

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-142**

PANEL: Ms Yvonne Tavares, Chairperson
Dr. Sheldon Claman
Dr. Chandulal Shah

APPEARANCES: The Appellant, [text deleted], was represented by Ms Virginia Hnytka;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.

HEARING DATES: June 2 and 3, 2014

ISSUE(S): 1. Entitlement to Income Replacement Indemnity Benefits beyond June 14, 2009;
2. Entitlement to reimbursement of further supervised treatments.

RELEVANT SECTIONS: Sections 110(1)(c) and 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) of Manitoba Regulation 40/94.

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

On January 18, 2007, the Appellant, [text deleted] was the seat-belted driver of a vehicle that slid through a stop sign and hit the rear of a truck. On the Appellant's Application for Compensation, which was completed on March 26, 2007, the Appellant reported injuries to her left shoulder and in between the shoulder blades of her back. The Appellant attended her family physician in regard to these injuries and he referred her for physiotherapy treatment.

At the time of the motor vehicle accident, the Appellant was not working. She was scheduled to commence employment as an accountant on January 29, 2007. Due to the injuries which the Appellant sustained in the accident, she was unable to begin this employment and qualified for income replacement indemnity (“IRI”) benefits in accordance with Section 85 of the MPIC Act. The Appellant also took on a seasonal job during the summer months where she worked as a concession manager.

By letter dated July 23, 2007, MPIC’s case manager set out that the Appellant was classified as a non-earner at the time of the motor vehicle accident. By letter dated July 25, 2007, MPIC’s case manager indicated that the Appellant was entitled to a 180-day determination because she was unable to continue working as of the 181st day following the motor vehicle accident. Taking into consideration the Appellant’s employment experience, education, training and physical and intellectual abilities, she was determined as a “bookkeeper/accounting clerk”.

By letter dated August 8, 2007, the Appellant was notified of an eight week reconditioning and work hardening program that was to take place at the [Rehabilitation (Rehab) Clinic]. This program was initiated with a view to return the Appellant to full hours and duties in her determined employment. [Rehab Clinic] provided a discharge report dated October 10, 2007. It indicated that prior to admission to the rehabilitation program the Appellant was performing at a functional strength demand of sub-sedentary. Prior to discharge, the report indicated that the Appellant achieved a functional strength demand of sedentary, according to the Dictionary of Occupational Titles. The discharge report recommended that the Appellant was fit for an immediate, unmodified return to work at a sedentary level, on a full time basis.

By letter dated October 11, 2007, MPIC's case manager advised the Appellant that her entitlement to IRI benefits ended as of October 5, 2007 based upon the [Rehab Clinic's] discharge report. The case manager determined that the medical information supported that the Appellant was able to hold a sedentary full-time job, thus ending her entitlement to IRI benefits.

The Appellant disagreed that she was capable of returning to work at the end of the eight week rehabilitation program at [Rehab Clinic] and filed for an Internal Review of that decision. In support of her Application for Review, the Appellant provided a note from [Appellant's Doctor #1] dated October 15, 2007. In that note, the Appellant reported ongoing pain in her upper back and left shoulder and that she was unable to sit for longer than 10 minutes without developing increased pain. In that note, [Appellant's Doctor #1] concluded "I am not sure that she will cope well with a full time office job yet".

An Internal Review decision dated December 3, 2007 confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found that the Appellant was functionally capable of performing the essential duties of her determined employment and therefore she was not entitled to further IRI benefits beyond October 5, 2007.

[Appellant's Doctor #1] subsequently referred the Appellant to [Appellant's Doctor #2] for assessment of chronic left shoulder pain. [Appellant's Doctor #2] diagnosed the Appellant with rotator cuff tendinitis with numerous trigger points involving the posterior neck musculature, both shoulder girdles and rhomboids major and minor. Based on his examination, [Appellant's Doctor #2] also diagnosed the Appellant with possible fibromyalgia. On October 15, 2008, [Appellant's Orthopedic Surgeon] performed left shoulder surgery to repair the Appellant's left rotator cuff tear. Due to this surgery, the Appellant was incapable of working as a

bookkeeper/accounting clerk. In a decision dated February 19, 2009, the Internal Review Officer reconsidered her December 3, 2007 decision finding that the Appellant was not entitled to further IRI beyond October 5, 2007 to allow her IRI in accordance with a report from [MPIC's Doctor] dated February 3, 2009. In that report, [MPIC's Doctor] concluded that there was a period of measurable disability from the date of the Appellant's rotator cuff surgery, May 15, 2008 to October 6, 2008. As such, the Appellant's IRI benefits were reinstated effective May 15, 2008.

In a decision letter dated May 19, 2009, MPIC's case manager reviewed the Appellant's file and determined that her current impairment/inability to work related solely to pain and the presence of medical conditions which were not causally related to the motor vehicle accident of January 18, 2007. As a result, the Appellant was no longer entitled to further IRI benefits and her IRI entitlement ceased as of June 14, 2009 in accordance with Section 110(1)(c) of the MPIC Act. The case manager also found that the Appellant was no longer entitled to receive any further supervised treatment interventions for the medical conditions which were not causally related to the motor vehicle accident of January 18, 2007 (i.e. physiotherapy treatment, reconditioning, chiropractic treatment, etc.).

The case manager's decision was based upon an April 1, 2009 medical review conducted by MPIC's Health Care Services. The medical review concluded that based upon the information in the Appellant's file, she sustained three separate injuries in the motor vehicle accident, consisting of a whiplash associated disorder affecting her cervical spine, a mechanical thoracic spinal pain syndrome and left rotator cuff injury. The medical review concluded that the Appellant no longer had an objective functional impairment as it related to her left shoulder surgery. Any ongoing impairment related solely to pain related to diagnoses of fibromyalgia/myofascial pain

syndrome and the presence of other medical conditions (the Appellant's low back condition and depression) which were not causally related to the motor vehicle accident of January 18, 2007.

The Appellant sought an Internal Review of the case manager's decision of May 19, 2009. In an Internal Review decision dated November 12, 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 medical documentation on the Appellant's file confirmed that her accident related injuries were not preventing her from holding the determined employment. She also found that the Appellant's current symptoms were not causally related to her motor vehicle accident of January 18, 2007 and therefore the Appellant was not entitled to reimbursement for further treatment interventions.

The Appellant has now appealed that Internal Review decision to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to further income replacement indemnity benefits beyond June 14, 2009 and whether she is entitled to reimbursement for treatment interventions beyond June 14, 2009.

Relevant Legislation:

Sections 110(1)(c) and 136 (1)(a) of the MPIC Act provide that:

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:

...

(c) the victim is able to hold an employment determined for the victim under section 106;

Reimbursement of victim for various expenses

[136\(1\)](#) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

(a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

Section 5(a) of Manitoba Regulation 40/94 provides that:

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

(a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

Prior to the hearing of this appeal, the Appellant underwent an independent medical examination with [Independent Doctor]. In his reports dated May 14, 2011 and November 6, 2011, [Independent Doctor] concluded that, “there is no evidence on the current examination of a low back condition present and causally related to the motor vehicle accident in question of January 18, 2007”. [Independent Doctor] also concluded that the Appellant would have been expected to have been able to return to work as a bookkeeper/accounting clerk as of June 14, 2009. [Independent Doctor] also found that despite her past history of fibromyalgia syndrome, on his clinical examination there was no identification of any of the tender points, and only minimal soft tissue irritability reported with some pain on palpitation.

At the appeal hearing, the Commission heard testimony from the Appellant. She testified that she currently has pain primarily in the upper shoulder and top of the shoulder and between her shoulder blades. She has aching through the back and across the low back, and numbness and tingling in both hands. The Appellant testified that following the accident her left shoulder pain

was the worst so she dealt primarily with her left shoulder, her neck and mid back. The Appellant testified that she always had low back pain which was a dull ache following the accident. She didn't mention low back pain initially because it was just a dull ache and her other problems (shoulder, neck, mid back) were worse and she was trying to deal with one problem at a time. The Appellant testified that she has had a number of assessments, investigations and trials of treatment and medical management since the motor vehicle accident. She reported that she has pain seven days a week, almost 24 hours per day and that pain occurs at night. The Appellant reported that her pain is best in the afternoon, with the worst times being when she first wakes up, morning and evening. She described the overall severity of her pain as severe and that it is ruining the quality of her life. As a result of her pain symptoms, she testified that she has a significantly decreased activity level. She noted that sitting and laying down decreases the symptoms in her back. Walking immediately increases the symptoms in her back and left leg, as does standing and bending forward. She reported that bending backwards is impossible without severe pain to the back. She takes pain killers in order to allow her to manage throughout the day.

In terms of her daily function, she testified that she was able to perform her activities of daily living, however she was unable to do most of her usual housework activities. She testified that she had been attempting to resume her housework activities with her only recently being able to progress to do her dishes again. She reports that she spent almost all day laying down or sitting to control her pain. The Appellant did note that she is trying to slowly increase her exercise, but is only at limited minutes on a treadmill at home now.

The Appellant feels that her symptoms are all connected to the motor vehicle accident of January 18, 2007. She wants to return to work but is unable due to her pain symptoms. She described the pain which prevents her from returning to work as follows:

- her arms and legs ache;
- pain between her shoulder blades;
- pain in her shoulders;
- sharp pain in her neck;
- pain in the low back with shooting pain down her leg.

Due to these ongoing pain symptoms she has not been able to return to work since the motor vehicle accident.

Appellant's Submission:

The Claimant Adviser submits that as a result of the injuries which the Appellant sustained in the motor vehicle accident of January 18, 2007, she has incurred ongoing chronic problems which prevent her from returning to work. The Claimant Adviser contends that as a result of the motor vehicle accident of January 18, 2007, the Appellant sustained injuries to her neck, shoulder, upper back, and lower back. She notes that the Appellant reported these injuries to her family physician on February 1, 2007 and that she didn't have any of these injuries prior to the motor vehicle accident. She also relies on the Appellant's testimony that her low back injury was an ongoing injury and that her other injuries were more severe and were the focus of her attention immediately following the motor vehicle accident.

The Claimant Adviser refers to the reports of the Appellant's treating practitioners, including;

1. [Appellant's Doctor #3] who treated the Appellant with cortisone injections for her low back. Unfortunately [Appellant's Doctor #3] was not able to comment on the Appellant's ability to work.
2. [Independent Doctor's] independent medical examination which relied heavily on [Rehab Clinic's] discharge report. The Claimant Adviser submits that [Independent Doctor's] reports and opinions should be discounted because he relied heavily the [Rehab Clinic] discharge report which was not valid.
3. [Appellant's Doctor #2] who diagnosed the Appellant with fibromyalgia in November 2008. In his report of October 15, 2013, [Appellant's Doctor #2] opined that the Appellant was not capable of performing work duties. The Claimant Adviser also argues that [Appellant's Doctor #2's] opinions should be given greater weight than those of MPIC's Health Care Services consultant, [MPIC's Doctor], since [Appellant's Doctor #2] was the Appellant's treating practitioner since shortly following the motor vehicle accident.

The Claimant Adviser submits that the Appellant is not a malingerer. She was a career focused individual. She was studying and getting her Certified General Accountant diploma. She was a busy individual prior to the motor vehicle accident. If not for the chronic pain and fibromyalgia following the motor vehicle accident she would have continued her busy work-oriented lifestyle. The Claimant Adviser requests that the Internal Review decision of November 12, 2009 be rescinded and the Appellant's IRI and treatment benefits reinstated.

MPIC's Submission:

Counsel for MPIC submits that the Appellant has not established, on a balance of probabilities:

1. that she is entitled to IRI benefits beyond June 14, 2009; or
2. that further treatment interventions are required beyond June 14, 2009 due to a medical condition resulting from the January 18, 2007 motor vehicle accident.

Counsel for MPIC submits that as of June 14, 2009, the Appellant's primary complaints were related to her low back condition. Counsel for MPIC submits that the Appellant's low back condition is not related to the motor vehicle accident of January 18, 2007. She maintains that according to [Appellant's Doctor #2], the primary reason for the Appellant's inability to work is her fibromyalgia syndrome. The Appellant's fibromyalgia syndrome is not related to the motor vehicle accident of January 18, 2007.

Counsel for MPIC maintains that MPIC does not accept that the following conditions are related to the Appellant's motor vehicle accident of January 18, 2007:

1. low back condition;
2. chronic pain syndrome;
3. fibromyalgia;
4. depression.

Counsel for MPIC maintains that throughout the course of this file, MPIC has given the Appellant the benefit of the doubt, even extending IRI benefits beyond October 2008, when the Appellant should have recovered from her left rotator cuff surgery.

Counsel for MPIC submits that the Appellant's complaint of low back pain on August 8, 2007 was described as dull and intermittent. Prior to August 8, 2007 the Appellant had received no physiotherapy or chiropractic care in respect of her low back and there was no mention of low

back pain in the Appellant's Application for Compensation which she completed herself. Counsel for MPIC also notes that there is an improbable temporal relationship with the Appellant's disc herniation and spinal stenosis which developed in September of 2008, one year and eight months following the motor vehicle accident in question which would not bear a temporal relationship to the accident of January 18, 2007.

With respect to the Appellant's diagnosis of fibromyalgia, MPIC submits that there is no conclusive evidence that the criteria for fibromyalgia have been met for this Appellant. Further she maintains that even if the Appellant suffers from fibromyalgia, there is no objective medical evidence or opinion that she was unable to work as a result of fibromyalgia syndrome.

With respect to the Appellant's diagnosis of depression, counsel for MPIC notes that again there are no opinions that the depression prevents the Appellant from returning to work or that the depression is connected to the motor vehicle accident of January 18, 2007.

Counsel for MPIC submits that the Appellant has not met the onus of proving that she is unable to return to her employment due to any injuries resulting from the January 18, 2007 motor vehicle accident as of June 14, 2009. Counsel for MPIC argues that the Appellant was able to return to work as of that date. Alternatively, if she wasn't able to return to work as of that date, it was not due to any motor vehicle accident related injuries, but rather due to the Appellant's de-conditioned status and her other conditions which are not related to the January 18, 2007 motor vehicle accident.

With respect to ongoing supervised treatment interventions since June 14, 2009, counsel for MPIC submits that there is no evidence that the Appellant has incurred any costs since that date

for treatment interventions. Further, counsel for MPIC submits that the Appellant has not established that any supervised treatments required beyond June 14, 2009 were medically required due to injuries sustained in the motor vehicle accident.

As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review decision of November 12, 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 and of counsel for MPIC, the Commission finds that the Appellant is not entitled to IRI benefits beyond June 14, 2009 or reimbursement of treatment interventions beyond June 14, 2009.

Reasons for Decision:

Upon a consideration of the totality of the evidence before it, the Commission finds that the Appellant has not established, on a balance of probabilities, that her current and ongoing pain complaints are related to her motor vehicle accident of January 18, 2007. The Commission finds that the preponderance of the medical evidence on the Appellant's file does not establish a causal relationship between the Appellant's motor vehicle accident and her ongoing pain symptoms including her possible fibromyalgia syndrome, her chronic pain syndrome and her depression.

The Commission accepts the opinion offered by [MPIC's Doctor], medical consultant to MPIC's Health Care Services team, that there is an unlikely temporal relationship between the Appellant's low back condition and the motor vehicle accident of January 18, 2007. Further, the

Commission accepts the opinion of [MPIC's Doctor] set out in his interdepartmental memorandum of March 21, 2013, wherein [MPIC's Doctor] concludes that:

When all of this information is taken into consideration, it was noted that it was the opinion of [Appellant's Orthopedic Surgeon] that [the Appellant] would be able to return to her employment as of the date of his assessment based upon the compensable left shoulder injury. [Text deleted] letter of February 2009 indicated that restrictions in return to work were mostly related to the effects of the non-collision-related low back condition as of that date based on his examination of [the Appellant]. [Appellant's Doctor #3's] reports went on to indicate restriction in objective function present associated with lower back injury, however, his recommendation did not indicate prolonged disability associated with this condition. Rather, he indicated a recommendation for increasing activity and function. Finally, the two opinions forwarded by the [Rehab Clinic] treatment team and [Independent Doctor] in their assessments of [the Appellant] indicated that she met the physical demands for a return to a pre-injury employment and/or the determined employment of a bookkeeper based on their physical examination assessments of [the Appellant]. In contrast to these opinions was the opinion forwarded by [Appellant's Doctor #2] in which he provided an opinion on disability solely caused by her pain; of which he related to many non-collision related conditions. When all of this information is taken into consideration, the preponderance of evidence points to [the Appellant's] functional ability to return to her employment as a bookkeeper/accountant as of June 14, 2009 as it related to the injuries that had been accepted as being related to the motor vehicle collision.

The Commission finds that [MPIC's Doctor] had the opportunity to review all of the medical reports, assessments and reports of interventions on the Appellant's file and was in the best position to assess causation of the Appellant's injuries. The Commission preferred the evidence provided by [MPIC's Doctor] to that of the Appellant. While, the Commission found that the Appellant was not a malingerer and that she was a credible individual, the Commission finds that the Appellant has not established, on a balance of probabilities, that the cause of her ongoing pain symptoms is the result of her motor vehicle accident. The medical evidence before the Commission did not corroborate the Appellant's position or provide support for the Appellant's argument that the motor vehicle accident must have caused her ongoing pain complaints and symptoms.

As a result, the Commission finds that the Appellant has not established that her ongoing pain condition is related to her motor vehicle accident of January 18, 2007. Accordingly, the Appellant's appeal is dismissed and the Internal Review decision dated November 12, 2009 is confirmed.

Dated at Winnipeg this 21st day of August, 2014.

YVONNE TAVARES

DR. SHELDON CLAMAN

DR. CHANDULAL SHAH