

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-153**

PANEL: Ms Laura Diamond, Chairperson
Mr. Paul Johnston
Ms Linda Newton

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation (“MPIC”) was represented by Mr. Dean Scaletta.

HEARING DATE: May 13, 2009

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits (“IRI”)

RELEVANT SECTIONS: Section 81 and 110(1)(a) 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 was injured in a motor vehicle accident on March 25, 2004. At the time of the accident, the Appellant was a full-time earner and self-employed as an auto broker. He received treatment benefits, including physiotherapy treatments.

The Appellant’s case manager wrote to him on May 18, 2004 noting that reports from his physiotherapist indicated he was able to return to his employment. The Appellant had indicated

that as a result of injuries sustained in the motor vehicle accident, he was experiencing pain in his neck which prevented him from doing any of the heavy lifting involved in the repairing of the vehicles which he purchased for resale.

The Appellant sought an Internal Review of the case manager's decision. A third party assessment was received from [independent doctor] on July 4, 2004, and reports from [Appellant's physiatrist] were also considered, along with the physiotherapist's reports.

On August 10, 2004, an Internal Review Officer for MPIC reviewed this information and concluded that the medical information on the Appellant's file indicated that he did not suffer a functional impairment as a result of the motor vehicle accident of March 25, 2004 that would prevent him from performing the duties of his employment. The case manager's decision was confirmed. It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He described his employment as a machinist who started working as an auto dealer in 1994. He described the job of an auto dealer, which involved purchasing vehicles, taking them to an inspection facility, repairing and selling them.

The Appellant described the work involved in repairing the vehicles as well as the tools used. He stated that he used a handheld electric power grinder which weighed 10 to 15 pounds and electrical sanders weighing approximately 10 pounds. He noted that because of his mechanical

background, he does most of this work himself, and estimated that he spent three or four hours of each day doing body work and/or grinding work.

The Appellant described the effects of a previous motor vehicle accident in March of 2002 when he suffered a whiplash injury. Following that first motor vehicle accident he required some assistance in his business, due to his injuries, and retained helpers for several months. His general practice was only to hire helpers when he had a greater than usual load of work which he could not handle himself.

By the time of the second motor vehicle accident in March 2004 he described his health as generally good. He was able to handle his work load, working full-time.

Following the motor vehicle accident in March 2004, he testified that to keep the business going he continued doing purchases and taking vehicles to inspections or auction, but he required a helper for the repair work. He was doing the light jobs and the worker was doing the manual and physical labour. He testified that this continued for about six months until the end of September 2004.

On cross-examination, the Appellant was asked to review the Physical Demands Analysis regarding his job, which was completed following the motor vehicle accident in 2002. After the 2004 motor vehicle accident, he had confirmed that this was an accurate description of his duties. That Physical Demands Analysis described lifting a 2.9 pound sander and a 4.4 pound grinder. The Appellant noted that he had several different grinders and sanders, and that this referred to a finishing sander (a different kind of sander).

It was also suggested to the Appellant that he had been using helpers even before the 2002 motor vehicle accident, but he indicated that this had only been when he had been unable to complete jobs on time.

The Appellant was also asked about taxi claims he had submitted separately for himself and his wife following the motor vehicle accident, although they had used the same taxi together. He was also asked about a claim he had made on June 24, 2004 for personal care performed for his wife (who was also injured in the motor vehicle accident), which indicated that he had performed such duties from 7:30 a.m. to 9:00 p.m. each day, for 90 consecutive days. When asked how he could have done such work while also doing 50% of the duties in the business, the Appellant indicated that the hours for personal care varied and that since he had a home based business working from his garage, he was able to go back and forth throughout the day.

The Appellant was also asked about a conviction in Manitoba Provincial Court in July 2007 where he was convicted on a charge of fraud over \$5,000 in connection with a vehicle theft claim. The Appellant acknowledged that the conviction had been upheld by The Manitoba Court of Appeal, but that the matter was now before a judicial council for public inquiry.

Counsel for the Appellant submitted that the Internal Review Decision had relied on reports from the physiotherapist, [text deleted], and from [independent doctor], which did not contain a detailed or thorough analysis. [Appellant's physiotherapist] had merely filled out the Primary Health Care Report form and checked off the boxes indicating the Appellant could work, without any detailed analysis.

[Independent doctor] focused on those same questions and acknowledged that he had not reviewed any diagnostic studies, stating that “No diagnostic studies were available for review”. He also had not reviewed any reports from [Appellant’s physiatrist].

Two reports from [Appellant’s physiatrist] were filed with the Commission following the Internal Review Decision. These reports quite clearly described the Appellant’s disability and related it to the motor vehicle accident in 2004:

“...His functional level is still significantly reduced. He can do only 50% of the work and cannot do any heavy work. The heavy work is done by his helper...”

This report, dated February 6, 2005, reflected a note from a clinic visit on August 27, 2004 which indicated that the Appellant had been able to increase his working hours, but still had reduced endurance and mild weakness.

A report dated August 30, 2004 from [Appellant’s physiatrist] also recorded a note from the August 27, 2004 visit which indicated:

“He was reviewed in the clinic and stated that he has just returned from 4 weeks of holidays and was doing much better during his holidays. He will return to his regular work next week. He has only required Tylenol #3 1 tablet/day for headaches. His neck and shoulder pain is almost resolved.”

Counsel submitted that this was the best medical evidence, from a specialist, that the Appellant was not able to return to work until September 2004.

Accordingly, Counsel submitted that the Commission should accept the best medical evidence of the specialist, [Appellant’s physiatrist], that the Appellant was quite clearly disabled by at least 50% from this motor vehicle accident and not ready to go back to work until September 2004.

Therefore, the Commission should find that the Appellant was entitled to IRI benefits from March 25, 2004 until the first week of September 2004.

Evidence and Submission for MPIC:

Counsel for MPIC reviewed the Physical Demands Analysis dated May 21, 2002 which had been obtained in connection with the 2002 accident, and which the Appellant had confirmed remained accurate for the purpose of assessing his IRI entitlement from the 2004 accident.

He also reviewed the first report from [text deleted], the physiotherapist, on March 31, 2004, six days after the accident, which noted complaints of right-sided neck pain, bilateral headaches and sleep disturbance/fatigue. However, [Appellant's physiotherapist] answered "no" to all four of the questions on the form which are designed to list the potential barriers to continuing with one's occupation. [Appellant's physiotherapist] advised the case manager, during a telephone conversation on May 17, 2004 (which is recorded on the indexed file), that he was aware of the physical demands for the Appellant's occupation and that in his opinion there were no functional impairments that would preclude the Appellant from performing these job duties. Following a review of the Physical Demands Analysis on May 20, 2004, [Appellant's physiotherapist] confirmed, on May 28, 2004 that:

"The current objective findings would indicate that [the Appellant] would be able to perform his essential job duties. However, I believe his work does exacerbate his current symptoms. Patient reports difficulty sleeping, headaches and increased right sided neck pain after using grinder. His subjective complaints are supported by the objective findings."

Counsel also reviewed the report from [independent doctor] dated July 4, 2004. [Independent doctor] had reviewed the Physical Demands Analysis and was asked to identify any measurable impairment of function which would preclude the Appellant from performing his full-time job

duties. He had performed an examination of the Appellant on June 15, 2004. Although he did note that the Appellant had some limitations and dysfunctions as a result of pain (noting that heavy pushing or pulling work might aggravate his cervical spine symptoms), he concluded that the examination disclosed no physical impairment that would preclude the completion of essential job tasks by the Appellant.

Counsel for MPIC rejected the Appellant's criticism regarding [independent doctor's] failure to examine diagnostic studies, when in fact, he pointed out that no diagnostic studies such as MRI's, CT scans or x-rays had even been ordered in the Appellant's case.

Counsel for MPIC reviewed the evidence regarding the Appellant's use of helpers. Noting inconsistencies with the Appellant's evidence on cross-examination, he submitted that the indexed file showed that the Appellant's use of helpers had not changed during the previous two years. He also noted that the Appellant had indicated on the Personal Care Assistance form that he was able to help his wife 13.5 hours per day, seven days per week, although on cross-examination, the Appellant gave different evidence about what he meant when he filled in that form.

Counsel reviewed another report from [Appellant's physiotherapist] dated July 13, 2004 which described the Appellant's complaints of right sided neck stiffness and occasional headaches and described the Appellant as having full function with symptoms. He suggested that the Appellant should "restrict use of grinder" although in a later conversation with the case manager recorded on the indexed file, [Appellant's physiotherapist] stated that the inability to use the grinder was based on self-reporting by the claimant. As well, Counsel noted that there was no indication the Appellant had been directed to avoid use of the grinder entirely.

Counsel then reviewed the reports of [Appellant's physiatrist] dated August 30, 2004 and February 6, 2005. Although he noted that [Appellant's physiatrist] did make several references to the existence of reduced "functional capabilities" and to work related activities which generated pain, he emphasized that there was nothing in these reports to indicate that these assertions were based on anything other than what [Appellant's physiatrist] was told by the Appellant on those points. He submitted that these assertions were not supported by any relevant objective medical findings noted on examination.

Counsel reviewed the criteria for a full-time earner to establish an entitlement to IRI under Section 81(1)(a) of the MPIC Act and the meaning of "unable to hold employment" found in Section 8 of Manitoba Regulation 37/94 under the MPIC Act. He submitted that in the Appellant's case:

1. There were very few duties (essential or otherwise) which the Appellant was said to be unable to perform following this accident. The short list of duties potentially falling into this category included using a grinder, hammering and heavy manual labour.
2. A number of the medical reports indicate that, according to reports from the Appellant himself, participating in these activities caused or aggravated his neck and sometimes shoulder pain.
3. Quite apart from the issue of how essential these particular duties were, there was also some question as to how much, or how often, the Appellant was performing those duties during the two years prior to the 2004 motor vehicle accident.

On the whole, Counsel submitted that the totality of the evidence did not, on a balance of probabilities, satisfy the test for IRI entitlement at any time following the 2004 accident and that the appeal should be dismissed.

Discussion:

The MPIC Act and Regulations provide:

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;

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 show, on a balance of probabilities, that he was unable to perform the essential duties of his employment and as such, is entitled to IRI benefits.

The panel has reviewed the evidence of the Appellant and on the indexed file, as well as the submissions of Counsel for the Appellant and for MPIC.

The Appellant's submission relied upon his testimony at the hearing regarding the duties of his work and his inability to perform certain of these duties. However, the panel finds that there was a lack of consistency between the reports on the indexed file and the evidence and position of the Appellant.

These include discrepancies regarding:

- The hours of personal care assistance he provided for his wife during the relevant period.
- The percentage of job duties the Appellant was actually performing during the relevant period.
- The weight of the tools the Appellant was using in his employment, including the sander and grinder.
- Taxi receipt claims submitted for the Appellant and his wife in connection with the motor vehicle accident.
- The accuracy and applicability of the Physical Demands Analysis dated May 21, 2002.
- The number of helpers the Appellant was using in his business both before and after the motor vehicle accident.
- The Appellant's conviction for fraud in the Provincial Court of Manitoba.

As a result of these discrepancies in the evidence, the panel is unable to rely upon the evidence of the Appellant to establish, on a balance of probabilities, that he was unable to perform the essential duties of his job during the relevant period and should be entitled to IRI benefits as a result.

The Appellant also submitted evidence in the form of two reports from [Appellant's physiatrist]. Counsel for the Appellant submitted that the Internal Review Officer had failed to take these

reports, which constituted the best medical expert evidence in regard to the appeal, into consideration. However, the Internal Review Officer did consider [Appellant's psychiatrist's] views in a letter dated February 25, 2005, and concluded that [Appellant's psychiatrist's] report did not cause her to change her decision of August 10, 2004.

The panel agrees with the comments of the Internal Review Officer and of Counsel for MPIC, that any comments made by [Appellant's psychiatrist] in his reports in regard to the Appellant's ability to work, are based upon the Appellant's own subjective reporting to him of his symptoms. No independent analysis of the Appellant's functional ability to perform the essential duties of the particular job is addressed by [Appellant's psychiatrist].

As a result, the panel finds that the Appellant has failed to establish, on a balance of probabilities, that he was unable to perform the essential duties of his pre-accident employment, and that he should be entitled to receive IRI benefits for the period from March 21, 2004 to September 2004.

The decision of the Internal Review Officer dated August 10, 2004 is hereby confirmed and the Appellant's appeal dismissed.

Dated at Winnipeg this 11th day of June, 2009.

LAURA DIAMOND

PAUL JOHNSTON

LINDA NEWTON