

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-087**

PANEL: Ms Laura Diamond, Chairperson
Ms Deborah Stewart
Mr. Les Marks

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

HEARING DATE: February 28, 2012

ISSUE(S): 1. Whether the Appellant is entitled to further Personal
Injury Protection Plan benefits.
2. Whether the Appellant is required to reimburse
Manitoba Public Insurance Corporation in accordance with
Section 189(1) of the Act

RELEVANT SECTIONS: Section 149, 160(a), and 189(1) 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

The Appellant was a pedestrian struck by a motor vehicle accident. As a result of the accident she applied for and received Personal Injury Protection Plan ("PIPP") benefits including Income Replacement Indemnity ("IRI"), personal care and medical benefits.

In support of her claim, the Appellant provided MPIC with information concerning the extent of her injuries and the effect on her ability to function. A Functional Capacity Evaluation (“FCE”) was also scheduled, and following some delays, finally occurred on May 6 and 7, 2008.

The Appellant’s case manager wrote to her on June 12, 2008 and advised that there were inconsistencies found between the information the Appellant provided regarding her injuries and her ability to function and other information obtained by MPIC. The Appellant’s reports were not consistent with the results of the FCE, observations by the Appellant’s caregivers at the [rehab clinic], or videotaped surveillance evidence of her activities. The case manager noted all of these inconsistencies and concluded that the Appellant had contravened Section 160(a) and Section 149 of the MPIC Act for her failure to advise MPIC of changes in her circumstances which would affect her entitlement to benefits. By providing false and inaccurate information to MPIC concerning the extent of her injuries and her functional abilities, the Appellant was found to be in contravention of those Sections of the Act. Her entitlement to benefits was terminated.

In addition to terminating her entitlement to benefits, the Appellant’s case manager found that the Appellant was responsible for reimbursing MPIC for an excess payment of IRI benefits she had received as a result of her failure to notify and provide accurate information concerning her functional ability, in accordance with Section 189 (1) of the MPIC act. The case manager found that the Appellant was responsible for reimbursing MPIC the amount of \$2,242.93, which was the amount of excess monies paid to her since May 6, 2008.

The Appellant sought an Internal Review of this decision.

On August 22, 2008, an Internal Review Officer for MPIC upheld the case manager's decision. The Internal Review Officer reviewed the reports of her injuries and capacity which the Appellant had provided to MPIC. She also reviewed the reports from the FCE and videotape surveillance of the Appellant's activities on several days around that time period.

The Internal Review Officer noted, for example, that in spite of her description of extensive injuries, and her wearing of a walking cast to the FCE, the Appellant was observed being active, walking for long distances and wearing two inch heeled shoes instead of her walking cast, when out of the clinic.

The Internal Review Officer also considered reports from MPIC's Health Care Services Team who had reviewed earlier videotape surveillance from 2006 and 2007 and noted that the Appellant did not exhibit any functional deficits while under surveillance that might be a by-product of a medical condition causally related to the accident. This included performing activities while showing no signs of shoulder impairment, in spite of a permanent impairment assessment of her shoulder.

The Internal Review Officer concluded that it was quite clear that the Appellant had provided MPIC with false and inaccurate information in contravention of Section 160(a) of the MPIC Act and had also failed to advise MPIC of changes in her circumstances which would affect her entitlement to benefits in contravention of Section 149 of the MPIC Act. The decision of the Appellant's case manager 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 the pain and difficulties which she had suffered following the accident and noted that she had also fractured her foot as a result of a fall in October of 2007. This resulted in her being in a cast boot and using crutches for a long time.

She described issues such as falling off a chair while trying to change a light bulb and trouble navigating snow outside her home. In order to manage the pain, the Appellant testified that she took Percocet for over three weeks. She testified that this included the period when she went for the FCE. She testified that that time period is “like a blank” because she was not used to taking heavy prescriptions and she was “right out of it”. As a result, she does not remember much of the evaluation.

The Appellant emphasized that she was still sore in her back at that time and is still sore today. She had a great deal of difficulty performing the exercises requested of her at [rehab clinic], even while using the Percocet prescription.

On cross-examination, the Appellant was shown videotape surveillance evidence where she was shown shopping for long periods, walking without a walking cast, and wearing two inch heels. She was shown lifting, pushing and pulling her overhead garage door with ease as well as washing her car in a wand wash while using her left and right arms for a lengthy period in continuous motion, while washing, reaching, drying, rubbing and polishing around her car. One of the videotapes shows the Appellant wearing a walking cast to walk into the [rehab clinic] for her FCE and then changing into runners taken from the trunk of her car when the evaluation session was over, and going to [text deleted] wearing runners.

The Appellant was also reminded of and asked questions regarding Level of Function reports which she had completed for MPIC. These showed very low levels of function with no ability to do overhead lifting. The Level of Function reports also indicated that the Appellant was not able to bend or flex her spine and hips. They stated that she could not pick up objects off the ground, from cupboards and cabinets, and she could not reach objects in the trunk of her car.

When asked about the inconsistencies between her reports of function, complaints of lack of capacity during the FCE, and the evidence seen in the videotape surveillance, the Appellant stated that she was only able to perform the videotaped functions because she was high from the Percocet prescription she filled on April 17, 2008. She also noted that because of the passage of time, and the effects of the Percocet, she could not remember much at all and was unable to explain many of the inconsistencies pointed out to her on cross-examination.

The Appellant could not explain how her doctors and physiotherapists did not make a note of any incapacity as a result of her taking medication. The Appellant simply stated that she did not know why her caregivers did not mark it down.

The Appellant submitted that she had a great deal of pain in her left arm, back, knees and stomach, along with scarring, depression and post traumatic stress, all due to the motor vehicle accident. She stated that her arm still hurts and has decreased range of motion. The Appellant submitted that the Internal Review Officer and case manager were wrong.

The Appellant submitted that before the motor vehicle accident she was working and happy. Had it not been for the motor vehicle accident she could be leading a productive life, doing the

same activities she was doing before she got hit. She can no longer do the activities she likes. She is not able to golf, bowl, swim or bike, things she was able to do before the motor vehicle accident. Even her socializing has been curtailed.

Accordingly, she submitted that her appeal should be upheld.

Evidence and Submission for MPIC:

Counsel for MPIC submitted that the question was whether Section 160 of the MPIC Act was properly applied in this situation to terminate the Appellant's IRI benefits on May 6, 2008. The details of the motor vehicle accident of December 8, 1999, when the Appellant was injured as a pedestrian, were not in dispute. Her injuries included a fractured right humerus, right scalp hematoma, trauma to her knees, stitches, injury to her shoulder and post traumatic stress and depression. She began receiving benefits as a result, and received IRI and Permanent Impairment benefits. In May of 2008 she was still receiving IRI benefits. The Appellant had been employed as a [text deleted] retail sales person and claimed that she could no longer work as a result of her injuries.

MPIC undertook videotape surveillance of the Appellant on September 12 and 20, 2006, November 3, 7, and 9, 2006, April 27 and 28, 2007, and May 7 and 10, 2007, April 28, 2008 and May 6 and 7, 2008. Counsel submitted that MPIC went to great lengths to determine whether the Appellant was providing false information. Its investigation began in 2006 and continued through 2007 and 2008. MPIC then went to its Fraud Advisory Committee to determine what action needed to be taken. At that point, it was determined that a further FCE Evaluation should be undertaken.

The case manager tried to arrange that evaluation with the Appellant, but as a result of an unrelated accident when the Appellant had a fall, the evaluation was put over to 2008. The Appellant was not ready at the beginning of the year, but ultimately the evaluation took place on May 6 and 7, 2008.

All of this illustrated the great efforts MPIC made to make sure it was correct in the actions it was undertaking.

Counsel noted that a report from MPIC's Health Care Services team in 2007 confirmed that there were numerous discrepancies between what the Appellant was reporting and what she could actually do. The report from Health Care Services, dated August 17, 2007, goes into great detail in showing how the Appellant's reported functions were inconsistent with the video surveillance and the activities shown therein. Samples of the videotaped activities which the Appellant was able to perform were shown at the appeal hearing but the medical report also set out a list of all of the activities performed between September 12, 2006 and May 10, 2007:

“On the dates [the Appellant] was under surveillance, she was noted to be performing the following activities:

- Walking
- Driving a motor vehicle
- Entering and exiting a motor vehicle
- Entering and existing various stores
- Pushing a shopping cart
- Carrying objects with both her left hand and right hand
- Carrying purse on left shoulder
- Closing garage door with both left and right hand
- Smoking
- Drinking coffee
- Reaching across body with left hand to place purse on passenger seat
- Unloading packages from shopping cart to trunk
- Loading shopping bags into backseat of car
- Walking for extended periods

- Sitting for extended periods
- Reaching into trunk of car in order to obtain items from various bags in trunk
- Washing motor vehicle
- Drying motor vehicle
- Picking up items off of ground
- Shoulder checking when driving car in reverse
- Reaching for items on shelves in stores with both arms
- Using hands to groom hair
- Kneeling on right knee
- Mowing lawn.”

When these activities were compared with the Appellant’s reported levels of function, it was concluded that there were many inconsistencies:

“Based on information provided by [the Appellant] in the Level of Function Reports, it appears that she is significantly impaired from performing various activities and tasks as a result of physical problems relating to her peripheral joints (i.e. knees and shoulders) and spine. The information obtained from the reports indicates [the Appellant’s] level of function did not improve over an approximate period of time of one year. The information obtained from her Level of Function Reports lead me to conclude that any impairment [the Appellant] had in 2006 persisted to 2007 with no sign of subjective change.

When comparing [the Appellant’s] level of function as observed while under surveillance with the information she provided in the Level of Function Reports, it is my opinion a plausible medical explanation for the dramatic difference in the level of function between the two does not exist.

The only reasonable explanation I can provide is that [the Appellant] provided Manitoba Public Insurance inaccurate information as it relates to her functional capabilities at the time the Level of Function reports were completed in order to create the perception that she had a severe functional impairment even though she did not.

... It is my opinion [the Appellant] did not exhibit any functional deficits while under surveillance that might be a byproduct of a medical condition causally related to the incident in question.”

After receiving this report, MPIC decided to have the Appellant undergo a more formal FCE than that provided by the reported Level of Function forms. This occurred in May 2008, and around that time, additional video surveillance material was collected.

Counsel submitted that the videos from 2008 showed discrepancies as great as (if not greater than) what was seen and previously reviewed by the doctor in 2007.

Counsel referred to videos in 2008 which show the Appellant arriving at the [rehab clinic] for evaluation wearing a boot cast on her right foot, which she wore into the facility. She then leaves the facility wearing the cast, goes to her vehicle, opens the trunk and changes her shoes. She then drives to [text deleted] to shop in her runners, for almost an hour and is seen bending down, reaching and placing items in her cart, pushing the cart to her vehicle, twisting to unload it and doing more driving.

On May 7, 2008 she again returned to the [rehab clinic] wearing her cast, and then is shown going home and leaving the house again wearing a sandal type shoe with a narrow heel. There are other occasions when the Appellant was shown wearing quite high heels while walking around during her shopping period. This was not at all consistent with her reports of injuries.

Nor was any of the videotaped evidence consistent with the reports provided by the [rehab clinic] regarding the Appellant's performance in the functional evaluation period.

The staff at the [rehab clinic] indicated that testing was self limited by pain and pointed out the following indications of inconsistency:

- "The client's perceived activities as measured on the Spinal Function Sort (**SIGNIFICANTLY BELOW SEDENTARY RANGE**) were not consistent with general observations on Day 1 and Day 2, but could not be compared to functional results as function was self-limited due to pain.

- Objective inconsistencies between the Spinal Function Sort (SFS) response and spontaneous movements observed during the assessment were the following:
 - [The Appellant] answered question #1 on the SFS where ease of placing a bottle on the floor was reported as with “significant restriction”, and retrieving a tool from the floor was with “slight restriction”. These are very similar activities, and the responses are inconsistent. Besides that inconsistency, as [the Appellant] was leaving the [rehab clinic], she dropped her bottle top at the drinking fountain, and was observed to stoop with apparent ease to pick it up.
 - Responses to questions 29 and 31 on the SFS, the ease or difficulty of pushing/pulling a heavy door, were both answered with “significant restriction”, indicating significant difficulty completing this activity. [The Appellant] was observed leaving the [rehab clinic] while eating a sandwich in her right hand, pushing through both heavy doors at the exit of the [rehab clinic] (push force 11-15 lbs) with her right forearm, while continuing to eat. When she was made aware of this discrepancy on Day 2, she disputed it. When observed leaving the [rehab clinic] on Day 2, she used the disability button to automatically open the door.
 - She wore the orthopaedic boot on her right foot throughout testing on Day 1 and 2.
 - When measuring active right hip flexion, the client demonstrated the ability to flex to 90 degrees. When asked a question about her right foot, she spontaneously flexed and externally rotated her right hip to touch her right foot to demonstrate the problem area. Hip flexion at this time, actively, was measured as 100 degrees.
 - As [the Appellant] left the clinic on Day 2, she attempted to forcefully pull each of the two doors of the clinic with her right arm before she realized that they needed to be pushed. These movements were performed in frustration, but were demonstrations of upper extremity strength (peak force measured between 50 – 60 lbs).
 - [The Appellant] was observed getting into her car, and spontaneously reaching with her left arm to pull the door closed. Earlier on Day 2, she stated that her left hand was completely numb and she was unable to use it.

- [The Appellant] refused to complete a 6-minute walking test on either Day 1 or Day 2, due to pain in her right foot. She was observed leaving the [rehab clinic] and walking to her car in the Members’ Car Park, a distance of approximately 75 yds, walking on Day 1 with a mildly antalgic gait, and cutting across a grassy slope and descending the curb onto the roadway with no change in pace or loss of balance. She was eating as she went. On Day 2, having discussed this observation with her, she walked on the pavement, however stepped easily from an 8” curb to the road, landing with her right foot.

Functional limitations are not consistent with physical impairment and diagnosis.”

Clearly, counsel submitted, the ability to assess the Appellant was hampered by her refusal to participate in many of the evaluations, but, at that point, enough evidence had been gathered, in conjunction with the surveillance material, for MPIC to terminate the Appellant’s benefits pursuant to Section 160 of the MPIC Act. The Appellant had intentionally provided MPIC with false and fraudulent information, and had failed in her duty to advise the Corporation of any changes in her situation, pursuant to Section 149 of the MPIC Act.

Counsel submitted that given the nature of the Appellant’s activities while maintaining that she was incapacitated, MPIC was justified in pursuing repayment for amounts she had received in IRI benefits between May 2008 and June 2008, i.e., from the date she first appeared at the [rehab clinic] on May 6, 2008, to the date of the case manager’s decision. Counsel submitted that by May 2008 it was more than abundantly clear that the Appellant was providing false and inconsistent information. Although the potential existed to terminate her benefits as far back as 2007, MPIC took the 2008 evidence as confirmation of her falsification and was only claiming repayment pursuant to Section 189 of the MPIC Act from May 6, 2008 to June 12, 2008.

Counsel agreed however, that the case manager’s decision and the Internal Review Officer’s decision failed to clearly set out and quantify the amounts of benefits that the Appellant was receiving in that period and which would require repayment. Accordingly, counsel submitted that the Appellant’s appeal should be dismissed, the decision of the Internal Review Officer upholding the Appellant’s termination of benefits under Section 160 and Section 149 and repayment of benefits under Section 189 should be upheld, and the quantum of repayment

necessary pursuant to Section 189 of the MPIC Act should be referred back to the Appellant's case manager, for determination, along with an explanation for the Appellant how the figure is reached.

Discussion:

The MPIC Act provides:

Claimant to advise of change in situation

149 A person who applies to the corporation for compensation shall notify the corporation without delay of any change in his or her situation that affects or might affect, his or her right to an indemnity or the amount of the indemnity.

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity where the person

(a) knowingly provides false or inaccurate information to the corporation;

Corporation to be reimbursed for excess payment

189(1) Subject to Sections 153 (payment before decision by corporation), 190 and 191, a person who receives an amount under this Part as an indemnity or a reimbursement of an expense to which the person is not entitled, or which exceeds the amount to which he or she is entitled, shall reimburse the corporation for the amount to which he or she is not entitled.

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in upholding the case manager's decision to terminate the Appellant's benefits and require repayment.

The panel has reviewed the documentary evidence on the Appellant's indexed file, as well as the verbal testimony and video surveillance presented at the hearing. We have also considered the submissions of the Appellant and counsel for MPIC.

At the hearing, the Appellant was given the opportunity to review the videotape surveillance and observe and comment upon the activities depicted therein. Many inconsistencies between her Level of Function reports, FCE report and the videotape evidence were noted. Yet, most often, the explanation provided by the Appellant was either that she could not recall what she had claimed or what she had been doing, either in the videos or in the assessment session, or that she couldn't remember anything at all, because she was on Percocet. In contrast, she was very specific about the number of Percocet pills she took, and when she took them.

While engaging in the activities depicted in the videotapes the Appellant did not present with impairment, grimacing or other typical pain behaviours. Yet, the activities on the videotapes were inconsistent for someone with her reported disabilities. The tapes showed her washing a vehicle with both arms, and operating the water wand with dexterity, persistence and skill. She was shown walking in high and low heels at various points at a steady pace, with no evidence of impairment or use of assisted devices. She was shown bending to low shelves, stretching, loading, rotating, and carrying weight in both arms. She exhibited complete range of motion when opening her garage door, with no facial grimaces or apparent difficulty. She used a VLT machine with both hands, showing frequent ease of motion with her right hand. She was shown during long days when out and about, and showed that she had the ability to sit for long periods of time at VLT's and at a coffee shop.

The Appellant's decision to wear a walking cast only to the [rehab clinic] also calls into question her credibility. On the videotapes, she appears wearing it only when she is going into the [rehab clinic] and does not wear it in other occasions, clearly changing from it into other shoes, after her [rehab clinic] appointment, in order to continue on with her other activities.

Having observed all of the activities noted above, and having compared them with the Appellant's reported levels of function and the explanations contained in her oral testimony at the appeal hearing (where she said she could not remember any details), the panel is left with the same conclusions as were reached by [MPIC's doctor] in his memorandum of August 17, 2007:

“When comparing [the Appellant's] level of function as observed while under surveillance with the information she provided in the Level of Function Reports, it is my opinion a plausible medical explanation for the dramatic difference in the level of function between the two does not exist.

The only reasonable explanation I can provide is that [the Appellant] provided Manitoba Public Insurance inaccurate information as it relates to her functional capabilities at the time the Level of Function reports were completed in order to create the perception that she had a severe functional impairment even though she did not.

...It is my opinion [the Appellant] did not exhibit any functional deficits while under surveillance that might be a by product of a medical condition causally related to the incident in question.”

[MPIC's doctor] made these comments based upon material obtained in 2006 & 2007. He did not have the benefit of reviewing the material from 2008. However, the panel finds that the material from the 2008 investigations of MPIC supports and confirms the observations of [MPIC's doctor]. The Appellant has failed to meet the onus upon her to show, on a balance of probabilities, that the Internal Review Decision erred in its findings.

As a result, the Commission upholds the finding of the Internal Review Officer that the Appellant provided false and incorrect information in contravention of Sections 160(a) of the MPIC Act and failed to advise MPIC of changes in her circumstances that would affect her entitlement to benefits, in contravention to Section 149 of the MPIC Act. We find that MPIC was correct in terminating the Appellant's IRI benefits as of May 6, 2008 and that she should be required to reimburse MPIC, in accordance with Section 189(1) of the MPIC Act, for IRI benefits received between May 6, 2008 and June 12, 2008. The Appellant's appeal is dismissed. The matter will be referred back to the Appellant's case manager for a calculation of the amount of benefits which the Appellant should be required to repay, along with an explanation for the Appellant of how that amount was reached.

Dated at Winnipeg this 26th day of April, 2012.

LAURA DIAMOND

DEBORAH STEWART

LES MARKS