

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No. AC-11-160**

PANEL: Ms Karin Linnebach, Chairperson
Ms Linda Newton
Ms Janet Frohlich

APPEARANCES: The Appellant, [text deleted], was not present at the appeal hearing;

Manitoba Public Insurance Corporation (“MPIC”) was represented by Ms Danielle Robinson

HEARING DATE: February 1, 2018

ISSUE(S): Entitlement to Income Replacement Indemnity (“IRI”) benefits beyond August 12, 2011

RELEVANT SECTIONS: Subsections 70(1) and 110(1)(a) of The Manitoba Public Insurance Corporation Act (“MPIC Act”); Section 8 of Manitoba Regulation 37/94

Reasons for Decision

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.

Background:

The Appellant, [text deleted], was injured in a motor vehicle accident (“MVA”) on March 31, 2010. Following the MVA, the Appellant received Personal Injury Protection Plan (“PIPP”) benefits, including physiotherapy treatment and IRI benefits. On August 8, 2011, the Appellant’s case manager advised the Appellant that her IRI benefits were terminated as of August 12, 2011.

The case manager held that the Appellant had no objective functional limitation relating to the MVA that would preclude her from returning to her pre-accident employment. The Appellant filed an Application for Review of this decision to the Internal Review Office. In a decision dated November 15, 2011, the Internal Review Officer upheld the case manager's decision, finding that the medical evidence on the Appellant's file supports the decision that there are no objective findings that preclude her from working at the job she held at the time of the MVA on a full time basis.

The Appellant filed a Notice of Appeal to the Commission on December 20, 2011. The issue on appeal was whether the Appellant was entitled to further IRI benefits beyond August 12, 2011.

Decision:

For the reasons set out below, the panel finds the Appellant has not met the onus of establishing, on a balance of probabilities, that she is entitled to further IRI benefits beyond August 12, 2011.

Preliminary and Procedural Matters:

Six Case Conference Hearings were scheduled regarding this appeal. The purpose of the Case Conference Hearings was to discuss pre-hearing matters and to schedule a date for the hearing of the appeal.

The Appeal was set for hearing for February 1, 2018 at 9:30 a.m. The Notice of Hearing was sent to the Appellant by Xpresspost and regular mail. The Xpresspost was accepted by the Appellant on July 26, 2017.

On February 1, 2018, the hearing of the appeal was convened at 9:30 a.m. with counsel for MPIC present. The Appellant did not attend. The Commission's Notice of Hearing provided that the time and date of the hearing are firm and that postponements will only be granted under extraordinary circumstances. The Notice also provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and may issue its final decision either granting or dismissing the appeal in whole or in part.

Accordingly, the appeal hearing proceeded at 9:45 a.m. and the panel heard the submissions from counsel for MPIC. After submissions were completed, the panel advised counsel for MPIC that the panel would, as is the normal course, adjourn to deliberate and advise the parties of its decision in due course by providing a written decision. The hearing then adjourned.

Submission for the Appellant:

As indicated, the Appellant did not attend the hearing and therefore was not available to provide any testimony or to be cross-examined by counsel for MPIC.

In her Notice of Appeal to the Commission dated December 20, 2011, the Appellant indicated she would be providing a letter to the Commission addressing her reasons for filing the appeal. The following handwritten letter dated January 29, 2012 was received by the Commission:

As stated on my "Notice of Appeal", here are my reasons for appealing your review: It appears, prior to the MVA, that I had no issues or stress in my workplace. I was quite competent in performing my work duties, in an efficient manner in the workplace. After the MVA, it appears that I have some elements of PTSD as stated by [Appellant's doctor #1] on not wanting to drive my car. I like my work and wanted to continue to work in my profession. I conquered my fear of driving in a confined space and was able to commence a GRTW program with every intention of working again. I needed to be able to drive again to ensure I could get to my patients in a timely manner.

I then developed a syncope or vertigo as stated by [Appellant's doctor #2]; with stress building up from the MVA and pressures at work, there was an incident at work where I

was put on leave, with respect to disciplinary suspension. [Appellant's doctor #3] reported that there was indication of stress, anxiety and depression, which was created after my MVA and not the workplace incident, which was compounded by the GRTW program. I should have been placed back in my usual work area, on limited hours then the hrs increased gradually.

[Appellant's neuro-psychologist] reported that I appeared to have some earlier anxiety symptomology as discussed by [Appellant's doctor #1]. I then started a second GRTW program with every intention of continuing my employment. [Appellant's doctor #4] confirmed my stress issues in his [text deleted] modified duty form, stating I was unable to work over six hours per day and he also stated on this form that I was unable to multi-task as confirmed by [text deleted] [Appellant's supervisor's] August 8, 2011 letter to [Appellant's doctor #4], asking that question and duly noted on her copy of the letter.

I feel I am entitled to IRI, due to the fact prior to the MVA I had never had a problem with multitasking or doing my job.

Submission for MPIC:

Counsel for MPIC confirmed that the issue under appeal is whether the Appellant is entitled to IRI beyond August 12, 2011. Counsel reviewed the facts in this matter, with reference to the documents in the Appellant's claim file. The Appellant was involved in an MVA on March 31, 2010 and, at the time of the MVA, the Appellant was a [text deleted] working for [text deleted]. MPIC accepted that the MVA-related injuries prevented the Appellant from working and paid her IRI benefits.

In May 2010, the Appellant attended for a psychological assessment and was found to have some elements of Post-Traumatic Stress Disorder (PTSD), but she did not meet the full criteria for the diagnosis. The psychologist recommended therapy and MPIC funded this therapy to address the MVA-related psychological symptoms.

In August 2010, the Appellant began a gradual return to work program with her pre-accident employer in the [clinic]. On September 15, 2010, the Appellant was involved in a work altercation

which resulted in a work leave and disciplinary action. Counsel referred the panel to case manager file notes dated September 28, 2010 and October 20, 2010 documenting the case manager's discussions with the [text deleted] Disability Coordinator and the Appellant regarding her return to work status. Counsel also referred the panel to a Respectful Workplace Complaint Form filed against the Appellant dated September 23, 2010; the Complaint Investigation dated June 10, 2011; an email from [text deleted] Disability Claim's Manager dated June 23, 2011 confirming that the Appellant would be serving a disciplinary suspension on June 27, 28 and 29, 2011; and the Notice of Decision and Reasons dated January 30, 2012 issued by the [text deleted].

The Appellant was sent to an Independent Third Party Examination with [Appellant's doctor #3], who provided a report dated December 16, 2010. With respect to her physical injuries, [Appellant's doctor #3] concluded that there was no pathoanatomical condition that was identified and recommended that the Appellant return to regular duties in a gradual manner.

The Appellant attended to [Appellant's neuro-psychologist] for a neuropsychological evaluation in February 2011. In her report dated March 3, 2011, [Appellant's neuro-psychologist] stated that the Appellant likely is experiencing no significant deficits in intellectual skills, attention, memory, language, visuospatial abilities, or executive functioning. MPIC's psychological consultant provided an opinion dated April 28, 2011 and stated that there was no accident related psychological or neuropsychological condition that would preclude the Appellant from a gradual return to work.

The Appellant began a second gradual return to work in June 2011, but did not progress past working 6 hours per day due to depression and stress. Counsel referred the panel to a Modified Duty Form completed by the Appellant's physician dated August 5, 2011, which states that the

Appellant is unable to work over 6 hours per day, is depressed with neck pain and headaches, tires easily and is unable to handle stress.

The case manager found that there was no physical or psychological condition related to the accident that would prevent the Appellant from returning to her pre-accident employment and found that her entitlement to IRI benefits ended as of August 12, 2011. The Internal Review Officer upheld that case manager's decision by letter dated November 15, 2011.

The Appellant's former representative requested that the Commission order an assessment and report from [Appellant's psychologist]. This request was granted and [Appellant's psychologist] conducted a psychological and neuropsychological assessment of the Appellant. He provided an initial report dated September 11, 2015 and a clarification of his report on June 10, 2016.

MPIC's psychological consultant reviewed [Appellant's psychologist's] reports and indicated [Appellant's psychologist] found, consistent with [Appellant's doctor #1's] report of May 27, 2010, that the Appellant developed PTSD symptoms as a result of the accident, but that these symptoms resolved over time. The consultant also noted that [Appellant's psychologist] was unable to retrospectively state whether a psychological condition related to the accident caused the Appellant's behaviour on September 15, 2010 and that [Appellant's psychologist] concluded that the Appellant's accident related psychological injury did not render her functionally incapable of returning to her pre-accident employment.

Counsel submitted that a claimant is entitled to IRI for so long as accident related injuries prevent them from performing the essential duties of the pre-accident employment. Counsel submitted that the evidence as cited above shows that the accident related injuries did not prevent the Appellant

from returning to her pre-accident employment as of August 12, 2011 and therefore that the Appellant's appeal ought to be dismissed.

Discussion:

The issue before the Commission is whether the Appellant is entitled to IRI benefits beyond August 12 2011. To be entitled to IRI benefits beyond August 12, 2011, the Appellant must demonstrate, on a balance of probabilities, that she sustained a physical or psychological injury in the MVA that prevents her from returning to her pre-accident employment.

The relevant provisions of the MPIC Act are as follows:

Definitions

70(1) In this Part,

"**accident**" means any event in which bodily injury is caused by an automobile;

"**bodily injury caused by an automobile**" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile...

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;

Manitoba Regulation 37/94 addresses the meaning of "unable to hold employment" and states:

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 Appellant participated in two gradual return to work programs with her pre-accident employer. As the Appellant's employer was not able to accommodate her in a gradual return to work in her regular position in [text deleted], the first return to work program occurred in the summer of 2010 in an in-clinic position in [text deleted]. Unfortunately, the Appellant did not complete the first return to work program due to an incident in the workplace on September 15, 2010. Ultimately, the Appellant received a three day disciplinary suspension for her role in the incident.

After the failed return to work program in 2010, the Appellant attended to an Independent Third Party Examination with [Appellant's doctor #3], who concluded that "in regards to a musculoskeletal standpoint, there would be no current pathoanatomical condition that had been identified". [Appellant's doctor #3] did note there was indication of stress, anxiety and depression which appeared to be related to the Appellant's workplace placement through the first gradual return to work program. [Appellant's doctor #3] recommended that the Appellant return to her regular duties of her occupation in a gradual manner and indicated there was no medical contraindication for the Appellant to begin the return to work program.

The Appellant also attended for a neuropsychological assessment of her cognitive status. The assessment report notes that the Appellant sustained no head trauma or loss of consciousness in the MVA, but that the Appellant reported cognitive and emotional changes post-MVA. The neuropsychologist concluded that the Appellant was likely experiencing no significant deficits in intellectual skills, attention, memory, language, visuospatial abilities, or executive functioning.

MPIC's psychological consultant reviewed the Appellant's file and provided an opinion dated April 28, 2011. The consultant opined that the Appellant's reason for going off work in September 2010 had to do with her work environment and this would not be considered MVA-related. The

consultant concluded that the Appellant did not have a specific physical condition that would preclude her from working. With respect to her mental health, the consultant noted that the Appellant had some earlier psychological symptomatology due to the MVA, but that there was no indication that she had an MVA-related psychological or neuropsychological condition at the time of her assessment with the neuropsychologist. The consultant concluded that there was no indication that the Appellant had an MVA-related psychological condition that would preclude her from returning to work in a graduated fashion.

The Appellant agreed to participate in a second graduated return to work program commencing June 20, 2011 and ending during the week of August 15, 2011. On August 5, 2011, the Appellant's family physician provided a modified duty form stating that the Appellant was unable to work over 6 hours per day. It appears that the Appellant went off work entirely at that time and never returned.

The Appellant did not testify at the hearing and therefore did not provide her reasons as to why she could not return to work full-time with her pre-accident employer. It appears that the Appellant attributes her workplace difficulties that she encountered during both gradual return to work programs due to changes in her personality and abilities caused by the MVA.

At the request of the Appellant's former representative, the Appellant was referred to [Appellant's psychologist] for a psychological and neuropsychological assessment to determine whether or not she sustained psychological and neuropsychological injuries in the MVA and whether or not her injuries prevented the Appellant from returning to her pre-accident employment as a [text deleted]. [Appellant's psychologist] concluded that the Appellant did not sustain a brain injury but did have post-MVA PTSD symptoms with symptoms resolving over time. However, he found that a psychological injury did not render the Appellant to be functionally incapable of returning to her

pre-accident employment. With respect to whether the Appellant's psychological injury contributed to her September 15, 2010 workplace incident, [Appellant's psychologist] stated he could not retrospectively state whether or not a psychological condition arose as a result of the MVA that caused the Appellant's behaviour on September 15, 2010. [Appellant's psychologist] also stated that it was unlikely that the Appellant's minor musculoskeletal or soft tissue injuries would lead her to a longer term inability to return to her occupation, particularly in the modified form that was outlined by her physician on August 5, 2011.

MPIC's psychological consultant provided another review after receipt of [Appellant's psychologist's] reports. The consultant stated that [Appellant's psychologist's] opinion appears to be consistent with the consultant's view that the Appellant developed psychological symptoms post-MVA that resolved over time. The consultant's previous opinion remained unchanged.

The Appellant did not provide any medical reports after the Commission received the results of [Appellant's psychologist's] psychological and neuropsychological assessment and the MPIC consultant review. As indicated, the Appellant did not participate in her appeal and therefore did not provide testimony as to why her IRI benefits should continue beyond August 12, 2011. Considering the documentary evidence, the Appellant's reasons for appeal letter dated January 29, 2012, and the submission of counsel for MPIC, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that she sustained a physical or psychological injury in the MVA that prevents her from returning to her pre-accident employment. The Appellant has therefore failed to establish that she is entitled to IRI benefits beyond August 12, 2011.

Disposition:

Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated November 15, 2011 is upheld.

Dated at Winnipeg this 23rd day of February, 2018.

KARIN LINNEBACH

LINDA NEWTON

JANET FROHLICH