Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-111

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Neil Cohen** **Dr. Patrick Doyle**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**November 30, 2006**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits prior to May 18, 2006**
RELEVANT SECTIONS:	**Sections 81(1) and 117(3) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Section 8 of Manitoba Regulation 37/94**

Reasons For Decision

The Appellant, [text deleted], was injured in a motor vehicle accident on December 22, 2002.

Following the accident, the Appellant continued to work at her job as a business analyst at [text deleted]. However, she continued to have ongoing medical issues with her right shoulder, for which she sought medical advice. She was ultimately diagnosed and treated by an orthopaedic surgeon who performed a shoulder scope, acromioplasty and resection of the distal clavicle. A twenty-five percent (25%) partial undersurface cuff tear was repaired. The surgery was

performed on May 18, 2006 and the Appellant became entitled to and received Income Replacement Indemnity ('IRI') benefits following that date.

However, prior to her surgery, the Appellant sought IRI benefits from MPIC. She had been laid off from her position at [text deleted] on June 30, 2005 and took the position that she was unable to work or find employment as a result of injuries sustained in the motor vehicle accident.

On January 18, 2006 the Appellant's case manager informed the Appellant that she was capable of working and was not entitled to IRI benefits. The Appellant sought an internal review of this decision.

On June 1, 2006, an Internal Review Officer for MPIC found that the Appellant was substantially able to perform the duties of her sedentary employment with modification, and could have substantially performed the duties of a business analyst. Although she found that the Appellant would be incapable of holding employment from the date of her surgery and during part of her initial rehabilitation, she found that prior to the surgery the Appellant was not entitled to receive IRI benefits. It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant

According to the Appellant, the issue before the Commission is whether she was capable of holding employment as a result of injuries sustained in the motor vehicle accident. She testified that in her employment as an analyst, her department was run electronically and she spent seventy to eighty percent (70-80%) of her work day on the computer. As a result of transitional issues at her employer, [text deleted], she was not required to physically perform her job duties

from January 2005 onwards, as the staff from [text deleted] who would be assuming her job was present in the office. Her role was to train this new staff, while they physically performed her job.

At the same time, the Appellant testified that her level of discomfort from her shoulder injury was gradually worsening. Before the workplace transition, she had shifted her computer tasks to her non-dominant left arm. However, she was still encountering difficulty with sleeplessness due to pain and difficulties caring for her child. She had trouble opening doors and found that, in spite of physiotherapy treatments, the range of motion in her arm was impacted by any hours spent on the computer. She could not use her right hand for shelving files, and found it difficult to write or cook. Any overuse of her arm would result in lingering pain, and this intensified with computer useage.

The Appellant testified that she consulted with [Appellant's Doctor #1] in October of 2005, seeking assistance with the level of discomfort which was distracting and disabling her from performing her day-to-day activities. [Appellant's Doctor #1] recommended that she be placed on opiates on a daily basis, until surgery.

The Appellant testified that she was in receipt of severance payments from [text deleted] until January 2006. She was solicited for, and hired for a position as a program manager with [text deleted] to be effective November 1, 2005. However, this job offer was rescinded, according to a letter from [text deleted] dated October 31, 2005 when the employer learned of her upcoming shoulder surgery *"as this event would negatively impact our ability to conduct our business in an effective manner."*

The Appellant testified that she did not discuss her physical capabilities in any great detail with this prospective employer. However, it was her view that, as a result of her injuries, she would not have been capable of performing this work, at least not without excruciating pain.

The Appellant submitted that the fact that she was able to work immediately following the motor vehicle accident should not mean that she should not be entitled to receive IRI benefits when her condition worsened over time. Nor should she be disentitled from receiving IRI benefits simply because she was in receipt of severance benefits from her previous employment.

She argued that throughout the fall of 2005 her symptoms were worsening and she was seeking medical assistance with pain management. Although [Appellant's Doctor #1's] letter of February 28, 2006 did not address her functional capabilities, she submitted that [Appellant's Doctor #2's] letter of January 27, 2006 and a Certificate from her general practitioner dated February 3, 2006 support her position. [Appellant's Doctor #2] examined her on January 6, 2006 for her complaints of right shoulder pain. He scheduled her for shoulder scope, acromioplasty and resection of distal clavicle because of ongoing AC joint degeneration and subsequent symptoms. He noted:

> . . . On assessment, she had a complaint of ongoing pain, stiffness, and weakness with pain with overhead activity. She is unable to work on a computer or do repetitive activity. Her normal work is as an analyst, and she was forced to quit her job because of this.

Her general practitioner, [Appellant's Doctor #3], provided her with a Certificate for Human Resources and Skill Development Canada indicating that she would be incapable of working due to post-traumatic difficulties with her right shoulder, requiring surgery, from February 14, 2006 until post-surgical rehabilitation was completed, perhaps in June of 2006.

The Appellant submitted that this evidence supported her position that she was unable to work due to injuries arising out of the motor vehicle accident, at least from January 6, 2006.

Although she argued that her pain prevented her from working as early as the fall of 2005, the Appellant conceded that she had not provided sufficient medical evidence to support her claim to benefits at that time. Therefore, she submitted that she should be entitled to benefits from January 6, 2006, the date she saw [Appellant's Doctor #2], until May 18, 2006, the date her surgery was performed and MPIC began paying her IRI benefits.

Submission for MPIC

Counsel for MPIC submitted that at the time the Internal Review Officer made her decision, the issue was not whether the Appellant should receive IRI benefits because she was unable to work. Although the Appellant had symptoms between her last day of work in June 2005 and the date of her surgery, there was nothing to suggest that the Appellant was unable to work as a result of her injuries from the accident.

Rather, the Appellant was offered a job with [text deleted], but did not want to accept this job, it was submitted, because she might have to leave for surgery at some point in time. The letter dated October 31, 2005 from the President of [text deleted] indicated that because the Appellant anticipated she would require surgery sometime in April or May of 2006, the organization had to rescind its offer, as this event would negatively impact upon [text deleted] ability to conduct its business in an effective manner. There is no reference in this letter to the Appellant's lack of ability to do the job. Accordingly, counsel for MPIC argued that the Appellant was able to hold employment at that time, and did not suffer a relapse until the date of her surgery in May 2006,

when she became entitled to IRI benefits. If the Commission were to find that the Appellant became entitled to benefits before this date, it would have to find that she had suffered a relapse prior to May 2006, and in counsel's view the relapse did not occur until her surgery, as noted by the Internal Review Officer.

Discussion

The MPIC Act deals with the question of relapse in Section 117(3):

> **Relapse after more than two years**
> **117(3)** A victim who suffers a relapse more than two years after the times referred to in clauses (1)(a) and (b) is entitled to compensation as if the relapse were a second accident.

IRI benefits are set out in Section 81(1):

> **Entitlement to I.R.I.**
> 81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
> (a) he or she is unable to continue the full-time employment;
> (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
> (c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

The definition of 'unable to hold employment' is found in Section 8 of Manitoba Regulation 37/94:

> **Meaning of unable to hold employment**
> **8** A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The onus is on the Appellant to prove, on a balance of probabilities, that she was unable to hold her employment as a result of injuries sustained because of the accident and that the accident rendered her entirely or substantially unable to perform the essential duties of the employment that was performed by her at the time of the accident.

The Appellant was employed as an analyst. Her position required a great deal of time to be spent using the computer in a repetitive manner.

We find the evidence of the Appellant describing the difficulties she encountered in performing her job as a result of her shoulder injury to be credible. Due to the particular circumstances regarding her lay-off and the modified duties she was asked to fulfill while training her replacement, we find that the Appellant was able to do her job as an analyst with [text deleted] following the accident. However, due to the gradual exacerbation of her injury, she became unable to perform the duties of her employment prior to her surgery in May of 2006.

No issue arose between the parties regarding the causal relationship between the shoulder injury and the motor vehicle accident. This causal relationship was recognized by [MPIC's Doctor], a medical consultant with MPIC's Health Care Services Team.

When questioned as to whether the Appellant's pain precluded her from performing sedentary duties, [MPIC's Doctor] responded:

> Pain is subjective, therefore this is difficult to answer. [Appellant's Doctor #2] has documented full right shoulder range of motion, however with positive jobs impingement sign. Tasks involving right overhead motion and repetitive right upper limb use should be restricted. Objectively, sedentary tasks avoiding the noted activities would be attempted/modified . . .

Thus, [MPIC's Doctor] recognized the restrictions on the Appellant's performance of tasks involving overhead motion and repetitive right upper limb use.

[Appellant's Doctor #3], the Appellant's general practitioner, indicated that for the purposes of Human Resources and Skill Development Canada, the Appellant would not be able to work from February 14, 2006 until sometime after her surgery.

[Appellant's Doctor #2], the orthopaedic surgeon who examined the Appellant on January 6, 2006 and performed surgery on her shoulder, stated that the Appellant was "*unable to work on a computer or do repetitive activity".*

The panel has reviewed the evidence on file, including the testimony of the Appellant and the opinions of these physicians. We find that, on a balance of probabilities, the evidence establishes that the Appellant was unable to perform her job duties and should be entitled to IRI benefits from January 6, 2006.

Counsel for MPIC argued that should the panel find that the Appellant was unable to hold employment prior to her surgery, we must find that this was a result of a relapse in her condition.

The panel has reviewed this submission and concluded that the Appellant's entitlement to IRI benefits during this period does not arise as a result of a relapse. The Appellant continued to work following the accident and, by January 6, 2006, was '*unable to continue the full time employment'* and therefore entitled to IRI benefits pursuant to Section 81(1) of the MPIC Act.

In the alternative, if the panel is not correct in this regard and the Appellant's entitlement to IRI benefits arises as a result of a relapse, Section 117(3) would apply to entitle an Appellant suffering a relapse more than two (2) years after the day of the accident to compensation as if the relapse were a second accident. This would not change the Appellant's entitlement to IRI benefits during the period from January 6, 2006 until May 18, 2006 (the date she began receiving IRI benefits following her surgery).

The Commission therefore determines that the Appellant was entitled to receive IRI benefits from January 6, 2006. The decision of the Internal Review Officer dated June 1, 2006 is therefore rescinded. The Appellant shall be entitled to IRI benefits from January 6, 2006 to May 18, 2006, when she began receiving IRI benefits following her surgery. Interest in accordance with Section 167 of the MPIC Act shall be added to that amount.

Dated at Winnipeg this 18th day of December, 2006.

LAURA DIAMOND

NEIL COHEN

DR. PATRICK DOYLE