

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-047**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Robert Malazdrewich
Ms Jean Moor

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

HEARING DATE: May 5, 2014

ISSUE(S): Entitlement to Income Replacement Indemnity benefits from July 31, 2009 until November 15, 2010.

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

On August 3, 2007, the Appellant, [text deleted], was the driver of a motorcycle that collided with a third party vehicle which made a left turn in front of him. The Appellant flew over the handlebars and his left shoulder struck the other vehicle. Following that accident, the Appellant complained of a sore neck, sore back, sore shoulders, bruised legs, sore right wrist and hand (he had five stitches to the right wrist).

At the time of the motor vehicle accident, the Appellant was employed full-time as a [current position] with [text deleted] and employed part-time as a grounds keeper with [text deleted]. The Appellant's job as a [current position] involved preparing and loading rolls of paper on to the press. He had been moved into the [current] position two to three months before the motor vehicle accident. Prior to that, for 10 years, he had worked as a [former position]. This position involved offloading printed material from the press, bundling the printed material ([text deleted]) and stacking the material in boxes or on skids for transport. Due to the injuries which the Appellant sustained in the motor vehicle accident, he was unable to return to his employment and became entitled to income replacement indemnity ("IRI") benefits.

The Appellant did return to work on a gradual return to work basis effective February 7, 2008, initially working two hours per day. The Appellant was involved in a subsequent motor vehicle accident on June 10, 2008, when he was a passenger in a car in a deceleration, front impact motor vehicle accident. He sustained injuries to his neck and back. As a result of these further injuries, the Appellant was unable to return to his employment. He again began attending for physiotherapy treatment and tried cortisone injections, all with minimal changes.

The Appellant was able to return to work on a gradual basis, on light administrative duties, effective December 15, 2008, again starting at 2 hours per day. Thereafter, arrangements were made for the Appellant to undergo an assessment with [text deleted] Physiotherapy on April 8, 2009. As a result of that assessment, a reconditioning program was recommended for the Appellant which he began on May 19, 2009 and which concluded on July 10, 2009. In a report dated July 14, 2009, [text deleted] Physiotherapy indicated that the Appellant was capable of returning to work, full duties without restrictions as of July 13, 2009.

On July 22, 2009, MPIC's case manager advised that the Appellant's entitlement to IRI benefits would cease effective July 31, 2009. The case manager based his decision on the [text deleted] Physiotherapy discharge report of July 14, 2009, which confirmed that the Appellant had regained the functional ability to return to his pre-accident employment.

The Appellant sought an Internal Review of that decision. In a decision dated January 29, 2010, 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 medical information on your file confirms that you have the physical capacity to perform the essential duties of your pre-accident employment. I note that it is not only [text deleted] Physiotherapy that is indicating that you can go back to work, but your other healthcare practitioners with the exception of [text deleted] has indicated that there is no objective medical information to indicate a physical impairment of function resulting from your accident related injuries.

On May 13, 2010, the Appellant saw [Appellant's Doctor] regarding his ongoing right wrist and hand pain. At that time, he complained of numbness in the fingers of the right hand of about 2½ years duration. The numbness affected his thumb, index finger and sometimes little finger. [Appellant's Doctor] diagnosed the Appellant with right carpal tunnel syndrome. He had surgery to release the right carpal tunnel under local anesthetic on November 15, 2010. IRI was reinstated for the Appellant effective November 15, 2010 to May 29, 2011.

The Appellant has now appealed the Internal Review decision dated January 29, 2010 to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to further IRI benefits from July 31, 2009 until November 15, 2010.

Relevant Legislation:

Section 110(1)(a) of the MPIC Act provides as follows:

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:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

Appellant's Submission:

The Claimant Adviser, on behalf of the Appellant, submits that the Appellant was not capable of returning to work from July 31, 2009 until November 15, 2010 on a full-time basis. She submits that the Appellant has had consistent complaints of right hand, shoulder and lower back pain since the accident and those complaints have never stopped. The Claimant Adviser maintains that the Appellant's job required full function of his right hand and wrist. According to the medical reports and the Appellant's testimony, the Appellant had not regained full function of his right hand and wrist as of July 31, 2009 when his IRI benefits were terminated. As a result, the Claimant Adviser maintains that the Appellant's IRI benefits should not have been terminated effective July 31, 2009.

The Claimant Adviser contends that the Discharge Report from [text deleted] Physiotherapy was flawed as the [text deleted] physiotherapists did not have a job description for either the position of [former position] or [current position]. She submits that their opinion that the Appellant could return to work on a full-time basis was unsound as [text deleted] Physiotherapy was not aware of the Appellant's job duties. The Claimant Adviser argues that the case manager's decision of July 22, 2009 was faulty as it relied solely on the [text deleted] Physiotherapy Discharge Report. At that time, the Claimant Adviser contends that the Appellant's family physician still had not

released him to return to work and he continued to provide restrictions for the Appellant's return to work. As a result, the Claimant Adviser submits that the medical professionals did not agree with regards to the Appellant's return to work on a full-time basis as of July 31, 2009.

The Claimant Adviser argues that MPIC's Health Care Services consultant, who reviewed the file, did not appreciate the job duties of the Appellant as a [current position]. She submits that the Health Care Services consultant did not review the [current position] job and did not appreciate that the Appellant required significant right grip strength in order to perform his pre-accident employment.

Lastly, the Claimant Adviser submits that the Appellant was a compliant patient. He attended all of his appointments and worked diligently to regain his strength and be able to return to work. Further she argues that the Appellant was not a malingerer. He returned to light duties at [text deleted] as soon as he was able and worked at those light duties until he was able to progress and take on heavier job demands. As a result, the Claimant Adviser maintains that the Appellant is a reliable witness and the Commission should accept his testimony that he was not capable of performing his pre-accident job demands on a full-time basis from July 31, 2009 until November 15, 2010. As a result, she submits that the Appellant's IRI benefits should be reinstated for that period of time.

MPIC's Submission:

Counsel for MPIC submits that the Appellant is not entitled to IRI benefits from July 31, 2009 until November 15, 2010. He submits that the Appellant has not established that he was unable to hold his employment at [text deleted] as of July 31, 2009.

Counsel for MPIC submits that there is a lack of medical evidence to support the Appellant's position. Counsel for MPIC relies upon the opinions of [Appellant's Doctor], who was unable to comment as to whether the Appellant's carpal tunnel syndrome was related to the motor vehicle accident of August 2007. Counsel for MPIC relies upon the Discharge Report prepared by [text deleted] Physiotherapy dated July 14, 2009 which determined that the Appellant could return to work on a full-time basis without restrictions based upon his demonstrated ability throughout the reconditioning program. Counsel for MPIC submits that the Discharge Report is the best evidence of the Appellant's abilities at the relevant time.

Counsel for MPIC also relies upon the report prepared by MPIC's Health Care Services consultant dated March 9, 2012. The Health Care Services consultant who reviewed the Appellant's file determined that:

From an objective standpoint, the above noted documents do not contain much in the way of physical findings. The findings that are identified do not indicate [the Appellant] was physically impaired to the extent that he was not able to perform his required work duties. The documents do not contain information indicating [the Appellant's] objective evaluation identified deterioration in his condition during the time he was performing his work duties to the extent he had to stop as a result of the deterioration.

The file does contain documentation indicating [the Appellant's] assessment shortly after the incident in question identified problems with his right hand as well as a wrist laceration. The physical findings noted initially do not indicate a significant injury occurred to the right wrist that might contribute to problems in the future such as the development of carpal tunnel syndrome. As I am sure you (sic) aware, carpal tunnel syndrome develops in the absence of a single traumatic event in the majority of cases. It is assumed [the Appellant's] used his hands to perform various work, day-to-day and recreational activities. I was unable to extract information from the file indicating [the Appellant's] sustained an injury to the wrist that would render him more susceptible to developing carpal tunnel syndrome while performing basic work, day-to-day and recreational activities...

Based on the information obtained from the above noted documents in conjunction with the results of the review performed on November 29, 2009, it is my opinion a probable cause/effect relationship between the incident in question and the diagnosed carpal tunnel syndrome cannot be established. As I am sure you (sic) aware, reporting of hand

and/or wrist symptoms subsequent to the incident in question might establish a temporal relationship but this by itself does not establish a cause/effect relationship.

Counsel for MPIC argues that although MPIC paid IRI benefits to the Appellant following his carpal tunnel surgery, it was a mistake on the part of the case manager. He submits that there was no Health Care Services review at the time confirming that the Appellant's carpal tunnel syndrome which necessitated the surgery was related to the motor vehicle accident. Based upon the Health Care Services interdepartmental memorandum dated March 9, 2012, counsel for MPIC submits that the Appellant's carpal tunnel syndrome was not related to his motor vehicle accidents and therefore IRI benefits should not have been reinstated for the Appellant from November 15, 2010 to May 29, 2011.

Counsel for MPIC therefore submits that the Appellant has not met the onus of establishing that he was not able to work from July 31, 2009 until November 15, 2010 due to a motor vehicle accident related injury. As a result, counsel for MPIC maintains that the Appellant's appeal should be dismissed and the Internal Review decision of July 29, 2010 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 entitled to IRI benefits for the period July 31, 2009 to November 15, 2010.

Reasons for Decision:

The Commission finds that the application of Section 110(1)(a) of the MPIC Act in this case was flawed. Upon a careful review of the documentary evidence before it, the Commission was unable to determine which job the Appellant was determined to be capable of holding as of July 31, 2009. It was not clear from the evidence before the Commission as to whether the case manager was applying the job description for the Appellant's job as a [current position], which he held at the time of the accident, or whether the case manager determined that the Appellant could return to his position as a [former position], which position he held just prior to being promoted to the [current] position. Throughout the file, references were made to the [former] job rather than the Appellant's position as a [current position]. It was therefore not clear which position MPIC determined that the Appellant was capable of holding as at July 31, 2009. Ultimately though, the Commission finds that either position was a labourer position on a production line with significant physical demands and which required significant grip strength and lifting ability. We find that the Appellant did not possess the necessary physical requirements to hold either position as of July 31, 2009.

The Commission accepts the Appellant's testimony that he was not capable of returning to his employment as a [current position] as of July 31, 2009 due to his ongoing complaints with his hand and lower back pain. The Appellant testified in a forthright manner. He did return to work on light duties in September 2009. The Appellant gradually increased his duties as he was capable. He tried the [former position] job from time to time in order to test whether or not he was capable of heavier duties. The Commission finds that the Appellant was not a malingerer, he was honestly trying to return to his pre-accident position throughout this time. The Commission accepts the Appellant's testimony that he could not return to work as a [current

position] as of July 31, 2009. Accordingly, the Appellant is entitled to IRI benefits from July 31, 2009 until November 15, 2010.

Accordingly, the Appellant's appeal is allowed and the Internal Review decision date January 29, 2010 is therefore rescinded.

Dated at Winnipeg this 17th day of July, 2014.

YVONNE TAVARES

ROBERT MALAZDREWICH

JEAN MOOR