

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant] (formerly [text deleted])
AICAC File No.: AC-09-49**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Dr. Patrick Doyle
Mr. Les Marks

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

HEARING DATE: June 16, 2010

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits
beyond August 3, 2008.

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

[The Appellant] was involved in a motor vehicle accident on February 19, 2007 and suffered injuries to her right arm and left hand. At the time of the motor vehicle accident, the Appellant had been employed full-time as a telephone interviewer for [text deleted].

The Appellant attended at her family physician, [Appellant's Doctor #1], on February 23, 2007. [Appellant's Doctor #1's] clinical notes documented pain to the Appellant's mid-back, right shoulder and abdomen. [Appellant's Doctor #1] diagnosed the Appellant with a shoulder strain,

right lumbar strain and a contusion to her left lower abdomen. An examination of [Appellant's Doctor #1's] clinical notes between the period February 23, 2007 to June 28, 2007 indicate that the Appellant continued to complain about pain to her right shoulder. [Appellant's Doctor #1] determined that the Appellant was unable to work until March 2007 and then subsequently until April 2007 due to limited mobility in her right arm, persistent severe pain in the left lower quadrant and difficulty walking and sitting.

In a report to the case manager dated July 20, 2007, [Appellant's Doctor #1] stated that the Appellant continued to have difficulty with her right shoulder and abduct to 120°. She further advised the case manager that the Appellant was being seen at the [text deleted] Clinic and the Appellant reported to her that she may require an acromioplasty. [Appellant's Doctor #1] further stated that the Appellant's sitting tolerance was poor and she had limited function of her right arm. [Appellant's Doctor #1] also indicated the Appellant remained unable to work at that time primarily due to "abdominal discomfort and poor sitting tolerance".

MPIC referred the Appellant to [Rehabilitation (Rehab) Clinic] [text deleted]. The work hardening program commenced on June 3, 2008 and ended on July 12, 2008. In a report to the case manager on July 18, 2008, [Rehab Clinic] stated that the Appellant was fit for immediate unmodified return to pre-injury employment.

On July 18, 2008, the case manager wrote to [Appellant's Doctor #2] at the [text deleted] Clinic and requested the following information regarding [Appellant's Doctor #2's] examination of the Appellant:

1. Copies of your consult notes.
2. Copies of any diagnostic tests and the results of same.
3. Details of any further treatment or other interventions recommended at this time.

4. Is surgery required? If so, is there a date?

The case manager provided a copy of the discharge report from [Rehab Clinic's Doctor] of [Rehab Clinic] which indicated that the Appellant was capable of returning to full-time hours at her job.

[Appellant's Doctor #1] referred the Appellant to [Appellant's Doctor #2] at the [text deleted] Clinic for his assessment.

On July 22, 2008, [Appellant's Doctor #2] wrote to the case manager and stated:

“Thank you for your facsimilie (sic) request of July 18, 2008, regarding this patient. I have enclosed copies of all clinical notes from [text deleted]. I have included copies of her MRI report of May 2, 2007. She has refractory right shoulder impingement that has failed to respond to conservative treatment. She has been referred for Orthopedic consultation with [Appellant's Orthopedic Surgeon] to determine if she is a candidate for elective arthroscopic evaluation and subacromial decompression. She is currently on a waiting list to see [Appellant's Orthopedic Surgeon] and the date for the consultation is yet to be determined.”

The Commission notes that at this time the Appellant returned to work three days per week, Monday, Wednesday and Friday, and was not working on Tuesday and Thursday in accordance with the instructions of her personal physician, [Appellant's Doctor #1].

On July 25, 2008 the case manager wrote to [Appellant's Doctor #1] and stated:

“I am writing you with regards to [the Appellant] and the completion of her program at [Rehab Clinic].

I have attached the discharge report indicating that [the Appellant] can tolerate working the additional two days which would bring her up to full time duties. As well, I have requested information from [Appellant's Doctor #2] at [text deleted] Clinic. There is no medical information on file to indicate that [the Appellant] will be having surgery to her right shoulder in the coming months.

As well her work place has been assessed regarding modifications. This was done with [Appellant's Occupational Therapist] of [text deleted].

Based on the above information [the Appellant] will be returning to her full duties as of the week of August 4, 2008.”

Case Manager's Decision:

On July 28, 2008, the case manager wrote to the Appellant and indicated that the Appellant had been working three days a week and had attended [Rehab Clinic] two days a week. The case manager stated:

“The discharge report from [Rehab Clinic] dated July 18, 2008 (copy attached) indicates that you are fit to return for an immediate, unmodified return to pre injury employment full time.

Therefore, your entitlement to IRI ends as of August 3, 2008. This is in accordance with Section 110(1)(c) of the Manitoba Public Insurance Corporation Act (copy attached for review).”

On September 2, 2008 the Appellant made Application for Review of the case manager's decision and stated:

“I am requesting a hearing as the decision of [Rehab Clinic] is wrong. I never lifted 7 kg with my right arm nor could I. I only met the doctor there twice and he also requested I buy a personal hand massager but never even used it on me at the clinic. Also other info in his report is wrong. I also have my family doctor who will only let me work 3 days.”

In a medical report dated October 1, 2008 [Appellant's Orthopedic Surgeon] indicated that the Appellant was seen previously in the physiotherapy doing shoulder exercises but there was no significant response and the cortisone injection she received only provided her with temporary relief.

[Appellant's Orthopedic Surgeon] further stated in this report that when he saw the Appellant on October 1, 2008, her main complaint was of significant pain to her right shoulder especially with overhead activity and lifting of heavy objects. In respect of a plan for treatment, [Appellant's Orthopedic Surgeon] stated:

“Our impression is that [the Appellant] had evidence of tendonitis and a surgical option was given for her and fully explained in the form of arthroscopy right shoulder with bursectomy and acromioplasty with a dressing of any defined pathology at that time. She is willing to go for surgical treatment, and we are planning to book her according to our schedule.”

On October 4, 2008 the case manager wrote to [Appellant's Doctor #2] and stated:

“Further to your letter dated July 22, 2008, you advised that you referred [the Appellant] to [Appellant's Orthopedic Surgeon] for an Orthopedic Consultation to determine if she is a candidate for an elective arthroscopic evaluation and subacromial decompression. I understand [the Appellant] saw [Appellant's Orthopedic Surgeon] on October 1, 2008. We are requesting that you please provide a copy of [Appellant's Orthopedic Surgeon's] report once it is received.”

On October 28, 2008, [Appellant's Doctor #1] issued the following medical report:

“[The Appellant] has ongoing rt shoulder dysfunction related to her mva of Feb 19/07. She has been my patient since 1994, and has had no complaints of shoulder problems before that accident. The shoulder has a limited range of motion and is painful by the end of a workday. It restricts activities at home. She has seen [Appellant's Doctor #2] and [Appellant's Orthopedic Surgeon] who feel she requires surgery. They also feel, as do I, that she is unable to work more than the Mon – Wed – Fri that she is currently working.”

On November 13, 2008 MPIC's case manager wrote to [Appellant's Orthopedic Surgeon] requesting information in respect of the Appellant. [Appellant's Orthopedic Surgeon] responded indicating that the cause of the Appellant's right shoulder condition from medical history is a motor vehicle accident on February 19, 2007. He further stated that he suggested arthroscopic acromioplasty which may benefit her as she has evidence of tendonitis of the rotator cuff. In respect of comments on the Appellant's restrictions, [Appellant's Orthopedic Surgeon] indicated that the most appropriate person to provide this information would be the Appellant's family

doctor or her referring physician. He further indicated that he would be happy to deal with the restrictions and return to work details after the surgery.

The Internal Review Officer referred the entire medical file to [MPIC's Doctor], [text deleted], and requested a medical opinion regarding the Appellant's work capabilities secondary to collision related injury.

On January 16, 2009 [MPIC's Doctor] provided an opinion to the Internal Review Officer wherein she reviewed the description of the Appellant's job related duties. [MPIC's Doctor] stated:

“The claimant is involved in what is indicated to be a sedentary job. It is not evident from job description that undue stress would be placed on the shoulder. With specific regards to symptoms that typically aggravate the rotator cuff muscle tendon complex (the surgeon identifying rotator cuff tendonitis to be the pain generator), this pain entity typically causes symptoms when the arm is placed or maintained at shoulder height and/or when shoulder rotation movements are required such as to reach behind one's back. It cannot be appreciated that these would be significant components of the claimant's workday, said to be characterized by speaking on the phone and entering data. Taking the nature of the claimant's work into consideration, I cannot appreciate that chronic rotator cuff tendinopathy accounts for her inability to make a successful return to her workplace. I cannot account for the claimant's reluctance to return to full time, unrestricted work duties based on collision related injury.”

On January 27, 2009, MPIC's case manager wrote to [Appellant's Orthopedic Surgeon] indicating that it was his understanding that a surgery date had been set for January 29, 2009 and that the case manager would appreciate receiving a copy of the operative report. The case manager asked for further information from [Appellant's Orthopedic Surgeon] including a request to be advised as to the “period of time she will be unable to work as a Computer Assisted Telephone Interviewer with [text deleted]”.

In response to the case manager's request for information, [Appellant's Orthopedic Surgeon] wrote to him on February 5, 2009 and stated:

"[The Appellant] underwent arthroscopic acromioplasty of the right shoulder on January 29th, 2009. Please find enclosed the operative report. The injury to her shoulder was caused by the motor vehicle accident of February 17, 2007 according to her history. There is no way to tell intraoperatively.

The plan now is to start physiotherapy.

She only had her surgery the other day, so it is a little early to predict when she will be able to return to work, but it is normally between 6 and 12 weeks."

Internal Review Officer's Decision:

On February 6, 2009 the Internal Review Officer issued a decision dismissing the Appellant's application for review and confirming the case manager's decision of July 28, 2008. In her reasons for decision, the Internal Review Officer stated:

"Given the sedentary nature of your position as a telephone interviewer, and taking into account the ergonomic changes made to your workstation, I prefer the opinions of the specialist, [Rehab Clinic's Doctor], and the MPI Medical Consultant, [MPIC's Doctor] to the effect that you were – effective August 3, 2008 – fit for an immediate, unmodified, full-time return to your pre-accident employment.

While you disagree with a number of the comments in the [Rehab Clinic] report, I cannot disregard the fact that it provided the most thorough assessment of your condition based upon first-hand observation of your activities. I accept that you may experience symptoms while performing certain duties, but I not convinced that such activities are likely to cause a medical worsening of your condition.

I have also considered the views expressed by [Appellant's Doctor #1] regarding your ability to return to full-time employment. Her comments were based primarily upon your own reports of pain and discomfort, rather than on any objective signs of work-related disability. By contrast, [Appellant's Orthopedic Surgeon's] report of November 28, 2008 makes no mention of your inability to work on a full-time basis.

In the result, I am therefore confirming the decision of the case manager that your entitlement to IRI ended on August 3, 2008.

You said at the hearing that you were undergoing arm surgery on January 29, 2009. If new objective evidence of your inability to work unrestricted duties on a full-time basis due to an accident-related condition becomes available, you are free to provide this information to the case manager for further consideration of your entitlement to IRI."

On February 11, 2009 [Appellant's Orthopedic Surgeon] again wrote to the case manager providing further information in respect of the Appellant as follows:

1. She was seen two weeks after the right shoulder arthroscopic acromioplasty and bursectomy.
2. Her injury was caused by the motor vehicle accident on February 19, 2007. She had surgery on January 29, 2009 consisting of a bursectomy and acromioplasty.
3. She has been referred to physiotherapy.
4. She was unable to work at this time "because of her rotator cuff tendonitis/bursitis, she was unable to work her job with [text deleted]. Her inability to do her job was actually one of the reasons why we suggested that she have surgery." (underlining added)
5. "I do not think that she will be able to return to work between six and twelve weeks postsurgery. I am going to see her again in six weeks' time."

On February 27, 2009 the case manager wrote to [MPIC's Doctor] enclosing the reports of [Appellant's Orthopedic Surgeon] and requested [MPIC's Doctor] to review this information. In an interdepartmental memorandum dated March 11, 2009 [MPIC's Doctor] wrote to the case manager and indicated:

"Your second question relates to whether the claimant would have been able to return to full time unrestricted work duties following discharge from the work hardening program she underwent at [Rehab Clinic] in the summer of 2008. Review of the Operative Note from [Appellant's Orthopedic Surgeon] reflects that no pathology was documented to have been present when the surgeon had a direct view of the claimant's right shoulder while performing surgery on the claimant's shoulder. In my opinion, the claimant would have experienced perceived right shoulder symptoms whether she was at work on a full time basis or whether she was at home and, there is insufficient information to indicate that her shoulder symptoms would have been exacerbated if she had worked full time as opposed to part time, post [Rehab Clinic] program. Having reviewed the newly submitted medical documentation, I find that my January 16, 2009 reported opinion regarding the claimant's ability to return to work on a full time basis remains unchanged."

On May 1, 2009 the Appellant filed a Notice of Appeal.

Appeal:

The relevant provision of the MPIC Act in respect of this appeal is:

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;

The Appellant testified at the hearing and indicated:

1. Prior to the motor vehicle accident she never had a problem with her right shoulder.
2. As a result of the motor vehicle accident she had several injuries including an injury to her right shoulder which caused her significant pain.
3. She was referred to physiotherapy, but this did not provide any assistance.
4. She was also referred by MPIC to [Rehab Clinic] which provided a six week rehabilitation program.
5. The program was of no benefit to her and she complained on a regular basis to her case manager without avail.
6. Because of the extreme pain to her right shoulder, [Appellant's Doctor #1] advised her to return to work three days per week, Monday, Wednesday and Friday and not to work on Tuesday and Thursday each week.

She further testified as to her job duties and stated:

1. During the course of a regular day of 6.5 hours she received constant requests for information from the public.

2. She recorded the information on her computer.
3. She was required to lift her arms above the computer keys and to then press down with some force on these keys.
4. She was required to use the computer mouse with her right hand in order to operate the computer.
5. As a result of these activities she experienced increased pain to her right shoulder which significantly interfered with her ability to work.
6. After several hours of work her shoulder locked and she was unable to raise her right arm without a great deal of difficulty and with increased pain.

She further testified that:

1. [Rehab Clinic] incorrectly reported that she was lifting 7 kilograms of weight and she testified that she had never lifted that weight.
2. [Rehab Clinic] erred in concluding that she was capable of returning to work full-time.
3. Because the physiotherapy and the cortisone shots did not resolve her difficulties, she agreed to surgery.
4. The surgery was successful and as a result she was able to return to work full-time.

Discussion:

[Appellant's Doctor #1], who had been the Appellant's personal physician for many years prior to the motor vehicle accident, treated the Appellant's injuries as a result of the motor vehicle accident. MPIC's legal counsel did not challenge [Appellant's Doctor #1's] report that the Appellant did not suffer any shoulder problems prior to the motor vehicle accident or the Appellant's testimony in this respect. As well MPIC's legal counsel did not challenge the

Appellant's testimony that she had received advice from her personal physician that she was not capable of working more than three days per week after the motor vehicle accident.

In his initial report to MPIC [Appellant's Orthopedic Surgeon] indicated that he would not be in a position to comment on the Appellant's inability to work prior to the Appellant's surgery. [Appellant's Orthopedic Surgeon] indicated to MPIC in his second report dated February 11, 2009 that prior to the surgery the Appellant was unable to work her job with [text deleted] because of the rotator cuff/tendonitis/bursitis. He further stated "Her inability to do her job was actually one of the reasons why we suggested that she have surgery."

Both [Appellant's Doctor #1] and [Appellant's Orthopedic Surgeon] had the opportunity of examining the Appellant on several occasions and were able to obtain a medical history from her and determine whether or not the Appellant's information was consistent with her medical history and whether the Appellant was exaggerating her complaints. It is clear from [Appellant's Doctor #1's] and [Appellant's Orthopedic Surgeon's] reports that they agreed that her complaints were valid that she was unable to work full-time as a result of the significant pain to her right shoulder.

On the other hand, [MPIC's Doctor] at no time personally interviewed the Appellant and based on a paper review of reports she received from [Appellant's Doctor #1], [Rehab Clinic] and [Appellant's Orthopedic Surgeon], she concluded that the rotator cuff tendonitis the Appellant was suffering from would not have prevented the Appellant from carrying out her job of speaking on the phone or entering data on a full-time basis. Since [MPIC's Doctor] did not interview the Appellant she was not able to determine the Appellant's specific job duties and to what degree the Appellant was having trouble carrying out these job duties. For these reasons

the Commission gives greater weight to the medical reports of [Appellant's Doctor #1] and [Appellant's Orthopedic Surgeon] than it does to [MPIC's Doctor].

The Appellant was cross-examined by legal counsel for MPIC. The Appellant's testimony throughout her examination in chief and cross-examination was direct and unequivocal and was not inconsistent with previous information that she provided to the case manager in respect of her right shoulder injury.

The Commission finds that the medical reports of [Appellant's Doctor #1], the Appellant's long-time physician, and [Appellant's Orthopedic Surgeon], the orthopaedic surgeon, corroborate the Appellant's testimony that because of the extreme pain to her right shoulder she was unable to carry out her job duties five days each week.

Decision:

For these reasons the Commission finds that the Appellant has established on a balance of probabilities that as a result of the continuous pain to her right shoulder, she was only capable of working part-time prior to the surgery and was only able to return to work full-time after the surgery had taken place. As a result, the Commission allows the Appellant's appeal and rescinds the Internal Review Decision dated February 6, 2009.

Dated at Winnipeg this 12th day of July, 2010.

MEL MYERS, Q.C.

DR. PATRICK DOYLE

LES MARKS