

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-09-075**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Ms Deborah Stewart

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Dan Joannis of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: July 16, 2012

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits from December 7, 2008 to July 2009

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC: 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 several motor vehicle accidents as follows:

- October 1992 – she was rear-ended while she was stopped. Her car was pushed forward six to ten feet. She was in shock after the motor vehicle accident and complained of lower back, shoulder and neck pain. The Appellant testified that the treatment she received for her injuries really didn't benefit her; she has always continued to have symptoms from the motor vehicle accident and difficulty sitting.

- October 9, 2005 – she was the seat-belted driver of a [text deleted] that was hit by a reversing vehicle in a parking lot. Following this accident, the Appellant reported injuries to her neck, shoulders and lower back. She also developed migraines several weeks after the accident. The Appellant was not employed at the time of this accident and was classified as a non-earner for the purpose of determining her income replacement indemnity (“IRI”) benefit entitlements under Personal Injury Protection Plan (“PIPP”). The Appellant was not entitled to IRI benefits for the first 180 days after the accident.
- June 2, 2008 – the Appellant was the seat-belted driver exiting a parking lot in the main lane when a third party driver came out of a feeder lane and collided with the passenger front side of her vehicle. As a result of this accident the Appellant again complained of a sore neck, sore upper back and sore lower back.

At the time of the June 2, 2008 motor vehicle accident, the Appellant was a self-employed web design consultant. Due to the injuries which the Appellant sustained in this motor vehicle accident, she was unable to perform the essential duties of her self-employed position. As a result, the Appellant became entitled to IRI benefits pursuant to subsections 81(1) and (2) of the MPIC Act.

The Appellant underwent a 12 week Work Hardening Program commencing September 15, 2008 and ending December 5, 2008 at [Rehabilitation (Rehab) Facility]. At the start of the program, the Appellant demonstrated a sedentary strength level. At the end of the program, the Appellant demonstrated a light “occasional” strength level. The Work Hardening Program Discharge Report dated December 11, 2008 stated that the Appellant was fit for an immediate, unmodified return to her pre-injury employment.

In a decision dated December 30, 2008, MPIC's case manager advised the Appellant that in accordance with the [Rehab Facility] Discharge Report which stated that she was capable of a full return to work, her entitlement to IRI benefits would end as of December 7, 2008 pursuant to Section 110(1)(a) of the MPIC Act.

The Appellant disagreed with that decision and sought an Internal Review of that decision. In a decision dated April 14, 2009, MPIC's Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the Appellant was capable of performing the duties of her sedentary work as a web designer and accordingly her entitlement to IRI benefits was properly terminated pursuant to Section 110(1)(a) of the MPIC Act effective December 7, 2008.

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 from December 7, 2008 to July 2009.

Appellant's Submission:

At the outset of the hearing, the Claimant Adviser, on behalf of the Appellant, confirmed that the Appellant is seeking IRI benefits from December 7, 2008 until July 2009, on a part-time basis. The Claimant Adviser advised that the Appellant has a lengthy history of chronic neck, upper and lower back pain dating back to the motor vehicle accident of October 1992. He contends that these conditions predisposed her to further injury and in that regard, both the October 9, 2005 and the June 2, 2008 motor vehicle accidents contributed substantially to a permanent enhancement of the Appellant's neck and lower back conditions.

The Claimant Adviser maintains that prior to the October 9, 2005 motor vehicle accident, the Appellant was not having significant difficulties and was able to manage her sedentary employment. Additionally, she was no longer receiving regular chiropractic treatments as of August 1994. However, following the October 9, 2005 motor vehicle accident, the Appellant has continuously deteriorated, her subjective complaints of pain have increased and her lower back condition has become increasingly unstable.

In support of the Appellant's position, the Claimant Adviser relies on the report from the [Appellant's Doctor], dated March 10, 2011, wherein [Appellant's Doctor] noted the following:

...The status of her back condition prior to the October 2005 accident, was classed as somewhat unstable and this may have been from the 1992 accident. Her level of functioning prior to the October 2005 accident found her working in a full time desk job but with a lot of symptoms of neck and upper back pain. The medical conditions that have had an impact on her recovery from her accident related injuries would have been all her other falls and accidents, her hypothyroidism, her sleep apnea and her depression. Both the October 2005 and June, 2008 accidents resulted in a significant deterioration of her pre-existing low back condition as you can see by the history with her more frequent complaints of her back "going out" and complaints of low back pain. I believe that the fall at [Rehab Facility] on October 9th, 2008 resulted in a significant deterioration of her pre-existing lower back injury and after this time, she had an escalation of her symptoms of back instability, facet and sacroiliac joint instability.

I believe I have given you in the history, good objective evidence from the March 2009 visits of worsening of her pre-existing low back condition.

In summary, on a balance of probabilities, I do believe that both the October 2005 and June 2008 accidents directly contributed to a permanent worsening of her lower back injury. As well I believe that the October 9th, 2008 fall at [Rehab Facility] contributed significantly to a permanent worsening of her lower back injury.

Finally, if one looks at the OT, PT assessment at [Rehab Facility Doctor's] Work Hardening Program/Pain Clinic, in over 30 pages, there is only one comment made about her ability to sit and that was that she sat without apparent discomfort for as long as two hours. It seems somewhat odd that since her job involves long periods of sitting that that was not assessed as much as all the other lifting, pulling, pushing etc. parameters were assessed. I do (sic) not believe that [the Appellant] had the capacity to perform full time duties of her sedentary pre-accident employment as a web designer sitting at a computer on a full time basis as of December 7th, 2008.

I still do not believe that she has her pre-accident status for working full time at this type of job. She is doing as much as (she) can and probably more than she should and is having significant symptomatology and not much treatment and not much relief.

Relying upon [Appellant's Doctor's] report, and the Appellant's testimony at the hearing, the Claimant Adviser submits that due to the injuries which the Appellant sustained in the motor vehicle accidents of October 9, 2005 and June 2, 2008, her chronic pain condition was enhanced. As a result, the Appellant was not able to resume her duties on a full-time basis in December 2008. He submits that the Appellant has established that she was unable to return to her sedentary employment as of December 7, 2008 on the balance of probabilities. As a result, the Claimant Adviser submits that the Appellant's appeal should be allowed.

MPIC's Submission:

Counsel for MPIC submits that the Appellant has a longstanding history of neck, shoulder and lower back problems dating back to the 1980's, continuing on into the 1990's and to the present. He contends that the minor motor vehicle accidents of October 2005 and June 2008 did not cause or enhance her pre-existing condition. Relying upon the Health Care Services Review dated October 26, 2011 completed by [MPIC's Doctor], counsel for MPIC submits that the documentation on the Appellant's file does not show a dramatic change in her spine and/or extremities that would support the conclusion that an enhancement of a pre-existing condition has occurred.

Counsel for MPIC also relies upon the [Rehab Facility's] Discharge Report dated December 11, 2008 which cleared the Appellant for an immediate return to her pre-accident employment. Counsel for MPIC submits that the Appellant has a sedentary job and is self-employed. He maintains that she is able to take breaks as necessary. He submits that the Appellant has not

shown any physical challenges to sitting. He contends that as a self-employed web designer she has the most flexible job he can think of.

Counsel for MPIC submits that the Appellant has not met the onus of establishing an inability to work beyond December 7, 2008. Counsel for MPIC argues that the subjective nature of the Appellant's problems cannot be relied upon, especially given that her credibility is questionable. He maintains that the Appellant's answers during her testimony were vague and her recollection of events was poor. As a result, he submits that the Appellant's appeal should be dismissed and the Internal Review Decision dated April 14, 2009 should be confirmed.

Decision:

Upon hearing the testimony of the Appellant and after 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 submissions of the Claimant Adviser on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant has not established an entitlement to IRI benefits beyond December 7, 2008.

Reasons for Decision:

The Commission finds that the Appellant has failed to establish, on a balance of probabilities, that she was unable to perform her sedentary employment as a web design consultant as of December 7, 2008. At the appeal hearing, the Appellant had a poor recollection of many events and was unable to recite many of the relevant details pertaining to her accidents, her employment information and her return to work. She had significant difficulty recalling the events surrounding her inability to return to work. As a result, the Commission finds that the

Appellant's testimony at the appeal hearing was insufficient to establish an inability to return to work as of December 7, 2008.

Additionally, the Commission finds that the Appellant has not met the onus of establishing that she was unable to return to work as a web designer beyond December 7, 2008, on the balance of probabilities, due to injuries arising from either the October 9, 2005 or June 2, 2008 motor vehicle accidents. The Appellant's subjective complaints and indication that she was unable to return to work as of December 7, 2008 are insufficient to establish an inability to return to work in the circumstances of this case. Further, the report of [Appellant's Doctor], which relies on the Appellant's subjective complaints, is insufficient evidence to contradict the [Rehab Facility's] Discharge Report of December 11, 2008 that stated that the Appellant was capable of an immediate return to work effective December 7, 2008.

Accordingly, the Commission finds that the Appellant is not entitled to IRI benefits beyond December 7, 2008. As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated April 14, 2009 is confirmed.

Dated at Winnipeg this 20th day of August, 2012.

YVONNE TAVARES

NEIL COHEN

DEBORAH STEWART