Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-19-167

PANEL:	**Pamela Reilly, Chairperson** **Janet Frohlich** **Sharon Macdonald**
APPEARANCES:	**The Appellant, [text deleted], was self-represented and did not appear;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Andrew Robertson.**
HEARING DATE:	**April 13, 2022**
ISSUE(S):	**Whether the Appellant is entitled to IRI beyond November 28, 2018.**
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 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

Background facts

On July 18, 2018, while driving his vehicle, the Appellant was rear ended and pushed into the vehicle in front of him (the "MVA"). The Appellant's Personal Injury Protection Plan ("PIPP") Intake Form records whiplash injuries to the Appellant's neck, back, left wrist and shoulder, with right pointer finger pain, and right ankle sprain. No ambulance attended the scene and the Appellant did not go to the hospital.

The Intake Form shows that at the time of the MVA, the Appellant was self-employed in his parents' business, as a "[text deleted]". His hours are recorded as 40hrs/week, Monday to Friday, earning a rate of $25/hr. He was not able to work as a result of his MVA injuries.

The Appellant made telephone contact with the MPIC Case Manager (CM) on August 2, 2018. The record of the contact states that the Appellant had no telephone number to provide, and he would contact the CM with updated information. The Appellant also declined to provide contact information for his employer (i.e. his parents).

The above record also states that the CM explained to the Appellant that medical information must be provided to both verify his injuries and document how the injuries prevented him from returning to work. Regarding his employment, the CM requested that his employer contact the CM to verify the Appellant's employment. The CM advised that the Appellant's income tax returns were also required to verify his income.

Another telephone contact on August 8, 2018 records that the Appellant was again advised of the need for medical and employment documentation. The CM advised that Employer's Verification of Earnings ("EVE") and Medical Information Authorization ("MIA") forms had been mailed to the Appellant for completion. The Appellant responded that he would "not be completing the MIA's [sic] just yet - because he does not want MPI to have access to his health information for an unlimited amount of time". The CM reiterated MPIC's need for medical information because, without it, MPIC could not process his claim.

MPIC was contacted by the Appellant's mother who is the office manager of the family business that employs the Appellant. The Appellant's mother also declined to provide a telephone contact number and asked that MPIC send her the necessary documentation for her completion.

MPIC received an EVE dated August 23, 2018, which described the Appellant's profession as [text deleted], stated that he was a self-employed [text deleted] who began working at the business on February 12, 2018, and showed his gross wages over the 22 week period.

The record of an August 22, 2018 follow up telephone call with the Appellant states that the Appellant was still off work because of his injuries, but he had not yet sought medical treatment. MPIC again advised the Appellant of the requirement for medical verification of his injuries.

MPIC requested and received some medical information during the month of September 2018. September telephone calls with the Appellant record his statement that his injuries were getting worse over time, rather than better. There are calls that record MPIC's continued request for employment records, particularly the Appellant's 2017 Income Tax, which the Appellant said he would file and then provide to MPIC.

Based upon the documentation received from the Appellant, the CM issued a decision dated October 3, 2018 that confirmed the Appellant's entitlement to Income Replacement Indemnity ("IRI") benefits. Based upon his 2017 Income Tax Return,

MPIC had determined that the Appellant was a part-time earner, and calculated a bi-weekly IRI entitlement in the amount of $403.95.

The Appellant disagreed with the bi-weekly amount and advised he would provide documentation from a registered CPA to verify his 2018 earnings. The CM advised that new information would be considered. The CM also explained the decision letter and the review process.

October 2018 telephone calls document MPIC's ongoing advice to the Appellant about complying with attendance for physiotherapy treatment, in order to comply with his obligation to do everything reasonably necessary, to further his recovery. MPIC encouraged him to rebook his missed physiotherapy sessions.

In November 2018, MPIC retained the services of [rehabilitation center], and requested that its multidisciplinary team of professionals complete a physical assessment of the Appellant. The goal for [rehabilitation center] was to determine a diagnosis and prognosis of the Appellant's MVA related injuries, including any functional deficits that may prevent him from performing his duties as a [text deleted]. [Rehabilitation center] provided an assessment dated November 28, 2018 (the "Assessment") based upon the in-person interview and examination of the Appellant.

The Assessment did not identify any measureable, objective findings of functional deficits, or impairment that would prevent the Appellant from returning to his job as a [text deleted]. The following relevant findings are found at page 2:

The following pain behaviours and embellishments were noted:

- breakaway weakness
- extremely slow and stiff movements
- extremely limited range of motion of joints that should not be impacted by injury
- inability to activate his muscles for strength assessment

The Assessment concludes at page 3, as follows:

> The current presentation would be considered unreliable, and physical presentation not consistent. As such, a serious diagnosis is not found at this time. He mentions having discomforts in almost every part of the body, but no specific injury can be found in any of the symptomatic areas, now 133 days post collision. He may have sustained mild sprain/strain type of injuries in the MVA as described, and it is most probable they have all resolved.

MPIC next requested a medical opinion from its Health Care Services Medical Consultant asking for advice on whether there were any identifiable restrictions related to the MVA that would preclude the Appellant from returning to his [text deleted]. The Medical Consultant reviewed the documentation on the file, including the Assessment from [rehabilitation center] and provided a report dated December 10, 2018. The Medical Consultant concluded that "restrictions have not been identified on examination that would preclude the return to work."

The CM issued a decision dated December 5, 2018, which stated that as of November 28, 2018 the Appellant's injuries no longer prevented him from performing his work duties. Therefore, his IRI entitlement ended in accordance with section 110(1)(a) of the Act. He would nonetheless be paid up to and including December 7, 2018.

(The Appellant later submitted his 2018 Tax Return, which supported greater earnings than were calculated and paid by MPIC, pursuant to the 2017 tax information. MPIC subsequently paid the Appellant the shortfall income on or about May 28, 2019.)

The Appellant filed an Application for Review to the Internal Review Office ("IRO"), seeking a review of the December 5, 2018 CM decision. The Appellant attached his handwritten statement, which stated (among other things) that he disagreed with the [rehabilitation center] Assessment because the doctor did not properly examine him.

The Appellant's statement also described his job duties as a [text deleted]. He argued that the doctor did not understand the difference between a residential [text deleted] and his job as a commercial [text deleted], which is more physically demanding. Therefore, his injuries prevented him from resuming employment.

Following a telephone review hearing at which the Appellant participated on June 19, 2019, the IRO issued an Internal Review Decision ("IRD") dated June 21, 2019. During that telephone hearing, the Appellant variously questioned the reputation and validity of the [rehabilitation center] doctor's assessment, requested payment for medical expenses (which was not part of the review), and requested another hearing to address his issues. This request was denied. The IRD upheld the CM decision and dismissed the Appellant's request for a review.

On September 13, 2019, the Appellant contacted the Commission and advised that he wished to file a Notice of Appeal ("NOA") regarding the June 21, 2019 IRD. Information

was exchanged with the Appellant who ultimately provided his NOA dated November 12, 2019.

The NOA stated, “all communication by letter only”. The Appellant wrote that he disagreed with MPIC’s decision to discontinue his IRI because his injuries prevented him from resuming employment as a [text deleted] (i.e., he was still under doctor’s care).

The Appellant also stated a “second issue”; that is, MPI had failed to pay for his medication costs. The Appellant attached his February 1, 2019 handwritten statement (the same statement attached to his Application for Review to the IRO.)

In accordance with its procedures, the Commission scheduled a Case Conference Hearing (“CCH”). The general purpose of the CCH is to (among others matters) confirm the issue, and the parties’ readiness for hearing.

MPIC had previously agreed to numerous requests by the Appellant to postpone setting a CCH because he needed more time to obtain medical information. The Appellant had not provided new information as of May 2021 and the Appellant’s further request to postpone was denied. A teleconference CCH date was set for September 2, 2021 at 9:30 a.m.

The Appellant joined the CCH at 9:40 a.m. and requested an adjournment because “he was being attacked and it was a matter of national security”. The Appellant’s request

was denied at which point he stated that he would not participate. The Chair advised that the CCH would proceed, nevertheless.

The Appellant hung up and left the call, and the CCH continued in his absence. In accordance with Commission procedure, the Commission mailed both parties the CCH letter, which summarized the CCH discussions. In particular, the CCH letter stated that the Commission's Secretary would contact the parties to arrange for a suitable hearing date.

On January 17, 2022, the Commission's Secretary sent correspondence to the Appellant, which included a choice of hearing dates and requested his response by February 18, 2022. The Appellant did not respond and the Commission set a hearing date of April 13, 2022, to commence at 9:30 a.m. by teleconference.

A Notice of Hearing ("NOH"), dated February 22, 2022 and containing the above information was sent via regular mail and Xpresspost. The Appellant was provided with call-in instructions. The regular mail NOH was not returned as undelivered. Canada Post could not confirm delivery of the Xpresspost letter.

The hearing took place on April 13, 2022 at 9:30 a.m. The Panel provided the Appellant with a fifteen minute grace period, however he did not come on the line and the hearing proceeded without him. At the conclusion of the hearing, the Panel again enquired and noted that the Appellant had not attended any portion of the teleconference hearing.

Issue

Whether the Appellant is entitled to IRI beyond November 28, 2018.

Decision

The Panel confirms the IRD dated June 21, 2019 and dismisses the appeal.

Evidence

The Appellant did not testify and did not provide any further written evidence beyond what was on the Indexed File. MPIC did not call any witnesses. The Panel relied solely on the documentary evidence in the Indexed File, which was un-contradicted.

MPIC Submission

MPIC Counsel reviewed the PIPP benefits paid to the Appellant based upon his [text deleted] employment. Counsel noted that despite the fairly limited medical evidence of the Appellant's inability to work, MPIC paid IRI benefits. The Appellant's MVA injuries involved soft tissue injuries of tendonitis, whiplash and lumbar/thoracic strain. Due to the Appellant's subjective reports and lack of information about diagnosis, the CM sent the Appellant for an independent assessment by [rehabilitation center].

The Assessment described the Appellant's presentation as unreliable and his physical presentation as inconsistent. The doctor concluded that he could not make a diagnosis. He stated that the Appellant mentioned discomfort in every part of the body, but there were no objective findings. He concluded that the Appellant may have suffered a mild sprain, which had probably resolved.

Counsel submitted that the doctor was specifically asked to identify functional deficits, but reported no objective findings, and no expected deficits. The doctor was unable to find any measurable impairments to prevent work. Notably, the Assessment records pain behaviours and embellishment, break away weakness, extremely slow movements, extremely limited ROM by joints that should not be affected, and an inability to activate muscles for strength assessment.

The Assessment noted behaviour outside of the formal testing, such as the Appellant's normal movements when putting on his shirt, tie and jacket, and his ability to rotate his cervical spine in the waiting room. The doctor noted that strength testing was not reliable because the Appellant did not provide suitable effort. In particular, his demonstrated grip strength was not compatible with his ability to open a door, put on his shoes, or drive car.

MPIC Counsel submitted that this Assessment sets out subjective and objective results based upon testing. It is the most thorough and detailed report available and should be given a great deal of weight. The only other relevant report is a report from the Appellant's physiotherapist, which diagnosed "non-specific pain" and "deconditioning". The physiotherapist supported the Appellant's gradual return to work, which did not present risk and would not affect the natural history of his condition. The only limitation the physiotherapist noted was "caution with push, pull and lifting more than 20 lbs".

Counsel submitted that, overall, when considering both reports, there was little evidence of ongoing inability to perform work tasks, and little evidence that ongoing injury would

result from performing tasks. Therefore, the Appellant had not shown, on a balance of probabilities, that the IRD is incorrect. Counsel submitted that the Commission should uphold the IRD and dismiss the appeal.

Legislation

The applicable section of the MPIC Act is, 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) victim is able to hold the employment that he or she held at the time of the accident;
>
> **How notices and orders may be given to appellant**
>
> **184.1(1)** Under sections 182, 182.1 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant
>
> (a) personally; or
>
> (b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.
>
> **When mailed notice received**
>
> **184.1(2)** A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

Discussion

The Panel must decide whether the Appellant is entitled to IRI benefits beyond November 28, 2018.

Preliminary Issue: Non-attendance of the Appellant

The Panel decided to proceed with the hearing despite the Appellant's non-attendance. The Panel considered the fact that MPIC had previously agreed to numerous requests by the Appellant to delay the pre-hearing Case Conferences, so that he could provide further medical information. This medical information was never provided, the Appellant never indicated whether he had requested information, nor whether he expected to receive any such information.

The various Commission letters notifying the Appellant of hearing dates, sent by both regular and Xpresspost, were never returned. These involve the September 2, 2021 CCH letter, the January 17, 2022 letter advising the Appellant of his choice of hearing dates, and the February 22, 2022 NOH. The Commission received confirmation from Canada Post that the Xpresspost letters of September 2, 2021 and January 17, 2022 were delivered. Canada Post could not confirm delivery of the February 22, 2022 Xpresspost NOH.

The Appellant initially attended the teleconference CCH on September 2, 2021. The Panel therefore finds that he was aware that his appeal was proceeding to a hearing before the Commission. The Appellant has not contacted the Commission since September 2, 2021 to inquire as to the status of his appeal. MPIC had prepared for the hearing and was ready to proceed on April 13, 2022.

On balance, the Panel is satisfied that the Appellant received the Notice of the hearing in accordance with the legislation, and had ample opportunity to participate in his

hearing. The Panel found that it was fair and just to proceed with the hearing, despite the Appellant's absence.

Findings

The onus is on the Appellant to prove, on a balance of probabilities, that MPIC was wrong in discontinuing his IRI benefits.

The documentary evidence in the Indexed File was un-contradicted by the Appellant. The Assessment from [rehabilitation center] carries particular weight because it is the most detailed and comprehensive physical examination of the Appellant.

The Panel finds that the Appellant likely suffered soft tissue injuries in the MVA which had resolved by the time of the [rehabilitation center] Assessment. We find that there are no objective or measureable findings of impairment, and that there are no objective findings of injury that would preclude the Appellant from returning to his work as a [text deleted].

The Panel also considered the physiotherapy report which suggests a gradual return to work. However, the Panel puts more weight on the [rehabilitation center] Assessment, which concluded that the Appellant was able to make a full return to work as of November 28, 2018.

The Panel makes no findings with respect to the Appellant's issue of non-payment of medical expenses. This issue was not before the IRO and is not part of the June 21,

2019 IRD. Therefore, the Commission has no jurisdiction to consider it. As suggested in the IRD, if this is an issue for the Appellant, he must raise it with the Benefits Administration Unit at MPIC.

Disposition

The Internal Review Decision dated June 21, 2019 is confirmed and the appeal is dismissed.

Dated at Winnipeg this 16th day of May, 2022.

PAMELA REILLY

JANET FROHLICH

SHARON MACDONALD