Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by the ESTATE OF [the Appellant]
AICAC File No.: AC-00-115

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Neil Cohen** **Dr. Patrick Doyle**
APPEARANCES:	**The Appellant, the Estate of [text deleted], was represented by Mr. Bob Tyre of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Morley Hoffman.**
HEARING DATE:	**June 7, 2007**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits past August 7, 1999**
RELEVANT SECTIONS:	**Section 110(1)(a) of *The Manitoba Public Insurance Corporation Act* (the '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 (now deceased) was injured in a motor vehicle accident on April 3, 1999. At the time of the accident the Appellant was employed as a baker with [text deleted]. He was under the care of his family physician and was referred for physiotherapy treatment.

However, the Appellant continued to work full duties, while undergoing physiotherapy treatment, until July 25, 1999, when his pain became gradually worse. His family physician,

[Appellant's doctor #1], recommended that he be off work from July 26, 1999 until August 7, 1999 and referred him back for continued physiotherapy.

However, [Appellant's doctor #1] continued to recommend that the Appellant was not fit to return to work.

On January 10, 2000, his case manager determined that there was a lack of objective findings to validate that his injuries kept him from returning to his pre-accident occupation beyond August 19, 1999 and discontinued Income Replacement Indemnity ('IRI') benefits effective August 1999.

The Appellant sought internal review of the case manager's decision. An Internal Review Officer for MPIC, relying on the opinion of [MPIC's doctor] of MPIC's Health Care Services Team, that objective physical findings identified by the Appellant's health care providers did not support the period of disability sought by the Appellant, the Internal Review Officer found that any ongoing disability beyond August 7, 1999 was not causally connected to the motor vehicle accident in question. The decision of the case manager was upheld.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant

The Appellant's wife testified at the hearing into the Appellant's appeal. She testified that prior to the motor vehicle accident, the Appellant was in very good health and good physical shape, participating in such activities as jogging and lifting weights. She testified that following the motor vehicle accident he could not exercise and was complaining about headaches and pain in

his neck and back. He performed his physiotherapy home exercises and was taking medications for the inflammation and pain.

When asked about her husband's history of previous injuries, she indicated that he did not work for a period of time, as he stayed home with the children while she worked, and also attended classes.

She indicated that after the motor vehicle accident, her husband tried to work at the bakery for three (3) months, but couldn't handle the job as it was too hard physically, and he had to stop.

The Appellant's wife was asked about other symptoms which the Appellant suffered, leading to his ultimate diagnosis in approximately January of 2001 of cancer of the bladder. A medical investigation into these symptoms began in approximately August of 2000.

The Appellant never went back to work at [text deleted] after he stopped working there in July of 1999, and passed away on [text deleted].

Counsel for the Appellant relied on evidence from the Appellant's caregivers, including both reports and clinical notes from [Appellant's doctor #1] and reports from the Appellant's physiotherapist. He also referred to a report from [Appellant's doctor #2] dated February 2000 and from [text deleted], the Appellant's chiropractor.

[Appellant's doctor #1's] clinical notes recorded a history of complaints of neck and back pain, as well as headaches, from May 1999 through October 1999. On October 19, 1999, he provided a report setting out the Appellant's complaints of post-traumatic headaches, strain to his neck

and strain to his upper back, as well as spasm of muscles of the neck and pain in the back between the right shoulder and spine. [Appellant's doctor #1] stated that the Appellant was unfit to do repetitive bending, working in a bent position, lifting more than twenty (20ºº) degrees, working with right arm above the shoulder level. In his opinion, the Appellant would be fit to return to work on November 15, 1999.

A follow-up report from [Appellant's doctor #1] dated January 29, 2001 stated that the Appellant was unfit to return to work on November 15, 1999, as he still had post-traumatic headaches, persistent pain in neck, middle and lower back. He indicated that the Appellant had not recovered from the injuries he sustained in the accident on April 3, 1999 when he was injured in another accident on November 2, 2000.

> He was unfit at that time to do his regular work which required repetitive bending and lifting more than 30 lbs.

Similar pain complaints were documented by the Appellant's physiotherapist, in notes and reports through October 1999. The patient was still experiencing headache, lumbar and cervical range of motion restrictions and spasms.

In a report dated December 8, 1999, the physiotherapist described the Appellant's treatment and his response to treatment, reporting that although the patient continually reported he was feeling better with treatment, he continued to complain of headaches and cervical and lumbar pain.

[Appellant's doctor #2] provided a handwritten report dated February 2, 2000. He noted that the Appellant was experiencing back pain into his right leg, as well as neck pain and headache. His

examination revealed a limitation in cervical range of motion and tenderness on palpation of the lower back.

[Appellant's chiropractor] submitted a Health Care Report dated July 21, 2000. He indicated that the Appellant's functional classification was less than full function due to symptoms and that he should work modified duties with no heavy lifting or repetitive movements. He submitted a further report describing the Appellant's pain and recommending treatment twice a week.

> It is my opinion that [the Appellant] at this time can be engaging in moderate physical activity. However, heavy lifting from the floor to the waist greater than 75 lbs is contraindicated for his condition. [The Appellant] has been advised at this time to restrict any heavy lifting as well as any awkward bending, and repetitive postures which could disrupt the L5-S1 joint complex. (*unconfirmed)*

Counsel for the Appellant submitted that the Appellant had not complained of back pain prior to the motor vehicle accident and that testimony had shown him to be an active healthy person. It was submitted that the medical evidence established that the Appellant was unable to perform the duties of a baker well after the time when MPIC felt he was ready to return to that job in August of 1999. According to the Appellant's Application for Internal Review the bakery job required that:

> I have to lift trays with bakery products, which weigh sometimes up to 15 kg above my shoulders.

This was consistent with a statement which he made to his case manager, set out in a file note dated August 9, 1999 that *"he found it increasingly difficult to continue with his labor intense job."*

[Appellant's doctor #1] also noted that the Appellant was "*unfit at that time to do his regular work which required repetitive bending and lifting more than 30 lbs."*

Accordingly, counsel for the Appellant submitted that, on a balance of probabilities, the medical evidence established that the Appellant was unable to perform the duties of his occupation and should be in receipt of IRI benefits at least until the time he was injured in a second motor vehicle accident.

Evidence and Submission for MPIC

Counsel for MPIC relied on opinions provided by [MPIC's doctor] and [MPIC's chiropractor], of MPIC's Health Care Services Team. [MPIC's doctor] reviewed the Appellant's file on November 30, 1999. He noted that although it was difficult to obtain a true reflection as to the amount of force the Appellant's body might have been exposed to at the time of the collision, with only $850 damage to the Appellant's car, it would be unlikely that his lower back would have been exposed to any significant level of trauma, with the cervical spine being exposed to the majority of the force.

[MPIC's doctor] noted that the Appellant was able to continue working following the motor vehicle collision even though he was experiencing symptoms involving his neck and back regions. His condition appeared to regress in July 1999 and it was [MPIC's doctor's] view that [Appellant's doctor #1's] extension of the Appellant's period of disability until November 15, 1999 was mostly symptom based. It was [MPIC's doctor's] view that the objective physical findings identified by the health care providers involved in the Appellant's treatment did not support the period of disability [Appellant's doctor #1] documented. [MPIC's doctor] also stated:

> The exact job demands of [the Appellant's] pre-collision occupational duties, as a baker was not available at the time of this review. The information indicates that the disability commenced on July 26, 1999 but that a total disability beyond August 18, 1999 has not been objectively validated.

[MPIC's doctor] conducted a further review on April 3, 2000. He reviewed reports from the Appellant's physiotherapist as well as [Appellant's doctor #2]. [MPIC's doctor] indicated that the documents reviewed did not provide information identifying a medical condition arising from the motor vehicle collision in question, which in turn would result in an occupational disability.

[MPIC's doctor] conducted another review on April 18, 2000 when he was asked to determine whether there was objective evidence of a physical impairment of function that in turn would preclude the Appellant from performing his required work demands as a baker from August 1999 to November 2000. At that time, he also reviewed [Appellant's chiropractor's] reports, x-rays, and a report prepared by [MPIC's chiropractor]. [MPIC's doctor] concluded:

> . . . It is not medically probable the limitation of range of motion was a byproduct of some structural alteration occurring to the spine as a result of the incident in question. It is probable the decreased (sic) in range of motion was in someway related to his reported level of pain. It is my opinion a decrease in spinal range of motion would not preclude an individual from performing the required demands of a baker.
>
> The information leads me to conclude that [the Appellant's] reluctance to return to work subsequent to August 1999 was a byproduct of his reported pain in the absence of objective physical findings that would indicate he had a physical impairment that would preclude him from performing the required demands of his occupation.

[MPIC's chiropractor] provided a report dated August 24, 2000. He also reviewed [Appellant's chiropractor's] reports, which he viewed as consistent with the claimant having the following motor vehicle collision-related diagnosis:

1. Cervicothoracic sprain.
2. Lumbosacral sprain.
3. Cervicogenic headache.

He stated:

> It would seem to me that the file contents are relatively consistent in this claimant's complaints of headache, neck and low back complaints. There is no clear description on file of this claimant having recovered from these complaints although he was discharged from physiotherapy with some improvement. It is my opinion that a short course of chiropractic care would not be unreasonable provided there is documented objective evidence of ongoing improvement. . .

Counsel for MPIC submitted that the evidence did not establish that the Appellant could not work after August 1999 for reasons having to do with the motor vehicle collision. Although the Appellant did suffer from other ailments, such as cancer, in 2000, it was MPIC's position that these were not related to the motor vehicle accident. He was able to work following the accident at the baker's occupation, and, with the exception of a short relapse between July and August of 1999, the Appellant had failed to show that the motor vehicle accident had caused an inability to perform the duties of his occupation after August 1999.

Discussion

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 onus is on the Appellant to show, on a balance of probabilities, that he was unable to work after August 7, 1999 as a result of injuries suffered in the motor vehicle accident. The panel has noted that the Appellant did continue to work for a period of approximately three (3) months after the motor vehicle accident. His injuries and symptoms resulting from the motor vehicle accident were not disputed by MPIC at that point, and MPIC accepted the responsibility to pay

for physiotherapy treatment related to the motor vehicle accident. The Appellant continued to work, but complained of symptoms throughout that time. He stopped working, due to complaints of increasing neck and back pain and headaches, on July 25, 1999 and MPIC did not dispute that the Appellant was unable to work, as a result of the motor vehicle accident injuries between July and August 1999.

In August of 2000, [MPIC's chiropractor], in his review, recognized that the Appellant's symptoms of cervicothoracic and lumbosacral sprain, as well as cervicogenic headache, were related to the motor vehicle accident, and recommended further physiotherapy. He appeared to consider the most recent examination of the Appellant by [Appellant's chiropractor] on July 21, 2000.

[MPIC's chiropractor] did not make any comments regarding the Appellant's ability to perform the job of a baker at this time, but did not identify any significant improvements in the Appellant's condition.

[MPIC's doctor] reviewed the Appellant's file on November 30, 1999. He admitted at that time that he had no information regarding the exact job demands of the Appellant's pre-collision occupational duties as a baker. However, he remained of the opinion, both at that time, and in April of 2000 and in April of 2007 that the Appellant was able to perform the required demands of that job.

As no physical demands analysis was provided in regard to the demands of the baker's job, the best evidence before the panel in that regard was the evidence presented on behalf of the Appellant. In his report to his case manager and Application for Internal Review, the Appellant

indicated that the job was labour intensive, requiring repetitive bending and lifting, as well as lifting trays of up to 15 kg above his shoulders.

The Appellant completed his Application for Review on February 24, 2000. At that point, he indicated that he was still suffering from symptoms and still could not perform the duties of his occupation.

Although [Appellant's doctor #1] had anticipated that the Appellant would be able to return to work on approximately November 15, 1999, the Appellant's symptoms continued beyond that date. He continued with physiotherapy treatments, and his complaints were documented by his physiotherapist. On February 2, 2000, the Appellant saw [Appellant's doctor #2], who documented complaints of back pain, neck pain and headaches as well as limited range of motion and tenderness. His diagnosis at that time was neck, cervical/lumbar musculoligamentous strain, which was subacute.

The panel has reviewed the evidence and finds that there was a consistent pattern of symptoms and medical assessment throughout the period from July 1999 to July 2000 and the evidence has not established that the Appellant had recovered during this period.

The panel has considered the evidence presented on behalf of the Appellant that the baker's job was labour intensive and required repetitive bending and lifting, as well as lifting trays of up to 15 kg above his shoulders, as well as the evidence of his doctor that he was unable to do this job or perform these requirements, as well as the lack of evidence or assessment of the requirements of the job by MPIC. The panel finds that it has been established, on behalf of the Appellant that,

on a balance of probabilities, he was unable to perform the baker's job after July 25, 1999 and that this inability continued beyond August 1999.

The panel's review of the evidence indicates that MPIC accepted that the Appellant was unable to work between July 25 and August 1999 and that the Appellant continued to suffer from the same symptoms, with nothing to suggest that the Appellant was capable of returning to work before July of 2000. He was still suffering from symptoms at that point, and his caregivers were not of the view that he had made a substantial improvement which would have allowed him to return to his duties.

The Appellant, in his Notice of Appeal dated October 3, 2000, requested Income Replacement Indemnity benefits up until July of 2000. At the hearing, counsel for the Appellant submitted that the Appellant should be entitled to IRI benefits until the time of his second motor vehicle accident.

The panel has also heard evidence regarding the emergence of symptoms which the Appellant suffered in the summer of 2000, and his ultimate diagnosis of bladder cancer. After July 2000, it is difficult to differentiate between the various and numerous reported symptoms of the Appellant and evidence that investigations had begun regarding symptoms which ultimately were diagnosed as resulting from bladder cancer.

In light of this evidence, the fact that the Appellant is deceased and unable to provide clarifying evidence regarding his condition after July 2000, and considering his selection of July 2000 as the final date of entitlement on the Notice of Appeal, the Commission finds that the Appellant's

representative has not satisfied the onus of establishing, on a balance of probabilities, that he should be entitled to IRI benefits beyond July 2000.

Accordingly, the Commission finds that the evidence establishes, on a balance of probabilities, that the Appellant was unable to perform the duties of his occupation up to and including July 1, 2000, as a result of injuries suffered in the motor vehicle accident and that he was entitled to receive IRI benefits until that date.

Conclusion

The Commission finds that, for the reasons set out above, the Internal Review Officer erred in his decision dated August 15, 2000 when he terminated the Appellant's IRI payments in August of 1999. As a result, the appeal is allowed and the Internal Review Officer's decision dated August 15, 2000 is rescinded. The Appellant shall be entitled to IRI benefits, with interest from August 7, 1999 to July 1, 2000.

Dated at Winnipeg this 12th day of July, 2007.

LAURA DIAMOND

NEIL COHEN

DR. PATRICK DOYLE