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## **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-11-070**

**PANEL:** Ms Yvonne Tavares, Chairperson  
Ms Wendy Sol  
Ms Lorna Turnbull

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

**HEARING DATE:** December 20, 2011

**ISSUE(S):** Entitlement to Income Replacement Indemnity Benefits beyond December 12, 2010.

**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, [text deleted], was involved in a motor vehicle accident on January 16, 2009. She was a pedestrian struck by a motor vehicle. As a result of the accident, the Appellant sustained multiple soft tissue injuries and complained of pain in her left shoulder, left knee, low back and ribs. Due to the bodily injuries which the Appellant sustained in the motor vehicle accident, she became entitled to Personal Injury Protection Plan ("PIPP") benefits in accordance with Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was employed as a [text deleted] operator. Due to the injuries which the Appellant sustained in the motor vehicle accident, she was unable to return to her employment and became entitled to income replacement indemnity (“IRI”) benefits.

Following the motor vehicle accident, the Appellant was referred to and attended for physiotherapy treatment. However, she had a slow response to the treatment. A therapy discharge report completed by [text deleted], physiotherapist, based on an examination of July 16, 2009, documents a positive recovery overall with the exception of the Appellant’s left shoulder. The report advises that an MRI was scheduled.

The Appellant subsequently underwent an MRI of the left shoulder. An MRI report of August 17, 2009, documented a partial tear involving the articular surface of the supraspinatus tendon. A portion of the tear extended close to the bursal surface.

The Appellant attended for an appointment with [Appellant’s Doctor #1] on January 29, 2010 for her left shoulder complaint. [Appellant’s Doctor #1] suggested a surgical consultation with [Appellant’s Doctor #2]. The Appellant attended upon [Appellant’s Doctor #2] on April 14, 2010. In his report to [Appellant’s Doctor #1] dated the same date, [Appellant’s Doctor #2] documents that on examination of the left shoulder, the Appellant had no wasting and no asymmetry and no AC joint tenderness. He found that she had reasonable pendular motion and poor forward elevation as well as poor internal and external rotation. It was [Appellant’s Doctor #2’s] opinion that the Appellant was a poor surgical risk because of her pain focus and poor motion. He encouraged her to do active assisted forward elevation, external rotation and internal

rotation exercises many times a day. He also recommended that she do pendular motion exercises to push through the pain.

The Appellant's file was subsequently referred to [MPIC's Doctor], medical consultant with MPIC's Health Care Services. He was asked whether the medical evidence indicated that the Appellant developed a physical impairment of function arising from the pedestrian/motor vehicle accident to the extent that she would not be able to perform full-time work as a [text deleted] operator. On September 21, 2010, [MPIC's Doctor] provided an interdepartmental memorandum wherein he noted that:

The information reviewed indicates [the Appellant] developed problems involving the left shoulder that could be a byproduct of the incident in question. The information indicates she has not regained full function of the left shoulder. It is possible that [the Appellant] might be left with a permanent impairment of left shoulder function. At this stage she is not a surgical candidate as a result of her persistent pain and loss of mobility. Based on my review of the physical demands of a [text deleted] Operator it does (sic) not appear the position involves a lot of use of the upper extremities away from the body to lift various loads. The position does not require heavy lifting. The position would involve repetitive use of the upper extremities in order to maneuver material while operating the [text deleted].

I suspect that if [the Appellant] requested medical clearance to return to work as a [text deleted] operator, the health care professionals involved in her health would support her decision since the objective medical evidence does not indicate she has been left with a physical impairment of function that would prevent her from performing the required demands of her occupation. It is not medically probable the impairment she has been left with would deteriorate further if she was to return to work as a [text deleted] Operator. The information leads me to conclude that [the Appellant's] reluctance to return to work as a [text deleted] Operator is a byproduct of her symptoms, which are in some way related to the physical impairments associated with the left shoulder.

On December 3, 2010, MPIC's case manager issued a decision advising the Appellant that there was no evidence of a physical impairment of function that would prevent her from performing the required demands of her occupation as a [text deleted] operator. Accordingly, her IRI

benefits were terminated pursuant to Section 110(1)(a) of the MPIC Act as of December 12, 2010.

The Appellant sought an Internal Review of that decision. In a decision dated February 18, 2011, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the medical evidence on the Appellant's file supported the decision that there were no objective findings that would preclude the Appellant from working as a [text deleted] operator as of December 12, 2010 on a full-time basis.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant was capable of holding her pre-accident employment as a [text deleted] operator on a full-time basis as of December 12, 2010.

**Relevant Legislation:**

Section 110(1)(a) of the MPIC Act provides that:

**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;

**Appellant's Submission:**

At the hearing, the Appellant advised that she could not return to her occupation as a [text deleted] operator because of her left shoulder, her knee and her low back complaints. She

maintains that she still experiences significant pain due to the injuries caused by the motor vehicle accident. She has a difficult time moving around and cannot do many of the things she could normally do prior to the accident. She finds it difficult to clean her house, moving her shoulder from side to side and up and down causes pain and walking is not easy, especially up and down stairs. Further, she contends that she has had trouble returning to the activities of daily living. She has some difficulty taking the bus, crossing the street and she will experience pain when she does any type of lifting. As a result, the Appellant maintains that she was not ready to return to work as of December 12, 2010.

The Appellant submits that she could return to her occupation as a [text deleted] operator as soon as her shoulder is healed. She contends that she has to move her arm back and forth as part of her occupation as a [text deleted] operator and this is difficult due to her left shoulder pain. Also, the production demands of her position significantly increase the physical demand requirements of the job. She argues that her pre-accident occupation as a [text deleted] operator is more physically demanding than light duties because of the production demands. In summary, the Appellant maintains that she has not regained the capacity to return to her pre-accident employment as a [text deleted] operator on a full-time basis and therefore her IRI benefits should be reinstated effective December 12, 2010.

**MPIC's Submission:**

Counsel for MPIC submits that the Appellant was cleared to return to work by her family physician. She also notes that [Appellant's Doctor #2] advised the Appellant to return to work. Counsel for MPIC argues that the Appellant completed a reconditioning program wherein she attained the strength requirements for her position as a [text deleted] operator. Counsel for MPIC also submits that there was no medical evidence to contradict [MPIC's Doctor's] opinion

set out in his interdepartmental memorandum of September 21, 2010. As a result, counsel for MPIC submits that the Appellant is not entitled to further IRI benefits beyond December 12, 2010. She submits that the Appellant's appeal should be dismissed and the Internal Review Decision dated February 18, 2011 should be confirmed.

**Decision:**

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports 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 IRI benefits beyond December 12, 2010.

**Reasons for Decision:**

The onus is on the Appellant to show that, on a balance of probabilities, she was unable to perform the essential duties of her pre-accident employment as a result of injuries arising from the motor vehicle accident as of December 12, 2010. The Commission has carefully reviewed the medical evidence before it and has concluded that the evidence fails to establish, on a balance of probabilities, that the Appellant is unable to hold her pre-accident employment due to the injuries sustained from the motor vehicle accident of January 16, 2009. While the Appellant presented significant subjective complaints relating to her left shoulder and her pain experience, we find that there was insufficient objective evidence in the file before us to establish that the Appellant could not return to work as a [text deleted] operator.

We note that even though the Appellant argued that her position as a [text deleted] operator was not light duties because of the lifting involved, the Commission accepts the Physical Demands

Analysis of the position completed on June 12, 2009 which classified the position as light duties.

Further, the Commission notes that Appendix A to the Physical Demands Analysis provides that:

Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

As a result, the Commission finds that the production demands of the Appellant's position were taken into account when the Physical Demands Analysis of the position as a [text deleted] operator was evaluated.

The Commission does note that the Appellant appears to experience significant difficulty due to her pain-focused behaviour. Due to the Appellant's persistent pain-focused behaviour, the Commission finds that the Appellant's claim shall be referred back to MPIC's case manager in order to arrange for a referral to counselling for the Appellant to assist her with her chronic pain complaints. Further, at the hearing of the appeal, the Appellant testified that she had not received any permanent impairment benefits as a result of the injuries arising out of the accident. The Commission finds that MPIC's case manager shall arrange for an assessment to determine whether or not the Appellant sustained any permanent impairments as a result of the motor vehicle accident and especially with respect to the Appellant's range of motion of her left shoulder.

Accordingly, the Commission finds that the Appellant has not established, on a balance of probabilities, that she was substantially unable to perform her pre-accident employment as a result of injuries arising from the motor vehicle accident of January 16, 2009. As a result, the

Commission finds that the Appellant is not entitled to IRI benefits beyond December 12, 2010. Accordingly, the Appellant's is dismissed and the Internal Review Decision dated February 18, 2011 is confirmed.

Dated at Winnipeg this 6<sup>th</sup> day of February, 2012.

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**YVONNE TAVARES**

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**WENDY SOL**

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**LORNA TURNBULL**