

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-057**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Paul Johnston
Ms Linda Newton

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

HEARING DATE: January 26, 2012

ISSUE(S): Entitlement to further Income Replacement Indemnity
benefits.

RELEVANT SECTION: Section 117(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, [text deleted], is appealing the Internal Review Decision dated December 18, 2009, with respect to her entitlement to income replacement indemnity ("IRI") benefits for the period from November 27, 2008 to December 18, 2008.

Facts and Background:

The facts of this appeal can be briefly summarized as follows:

1. On March 3, 2002, the Appellant was a passenger in a vehicle when the driver lost control and collided with a cement barrier.
2. As a result of the accident, the Appellant sustained significant injuries, including fractures to her thoracic vertebrae and a right ankle fracture requiring open reduction and internal fixation.
3. At the time of the accident, the Appellant was a full-time student at the [text deleted]. She was also providing care to a young child and receiving payment from [text deleted]. Due to the injuries which the Appellant sustained in the motor vehicle accident, she was unable to continue to care for the child and she became entitled to receive IRI benefits from MPIC.
4. As a result of the physical restrictions from the injuries sustained in the accident, MPIC undertook a two-year determination of the Appellant's residual earning capacity.
5. In a decision dated October 18, 2007, MPIC's case manager advised the Appellant that the position of "Dispatchers and Radio Operators" was selected as the most suitable position for her determined employment. This was a sedentary employment which was identified as a result of a Transferable Skills Analysis which was completed in order to identify a suitable sedentary employment for the Appellant. The determination took effect October 29, 2007. The Appellant continued to receive IRI benefits for one year following October 29, 2007. Starting October 30, 2008 (the end of the one year job search) the Appellant's IRI payments were reduced by the net income of the determined employment. This resulted in the Appellant's IRI entitlement ending as of October 29, 2008.

6. On November 4, 2008, the Appellant had not secured alternate employment and she decided to accept a position as a Lodge Supervisor with [text deleted].
7. The Appellant continued to work as a Lodge Supervisor with [text deleted] until November 24, 2008 when she was no longer physically able to continue her employment. She contacted her case manager in late November 2008 requesting further IRI benefits due to a relapse of her medical condition (right foot pain with associated swelling).
8. In a decision dated August 10, 2009, MPIC's case manager denied the Appellant's request for additional IRI benefits for the period of November 27, 2008 to December 18, 2008. The case manager advised as follows:

Following the most recent emails we have been able to discern that you are requesting additional Income Replacement Indemnity for the period of November 27 to December 18, 2008 based on a position as a "Lodge Supervisor" at the [text deleted]. As indicated in our emails this will confirm our investigation revealed that this position is not sedentary in nature based on discussions with various personnel at [text deleted] named [text deleted]. We were also unable to secure confirmation of the dates in question and were unable to confirm you were disabled from performing sedentary duties.

We are aware that you have a letter signed by [text deleted] stating contrary information however it directly conflicts with the information he supplied to us during our tour of the [text deleted] and it also conflicts with the employee manual that he supplied as well. It is also noted that when we asked your attending physician for confirmation of your disability his report indicated that you were complaining of an inability to stand for extended periods and that you are trying to hide this discomfort from your employer. This information further corroborates that the position involved standing for extended periods and was not sedentary in nature and as a result we are unable to consider further entitlement to Income Replacement based on this position.

9. The Appellant sought an Internal Review of that decision. In a decision dated December 18, 2009, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision of August 10, 2009. The Internal Review Officer found that the position that the Appellant returned to as a Lodge Supervisor at [text deleted] was more demanding than sedentary. As a result, the Internal Review

Officer found that the employment which the Appellant undertook was more physically demanding than the sedentary occupation which had been determined for her and therefore she was not entitled to further IRI benefits.

The Appellant has now appealed that decision to this Commission. As noted above, the issue which requires determination on this appeal is whether the Appellant is entitled to further IRI benefits for the period from November 27, 2008 to December 18, 2008 due to a relapse of her accident related injuries.

Appellant's Submission:

The Appellant submits that the position which she returned to as a Lodge Supervisor at [text deleted] was sedentary in nature. She maintains that the Lodge Manager, [text deleted], agreed to modify the duties for her in order to allow her to stay in the office as much as possible and minimize the amount of walking which she would be required to do as a Lodge Supervisor.

The Appellant agrees that without modification, the position as a Lodge Supervisor was not sedentary work. However, she contends that the position was modified for her by [text deleted]. In support of her position, the Appellant relies upon a letter from [text deleted] dated March 18, 2009, wherein he advised that as he was the Lodge Manager at the time, it was reasonable to accommodate the Appellant's physical limitations. There was always one female staff in the office to answer the phone and sign students in and out, that being the Appellant, while the other female staff did room checks.

The Appellant testified that in November 2008 when she returned to work at [text deleted], there was three female staff on duty. This allowed her to stay in the office, while the other staff

members did the room checks. She maintains that she liked her job as Lodge Supervisor and [text deleted] was a good place to work. Since she was able to remain in the office, she did not do room checks, she did not have to chase any of the students and she did not go outside.

The Appellant also filed two statements from coworkers at the hearing in support of her position. The statements from [text deleted] and [text deleted] stated that they were aware that the Appellant had a physical disability and that her duties at [text deleted] were modified. The statements also confirmed that the Appellant stayed in the office or the female lounge/pool area while the other staff members were responsible for doing the room checks.

The Appellant submits that her IRI benefits were terminated prematurely. She was not ready to return to work in November 2008 as was evidenced by her failed attempt to return to work at [text deleted]. She maintains that the position at [text deleted] was modified for her to be sedentary, yet it was beyond her physical capabilities in November 2008. The Appellant argues that her accident related injuries resulted in her inability to perform the job demands at [text deleted]. As a result, she submits that she is entitled to further IRI benefits for the period from November 27, 2008 to December 18, 2008.

MPIC's Submission:

Counsel for MPIC submits that the Appellant is not entitled to a continuation of IRI benefits for the period from November 27, 2008 until December 18, 2008. He contends that the Appellant took a position that was beyond her physical capabilities which resulted in the relapse of her injury. He submits that the position as a Lodge Supervisor at [text deleted] was not a sedentary position. Counsel for MPIC maintains that, notwithstanding the accommodations that were made for the Appellant, the job did not involve just sitting at a desk. Ultimately, he submits that

the Appellant returned to an employment that she should not have. She was not capable of doing even the modified position that [text deleted] provided to her. Although some accommodations were made for the Appellant, these accommodations were not enough through her eight hour shift to qualify as sedentary employment. Counsel for MPIC argues that even the distance which the Appellant had to walk from the parking lot to the office was more than she should have been doing.

As a result, counsel for MPIC submits that the Appellant is not entitled to further IRI benefits for the period from November 27, 2008 to December 18, 2008. Therefore he argues that the Appellant's appeal should be dismissed and the Internal Review Decision of December 18, 2009 should be confirmed.

Decision:

Upon a careful review of all of the oral and documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that the Appellant is not entitled to further IRI benefits for the period from November 27, 2008 to December 18, 2008.

Reasons for Decision:

Upon a review of all of the evidence before it, the Commission finds that the position at [text deleted] which the Appellant undertook in November 2008 was more than sedentary employment. We find that it was apparent that the position, even as modified, was too strenuous for the Appellant and beyond her capabilities. [Appellant's doctor's] report of March 2, 2009 clearly described the Appellant complaining of increased pain and decreased sleep when she had returned to work at [text deleted]. It is apparent from [Appellant's doctor's] report that in

November of 2008 the Appellant was having ongoing difficulties coping with her duties at [text deleted] and as a result of her occupational demands, she was complaining of increased pain and fatigue. We find that the work duties, even as modified, were too strenuous for the Appellant's determined capability of sedentary employment.

Additionally, the Appellant testified that the duties during her shift required sitting for 50% of the time and standing for 50% of the time. The significant amount of standing and walking required in the position at [text deleted] are beyond sedentary job demands. As a result, the Commission finds that the Appellant accepted an employment that was beyond her physical capabilities and her determined capacity of sedentary employment. Although the employment duties were modified for her, even the modified position that was provided to her was beyond sedentary employment. As a result, the Commission finds that the Appellant is not entitled to additional IRI benefits for the period from November 27, 2008 to December 18, 2008 due to a relapse of her accident related injuries.

As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated December 18, 2009 is confirmed.

Dated at Winnipeg this 1st day of March, 2012.

YVONNE TAVARES

PAUL JOHNSTON

LINDA NEWTON