

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-108**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Ms Linda Newton

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATE: February 10, 2010 and May 12, 2010

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits beyond January 22, 2006

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 May 11, 2004. The weather conditions were poor that day. The Appellant was the driver and sole occupant of his car. He was travelling in the left lane, decided to change lanes, lost control of his vehicle and rear-ended another vehicle. The Appellant sustained injuries to his neck, back, low back, right thumb, right ankle and right toes as a result of this accident. He also advised that he had headaches and dizziness due to the motor vehicle accident. Due to the injuries which the

Appellant sustained in this accident, he became entitled to Personal Injury Protection Plan (“PIPP”) benefits in accordance with Part 2 of the MPIC Act.

At the time of the accident, the Appellant was a self-employed [text deleted] driver. As the Appellant was unable to return to his employment after the motor vehicle accident due to his motor vehicle accident related injuries, he became entitled to income replacement indemnity (“IRI”) benefits pursuant to Section 81(1) of the MPIC Act.

Arrangements were made by MPIC’s case manager for the Appellant to undergo a multi-disciplinary assessment at [Rehabilitation (Rehab) Clinic] on August 18 and 19, 2004. Following that assessment, the Appellant participated in a 6-week work hardening program at [Rehab Clinic]. In a work hardening program discharge report dated September 29, 2004, [Rehab Clinic] concluded that the Appellant had achieved a functional strength demand of **Heavy** according to the Dictionary of Occupational Titles, 4th edition. The Appellant’s pre-accident position as a [text deleted] was classified at a **Light** demand level, according to the Dictionary of Occupational Titles, 4th edition. As a result, it was [Rehab Clinic’s] opinion that the Appellant demonstrated the work day tolerance and strength to perform the duties of a [text deleted] driver. Additionally, prior to the end of the work hardening program, the Appellant acknowledged that he was capable of performing the physical demands of his pre-accident position.

In a letter dated October 14, 2004, MPIC’s case manager advised the Appellant that his IRI benefits were terminated effective October 1, 2004. That termination was based upon Section 110(1)(a) of the MPIC Act. MPIC’s case manager found that based upon the information received from [Rehab Clinic], the Appellant had regained the functional capacity to perform his

occupational duties and therefore was no longer entitled to IRI benefits as he was capable of returning to his full duties at work. In a subsequent meeting with the case manager, the Appellant advised that although he was physically capable of doing a job as a [text deleted] driver, he was not psychologically capable at that time of an immediate and unmodified return to his pre-accident employment. He advised that he was suffering from anxiety and that he was taking two types of medication for anxiety that cause drowsiness and therefore he should not be driving. The case manager reinstated the Appellant's IRI benefits while he sought further information with respect to the Appellant's psychological status.

The Appellant had a history of driving related anxiety related to an accident in July 2002. That accident had caused the Appellant to be off work for more than a year. During his rehabilitation from that accident, the Appellant was seen for a psychological assessment by [Appellant's Psychologist], clinical psychologist. [Appellant's Psychologist] felt that while the Appellant was reporting symptoms of post-traumatic stress, "these symptoms were not sufficient to warrant a diagnosis of Post Traumatic Stress Disorder, however, I believe he does meet criteria for Adjustment Disorder with mixed symptoms of depression and anxiety". On November 2, 2002, [Appellant's Psychologist] stated that he is not a good candidate for psychotherapy. "His level for insight and motivation for change are both fairly low". [Appellant's Psychologist] recommended that [the Appellant] take a Defensive Driving course, which the Appellant completed. After 11 months of receiving chiropractic care, the Appellant returned to work as a [text deleted] driver. However, the Appellant stated that he was forced to go back to work by MPIC and that he was never really ready. The Appellant repeatedly stated that he had high anxiety levels and felt that he needed treatment for this.

A psychological assessment was arranged for the Appellant with [Rehab Clinic's Psychologist], [text deleted]. In his report dated May 5, 2005, [Rehab Clinic's Psychologist] commented as follows with regards to the Appellant's psychological functioning:

[The Appellant's] testing indicates extreme levels of a wide variety of symptoms along with a strong tendency to magnify or over-report his symptoms. [The Appellant's] presentation during the assessment was not consistent with his scores on the testing.

In relating his distress [the Appellant] refers to all of his previous MVAs as playing a role in his current distress thus it is felt that there is at most limited causality related to his MVA dated May 11, 2004. Additionally, [the Appellant] continues to complain of this distress despite his previous treatment and the findings that he was able to drive in an appropriate manner.

Based on the results of his cognitive testing and his presentation in the assessment, it is felt that [the Appellant's] complaints are more likely the result of his limited intellectual functioning and misperceptions rather than to a psychological disorder per se. Individuals who are identified as being Mentally Retarded are identified by a combination of subaverage intellectual functioning as well as significant limitations in adaptive functioning in at least two of the following skill areas:

- Communication
- Self-Care
- Home Living
- Social/Interpersonal Skills
- Use Of Community Resources
- Self-Direction
- Functional Academic Skills
- Work
- Leisure
- Health
- Safety

In addition to the above some of the behavioural traits associated with Mental Retardation include: aggression, dependency, impulsivity, passivity, self-injury, stubbornness, low self-esteem and low frustration tolerance (Morrison, 1995).

It would appear that [the Appellant] has significant difficulty in interpersonal skills and possibly safety as evidenced by his string of MVAs along with the behavioral traits of low frustration tolerance, impulsivity and aggression. In addition to the above [the Appellant] appears to have developed a belief that he has an anxiety disorder that has not responded to attempts to reassure him about his lack of a disorder or attempts to assist him to develop increased confidence in his ability to drive via the driving class.

...

With regards to treatment, [the Appellant] is not presenting with a psychological disorder per se but rather with limited cognitive functioning and the problems inherent with this. Individuals with similar problems are usually offered assistance in the form of skill building and connection with community resources.

The Appellant's medical file was subsequently reviewed by [MPIC's Psychologist]. [MPIC's Psychologist's] opinion was sought regarding whether or not the Appellant had psychological problems that would be causally related to the motor vehicle of May 11, 2004 and that would prevent him from driving. [MPIC's Psychologist] found that the Appellant did not have a psychological condition that would be causally related to the motor vehicle accident in question. Additionally, he noted that there was no psychological condition that would prevent the Appellant from performing the duties of a self-employed [text deleted] driver. Relying upon [Rehab Clinic's Psychologist's] assessment, [MPIC's Psychologist] opined that the Appellant did not have depression or anxiety. Rather, [MPIC's Psychologist] agreed with [Rehab Clinic's Psychologist's] opinion that the Appellant had a number of other behavioral issues that were, in all probability, related to his lower intellectual functioning. [MPIC's Psychologist] concluded that from a physical perspective (in the [Rehab Clinic] work hardening report), the Appellant had been cleared to return to work. Further, the Appellant did not have a psychological condition that would be MVA-related according to his review. As such, there did not appear to be any physical or psychological condition that would prevent the Appellant from returning to his pre-accident occupation as a [text deleted] driver.

In a decision dated January 6, 2006, MPIC's case manager advised the Appellant that since he had been cleared to return to work from a physical perspective in the [Rehab Clinic] work hardening report and since he did not have a psychological condition that would be motor

vehicle accident related, his entitlement to IRI benefits was being terminated pursuant to Section 110(1)(a) of the MPIC Act effective January 22, 2006.

The Appellant sought an Internal Review of that decision. In a decision dated June 13, 2006, MPIC's Internal Review Officer dismissed the Appellant's Application for Review and upheld the case manager's decision. The Internal Review Officer found that any inability on the part of the Appellant to drive would be related more to long-standing mental health issues that pre-dated his PIPP involvement by many years rather than to any sequelae from his numerous accidents. As a result, the Internal Review Officer found that MPIC was not responsible for ongoing IRI payments in these circumstances.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether or not the Appellant is entitled to IRI benefits beyond January 22, 2006.

Prior to the appeal hearing, additional medical reports were filed with the Commission, as follows:

1. A report dated January 25, 2006, from the [Hospital] Department of Psychiatry, wherein [Appellant's Psychiatrist], [text deleted], advised that:

Unfortunately, we are unable to state that [the Appellant's] mental health problems are causally related to his MVA's as he had hoped. We have requested a neuropsychological assessment from the Department of Clinical Health Psychology here to thoroughly assess his intelligence, cognitions, and information processing. [The Appellant] presents at times as distracted and with decreased attention as well as having a strong tendency to perseverate on the limited topics that are of interest to him. While he had no known serious injuries from his MVA's, we can't rule out his having had some type of subtle brain injury affecting his cognitive abilities.

In terms of his psychiatric diagnosis, we believe that [the Appellant's] symptoms are most consistent with a background of a mixed personality disorder with paranoid, narcissistic, and antisocial traits. His coping resources are limited. He projects blame and resentment onto others for his various problems, including his unemployment and having to negotiate for insurance benefits that he believes he deserves. In our October correspondence, we recommended a gradual reduction of his medications as he described having essentially no therapeutic benefits while complaining of side effects including feeling groggy and sedated. Medication reduction may provide [the Appellant] with some relief from the possible side effects, adding to his sense of wellbeing. Unfortunately, characterological problems are not particularly responsive to pharmacotherapy treatment. That being said, for some individuals low dose antidepressants or low dose antipsychotic medications can be used to target the dysphoria or moodiness that come with real life problems.

2. A report dated November 28, 2007 from [Appellant's Neuropsychologist], wherein he concluded that:

Overall, [the Appellant] may suffer from some degree of cognitive impairment but because of concerns related to the validity of the current testing it is not possible with relative precision to confidently provide an estimate of his current level of cognitive functioning. I do, however, suspect that it is somewhat higher than might appear to be the case on his initial presentation.

3. A report dated March 1, 2008 from [Appellant's Doctor], wherein he advised that:

[The Appellant] has seen in my clinic since February 21, 2003. [The Appellant] has a history of adjustment disorder with mixed symptoms of depression and anxiety and [the Appellant] was involved in nine motor vehicle accidents from June 1999 to March 2003: his last motor vehicle accident up to date was on May 11, 2004 and [the Appellant] has seen in my clinic for the injuries of this motor vehicle accident, [the Appellant] stated that he has had pain on the back of the neck, left upper and right lower chest, right thumb, right ankle, headache, night mare (sic), poor sleeping, worrying, poor appetite, poor concentration, poor memory and scare (sic) to drive.

[The Appellant] had been on paxil, amitriptyline for his depression and NSAIDs for the pain on his neck, chest, right thumb, right ankle.

Currently [the Appellant] is still having pain on his right thumb and right ankle occasionally, poor concentration, poor memory, agitation, thought of harming the bad drivers; I think at the present [the Appellant] is not mentally stable enough for driving a car.

4. An interdepartmental memorandum dated September 17, 2009, from [MPIC's Psychologist] [text deleted], wherein [MPIC's Psychologist] notes that:

Based on the review of the recently added medical documentation to the claimant's file, it is the writer's opinion that the previous opinion as expressed in the document of December 15, 2005 would not change. Specifically, there is no indication that the claimant has suffered a psychological injury as a result of the MVA in question. As such, there would be no MVA-related psychological condition that would prevent the claimant from returning to his duties as a self-employed [text deleted] driver.

It is noted that the [Appellant's Doctor], has cancelled the claimant's license due to concerns about his mental and physical status but these concerns are not MVA-related.

The writer's opinion is clearly supported by [Appellant's Psychiatrist's] letter suggesting that the claimant's difficulties are not MVA-related and that his primary diagnosis is that of a mixed personality disorder. Furthermore, the neuropsychological assessment that was completed with the claimant does not support any MVA-related cognitive dysfunction and, in fact, it appeared that the claimant was exaggerating his cognitive difficulties. This finding would be consistent with that of [Rehab Clinic's Psychologist] who previously assessed the claimant who also indicated that the claimant had a tendency to exaggerate his symptoms and that his presentation during the assessment with him was not consistent with his test scores.

Appellant's Submission:

Counsel for the Appellant submits that the Appellant has a driving anxiety which is primarily related to the series of motor vehicle accidents in which he has been involved and which prevents him from working as a [text deleted] driver. Counsel for the Appellant argues that the Appellant testified that he developed anxiety related to driving as a result of his accidents. The Appellant also testified that he believes that he is a danger to others and that he could hurt other drivers. Counsel for the Appellant maintains that it is not difficult to accept that the Appellant continues to have a driving anxiety since the previous motor vehicle accident in 2002. At that time, [Appellant's Psychologist] diagnosed the Appellant with an accident-related driving anxiety. The Appellant had a driving anxiety at that time and he has consistently reported his anxiety towards driving since the accident of May 11, 2004. Counsel for the Appellant argued that it

follows that after a further motor vehicle accident, the Appellant's anxiety continues and he is unable to drive. Counsel for the Appellant concludes that the Appellant had an anxiety disorder which was related to the motor vehicle accident of 2002 and it is not hard to accept that the Appellant suffers from a driving anxiety due to the motor vehicle accident of May 11, 2004.

Counsel for the Appellant also argues that the Appellant lost his driver's license due to the accident of May 11, 2004. The Appellant reported his anxiety and his fear of driving to his family physician after the motor vehicle accident. Counsel for the Appellant submits that the Appellant's family doctor assessed him and formed the opinion that the Appellant could not drive as a result of his mental instability arising from the motor vehicle accident of May 11, 2004. This resulted in the Appellant's driver's license being revoked. As a result, the Appellant can no longer work as a [text deleted] because he has lost his driver's license. Therefore, counsel for the Appellant maintains that the Appellant's inability to work is related to the motor vehicle accident. Accordingly, counsel for the Appellant submits that the Appellant is entitled to ongoing IRI benefits beyond January 22, 2006.

MPIC's Submission:

Counsel for MPIC submits that the Appellant has not established, on a balance of probabilities, that he is unable to carry out the essential duties of his employment as a [text deleted] driver due to any ongoing effects from the motor vehicle accident of May 11, 2004. Counsel for MPIC maintains that the overwhelming evidence on the file establishes that the Appellant is capable of carrying out the duties of a [text deleted] driver. Further, any psychological issues which the Appellant may be facing are not related to the motor vehicle accident of May 11, 2004.

Counsel for MPIC argues that a number of experts have looked at the issue of whether there is a causal connection between the Appellant's psychological issues and the motor vehicle accident and have provided opinions that there is no causal connection. In support of his position, counsel for MPIC refers to the opinions of [Rehab Clinic's Psychologist], [Appellant's Psychiatrist], [Appellant's Neuropsychologist], and [MPIC's Psychologist]. He maintains that none of these experts were able to connect the Appellant's psychological problems to the motor vehicle accident. Referring to [Appellant's Doctor's] report of March 1, 2008, counsel for MPIC argues that although [Appellant's Doctor] concludes that the Appellant is not mentally stable enough to drive a car, [Appellant's Doctor] does not conclude that the Appellant's mental instability is causally related to the motor vehicle accident of May 11, 2004. Accordingly, counsel for MPIC maintains that the Appellant has not established, on a balance of probabilities, that any inability to return to his employment as a [text deleted] driver is as a result of the motor vehicle accident of May 11, 2004. As a result, counsel for MPIC submits that the Appellant's appeal should be dismissed and the Internal Review Decision dated June 13, 2006 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 counsel for the Appellant and of counsel for MPIC, the Commission finds that the Appellant has not established, on a balance of probabilities, that he is entitled to IRI benefits beyond January 22, 2006 as a result of the motor vehicle accident of May 11, 2004.

Reasons for Decision:

Upon a review of all of the evidence before it, the Commission finds that the Appellant has not established, on a balance of probabilities, that there is a causal connection between his psychological condition and the motor vehicle accident of May 11, 2004. The psychological/psychiatric evidence filed with the Commission was consistent that there was no connection between the Appellant's cognitive difficulties and/or his psychological issues and the motor vehicle accident of May 11, 2004. In that regard, we note the following opinions:

- [Rehab Clinic's Psychologist] in his report of May 5, 2005 noted that the Appellant's complaints were more likely the result of his limited intellectual functioning and misperceptions rather than a psychological disorder *per se*.
- [Appellant's Psychiatrist] in his report of January 25, 2006 concluded that he was unable to state that the Appellant's mental health problems were causally related to his motor vehicle accident as the Appellant had hoped. Rather he felt that the Appellant's symptoms were more consistent with his background of a mixed personality disorder with paranoid, narcissistic and anti-social traits.
- [Appellant's Neuropsychologist], in his report of November 28, 2007 noted that "overall, in spite of his initial presentation as being significantly cognitively impaired, there appeared to be some indication that was not entirely consistent with his overall presentation". Overall, [Appellant's Neuropsychologist] concluded that the Appellant may suffer from some degree of cognitive impairment but because of concerns related to the validity of the testing, it was not possible with relative precision to provide an estimate of his current level of his cognitive functioning.
- [MPIC's Psychologist], in his two reviews of the Appellant's files, agreed with the expert opinions and found that the Appellant's problems were not caused by the motor vehicle

accident. Specifically, [MPIC's Psychologist] found that there was no indication that the Appellant suffered a psychological injury as a result of the motor vehicle accident in question and therefore there would be no MVA-related psychological condition that would prevent the Appellant from returning to his duties as a self-employed [text deleted] driver.

The Commission finds that the Appellant did not rebut the evidence of the above-noted experts. The report dated March 1, 2008 from the Appellant's family physician, [Appellant's Doctor], wherein [Appellant's Doctor] provided his opinion that the Appellant was not mentally stable enough to drive a car, was insufficient to rebut the opinions of the above-noted experts. Further, [Appellant's Doctor] did not provide any opinion as to the cause of the Appellant's mental instability. As such, the Commission finds that there is a lack of evidence to establish that any psychological condition or cognitive deficit which the Appellant may have is related to the motor vehicle accident of May 11, 2004. As a result, the Commission is unable to conclude that any inability on the part of the Appellant to return to his employment as a self-employed [text deleted] driver is related to the motor vehicle accident of May 11, 2004. Accordingly, the Commission finds that the Appellant's IRI benefits were properly terminated effective January 22, 2006.

As a result, the Appellant's appeal is dismissed and the Internal Review Decision dated June 13, 2006 is confirmed.

Dated at Winnipeg this 30th day of June, 2010.

YVONNE TAVARES

NEIL COHEN

LINDA NEWTON