

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-12-141**

PANEL: Ms Laura Diamond, Chairperson
Ms Janet Frohlich
Mr. Les Marks

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

HEARING DATE: March 10, 2014

ISSUE(S): 1. Whether the Appellant's Income Replacement Indemnity benefits were properly terminated on June 4, 2010.
2. Whether the Appellant is entitled to Income Replacement Indemnity benefits subsequent to the accident of March 17, 2011.

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94

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

The Appellant was injured in a motor vehicle accident on December 5, 2009. At the time of the accident, the Appellant was employed as a custodian working 35 hours per week and provided commercial cleaning services up to 12.5 hours each week. For the purposes of calculating her Income Replacement Indemnity ("IRI") entitlement, the Appellant was classified as a temporary earner, based upon the length of time she had held her employment.

The Appellant received physiotherapy treatments and began a gradual return to work at her full-time job as a custodian on February 15, 2010, with a full return to work on February 22, 2010. She did not return to her part-time cleaning position and continued to receive a top-up IRI of her part-time wages.

The Appellant attempted a gradual return to work to her part-time cleaning position, but this was discontinued on June 9, 2010, when the Appellant decided to look for another part-time job.

The Appellant became entitled to a 180 day determination on June 16, 2010. On June 4, 2010 she was determined as a “cleaner”, the job she held at the time of the accident. As well, on June 4, 2010, her entitlement to IRI benefits ended when the Appellant was able to hold the employment determined for her. The Appellant did not request a review of that decision.

Then, on February 1, 2011, the Appellant called the case manager and advised that she should be off work due to her motor vehicle accident injuries. A February 4, 2011 Record of Employment from her employer indicated that her last day of work was January 18, 2011 when she had quit.

On March 17, 2011, the Appellant was injured in another motor vehicle accident. In regard to this second accident, she was classified as a non-earner, as the information stated she had quit her job in January 2011. Therefore, she was not entitled to IRI consideration for the first 180 days following the accident.

The Appellant again attended for physiotherapy treatment and also attended for chiropractic treatment. On August 18, 2011, a Functional Capacity Evaluation was conducted in order to determine her ability to perform the duties of a janitor/custodian. Then, on September 19, 2011,

an occupational therapist attended at her employer's premises to better understand the Appellant's pre-accident job demands.

The Appellant also attended for a psychological assessment. The psychologist concluded that although the Appellant suffered from depressive symptoms, these were, on the balance of probabilities, not related to the motor vehicle accident of December 5, 2009 but rather were due to pre-existing psychological conditions.

A review by MPIC's Health Care Services consultant concluded that there was no evidence of a relapse and that the Appellant had the functional capacity required to work in a janitorial position, despite her symptoms. Further, the psychological consultant with MPIC's Health Care Services team opined that the Appellant's psychological condition would not serve as a barrier to her ability to return to work.

A case manager's decision dated March 28, 2012 reviewed the information on the Appellant's file and concluded that the Appellant was not entitled to further IRI benefits in relation to her December 5, 2009 accident and that MPIC was unable to extend any further IRI benefits to her in relation to her March 17, 2011 accident. The Appellant sought an Internal Review of this decision. On June 21, 2012, an Internal Review Officer reviewed the Appellant's file and the medical and other information contained therein. The Internal Review Officer concluded that the Appellant had returned to her full-time cleaning job in February of 2010 and demonstrated that she could hold this employment on a full-time basis when her IRI entitlement ended effective June 4, 2010. Aside from reported subjective complaints of pain, there was insufficient medical evidence to conclude that a relapse of the accident injuries in fact occurred in January 2011. When the second accident occurred on March 17, 2011, the Appellant was properly classified as

a non-earner, as she was not employed at the time of that accident, even though she was able to work. There was insufficient evidence on the Appellant's file to show that she was unable to hold employment as a result of motor vehicle accident injuries on the 181st day following the accident and so she was not entitled to a 180 day determination of IRI benefits as a result of the injuries sustained on March 17, 2011. The case manager's decision of March 28, 2012 was upheld by the Internal Review Officer.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submissions for the Appellant:

The Appellant testified at the hearing into her appeal. She explained that due to her physical injuries, she had only been able to work a couple of hours at a time since the two motor vehicle accidents. She was only able to do that by using heavy medication for her back and neck pain. She had lost her benefits, and was receiving no treatment. She had gone to the pain clinic and had also received cortisone shots, but these did not help. She suffered from anxiety, depression and poor self-esteem, which resulted in weight gain, worry and affected her mood.

The Appellant explained that her ability to work more than a few hours is limited by her physical pain. She has difficulty sleeping and struggles physically. She had to quit her full-time job because of her pain and her inability to do the work.

Counsel for MPIC questioned the Appellant regarding inconsistencies in some of the reports regarding the motor vehicle accident, including her report that she had lost consciousness and her reports of pain. The medical evidence which she was referred to indicated that the Appellant had

not lost consciousness and that when the ambulance attended to her after the first motor vehicle accident, she did not report any complaints to them.

Although counsel for MPIC suggested that the Appellant was functionally capable, as of June 4, 2010, of performing her duties as a custodian, the Appellant maintained that she was unable to function, could not use floor cleaning machines and was unable to do a lot of tasks for her job. When it was suggested that there were a variety of reasons why she had not returned to her part-time job, the Appellant maintained that it was only because of her accident injuries. She denied having any problems with anxiety in the past and explained that her only history of depression was related to a previous marital breakdown.

The Appellant submitted that she had recovered from her divorce and her life was fine. Then she was hit twice in motor vehicle accidents and life got harder. She pushed herself to work but could not do it. She can only work a couple of hours a week and submitted that MPIC should be required to compensate her for this loss.

Evidence and Submission for MPIC:

Counsel for MPIC submitted that the Appellant was not a reliable historian in regard to her condition. Instead, counsel referred to a variety of documents and medical reports on the Appellant's indexed file which set out the history of the Appellant's condition.

The Ambulance Patient Care Report following the motor vehicle accident of December 5, 2009 indicated that the Appellant suffered from no complaints, and walked out of the car stable, with no change in her condition on the way to hospital. This was confirmed by the Emergency Triage

Record which did not show any trauma on the Glasgow-Coma Scale and resulted in an Outpatient and Emergency Report with a diagnosis of no injuries.

An emergency documentation form from the following day showed that the Appellant returned to the hospital complaining of major trauma and indicating that she had collapsed and then woken up in the ambulance. Counsel noted that this did not correspond with the earlier report.

The Outpatient Emergency Report from the March 17, 2011 accident showed a diagnosis of laceration, swelling, bruising and soft tissue injuries. A CT of the cervical and lumbar spine confirmed that there were no fractures and the diagnostic imaging report identified no injuries. A CT of the Appellant's brain showed no abnormalities.

Counsel for MPIC explained how, based on the Appellant's education and experience etc., the Appellant, whose earner status at the time of the first motor vehicle accident was based upon the length of time she had been employed before the accident, was determined as a "cleaner". MPIC obtained a Physical Demands Analysis regarding the Appellant's job which identified the essential duties of the job to include light lifting which did not require significant physical strain. It was concluded that the Appellant had the capacity to perform the duties of a cleaner and this was demonstrated by her ability to work at this job for 35 hours per week. She was able to perform this job for almost an entire year after she went back to work.

In spite of a Therapy Discharge Report dated March 11, 2010 which indicated that the Appellant was capable of starting a graduated return to work program regarding her part-time job, the Appellant decided to look for another part-time job. Counsel suggested that this was due to difficulties with and debts owed by the Appellant to that employer.

Counsel also reviewed a variety of medical reports on the Appellant's indexed file which indicated that she was able to work. These included:

- Primary Health Care Report from [Appellant's Doctor #1], dated December 15, 2009;
- Primary Health Care Report from [Appellant's Doctor #2], dated January 5, 2010;
- Report from [Appellant's Doctor #3] dated March 9, 2011.

MPIC carefully compared the Appellant's abilities, the medical information and the functional capacities required by the duties of a cleaner. The Appellant also attended at [Rehabilitation (Rehab) Clinic] for an assessment. [Rehab Clinic's] report dated August 18, 2011 concluded that the Appellant demonstrated ability to perform lifting activities within the "medium" categories and demonstrated physical abilities at the "medium physical demand level" overall, matching the physical requirements of her janitorial job.

Counsel also reviewed the psychological evidence on the Appellant's file. She indicated that prior to the motor vehicle accident, the Appellant had a history of suffering from significant depression. Medical evidence and documents on the indexed file from the pre-motor vehicle accident period were referred to in order to substantiate this position. For example, a report dated October 24, 2006 indicated that the Appellant had been diagnosed and treated for major depressive disorder in the past. In addition, other psycho-social and financial stressors affected the Appellant, predating the motor vehicle accident.

A psychiatric report from [Appellant's Psychiatrist] dated March 22, 2010, confirmed past episodes of major depression, including hospitalization, and noted a concern regarding bipolar

disorder, connected to a [text deleted] marriage to a man who had she had known for five months.

A letter dated January 31, 2011 from a registered social worker with a community mental health program, indicated that the Appellant has ongoing major depression symptoms and exhibits Cluster “B” personality traits.

A report from [text deleted] [Appellant’s Psychologist], dated January 31, 2012 reviewed the Appellant’s mental health history and her current condition. She noted that the Appellant:

...showed a tendency to endorse symptoms that are very infrequent in a psychiatric population and she tended to indiscriminately endorse psychiatric symptoms.

Given that two scales scores fell in the Probable Feigning category, there is a higher likelihood of symptom distortion (approximately 82% likelihood based on validation studies). However, the majority of scales falling in the indeterminate category suggest that [the Appellant] response pattern was variable and a definitive determination of her response style is not possible.

In regard to diagnosis, [Appellant’s Psychologist] indicated:

Based on the current assessment, [the Appellant] does appear to suffer from psychological difficulties. Based on her self-reported symptoms, she would meet diagnostic criteria for both Major Depression and for Pain Disorder. However, given her clear tendency to exaggerate, observed both in interview and on psychometric validity measures, invalid psychological measures, and potential secondary gain, I find it difficult to apply a definitive diagnosis based on this assessment.

Although malingering is not a DSM psychiatric diagnosis, it is listed under “other conditions that may be a focus of clinical attention”. The essential feature is the “intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives...” Given [the Appellant’s] history of depression, it is unlikely that she is intentionally, entirely falsifying psychological symptoms, but rather there is evidence of gross exaggeration, which meets the essential feature of malingering. In terms of pain experience, based on the documentation provided, there appears to be medical evidence of a neck/back injury. However, the severity of her self-described pain experience does not appear to be consistent with objective findings, suggesting an exaggeration of symptoms. She exhibited behaviours that are not typical of

pain patients, such as bending at the waist. Her profile on the MPI is not typical of pain patients, particularly with her self-report of a high level of social activities.

[Appellant's Psychologist] concluded that the depression the Appellant experienced was not directly related to the motor vehicle accident. Although this may have been one contributing factor to the further development to maintenance of symptoms, it was not directly the initial triggering factor. There was sufficient evidence to suggest that depression was a pre-existing condition and that the accident contributed to maintaining symptoms, but it was not clear that the Appellant's depression was exacerbated directly by the motor vehicle accident.

[Appellant's Psychologist] was not of the view that the Appellant was unable to work as a result of her depression.

Counsel relied upon a memorandum dated March 15, 2012 from the psychological consultant with MPIC's Health Care Services, which reviewed [Appellant's Psychologist's] report, concluding that the Appellant's psychological difficulties predated her motor vehicle accident and did not result in significant work interruption.

Therefore, based upon all the documentation referred to, counsel for MPIC submitted that the Appellant's IRI benefits were properly terminated on June 4, 2010. There were no physical functional limitations preventing the Appellant from working as a cleaner at that time and insufficient evidence was provided to establish that there was a relapse in her symptoms preventing her from working following the March 17, 2011 motor vehicle accident. Documentation which included a Functional Capacity Evaluation and Physical Demands Analysis supported this position. Further, assessments of the Appellant's psychological history

and condition showed that the Appellant's psychological condition was not exacerbated by the motor vehicle accident, and identified an inclination towards symptom exaggeration.

Therefore, the totality of the file indicated that based on the Appellant's physical and psychological levels she was able to work full-time as a cleaner from June 4, 2010 and the Appellant's appeal should be dismissed.

Discussion:

The MPIC Act provides:

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;

Manitoba Regulation 37/94 provides:

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review decision of June 21, 2012 erred in determining that the Appellant's entitlement to IRI benefits were properly terminated on June 4, 2010 and that she was not entitled to subsequent IRI benefits following the accident of March 17, 2011.

The panel has reviewed the Appellant's testimony, as well as the documentary evidence on the Appellant's indexed file and the submissions of the Appellant and counsel for MPIC.

In spite of her self-reported complaints, the panel finds that the Appellant has failed to meet the onus upon her of showing that injuries resulting from either motor vehicle accident, prevented her from working as a cleaner after June 4, 2010.

The evidence showed that the injuries she suffered in the motor vehicle accidents consisted of bruises, lacerations and some soft tissue injuries resulting in complaints of back and neck pain. The Appellant received IRI benefits and received physiotherapy treatments as well as chiropractic treatments following her second motor vehicle accident.

It was the view of her caregivers that she was capable of returning to work. Following a graduated return to work program, the Appellant was working full-time for a year after her determination as a cleaner in June of 2010. The Appellant then resigned from her position. There is no evidence (beyond the Appellant's testimony) to corroborate the Appellant's position that quitting her job in February of 2011 had anything to do with injuries arising from the motor vehicle accident that occurred in December of 2009. MPIC's position in this regard is supported by the medical reports referred to by counsel for MPIC, including [Appellant's Doctor #3's] opinion as well as by a Functional Capacity Evaluation and a Physical Demands Analysis regarding her job.

The indexed file also established that the Appellant suffered from a substantial pre-existing history of psychological difficulties, including major depression. [Appellant's Psychologist's] thorough psychological report dated January 31, 2012 included references to possible symptom magnification and exaggeration, along with a history of previous depression. Although the motor vehicle accident may have contributed to maintaining the pre-existing condition, the

evidence was not clear that the depression was exacerbated directly by the motor vehicle accident. Nor was it clear that her depression would prevent her from working:

In terms of depression (which is not entirely MVC related), the condition does not preclude travelling to and from the workplace or result in inability to perform the required work tasks of the nature of work that [the Appellant] has held in the past. Returning to work would not pose a safety risk or adversely affect the natural history of the condition. Rather, the introduction of productive activities and receipt of pay (thereby alleviating some financial strain) would likely improve [the Appellant's] mood status.

Although I question the validity of [the Appellant's] report of pain severity, even if she were diagnosed with Pain Disorder, this disorder would not preclude her from travelling to and from work, performing work tasks, pose a safety risk, or adversely affect the natural history of the condition.

Accordingly, the panel has concluded that the Appellant did not suffer from motor vehicle accident related injuries, either physical or psychological, that prevented her from working and would entitle her to IRI benefits after June 4, 2010 or following the accident of March 17, 2011. Accordingly, the decision of the Internal Review Officer dated June 21, 2012 is upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 16th day of April, 2014.

LAURA DIAMOND

JANET FROHLICH

LES MARKS