

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-111**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Danielle Robinson.

HEARING DATE: July 6, 2010

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits
beyond April 15, 2009.

RELEVANT SECTIONS: Section 110(1)(c) 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], was involved in a motor vehicle accident on April 13, 2008. As a result of that accident, the Appellant sustained soft tissue injuries to her neck, back and shoulders, dental injuries and post-concussion symptoms including headaches, dizziness and fatigue. Due to those injuries the Appellant became entitled to Personal Injury Protection Plan ("PIPP") benefits in accordance with Part 2 of the MPIC Act.

At the time of the accident, the Appellant was employed as an assistant art director and dresser for films and theatre productions. As the Appellant was unable to return to her employment after

the motor vehicle accident due to her motor vehicle accident-related injuries, she became entitled to income replacement indemnity (“IRI”) benefits pursuant to Section 83(1)(a) of the MPIC Act.

On August 11, 2008, the Appellant was referred to the [Rehabilitation (Rehab) Clinic] for a multi-disciplinary assessment. In a report dated August 19, 2008, [Rehab Clinic] recommended that the Appellant undergo an eight week modified work hardening program in order to gradually allow the Appellant to accommodate to increasing physical demands in a rehab setting. The [Rehab Clinic] report also recommended an acupuncture and/or dry needle technique trial, continuation of ongoing chiropractic treatments and a multi-cervical strengthening program. The Appellant withdrew from the program at [Rehab Clinic] on September 9, 2008 due to her dissatisfaction with the work hardening program.

On the 181st day following the accident, a determination of employment was completed pursuant to section 106 of the MPIC Act. The Appellant’s 180-day determination of employment was that of “Support Occupations in Motion Pictures, Broadcasting and the Performing Arts”.

On November 11, 2008, [Appellant’s Doctor #1] submitted a report to MPIC advising as follows:

Ongoing diagnosis of the injury sustained in the above MVA for [the Appellant] is mechanical and myofascial neck pain. She does also have chronic symptoms of headaches, balance problems, dizziness, and tingling in her face and etiology of this I’m not sure of.

Objectively she has tenderness of the trapezius muscles bilaterally and the cervical spine but close to full range of motion in the cervical spine. Gross neurological exam is unremarkable. An MRI of the brain was normal. An MRI of the cervical spine did not show any significant pathology specifically no spinal cord or nerve root compression.

...

The patient is capable of returning to work but should have a restriction with respect to mainly lifting not more than 10 pounds. I do believe she can do most other duties based on objective evidence.

On April 15, 2009, the Appellant advised her case manager that she was returning to work on April 16, 2009. On April 21, 2009, the Appellant left a message for her case manager advising that she was working her full hours and had not missed any time from work. On April 23, 2009, MPIC's case manager issued a decision advising the Appellant that as she had returned to her employment at full hours on April 16, 2009, her entitlement to IRI ended as of April 15, 2009.

On April 27, 2009, the Appellant contacted her case manager to advise that she had not been able to continue with the employment as the work had become too strenuous for her. She was working as a dresser for the [text deleted]. The position required moving props around, attending to costumes, including laundry, ironing, alterations and maintenance of costumes. She was required to carry a large bundle of costumes or manoeuvre a large wardrobe rack. During an actual performance she must work very intensively as she was responsible for costume changes. She has to work extremely quickly and sometimes in the dark. She was required to gather all of her actor's pieces and have them organized in a particular way. She found the long days too demanding, the set was too loud, she was becoming anxious on the set and was having difficulty sleeping. She asked for Wednesday, April 22nd off, as she needed a day to rest and recuperate and she only wanted to do "show calls". Her business agent advised that the employer was unable to accommodate her request for a day off or for show calls only. She was told to return her swipe card and her running notes and her employment on that production was terminated.

The Appellant's file was subsequently referred to MPIC's Health Care Services Team for an opinion as to whether the Appellant was entirely or substantially unable to hold her determined occupation as a support occupation in the motion picture, broadcasting and performing arts. In

an interdepartmental memorandum dated May 1, 2009, [MPIC's Doctor], [text deleted], opined that the medical evidence did not indicate that the Appellant was noted to have a physical impairment of function arising from the incident in question that would prevent her from performing her permanent position as a support occupation person for motion picture, broadcasting and performing arts. [MPIC's Doctor] further noted that based on information indicating the Appellant's symptoms arising from the incident in question were in keeping with a soft tissue injury, as well as information relating to the amount of supervised care that she was provided with, it was not medically probable that the Appellant developed a permanent impairment of function that would negatively affect her ability to perform gainful employment in the future.

As a result of the review completed by [MPIC's Doctor], the Appellant was sent a subsequent decision letter on May 11, 2009, again advising her that she was not entitled to IRI benefits beyond April 15, 2009. The Appellant sought an Internal Review of this decision.

In a decision dated August 13, 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 weight of evidence on the Appellant's file supported the position that she was able to perform the essential duties of her determined employment by April 16, 2009. The Internal Review Officer found that it was the Appellant's behaviour/attitude that was preventing her from finding work.

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 April 15, 2009.

Appellant's Submission:

The Appellant submits that she was unable to return to her pre-accident employment as of April 15, 2009. She argues that her pain complaints were genuine and precluded her return to work on a full-time basis in April 2009. Additionally, her headaches are disabling, causing her to be bedridden and unable to perform her usual activities. Also, she continues to experience dizziness, imbalance, nausea and fatigue since the accident, all of which prevent her from returning to her pre-accident employment.

The Appellant maintains that she developed post-concussion syndrome as a result of the motor vehicle accident of April 13, 2008, despite not being rendered unconscious following the accident. All of her symptoms correlate to post-concussion syndrome and her treating caregivers confirm the diagnosis. In this regard, she relies on the opinions and diagnoses provided by [Appellant's Doctor #2], her attending family physician, [Appellant's Neurologist], and [Appellant's Neuropsychologist], all of whom have had the opportunity of personally examining her and reviewing her history and who all confirm the diagnosis of post-concussion syndrome.

The Appellant maintains that her job as a support worker in film and theatre is both physically and mentally demanding. She maintains that whether she works as a set decorator, an assistant art director or a dresser, she is required to lift more than 10 pounds, contrary to the advice of [Appellant's Doctor #1] set out in his report of November 11, 2008. As a set decorator she has to be able to drive a one ton truck and pick up rentals, including furniture and props which usually weigh more than 10 pounds. As a dresser, the costumes which she is required to handle and the wardrobe racks will often weigh more than 10 pounds. With respect to her mental functioning, she advises that she works very intensively during an actual performance. During this time she is involved with costume changes and must work extremely quickly, sometimes in

the dark. Further, she must be extremely organized and alert in order to handle all of the costume changes. Her position as an assistant art director requires a lot of concentration to determine the required set locations and props for any given production. Although the Appellant concedes that she could probably work on a part-time basis, there is no part-time work available for her either in film or theatre.

The Appellant tried returning to work in April 2009, but she could not handle the demands of her job including lifting more than 10 pounds and the long hours. Further the combination of loud music, quick costume changes, pushing and pulling, all exacerbate her condition and she is unable to physically handle the demands of a position as a dresser. The Appellant maintains that part-time hours were not available either with film or with the theatre. As a result, she was unable to return to her employment.

The Appellant also relies on the report of [Appellant's Neuropsychologist] dated February 23, 2010. In his report, [Appellant's Neuropsychologist] concludes as follows:

1) Neuropsychological conditions: Yes, [the Appellant] does have evidence of cognitive difficulties. These were in nonverbal or visual forms of attention/concentration, and memory, as well as a few of her visual spatial skills. (In addition she had a mild difficulty in one form of auditory attention and mild slowness in her right hand's fine motor coordination). In contrast, she had been functional in verbal types of skills, such as verbal intellect, verbal reasoning, etc.

In response to your question on the relationship to the MVA, yes [the Appellant's] current difficulties are felt to have their origin in her MVA. You asked for the evidence for this, and the rationale is as follows:

- a. Her difficulties are not from a lack of effort, since [the Appellant] has put forth good effort based on validity testing and observations
- b. Her difficulties are not felt to be premorbid, both in light of her level of education, as well as the fact that verbal types of functions are normal.
- c. Her cognitive difficulties are not felt to be secondary to a clinical depression, or anxiety, etc,

- d. Although her deficits are generally of a nonverbal or visual nature, these do not appear simply due to a problem with visual acuity, since [the Appellant's] performance was normal on a number of other visually based tests, including reading relatively fine print, and searching for specific symbols across a page. However I am speculating here that they are related to her vestibular symptoms which can be exacerbated by complex visual stimuli, similar to [the Appellant's] report that watching cars pass by at a red light can trigger dizziness. This is outlined in point #f, below.
- e. The fact that her difficulties are so specific to nonverbal functions does certainly at minimum suggest they have a physical or organic basis. We would not expect a person to have several nonverbal cognitive deficits without a specific etiology.
- f. However I certainly recognize that [the Appellant] did not have a documented loss of consciousness and that her neuroimaging has been normal. In her particular case I am speculating that her cognitive difficulties might be secondary to the vestibular symptoms that she is describing, particularly in light of her vestibular therapist having noted some problems in visual scanning in her June 2008 report. This is also a possibility since [the Appellant] was reporting nausea in her testing here (although she had felt this was related to fatigue). I wonder if tests that are visually complex had a distracting effect on her. (For this to be happening, it would not matter if her vestibular symptoms are cervicogenic or from a vestibular concussion.) Thus, if [the Appellant's] vestibular symptoms can be improved, it is certainly also possible that her selected cognitive difficulties may improve as well. (Please also see my Comments section in her Medical Records portion of the report).

Based on [Appellant's Neuropsychologist's] report, the Appellant argues that her symptoms are genuine, they prevent her from holding the employment she held prior to the motor vehicle accident of April 13, 2008, and therefore she is entitled to ongoing IRI benefits beyond April 15, 2009.

MPIC's Submission:

Counsel for MPIC submits that the Appellant has not established that her symptoms are related to the motor vehicle accident and that her motor vehicle accident-related injuries prevent her from holding the determined employment. Counsel for MPIC maintains that:

1. there is no medical evidence that the Appellant cannot cognitively do the determined employment; and

2. there is no evidence that the Appellant is unable to physically hold the determined employment.

Relying upon [Appellant's Neuropsychologist's] of February 23, 2010 report, and [MPIC's Psychologist's] subsequent review of that report, she contends that the Appellant's cognitive difficulties are in the mild to moderately below average range and would not, in all probability, impact her day to day functioning. She argues that there are no cognitive or psychological barriers to the Appellant performing the essential duties of her determined employment.

Counsel for MPIC submits that the Appellant's main complaints are physical in nature, including imbalance, dizziness, nausea and fatigue. However, the etiology of these symptoms has not been established. She contends that the medical evidence on the Appellant's file does not establish that these symptoms are related to the accident and further does not establish that the Appellant cannot physically perform the essential duties of her determined employment. Accordingly, counsel for MPIC submits that neither the Appellant's cognitive deficiencies, nor her physical complaints prevent her from working. Counsel for MPIC concludes that without establishing that these symptoms are connected to the accident, there is no further entitlement to IRI benefits.

Decision:

Upon a careful review of all of the oral and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that the Appellant's IRI benefits should be reinstated effective April 16, 2009.

Reasons for Decision:

Upon a review of all of the evidence before it, the Commission finds that the termination of the Appellant's IRI benefits as of April 15, 2009 was premature as there was insufficient evidence before the case manager regarding the Appellant's ability to work on a full-time basis. The Appellant attempted a return to work on April 16, 2009, but by April 27, 2009 she had advised her case manager that the return to work was unsuccessful. The Commission accepts the testimony of the Appellant and found her to be a credible and reliable witness. As such, the Commission accepts the Appellant's evidence that she was unable to hold her determined employment as of April 16, 2009. We find that the Appellant's determined employment is both physically and mentally demanding and we accept the Appellant's testimony that she was unable to handle that employment and continue with that employment beyond April 21, 2009.

The Commission also finds that the Appellant's post-concussion symptoms are related to the motor vehicle accident of April 13, 2008. In that regard, we find that the medical evidence on the Appellant's file is consistent and does establish a link between her symptoms and the motor vehicle accident of April 13, 2008. The Appellant's early complaints led to a diagnosis of post-concussion during an emergency room visit on April 17, 2008. Her family physician, [Appellant's Doctor #2] also rendered a "post-concussion syndrome diagnosis" on April 25, 2008. Therefore we find that there is a temporal relationship between the Appellant's post-concussion syndrome and the motor vehicle accident. Additionally, the Commission relies on [Appellant's Neuropsychologist's] report dated February 23, 2010 and accepts his opinion that the Appellant's current difficulties have their origin in the motor vehicle accident and his diagnosis of the Appellant's symptoms as post-concussive syndrome.

Accordingly, the Commission finds that the Appellant's IRI benefits shall be reinstated effective April 16, 2009 and shall continue until such time as terminated in accordance with the MPIC Act. Interest in accordance with Section 163 of the MPIC Act shall be added to any amount due and owing to the Appellant.

Accordingly, the Appellant's appeal is allowed and the Internal Review Decision dated August 13, 2009 is therefore rescinded.

Dated at Winnipeg this 27th day of August, 2010

YVONNE TAVARES

NEIL COHEN

PAUL JOHNSTON