

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-95**

PANEL: Ms Yvonne Tavares, Chairperson
Dr. Sheldon Claman
Ms Deborah Stewart

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

HEARING DATE: July 27, 2011

ISSUE(S): Entitlement to Income Replacement Indemnity benefits
beyond October 31, 2009.

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], was involved in a motor vehicle accident on June 8, 2009. The Appellant was attempting to pass a gravel truck on its left when it turned and collided with the right front fender of the Appellant's vehicle, causing his vehicle to spin and damaging the passenger side of the Appellant's vehicle. As a result of this accident, the Appellant complained of headaches and dizziness and neck and back injuries. Due to the bodily injuries which the Appellant sustained in the motor vehicle accident, he 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 a salesperson with [text deleted]. Due to the injuries which the Appellant sustained in the accident, he was unable to perform his job duties as a salesperson and therefore he became entitled to income replacement indemnity (“IRI”) benefits.

In a letter dated November 2, 2009, MPIC’s case manager wrote to the Appellant to advise that his entitlement to IRI benefits would cease as of October 31, 2009 pursuant to Section 110(1)(a) of the MPIC Act. This decision was based upon the Appellant’s completion of the reconditioning program at [Rehabilitation (Rehab) Facility] and [Rehab Facility’s] work hardening program discharge report which indicated that the Appellant met the physical demands of his job as a salesperson. As a result, the case manager found that the Appellant had the ability to complete his job duties and his entitlement to IRI benefits was terminated pursuant to Section 110(1)(a) of the MPIC Act.

The Appellant sought an Internal Review of that decision. In a decision dated May 10, 2010, the Internal Review Officer confirmed the case manager’s decision and dismissed the Appellant’s Application for Review. The Internal Review Officer found that the Appellant was no longer entitled to IRI benefits as he was not suffering an impairment of function related to the accident that would prevent him from performing his pre-accident work as a salesperson.

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 October 31, 2009.

Appellant's Submission:

The Appellant submits that he was unable to return to work as a salesperson on October 31, 2009 and has been unable to return to his pre-accident employment at any time since the motor vehicle accident. He contends that despite his pre-existing back condition, he was very functional prior to the motor vehicle accident. He maintains that his back condition was aggravated by the motor vehicle accident. Since the motor vehicle accident, he has not been able to do many of the activities which he did prior to the accident. He argues that prior to the motor vehicle accident he was active – he could walk, drive, sleep normally, complete the yard work and home maintenance that was required and assist his wife with their [text deleted] business. Since the motor vehicle accident, he has difficulty sitting or walking for any length of time, he doesn't sleep longer than 2½ hours and he no longer does any of the yard work/yard maintenance which he did prior to the accident.

The Appellant claims that the work hardening program at [Rehab Facility] was not successful. He contends that the program did him more harm than good – the stress of the [Rehab Facility] program worsened his condition. The program was too extensive and rigorous for his condition, which further aggravated his back. He maintains that his complaints were not acknowledged by the [Rehab Facility] staff and after the first week in the program, he was in more pain and discomfort than when he started. He argues that his condition did not improve with the rehabilitation program at [Rehab Facility]. He maintains that a lot of the exercises were modified because of his pain and that the exercises, especially the stairs, took him a long time to complete. As a result, he submits that the [Rehab Facility] discharge report is flawed and, in fact, he did not attain the physical capacity to hold his pre-accident employment.

With respect to his use of medications prior to the motor vehicle accident, the Appellant maintains that although he did take Percocet and Flexeril before the motor vehicle accident for occasional back pain, his use of those medications has increased significantly following the motor vehicle accident. Lastly in support of his position, the Appellant relies upon the reports from his caregivers, who agree that he is unable to return to work. Specifically, the Appellant relies upon the following reports:

1. Report dated June 11, 2010 from [Appellant's Doctor #1], who states that: *“My impression, which is consistent with his CT scan findings, is that there was disc injury superimposed on the pre-existing narrow spinal canal (developmental) that resulted in the radiculopathy. The residual low back pain would not be related to the developmentally narrow canal. These symptoms could be facet in origin. There is underlying facet arthropathy, which might not have been symptomatic until exacerbated in the motor vehicle collision”.*
2. Report dated November 25, 2010 from [Appellant's Doctor #2], who states that: *“This letter was requested by [the Appellant] for his MPI appeal. [The Appellant] has been a patient of mine for many years. I treated [the Appellant] after his car accident for various injuries. Early in September 2009 we had discussed having him attend a rehabilitation program. At that point he was having ongoing problems with his lower back related to his car accident along with neck and middle back pain. He even stated that he could not get to his appointments without stopping his car to get out and move around up to 3 times. [The Appellant] returned to the clinic on November 12, 2009 after completing his rehab program. At this point he was in significantly more pain than before attending his rehabilitation program. Since the end of his claim, [the Appellant] has required ongoing care which at this point has been at a higher frequency than before his accident.”*
3. Report dated November 26, 2010 from [Appellant's Doctor #3], who states that: *“I have previously documented earlier this year with MPI on a letter dated March 4, 2010, [the Appellant] is unable to be employed due to the motor vehicle accident. He continues to have complaints of neck and back pain and is seeing a therapist in this regard. I continue to provide him with analgesic medication to help him in this regard. I have not done a recent physical evaluation of [the Appellant's] neck and back problems. These have been well documented in the past.*

I have known [the Appellant] for the past 27 years as a patient. For the vast majority of this time period, he has been gainfully employed. He also commented on numerous occasions about doing work around his house and property prior to the accident. It should also be noted that [the Appellant] did have a pre-existing back condition prior to this accident for which I was providing him medication. This has been previously well documented. However, at this point in time he

continues to have pain and discomfort in his neck and back. This pain and discomfort have prevented him from being employed. I believe that the accident of June 12, 2009 aggravated his pre-existing condition to the point where he could no longer be employed. As mentioned above, I do not have any recent objective medical evidence. However I have noted that this has been previously provided to MPI with letters from specialists and also tests.”

4. Report dated December 20, 2010 from [Appellant’s Doctor #4], who comments that: *“The patient continues to be unable to do his work secondary to a back injury that was suffered in a motor vehicle accident. . . .*

The patient continues to have low back pain as well as some mid and neck pain, and he will get a burning pain into his legs with sitting prolonged, sleeping more than 2½ hours, or fast walking. He did not have any pain prior to the accident so even though he has pre-existing narrowing of the spinal canal and some degenerative change, he had no symptoms present until the injury from the accident.

Relying upon all of the foregoing, the Appellant argues that the Internal Review Decision was wrong, that his injuries are related to the motor vehicle accident and prevent him from returning to work. As a result, he submits that his appeal should be allowed and his IRI benefits should be reinstated.

MPIC’s Submission:

Counsel for MPIC submits that the Appellant’s complaints after the motor vehicle accident are the same as prior to the accident and that he continues to suffer from the same chronic symptoms as he did prior to the motor vehicle accident. Counsel for MPIC argues that prior to the accident the Appellant had serious neck and back complaints for which he was receiving significant medications, including Percocet and Flexeril. She contends that the Appellant was not seriously injured in the motor vehicle accident and that any flare up of his symptoms due to the accident has long since resolved.

Counsel for MPIC maintains that the Appellant was able to hold his pre-accident employment as of October 31, 2009. In support of her position, counsel for MPIC relies upon the discharge report from the [the Rehab Facility] work hardening program which concluded that the Appellant had attained a medium strength level and therefore he could return to work as an industrial salesperson. She argues that the [Rehab Facility] discharge report should be preferred to the reports from the Appellant's caregivers.

Further, counsel for MPIC submits that the opinions of [MPIC's Doctor] of MPIC's Health Care Services team, should be preferred to those of the Appellant's treating caregivers. In support of her position she relies upon the opinion of [MPIC's Doctor] set out in his report dated April 14, 2010, wherein [MPIC's Doctor] commented that:

I was unable to extract information from the file that contradicts the opinions rendered by the health care professionals at [Rehab Facility]. In other words, the other health care professionals that indicate the [the Appellant] might have difficulties performing his work duties appear to base their opinion on subjective complaints in the absence of objective physical findings indicating he is physically not able to perform the required demands of his occupation as a result of a medical condition arising from the incident in question.

...

Based on my review of [the Appellant's] file, it is my opinion the medical evidence does not indicate he was noted to have objective evidence of a physical impairment of function that developed secondary to the incident in question that prevented him from performing the required demands of his pre-accident employment as of October 30, 2009, if he so desired.

It is my opinion [the Appellant's] reluctance to return to work is a byproduct of symptoms and that the opinions put forth by the health care professionals involved in the care relating to his inability to work are based on his reported symptoms and functional limitations and not on objective evidence of a physical impairment.

As a result, counsel for MPIC submits that there is no reason related to the accident that the Appellant cannot return to work as a salesperson. Therefore she argues that his appeal should be dismissed and the Internal Review Decision of May 10, 2010 should be confirmed.

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 were properly terminated on October 31, 2009, pursuant to Section 110(1)(a) of the MPIC Act.

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 October 31, 2009 was appropriate. The Commission finds that the [the Rehab Facility] work hardening program discharge report of November 2, 2009 is determinative of the Appellant's ability to return to work at a medium strength level demand position as of that date. We find that [Rehab Facility] was in the best position to assess the Appellant's functional abilities and his employability at that time. Further, the discharge report represents the best objective evidence of the Appellant's functional abilities as of October 31, 2009.

Additionally, the Appellant did not satisfy the onus of proof to establish that his ongoing condition was caused by or enhanced by the motor vehicle accident. The Commission finds that, on the balance of probabilities, it is more likely than not, that his ongoing condition is related to his pre-existing condition and progressive degeneration of that condition. The evidence on the Appellant's file was insufficient to establish a causal link to the motor vehicle accident. As a result, the Commission finds that the Appellant was not prevented from returning to work due to a condition arising from the motor vehicle accident of June 8, 2009.

Accordingly, the Commission finds that the Appellant is not entitled to further IRI benefits. As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated May 10, 2010 is confirmed.

Dated at Winnipeg this 18th day of October, 2011.

YVONNE TAVARES

DR. SHELDON CLAMAN

DEBORAH STEWART