

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-83**

PANEL: Ms Laura Diamond, Chairperson
Mr. Trevor Anderson
Ms Leona Barrett

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

HEARING DATE: October 20, 2010

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits beyond July 6, 2003

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 was injured in a motor vehicle accident on August 15, 2002. As a result, she was in receipt of Personal Injury Protection Plan ("PIPP") benefits from MPIC, including Income Replacement Indemnity ("IRI") benefits.

At the time of the accident the Appellant was employed as a laundry attendant at [text deleted] on a full-time basis. In addition to that employment she also worked approximately 4½ hours a week as a sales clerk.

The Appellant's case manager wrote to her on July 14, 2003 indicating that as the Appellant had regained the functional capacity to perform her occupational duties, she would no longer be entitled to Income Replacement Indemnity as of July 6, 2003.

However, the Appellant continued to miss work at her employment due, she said, to swelling and back pain. She attended for further medical assessment and a review of this information was undertaken by MPIC's Health Care Services Team.

On December 9, 2004, the Appellant's case manager wrote to her again indicating that the medical information on file did not substantiate that the Appellant's symptoms after February 2003 were related to the motor vehicle accident, and the decision of July 14, 2003 remained unchanged.

The Appellant sought an Internal Review of her case manager's decision.

On May 14, 2008, an Internal Review Officer for MPIC reviewed the medical and psychological information on the Appellant's file. The Internal Review Officer concluded that the Appellant had chosen not to return to her pre-accident employment due to reasons unrelated to the motor vehicle accident and that she was employable and capable of carrying out the physical demands of her pre-accident employment. The case manager's decision was upheld.

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 her education and work history and explained that prior to the motor vehicle accident, in addition to working both a full-time and part-time job she was involved in recreational and social activities such as swimming, hiking and dance classes.

The Appellant referred to a position description of her job at [text deleted], and described her duties. The job involved sorting through bins of linen, pushing linen through rollers, reaching above her head to a conveyor belt to pull out wet linen and pushing or pulling bins of linen weighing approximately 400 pounds. She had to walk and stand throughout the entire shift, and the job also involved a lot of bending and twisting.

The Appellant described difficulties she had with an injury to her left ankle in a previous motor vehicle accident. This had required surgical repair and she was off work for about a year.

She returned to work at [text deleted] in 2000 and had been back at work for over a year before the second motor vehicle accident. At that time she was able to perform all her duties without modification and even took on her second job, part-time as a sales clerk.

The Appellant described the injuries and pain she suffered as a result of the second motor vehicle accident in 2002. She had back, right shoulder, hip and leg pain as well as swelling and sharp pains in her ankle. She saw her family doctor, [Appellant's Doctor], as well as a chiropractor and then physiotherapist for treatment. She was prescribed orthotics and at some points used a cane or crutches. The Appellant explained that any activity such as walking or swimming would

cause pain and also swelling in her right ankle. She reported frequent falls because she could not put much weight on her ankle and also because she compensated by using her left leg, throwing her balance off.

The Appellant's doctor referred her to [Appellant's Orthopaedic Surgeon], who had performed her left ankle surgery. He found no fracture, but detected an abnormality which required investigation. He recommended that she use an air splint.

The Appellant attended for a functional assessment with [Appellant's Physiotherapist]. The Appellant described the testing performed and her adjustment to the orthotics which [Appellant's Physiotherapist] prescribed as a result. [Appellant's Physiotherapist] indicated that the Appellant should be able to return to her full job duties within one week of having the orthotics and proper footwear she had recommended.

The Appellant also described the care she was getting from her chiropractor, [Appellant's Chiropractor #1].

While she was waiting for her custom orthotics, the Appellant took a week off work from July 7 to July 11, 2003, planning to return to full duties on July 14, 2003. However, her return to work was not successful. She was still in quite a bit of pain and found that the work made the pain worse. She could not stand on her feet for long hours because her back hurt and her ankle swelled and could not handle standing. She advised MPIC that she was unable to work due to her injuries. She continued to attend to see [Appellant's Doctor], as well as her chiropractor and [Appellant's Orthopaedic Surgeon]. MPIC also asked that she attend for an independent medical

exam with [Independent Doctor] and an independent psychological assessment with [Independent Psychologist].

The Appellant did not describe herself as unemployable. She believed that she could be gainfully employed, but that she required more of a light duty occupation and that her job as a laundry attendant at [text deleted] was too physically difficult for her to perform with her injuries. She believed that the job was prolonging her injury and her pain. The requirement to stand, pull, bend and twist, with no chance to sit down and take a rest, was preventing her healing. She continued to do rehabilitation exercises with a ball and an elastic band at home and tried to do some swimming. She also continued to look for a light duty job at [text deleted] and tried volunteering and taking computer courses. She sought assistance from an organization [text deleted] which helps people with disabilities to find jobs they would be able to handle, and, for a while, did find alternate sedentary employment through this agency.

In July of 2006, the Appellant was successful in finding a different job at [text deleted]. This job involved working in the food services department delivering food to the different floors. The Appellant explained that this job did not involve bending or pushing heavy carts. She did have to push carts with trays but they were not heavy. She had to walk to different locations throughout her shift, but the duties were quite flexible and she was able to take rests when she needed them.

Then, in 2008, the Appellant found another job in the [text deleted] which was even less physical. This job involved performing tube feedings, including mixing the recipes for the feedings. This job was much less physical.

In November 2009 the Appellant got another new job in the food services dietary office. This job was fairly sedentary, involving a lot of sitting and some standing. She continued to perform that job at the date of the hearing.

The Appellant also provided medical reports and assessments from [Appellant's Doctor], her chiropractors, [Appellant's Chiropractor #1] and [Appellant's Chiropractor #2], and [Appellant's Orthopaedic Surgeon]. [Appellant's Chiropractor #1] opined, on March 13, 2004 that although the Appellant was not totally disabled, a "return to work at the laundry will not help alleviate her pains in the long run". He recommended a retraining and re-education program.

[Appellant's Orthopaedic Surgeon], in a report dated August 25, 2005 indicated that the Appellant was "unable to perform her regular laundry duties – to avoid prolonged standing, walking, etc.". He indicated that working at a desk job was more suitable.

The Appellant also attended at [Independent Doctor's] office for an Independent Medical Examination. [Independent Doctor] reported on February 19, 2009. He did not recommend permanent disability status, but noted that the Appellant's prognosis for further resolution of pain complaints was poor. He did not believe that the Appellant had reached maximum medical improvement and recommended a low back stabilization and strengthening program, psychological referral, chronic pain education with a rehabilitation psychologist, dietetic referral, weight loss, chiropractic treatment and a gradual return to work. In his view, the Appellant was capable of light work capacity.

On April 26, 2004, [Appellant's Chiropractor #1] noted:

“From my recent conversations with [the Appellant] she has expressed interest in returning to work but in an area other than the laundry facilities. She feels that to return to those duties will likely initiate her back pains again. In my professional opinion I would have to agree with her concerns. Hence I am recommending that the following restrictions be placed on any duty that can be given to [the Appellant]. These restrictions include:

1. No repetitive lifting over 10 lbs.
2. No pushing, pulling, dragging, or carrying any loads
3. No repetitive lower back motions such as forward flexion or twisting
4. No overhead work that involves reaching
5. An opportunity to alternate between sitting and standing”

[Independent Psychologist] provided a report on May 7, 2004. He diagnosed a pain disorder associated with both a medical condition and psychological factors. He noted that there was some organic basis to the Appellant’s ongoing pain complaints but that psychological factors exacerbated her subjective experience of them. He noted that in the absence of any information indicating that the Appellant’s functioning was compromised prior to the motor vehicle accident; he was left to conclude that there was a cause and effect relationship between the Appellant’s difficulties and the accident.

In [Independent Psychologist’s] view the Appellant was gainfully employable but:

“...Psychologically speaking this woman firmly believes that her return to her previous occupation will be damaging to her foot and has already begun the process of seeking alternate employment, both within her current work place as well as independently. As such there is a clear physiological barrier here to returning to her previous occupation. [The Appellant’s] firmly entrenched beliefs with regards to her pain and the role that her job plays in exacerbating her pain are formidable barriers at this point in time to [the Appellant] returning to her pre motor vehicle accident job.”

[Independent Psychologist] went on to indicate that the Appellant “could possibly benefit from focused, short term cognitive of (sic) behavioural pain management counseling (sic)”.

Counsel for the Appellant addressed the issue of the Appellant's ability to return to her job as a laundry attendant between July 6, 2003 and July of 2006 when she found other employment at [text deleted]. He reviewed her attempts to return to work immediately following the motor vehicle accident and later attempts at the end of 2003 and the spring of 2004. These were unsuccessful. Her attempts to return to work caused flare-ups in the Appellant's condition.

When [Appellant's Physiotherapist] indicated that the Appellant could return to work with the assistance of orthotics, the Appellant ordered and waited for her orthotics, preparing for a trial return to work on July 14. However, even before she had received the new orthotics, the Appellant's case manager terminated her IRI benefits on July 6, 2003.

Then the Appellant found that an attempt to return to work caused a flare-up of her pain and symptoms. She saw her doctor regularly and communicated with her case manager. On September 17 she told her case manager she was having a lot of problems and intended to change jobs because she could not handle the work. Finally, on October 14th she stopped work.

Her chiropractor and family doctor documented pain in her hips, low back, lumbar, thoracic and cervical regions as well as headaches and dizziness and an aggravation of her symptoms when standing. The Appellant also went to [Hospital] Emergency Department to try and deal with her pain and saw [Appellant's Orthopaedic Surgeon].

Counsel submitted that the Appellant wanted to work and felt that she was employable. However, her testimony established that the laundry attendant job at [text deleted] was not a light to medium level job. In fact, it was closer to a heavy demand occupation or at least a medium level job, involving a lot of lifting, twisting, stretching and constant standing.

[Independent Psychologist], in a report dated December 10, 2008, clarified that the Appellant expressed a willingness to return to gainful employment but that her anxiety and fear with regards to her pain was a formidable barrier to returning to her pre-existing occupation and that the motor vehicle accident was at least indirectly responsible for these feelings and beliefs.

The Appellant's constant pain and difficulties in trying to work through these issues, caused and contributed to psychological repercussions and the development of a chronic pain condition. This condition was described by [Independent Psychologist], who recognized a causal connection between the chronic pain condition and the motor vehicle accident.

Counsel for the Appellant submitted that contrary to the opinion of [MPIC's Psychologist], the Appellant's inability to return to work was not an issue of personal choice but rather a physical and psychological inability to perform the work.

[Appellant's Chiropractor #1] and [Appellant's Orthopaedic Surgeon] had clearly set out the restrictions under which the Appellant could work, and it was not possible for the Appellant to comply with these restrictions in her job as a laundry attendant.

It was clear from the Appellant's efforts to find other, more sedentary work, as well as attempts at volunteer work and retraining, that the Appellant was doing what she could to rehabilitate herself and return to work, without the assistance that she needed from MPIC.

Counsel also pointed out that MPIC did not heed or attempt to implement any of the recommendations which [Independent Doctor] had made in his report in order to assist the Appellant in her return to work. Although a psychological assessment was performed by

[Independent Psychologist], MPIC did not provide the Appellant with any supportive psychological counselling. Nor did they provide her with chronic pain education with a rehabilitation psychologist, a dietetic referral or a graduated return to work plan following her initial attempt to return in July of 2003.

Counsel submitted that prior to the motor vehicle accident the Appellant, although overweight, was in good physical health and able to work at two jobs. The motor vehicle accident caused back and ankle problems and a pain disorder. Medical evidence was clear that the Appellant was unable to meet the physical demands of her medium to heavy job as a laundry attendant and her caregivers identified and recommended that she work at a light duty job. The Appellant's chronic pain disorder complicated her recovery from her injuries and MPIC failed to provide the needed supports in this area.

The Appellant had demonstrated a desire to return to work and, through continuing efforts found less physically demanding work at [text deleted] in 2006. However, her inability to work between July of 2003 and the time she returned to work in 2006 was caused by her motor vehicle accident injuries. Counsel submitted that the Appellant was entitled to receive IRI benefits from MPIC during this period.

Evidence and Submission for MPIC:

Counsel reviewed a number of reports which MPIC had provided, from [Appellant's Physiotherapist], [Independent Doctor], [Independent Psychologist], [MPIC's Doctor] and [MPIC's Psychologist].

As noted, [Appellant's Physiotherapist] reported that there was no permanent disability noted upon examination. She recommended customized footwear and proper arch supports to increase the Appellant's standing and walking tolerance and allow her to perform the critical standing and walking demands of her job. She indicated that within one week of having the orthotics and proper supportive footwear the client should be able to return to her full job duties.

[Independent Doctor] believed that the acute injuries that may have resulted from the Appellant's accident were expected to have healed, yet she had not reached maximum medical improvement. He found the Appellant to be capable of light work and suggested a gradual return to work over six weeks. He did note that the Appellant seemed to suffer from a chronic pain condition and might benefit from supportive counselling if recommended by a psychologist and chronic pain education with a rehabilitation psychologist.

[Independent Psychologist] noted that as a result of both physical and psychological factors the Appellant would find a return to her previous occupation of laundry attendant to be quite difficult and that the motor vehicle accident was at least indirectly responsible for her feelings and beliefs in this regard.

[MPIC's Doctor] reviewed the medical evidence on file, including the diagnosis of pain disorder. In her view, on a balance of probabilities, the ongoing difficulty in maintaining work was likely a combined effect of the co-existing conditions and the soft tissue right ankle condition occurring subsequent to the motor vehicle accident. However, she noted that [Independent Doctor] had found the Appellant capable of light work as well as a graduated re-entry over six weeks to her previous position.

[MPIC's Psychologist] reviewed the information on the Appellant's file from [Independent Doctor] and [Independent Psychologist]. [MPIC's Psychologist] was of the view that there was a probable cause-effect relationship between the Appellant's diagnosis of pain disorder as described by [Independent Psychologist] and the motor vehicle accident

However, as [Independent Psychologist] had stated that the Appellant was currently gainfully employable, [MPIC's Psychologist] was of the view that there was no indication on the file that the Appellant was unable to work as of October 15, 2003 from a psychological perspective and there was no physical impairment of function that would prevent the claimant from returning to her employment as a laundry attendant.

[MPIC's Psychologist] reviewed [Independent Psychologist's] report of December 10, 2008 and opined that there was:

“...no specific psychological impairment of functioning that would have prevented the claimant from returning to her employment as a laundry attendant and that it was her personal choice not to return to this position due to her pre-existing difficulties with this work place...”

Counsel for MPIC submitted that the issue was whether a physical or psychological impairment precluded the Appellant from returning to her pre-motor vehicle accident job as a laundry attendant.

Counsel submitted that the evidence established that the Appellant had the physical ability to do this job.

No diagnosis was ever provided as to what, if anything, was wrong with the Appellant's right ankle. However, in May of 2003, [Appellant's Physiotherapist] addressed the issues with the

Appellant's ankle by prescribing orthotics. Although her chiropractor noted that being overweight was adding to the Appellant's low back pain, an independent medical examination by [Independent Doctor] revealed that the Appellant could do light work.

Although the Appellant seemed to be of the view that her laundry job was a heavy job, according to the job duties analysis submitted, it was clear that this job involved light to medium level work, with the hardest part being constant standing and the sorting of wet sheets. Counsel submitted that this is closer to the light than to the medium range of difficulty and that the mild reduction of range of motion in the Appellant's foot and minimal to zero physical disability in her ankle, did not prevent her to return to this job or even a more demanding one.

Counsel referred to [MPIC's Doctor's] review of the file on November 10, 2004, which recognized that the Appellant's complaints resulted from a combination of several factors. The Appellant's obesity and de-conditioning must be recognized as causes of her lower back pain, which were not related to the motor vehicle accident. As a result, the restrictions her chiropractor imposed because of low back pain were not relevant to the motor vehicle accident.

Although the Appellant's ankle was a somewhat limiting factor, the prescribed orthotics addressed this issue.

When asked to address the differences in accommodation which the Appellant's new job might have when compared to her previous job, particularly in regard to the standing requirement, counsel for MPIC submitted that the Appellant's real complaint in the laundry job was regarding the inability to take breaks when she felt she needed them. Counsel submitted that this is more of a staffing, work environment problem than one having to do with the ability to do the job.

Had the laundry department provided the same breaks and buddy system accommodations which had been provided in her dietary department job, the Appellant would be able to work in the laundry.

Counsel also addressed the issue of the Appellant's psychological impairment. Although the Appellant had maintained that she was prepared to work, counsel for MPIC submitted that this was not probable, as the Appellant was of the view that she was not able to do the laundry job. However, it was submitted that this was a result of non-motor vehicle related reasons, such as existing employment conditions. Too many other variables, such as the possibility of secondary gain from IRI, fear of injury or concern about employment conditions may have played a role in the Appellant's psychological fear of working in the laundry. Many non-motor vehicle accident reasons, such as working conditions, poor self image or past trauma could have contributed to the Appellant's psychological impairment. Counsel did not agree that this was connected to the motor vehicle accident. [Independent Psychologist's] opinion expressed in his letter of December 10, 2008 that on a balance of probabilities it is fair to conclude that the motor vehicle accident was at least indirectly responsible for her feelings, is so vague, counsel submitted, as to be meaningless. Rather, MPIC continued to rely on the numerous reviews provided by [MPIC's Psychologist], who reiterated that although the Appellant did have a pain disorder connected to the accident, that did not mean that she could not work as there was no psychological reasons and no basis for her belief that she could not return to the laundry.

Counsel submitted that for these reasons the commission should uphold the decision of the Internal Review Officer that the Appellant was not entitled to IRI benefits after July 6, 2003.

Discussion:

MPIC Act:

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 onus is on the Appellant to show, on a balance of probabilities that the Internal Review Officer was in error in finding that she was able to return to her pre-accident employment by July 6, 2003. The panel has reviewed the evidence on the Appellant's file as well as her testimony at the hearing and the submissions of counsel.

The panel does not agree with counsel for MPIC that the Appellant's position in the laundry was a light or a light-to-medium job. In our view this job falls into the "medium" category of work, having regard to the Appellant's evidence and the job description document provided by [text deleted].

The panel has reviewed the restrictions set out by the Appellant's chiropractor, which included:

1. No repetitive lifting over 10 lbs.
2. No pushing, pulling, dragging, or carrying any loads
3. No repetitive lower back motions such as forward flexion or twisting
4. No overhead work that involves reaching
5. An opportunity to alternate between sitting and standing

Her chiropractor laid out these restrictions in April of 2004, having based them upon a review of his assessments and continuing care and treatment of the Appellant as a regular patient.

The panel finds that the Appellant was not able to perform many of her duties as a laundry attendant with these restrictions in place. While it is possible that the appellant might have been able to gradually gain the ability to do that job with the recommended accommodations and rehabilitation supports, these were not put into place. She was not even provided time to obtain the orthotics recommended by [Appellant's Physiotherapist] and adjust to them before MPIC required her to return to her duties, eliminating her IRI benefits.

The Appellant was not provided with the focused short-term cognitive behaviour pain management counselling as recommended by [Independent Psychologist] or the low back pain program, psychological referral and possible counselling, dietetic referral, chronic pain education or gradual return to work supports recommended by [Independent Doctor].

Unsuccessful attempts to return to work as a laundry attendant without these supports and accommodations in place and without respecting the restrictions imposed by [Appellant's Chiropractor #1] led to, in [Independent Psychologist's] view, the development of the Appellant's chronic pain disorder. Although [MPIC's Doctor] and [MPIC's Psychologist] did not believe that the Appellant was prevented from working due to this chronic pain disorder, they did not disagree with [Independent Psychologist] that it was caused by the motor vehicle accident.

The panel agrees with both the Appellant's counsel and counsel for MPIC that the Appellant does have the ability to be gainfully employed. If MPIC had provided the recommended rehabilitation supports and if the employer had provided some accommodations, this might have been possible. However, we find that without these supports, the Appellant was not able to work

as a laundry attendant following her termination of IRI benefits on July 6, 2003. The combination of her back and ankle pain, the chronic pain disorder which developed, the restrictions placed upon her work and the medium demands nature of the job as a laundry attendant prevented the Appellant from performing her pre-motor vehicle accident duties. As such, we find that she was entitled to IRI benefits between July 2003 and July 2006, less deductions for amounts earned.

Accordingly, the Appellant's appeal is allowed and the decision of the Internal Review Officer dated May 14, 2008 is overturned. The question of the calculation of IRI benefits and/or IRI top-up to which the Appellant will be entitled is referred back to the Appellant's case manager for calculation. Interest upon the amounts due shall be owed to the Appellant, and the Commission will retain jurisdiction in the event that the parties are not able to calculate the appropriate amounts owed.

Dated at Winnipeg this 13th day of December, 2010.

LAURA DIAMOND

TREVOR ANDERSON

LEONA BARRETT