

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-132**

PANEL: Ms Laura Diamond, Chairperson
Dr. Arnold Kapitz
Ms Sandra Oakley

APPEARANCES: The Appellant, [the Appellant], was represented by Mr. Ken Kaltornyk and Mr. Rex Osivwemu of the Claimant Adviser Office;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Alexandra Miles and Mr. Morley Hoffman.

HEARING DATE: July 19, 2017

ISSUE(S): Entitlement to Income Replacement Indemnity benefits beyond 180 days.

RELEVANT SECTIONS: Section 86(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 injured in a motor vehicle accident (MVA) on September 14, 2009 when she was a passenger on a [text deleted bus. She fell when the bus stopped suddenly and struck her face on a pole. She was transported to hospital by ambulance where further investigation of her injuries was conducted, including x-rays. No fractures or dislocations were seen but x-ray confirmed a pre-injury degenerative disc disease in the cervical lumbar spine. The Appellant was diagnosed with "minor trauma".

At the time of the MVA the Appellant was unemployed and in receipt of EI benefits. For the purpose of determining her eligibility for Income Replacement Indemnity (IRI) benefits, she was classified as a non-earner.

The Appellant attended for physiotherapy treatment and reports were provided to MPIC by the physiotherapist.

As a non-earner, her initial entitlement to EI benefits was not affected by the MVA. MPIC found the Appellant was not entitled to IRI benefits for the first 180 days following the MVA. On March 3, 2010, the Appellant's case manager found that as the medical information indicated that the Appellant was functionally capable of returning to full-time sedentary employment as of November 27, 2009, she was not entitled to a 180 day determination or IRI benefits following the 180th day.

On September 28, 2011, an Internal Review Officer for MPIC upheld the case manager's decision that the Appellant was indeed capable of holding employment when she was assessed in November of 2009 and was not entitled to further IRI benefits.

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

Issues:

Initially, the issues before the Commission included the Appellant's entitlement to IRI benefits for the first 180 days, entitlement to additional physiotherapy treatment and the late filing of the Appellant's Application for Review. However, at the outset of the appeal hearing on July 19,

2017, counsel for the parties confirmed that the only issue outstanding and remaining before the Commission in the appeal was the Appellant's entitlement to IRI benefits beyond 180 days.

Based on the panel's review of the documentary evidence on the Appellant's indexed file, as well as the testimony of the Appellant (via teleconference) and the submissions of counsel, the Commission finds that the Appellant has not met the onus upon her to show, on a balance of probabilities, that she was entitled to IRI benefits for the period falling 180 days after the MVA.

Evidence and Submission for the Appellant:

The Appellant testified, via teleconference, at the appeal hearing. She described the MVA of September 14, 2009. She described trying to catch a post on the bus when the bus driver suddenly braked, falling, and injuring her fingers, hands, wrist, head, eye, toe, knees, ankle, buttocks and back.

She confirmed that prior to the MVA she had been in receipt of EI benefits and that prior to that, she had been a teacher in Northern Ontario in various communities. Prior to the MVA, she had not had any difficulties performing her job and had not been treated for any mental health problems. Since the MVA, however, she has not been able to return to gainful employment.

On cross-examination, the Appellant was asked to consider a report written by her physiotherapist and dated February 26, 2010 which noted that the Appellant was capable of returning to a sedentary occupation at the end of November 2009. The Appellant confirmed that she was treated by this physiotherapist, but noted that the physiotherapist also requested ten more physiotherapy sessions (which were denied by MPIC) that could have resulted in her making greater progress in her recovery. She also noted that she had submitted medical reports from her

doctor, [Appellant's doctor], which confirmed her inability to return to work at that time. She maintained that because she was going through pain and issues with her body, including difficulty walking and neck pain, she could not work. She also confirmed that at that time, no complaints about psychological injury from the MVA were made by her and that in fact, these complaints were not made until years after the MVA.

The Appellant was also asked about a report requested by the Commission from [text deleted], an expert in forensic psychology and neuro-psychology. [Appellant's psychologist] provided a diagnosis of a psychotic mental disorder for the Appellant, but opined that there was no causal connection between her psychotic mental disorder and the September 2009 MVA. The Appellant took the position that because of the MVA, the length of time, lack of resources and lack of treatment provided to put her back into her prior position, she suffered not just the injury, but extreme terror and socio-psychological, cultural and economic genocide as a result.

Counsel for the Appellant submitted that evidence on the indexed file from [Appellant's doctor] and [Appellant's psychologist] confirmed that the MVA played a significant role, through indirect causation and/or exacerbation of the Appellant's psychotic mental disorder and adversely affected her psychological domain functioning and coping, such that she was unable to work at the 180 day point after the MVA and following.

Counsel relied on the Appellant's testimony, which established that although she was unemployed and receiving EI benefits at the time of the MVA, she was also in the process of applying for teaching positions at that time and that during the 2007 to 2008 school year the Appellant had been employed as a teacher in [text deleted]. She had a history of working, prior to that, at [text deleted].

Counsel noted that the physiotherapy report of February 11, 2010 indicated that, at that time, the Appellant was still suffering from neck pain, right thumb pain, left knee pain and swelling the knee. This indicates that in early 2010, the Appellant still had not fully recovered from her physical injuries incurred in the MVA.

Further, a letter from [Appellant's doctor] dated November 24, 2011, indicated that the Appellant was "an honest individual who has multiple physical complaints plus stress from her circumstances".

A further letter from [Appellant's doctor], dated September 24, 2013, stated that the Appellant had been unable to work since the time of the MVA "... because of the psychological overlay precipitated by the accident". He indicated that it was "my considered medical opinion that there is a causal connection between [the Appellant's] motor vehicle accident of Sept. 14, 2009 and the (sic) [the Appellant's] physical and psychological problems".

Counsel also reviewed [Appellant's psychologist's] letter of August 28, 2015. Counsel objected to [Appellant's psychologist's] statement that:

In the context of her sustaining what the ER physician stated was "minor trauma" and, in the absence of sustaining a brain injury in the MVA, this narrative likely reflects significant mental status problems with thought process and thought content abnormality that would not be directly related to the MVA. ...

Counsel submitted that the Appellant's mental status need not be directly related to the MVA and that the MVA need only to have contributed significantly to that condition.

[Appellant's psychologist's] description of the Appellant's disordered thought processes and other symptoms led him to state that the Appellant clearly had a psychotic mental disorder. This

should be viewed as consistent with someone who could not possibly hold gainful employment and there was no evidence, it was submitted, that the Appellant had suffered from such a disorder during the years prior to the MVA. There was no mention of severe psychological problems at that time in [Appellant's psychologist's] interview notes.

[Appellant's psychologist] went on to state that in the absence of the Appellant sustaining a brain injury in the MVA there was no evidence that her mental disorder was caused by the MVA "although the multiple psychosocial and financial stressors that she dealt with would adversely impact her psychological domain functioning and coping".

Counsel for the Appellant took the position that this statement by [Appellant's psychologist] confirmed that the MVA played a significant role in the indirect causation or exacerbation of the Appellant's psychotic mental disorder and that he incorrectly applied a medical standard of proof in his conclusion that there was no causal connection between her psychotic mental disorder and the MVA. Since [Appellant's psychologist] confirmed that, in the psychological domain, the Appellant would likely not have had the functional ability to work as a school teacher on the 181st day following the MVA, it was counsel for the Appellant's position that, if we apply the correct legal criteria to the question of causation, the evidence is that the MVA, on a balance of probabilities, did play a significant role in causing or exacerbating the Appellant's mental disorder, either directly or indirectly. Accordingly, he submitted that the appeal panel should overturn the decision of the Internal Review Officer and accept the Appellant's entitlement to IRI benefits beyond the 180th day following the MVA.

Evidence and Submission for MPIC:

MPIC relied upon the reports of the physiotherapist as well as the reports of [Appellant's psychologist] in submitting that the Appellant was able to return to work on the 181st following the MVA. Counsel addressed both the physical and psychological components of the Appellant's condition.

With regard to the physical consequences of the MVA, counsel referred the panel to the [text deleted] Fire Paramedic Service report following the accident which indicated that the injuries suffered by the Appellant were limited to soft tissue injuries and bruising, with no note of lacerations, fractures or dislocations. The Appellant's application for Personal Injury Protection Plan (PIPP) benefits described her injuries as having hit her head on the post, with injuries to her right hand, thumb and wrist, left ankle, right knee, hitting head on ground, neck pain, left wrist twisted, bruises, no cuts, headaches, trouble sleeping. This corroborates the information in the Paramedic report.

On February 26, 2010, the Appellant's physiotherapist opined that after receiving 24 treatments, she was capable of returning to a sedentary occupation at the end of November 2009. The Appellant had not provided any medical evidence to refute that opinion. Accordingly, MPIC submitted that the Appellant was correctly found to be physically able to return to work at that time.

With regard to the issue of the psychological injury, counsel referred the Commission to [Appellant's psychologist's] report of August 28, 2015. [Appellant's psychologist] concluded that there was no evidence that the Appellant had sustained a brain injury in the MVA. In her

application for benefits, made on October 8, 2009 (24 days after MVA), the Appellant did not make any mention on psychological sequelae resulting from the accident. [Appellant's psychologist] pointed out that at appointments with her primary physician, [Appellant's doctor], on October 8, 2009 and with her physiotherapist on October 21, 2009, psychological injury was not raised as an issue by the Appellant.

[Appellant's psychologist] noted that two years' post-MVA, no psychological issues had been raised by the Appellant. It was only in 2013, four years after the MVA, that the Appellant raised psychological trauma with [Appellant's doctor]. [Appellant's psychologist] definitively stated that in the absence of the Appellant sustaining a brain injury in the MVA, there was no evidence that her mental disorder circumstances were caused by the MVA.

It was submitted that [Appellant's doctor's] letter dated September 24, 2013, although stating that the Appellant had suffered psychological trauma at the time of the accident and had suffered psychological symptoms in relation to it since then, did not refer to any previous reports by him regarding these issues and did not state what kind of treatment the Appellant was undergoing for these psychological issues. He did not refer to any reports from any psychologists or psychiatrists that would support his opinion. It should be noted that [Appellant's doctor] is not a psychologist or psychiatrist, but rather, is a respiratory medicine and tuberculosis physician.

It was MPIC's position that no objective medical findings have been presented that point to the MVA being the cause of any ongoing psychological issues that the Appellant is experiencing.

As the onus is on the Appellant to demonstrate that she was rendered physically or psychologically incapable of holding employment as a result of the MVA, it was MPIC's

position that she had not, and that the decision of the Internal Review Officer that the Appellant was correctly denied IRI benefits on the 181st day following the accident should be upheld by the Commission.

Discussion:

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

The onus is on the Appellant to show, on a balance of probabilities, that she was unable to work from the 181st day following the MVA as a result of psychological or physical injuries sustained in the MVA.

The MPIC Act provides:

Entitlement to I.R.I. after first 180 days

86(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section 106, and the non-earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident.

Physical Injuries:

A review of reports from the paramedics and hospital following the MVA, as well as [Appellant's doctor's] Primary Health Care Report dated October 8, 2009, reports from the physiotherapist and from MPIC's Health Care Services team do not disclose continuing areas of physical injury which would have prevented the Appellant from pursuing gainful employment as of November 27, 2009.

The reports from the paramedics and the hospital, as reviewed above, describe soft tissue injuries and minor trauma complaints with no lacerations, fractures or dislocations.

[Appellant's doctor's] Primary Health Care Report provided a clinical diagnosis of whiplash with a normal neurologic examination in October 2009.

Following continued physiotherapy treatment, MPIC's Health Care Services consultant reviewed the Appellant's file, along with her injuries and treatment and indicated that:

The medical evidence indicates claimant's medical status is improving with PT and has the physical ability to pursue gainful employment (such as teaching) as of Nov. 27/09, if not sooner.

This was confirmed by the report of the physiotherapist, [text deleted] dated February 26, 2010.

She stated:

As per telephone conversation today the purpose of this report is to determine when the claimant was capable to returning to a sedentary occupation at full time status.

Although the claimant continued to complain of pain in her neck, headaches, right thumb and left knee pain it is the opinion of the writer that she was capable of returning to a sedentary occupation at the end of November 2009.

The Appellant has not met the onus of showing, based on further medical evidence, that these reports were not correct and that she was unable to work at sedentary employment on the 181st day following the MVA. Accordingly, the panel finds that the Appellant has failed to show that she was physically unable to return to work at the end of November 2009.

Psychological Injury

In reviewing the medical evidence regarding the Appellant's alleged psychological injuries, the panel reviewed the reports of [Appellant's doctor] and of [Appellant's psychologist].

Counsel for the Appellant submitted that [Appellant's psychologist] applied an incorrect standard in his examination of whether there was a causal connection between the Appellant's psychological condition and the MVA. Counsel argued that [Appellant's psychologist] focused only upon whether there was a direct connection between the Appellant's condition and the MVA and failed to consider the indirect connection. He had also failed to sufficiently recognize the impact of the psychosocial stressors created by the MVA.

The panel finds that [Appellant's psychologist's] report of August 28, 2015 is central to this issue. He notes that:

In the absence of [the Appellant] sustaining a brain injury in the MVA in question, there is no evidence that her Mental Disorder(s) circumstance was caused by the MVA although the multiple psychosocial and financial stressors that she has dealt with would adversely impact her psychological domain functioning and coping, including related to her perception that the MVA had led to her multiple problems although, the most important factor in her outcome relates to her mental disorder status.

...

In the psychological domain, there is no causal connection between her Psychotic Mental Disorder and the September 2009 MVA. In the physical domain, as of the Physiotherapist's report of February 26, 2010, the opinion was that she was capable of returning to a sedentary occupation at the end of November 2009.

[The Appellant], in the psychological domain, most likely would not have had the functional ability to work as a School Teacher on the 181st day following the accident, in mid-March 2010, given her nonrelated Psychotic Mental Disorder.

[Appellant's psychologist's] opinion that "there is no causal connection" between the Appellant's psychological condition and the MVA is clear. Although the panel acknowledges that [Appellant's doctor] is a well respected doctor with a long-standing professional relationship with the Appellant, we note that his reports did not document psychological complaints by the Appellant throughout her treatment, until 2013. Even at that point, [Appellant's doctor's] reports

did not provide an analysis of the Appellant's psychological condition or its connection to the MVA. He is not a psychologist or psychiatrist, nor did he refer her to one for treatment.

Accordingly, the panel must place greater weight upon the evidence of [Appellant's psychologist], a psychologist with forensic experience who interviewed the Appellant and focused directly upon the questions set out for him by the Commission. He provided expert reports which included a thorough analysis of whether or not there was a causal connection between the motor vehicle accident and the Appellant's psychological condition, concluding that there was not.

As a result, we find that the Appellant has failed to establish, on a balance of probabilities, that she suffered from a physical or psychological condition caused by the MVA which prevented her from working 181 days after the MVA and following. The Internal Review decision dated September 28, 2011 is thereby upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 24th day of August, 2017.

LAURA DIAMOND

DR. ARNOLD KAPITZ

SANDRA OAKLEY