Appellant was entitled to IRI benefits as per Section 85(1)(a) of the MPIC Act. The Appellant commenced working March 1, 2004 at a reduced capacity, performing only 40% of her duties and was thus entitled to top-up IRI benefits. A follow-up assessment was conducted with the Appellant on August 17, 2004 in order to determine the Appellant's functional abilities related to the performance of her job duties. That assessment determined that the Appellant was capable of managing approximately 67% of her duties as the owner/operator of the [text deleted] restaurant. A further follow-up assessment was conducted with the Appellant at her workplace on October 21, 2004. This assessment determined that the Appellant was capable of performing all of the duties of her job as an owner/operator of the [text deleted] restaurant as of October 21, 2004.

In a letter dated November 26, 2004, MPIC's case manager wrote to the Appellant to advise her that her entitlement to top-up IRI benefits would cease as of October 24, 2004 as she was now capable of performing 100% of her duties as an owner/operator of a [text deleted] restaurant. The Appellant sought an Internal Review of that decision.

[Appellant's Neuropsychologist] provided a further report dated January 7, 2005 wherein he noted that the Appellant was continuing to present with an under-treated Depressive Disorder and Pain Disorder. [Appellant's Neuropsychologist] further indicated in his report that the

information presented by the Appellant and her husband indicated that the motor vehicle accident of November 12, 2001 was the significant causative factor in her psychological difficulties. Although [Appellant's Neuropsychologist] did indicate that there were other significant non-motor vehicle accident related factors [text deleted] that were also contributing to the Appellant's current mood state. Based on his view of the Appellant, [Appellant's Neuropsychologist] opined that ". . . this woman unfortunately has an under-treated Depressive Disorder and Pain Disorder. She has attempted to return to work, which has been unsuccessful. I do not believe that she is able to return to her pre-accident employment as a home care aide, or at this point any job, given the combination of the Pain Disorder and Depressive Disorder".

The Appellant subsequently underwent an independent psychiatric examination with [Independent Psychiatrist]. In his report dated September 23, 2005, [Independent Psychiatrist] indicated that the Appellant was suffering with a major depression of moderate severity. In terms of her prognosis, [Independent Psychiatrist] felt that her depression was likely to resolve. He was unable to comment on her pain difficulties with regard to her back and shoulders. [Independent Psychiatrist] further indicated in his report that the Appellant attributed most of the pain in the back to the first accident of November 2001. [Independent Psychiatrist] opined that the Appellant's depression was a direct consequence of the pain she suffered. Furthermore, he indicated that the pain limited her capacity to work. He concluded that "From all the reports I have read, it appears that the injury she had suffered is a result of the first accident and is the cause of most of the pain in her back".

[MPIC's Psychologist], psychological consultant to MPIC's Health Care Services team subsequently reviewed the Appellant's file and provided a report dated October 24, 2005. In his report, [MPIC's Psychologist] opined that:

Based on the information reviewed in the claimant's medical file, it is the writer's opinion that there is insufficient information to indicate that the claimant would have been psychologically unable to work in her pre-accident vocation since the time of her income replacement indemnity ending as of April 12, 2002. As noted in [Appellant's Neuropsychologist's] report of June 7, 2004 and [Independent Psychiatrist's] recent report, the claimant was able to work at a [text deleted] restaurant as a cashier for approximately three months in 2003 and then was able to run a [text deleted] business for approximately one year (according to [Independent Psychiatrist's] report) beginning sometime in 2004. More recently, [Independent Psychiatrist] indicates that the claimant started to work again at approximately thirty hours per week in the spring of 2005. In the writer's opinion, this would contradict [Appellant's Neuropsychologist's] most recent report of January 7, 2005 where he indicates that the claimant is unable to return to any type of employment due to a combination of her pain disorder and depressive disorder.

Therefore, based on the information reviewed, it is evident to the writer that the claimant, since the time of her income replacement ending, has been working to varying degrees in light/sedentary type of jobs which would be equivalent to her pre-accident vocational activities.

In a decision dated December 15, 2005, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the medical information on the Appellant's file indicated that she was physically functionally capable of performing 100% of the job duties as a restaurant owner/operator. The medical information on the Appellant's file further indicated that she did not suffer a psychological impairment that would prevent her from performing 100% of her job duties as a restaurant owner/operator. As a result, the Internal Review Officer found that the Appellant was not entitled to IRI top-up payments beyond October 24, 2004 as she was physically and psychologically capable of performing the job duties of a restaurant owner/operator.

The Appellant has now appealed that decision to this Commission. The issue which arises on this appeal is whether the Appellant is entitled to further IRI top-up benefits beyond October 24, 2004 as a result of the accident of January 30, 2004.

Accident of January 22, 2007 -

The Appellant was involved in a subsequent motor vehicle accident on January 22, 2007 wherein she sustained injuries to her left knee, neck, upper and lower back and migraine headaches.

At the time of this accident, the Appellant had commenced employment as a kitchen helper with [text deleted], having just completed two weeks of training. As a result of the injuries sustained in this accident, she was not able to return to that employment and became entitled IRI benefits. The Appellant also reported that she still had some symptoms in her back from her previous motor vehicle accidents, which were then aggravated by the motor vehicle accident of January 22, 2007.

The Appellant subsequently attended a reconditioning program at [Rehab Facility]. Upon completion of the reconditioning program, [Rehab Facility] indicated that the Appellant met the job demands for the employment she held at the time of the accident, that being as a kitchen helper at [text deleted]. In a decision dated July 10, 2007, MPIC's case manager wrote to the Appellant to advise her that her IRI benefits would cease effective June 30, 2007 in accordance with Section 110(1)(a) of the MPIC Act. However, the Appellant was entitled to a temporary continuation of IRI benefits in accordance with Section 110(2)(a) of the MPIC Act, because the job that the Appellant had at the time of the accident was lost and no longer available. As a result she qualified for a temporary continuation of IRI benefits in accordance with Section 110(2)(a) for an addition 30 days until July 31, 2007 to allow her to find alternative employment.

The Appellant sought an Internal Review of that decision. In a decision dated February 18, 2009, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the evidence on

the Appellant's file indicated that she was functionally capable of performing the essential duties of her pre-accident employment as at July 31, 2007.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to IRI benefits beyond July 31, 2007.

Appellant's Submission:

Counsel for the Appellant submits that the Appellant is entitled to further IRI benefits from each of her motor vehicle accidents. He maintains that the motor vehicle accident of November 12, 2001 was responsible for a major change in the Appellant's functioning. Prior to this motor vehicle accident, the Appellant's degenerative changes in her spine were asymptomatic. Counsel for the Appellant claims that all of the evidence regarding the Appellant's pre-accident health demonstrated that her function was good. However, he argues that the accident of November 12, 2001 triggered her symptoms. Counsel for the Appellant maintains that the medical reports from the Appellant's caregivers support that her physical and psychological conditions are related to the motor vehicle accident and had their origin in the motor vehicle accident of November 12, 2001.

Prior to the motor vehicle accident of November 12, 2001, the Appellant's was functioning well. She had no difficulties with her day to day functioning and maintaining her household tasks, looking after her children and participating in her community and social events. Further, the Appellant was not suffering from any psychological condition prior to the motor vehicle accident. Although [text deleted], the Appellant did not display any signs of depression as a consequence of [text deleted]. However, the onset of her depression and chronic pain syndrome

was evidenced by early 2002 to the extent that her family physician referred her to [Appellant's Neuropsychologist] for assessment. Counsel for the Appellant argues that there was not any other triggering event which led to the decline in the Appellant's physical functioning and psychological functioning. In further support of his position, counsel for the Appellant relies on the reports of the Appellant's caregivers including:

- [Appellant's Neuropsychologist], [text deleted], when he explains that the consequences of this motor vehicle accident were more significant for [the Appellant] because of the contextual factors which may have predisposed her to a depression.
- [Appellant's Doctor #1], the Appellant's family physician, who advises that the Appellant had been suffering from chronic pain and depression since the motor vehicle accident of November 2001.
- [Independent Psychiatrist] whose diagnosis was clear that the Appellant's depression was caused by the pain brought on by the motor vehicle accident of November 2001.

Counsel for the Appellant submits that the evidence on the Appellant's file clearly demonstrates that the changes that occurred in the Appellant's life were as a result of the motor vehicle accident of November 12, 2001. Further he maintains that none of MPIC's consultants took into account the interplay between the Appellant's physical and psychological difficulties. Counsel for the Appellant argues that the Appellant never received a multi-disciplinary approach to her problems as was clearly outlined and recommended by [Appellant's Neuropsychologist]. Counsel for the Appellant claims that the lack of this follow-through perpetuated the Appellant's difficulties. Counsel for the Appellant submits that the Appellant should have been entitled to receive IRI benefits until a reconditioning/multi-disciplinary approach could have been implemented, since [MPIC's Doctor] agreed with the recommendation for a reconditioning

program. As a result, counsel for the Appellant submits that the Appellant should have been entitled to receive IRI benefits from the November 12, 2001 motor vehicle accident beyond April 12, 2002.

Counsel for the Appellant submits that after the second motor vehicle accident of January 30, 2004, the Appellant tried her best to get back to work. However, MPIC's efforts in assisting her were flawed. Counsel for the Appellant argues that the case manager put the Appellant in a work-hardening program even though that didn't work after the first motor vehicle accident. Again, even though [Appellant's Neuropsychologist] strongly recommended a comprehensive program, MPIC did not follow his recommendations. Counsel for the Appellant maintains that the Appellant has never been able to return to her original job which she held prior to the November 12, 2001 accident. However, the Appellant has made an extraordinary effort to get back to work as can be seen by the variety of positions which she has held throughout her claim. Counsel for the Appellant argues that the Appellant is a motivated individual who wants to get back to work. He maintains that the preponderance of medical evidence demonstrates that the Appellant never regained the ability to return to work as a homecare worker and therefore should be entitled to IRI benefits since April 12, 2002.

MPIC's Submission:

Counsel for MPIC argues that this case involves 3 separate motor vehicle accidents and the IRI benefits flowing from each of those accidents as separate and distinct events. With respect to the first motor vehicle accident, counsel for MPIC maintains that there was no evidence that the Appellant had a physical or psychological condition which prevented her from returning to work. Rather, he maintains that the Appellant was able to do the work that she held at the time of the motor vehicle accident. Counsel for MPIC relies on the report of [Independent Doctor] who felt

that the Appellant could work and had no ongoing impairments due to the motor vehicle accident and that she was fit for an immediate return to work. Further, counsel for MPIC submits that the Appellant was able to travel to [text deleted] and that by August 2003 she was at work at [text deleted]. He maintains that there was nothing preventing the Appellant from working as at April 12, 2002 and there is no evidence that she was unable to return to her employment.

With respect to the motor vehicle accident of January 30, 2004, counsel for MPIC maintains that there was no psychological reason why the Appellant could not return to her work at the [text deleted] restaurant. Rather, he maintains that the evidence establishes that the Appellant's difficulties at the time related more to her [text deleted], not motor vehicle accident-related injuries. Further, counsel for MPIC submits that the Appellant was working more than full-time hours, 65 hours plus per week running her own [text deleted] restaurant and in fact was working full-time prior to October 24, 2004. As a result, counsel for MPIC maintains that there is no entitlement to further top-up IRI benefits beyond October 24, 2004.

With respect to the motor vehicle accident of January 2007, counsel for MPIC maintains that there is no entitlement to IRI benefits beyond July 31, 2007. In support of his position he relies on the discharge report from [Rehab Facility] which advised that the Appellant could go back to work as a kitchen helper at [text deleted]. Additionally, [Independent Psychiatrist] was of the opinion that the Appellant was capable of light kitchen work as of June 2007. Counsel for MPIC maintains that there are no medical reports that the Appellant could not do the work as a kitchen helper as of July 31, 2007. Further, her employment history after that time was more consistent than before the motor vehicle accident.

Additionally, counsel for MPIC submits that the Appellant is not a credible, reliable, accurate historian. He submits that the Appellant has exaggerated her claim. Further, he maintains that the Commission should not rely on the medical reports from her caregivers that are based on her self-reports since her own self-report is so unreliable and questionable.

Counsel for MPIC submits that there is no evidence to support that the Appellant could not do the work that she was doing at the time of the third motor vehicle accident. He maintains that the Appellant has not met the onus to establish that she is entitled to further IRI benefits following the termination of those benefits on June 30, 2007. He argues that the Appellant has worked at all types of jobs since July 31, 2007 and there is simply no evidence that she could not have returned to work because of any accident related injuries.

Decision:

Upon 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 testimony of the Appellant and of her husband, the submissions of counsel on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant has not established an entitlement to further IRI benefits arising out of the accidents of November 12, 2001, January 30, 2004, or January 22, 2007.

Reasons for Decision:

With respect to the Appellant's claim for IRI benefits, we find that the Appellant's testimony and the evidence on her file are insufficient to support a claim for further IRI benefits. In particular:

1. With regards to the accident of November 12, 2001, the Commission finds that the medical evidence is insufficient to establish that the Appellant was unable to return to her pre-accident employment as of April 12, 2002.
2. With regards to the accident of January 30, 2004, we find that the Appellant is not entitled to further top-up IRI benefits beyond October 24, 2004. Rather, the evidence before the Commission establishes that the Appellant was clearly able to work at the [text deleted]. Her testimony was that she often worked in excess of 40 hours per week in running the [text deleted] restaurant and accordingly we find that there is no further entitlement to IRI benefits arising as a result of the accident of January 30, 2004.
3. With respect to the accident of January 22, 2007, we find that the medical evidence establishes that the Appellant was capable of returning to her pre-accident employment as a kitchen helper as of June 30, 2007. There was no medical evidence that the Appellant could not do the work that she was doing at the time of the motor vehicle accident beyond June 30, 2007. Further, the Appellant's own activities demonstrate that she was actively seeking employment in July of 2007 and was capable of maintaining employment as a dietary aide at [text deleted] from September 2007 to the present. Additionally, she was able to take on other casual positions and complete a nursing aid course in order to obtain further education required for other positions at [text deleted].

The Commission was not satisfied with the evidence provided by the Appellant or her husband with respect to the events surrounding her claims with MPIC. The Appellant's evidence was inconsistent at best. She was not a credible witness and was a very inaccurate historian of the events surrounding not only her claim, her work history, but also her personal life. Her husband was not able to provide any further insights into many of the events regarding the Appellant's employment history or his own. The inability of the Appellant to recall many significant events

leads us to question the reliability of her report as a whole. Further, it also leads the Commission to question the reliability of the reports provided by her medical caregivers. We found much of the evidence provided by the Appellant and her husband inconsistent and unsatisfactory. As a result, the Commission gave very little weight to the testimony of the Appellant. Additionally, where the Appellant's self-report was relied upon by her healthcare providers, that evidence is also questionable given the underlying unsatisfactory basis of the Appellant's self-report.

As a result, the Commission finds that the Appellant has failed to establish that she was unable to return to her various employments which she held throughout the course of her three claims arising from the accidents of November 12, 2001, January 30, 2004 and January 22, 2007. Accordingly, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, an entitlement to further IRI benefits as a result of any of these accidents.

Accordingly, the Appellant's appeal is dismissed and the Internal Review Decisions dated August 1, 2003, December 15, 2005 and February 18, 2009 are hereby confirmed.

Dated at Winnipeg this 4th day of October, 2010.

YVONNE TAVARES

PAUL JOHNSTON

LES MARKS