Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-81

PANEL:	**Ms Yvonne Tavares, Chairperson** **Mr. Neil Cohen** **Ms Deborah Stewart**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Dan Joanisse of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.**
HEARING DATE:	**August 19, 2010**
ISSUE(S):	**Entitlement to further Income Replacement Indemnity Benefits**
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 September 27, 2006 when his vehicle t-boned another vehicle that had pulled out in front of him while travelling on the highway. As a result of that accident, the Appellant sustained a sore head, sore back and sore shoulders. The Appellant's ongoing symptoms affected his left side and he had difficulty using his left arm.

At the time of the accident, the Appellant was a self-employed farmer with a mixed farming operation. His duties included the duties of a grain farmer, cattle farmer, and pig farmer. Due to the injuries which the Appellant sustained in the accident, he was unable to perform duties that required him to bend, twist, lift or reach excessively. The Appellant was able to perform light to medium duties and was able to perform the basic duties required with his livestock such as feeding and checking the animals. Due to the limited ability of the Appellant to engage in his farming operation as a result of the injuries sustained in the motor vehicle accident, the Appellant became entitled to income replacement indemnity ("IRI") benefits based on the percentage of farm duties he was able to perform.

In a letter dated August 29, 2008, MPIC's case manager wrote to the Appellant to advise that his entitlement to IRI benefits would cease as of August 31, 2008. This was based upon a follow-up Percentage of Duties Report/Assessment report dated August 7, 2008 and completed by [Appellant's Occupational Therapist #1] [text deleted], which indicated that the Appellant was able to complete 100% of his pre-motor vehicle accident job duties, although it took him longer to perform the duties. As a result, the case manager found that the Appellant had the ability to complete 100% of his job duties and his entitlement to IRI benefits was terminated pursuant to Section 110(1)(a) of the MPIC Act. The case manager also determined that there was no basis for an entitlement to IRI benefits for carpentry work.

The Appellant sought an Internal Review of that decision. In a decision dated June 23, 2009, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found that:

1. the Appellant was capable of performing his full farming duties and accordingly his entitlement to IRI benefits ended as of August 31, 2008;

2. there was no evidence supporting that the Appellant's carpentry business was a going concern as of the date of the accident, or that he missed out on any contracts as a result of the motor vehicle accident. Therefore, the Appellant was not entitled to IRI benefits with respect to his carpentry work.

The Appellant has now appealed that decision to this Commission. The issues which require determination on this appeal are:

1. whether the Appellant's IRI benefits for his farming occupation were properly terminated as of August 31, 2008;
2. whether the Appellant is entitled to IRI benefits for his carpentry work.

Appellant's Submission:

The Claimant Adviser submits that the Appellant is not able to do the same amount of work on his farm that he did prior to the motor vehicle accident. He argues that the Appellant has reduced the size of his farming operation, he no longer has pigs and he has more assistance with his farming duties. Additionally, the Appellant requires more time to do the work on his farm because of his left shoulder injury. The Claimant Adviser maintains that if the Appellant was not self-employed, he would not have lasted in his job as he requires so much more time to perform all of his job duties.

In further support of his position, the Claimant Adviser relies on the report of [Appellant's Occupational Therapist #2], dated April 6, 2010. In that report, [Appellant's Occupational Therapist #2] concluded that the Appellant was capable of performing 61% of his pre-motor vehicle accident farming duties in the same amount of time as before the accident. The Claimant Adviser submits that [Appellant's Occupational Therapist #2's] report is far more detailed and

thorough than [Appellant's Occupational Therapist #1's] report of August 7, 2008, relied upon by MPIC. He argues that [Appellant's Occupational Therapist #2's] report should be given more weight than [Appellant's Occupational Therapist #1's]. The Claimant Adviser concludes that the Appellant is unable to perform farming duties as he did prior to the accident and therefore his IRI benefits should not have been terminated by MPIC as of August 31, 2008.

With respect to the Appellant's carpentry work, the Claimant Adviser maintains that there was evidence from [text deleted] regarding the work done by the Appellant in 2006. The Claimant Adviser maintains that the letter from [text deleted] establishes the Appellant's carpentry work as a going concern before and after the motor vehicle accident. The Claimant Adviser further argues that at the time of the accident the Appellant was doing work for [text deleted] performing carpentry work on his cabin. The Claimant Adviser argues that but for the accident, the Appellant would have continued with the carpentry work on the cabin. As a result, the Claimant Adviser submits that the Appellant had substantiation for his carpentry work and that income should be included and added to his Gross Yearly Employment Income used in calculating his IRI benefits.

MPIC's Submission:

Counsel for MPIC argues that the Appellant's IRI benefits were properly terminated pursuant to Section 110(1)(a) of the MPIC Act on the basis that the Appellant was able to do 100% of his farming duties. Counsel for MPIC argues that the termination of IRI benefits is dependent on the ability to do the employment, it is an individual's functional capacity and not dependent on the length of time required to carry out the tasks. She maintains that the Appellant is able to do his farming work, even if his takes him longer. Counsel for MPIC submits that the report of [Appellant's Occupational Therapist #2] is not inconsistent with that of [Appellant's

Occupational Therapist #1]. Her report indicates that the Appellant could do 95% to 100% of the farming duties, given more time to do those duties. She submits that the Appellant is not entitled to ongoing IRI benefits so long as he is capable of performing his farming duties, even if it takes him much longer to do his job.

With respect to the Appellant's entitlement to IRI benefits for his carpentry work, counsel for MPIC maintains that the carpentry work was not a going concern. She submits that the Appellant's Income Tax returns do not support that his carpentry business was a going concern at the time of the motor vehicle accident. Counsel for MPIC argues that the Appellant's carpentry was a hobby. He picked up odd jobs doing carpentry work for other people. She submits that this was not employment that he held on a regular basis. Further, counsel for MPIC argues that there is no indication that the Appellant lost any income from his carpentry work as a result of the motor vehicle accident. Accordingly, counsel for MPIC submits that the Appellant's appeal should be dismissed.

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 Claimant Adviser on behalf of the Appellant and of counsel for MPIC, the Commission finds that:

1. The Appellant's IRI benefits were improperly terminated pursuant to Section 110(1)(a) of the MPIC Act as of August 31, 2008 as he was unable to hold the employment which he held at the time of the accident.
2. The Appellant is entitled to IRI benefits for the loss of income related to his carpentry work for [text deleted].

Reasons for Decision:

Pursuant to Section 110(1)(a) of the MPIC Act, a victim ceases to be entitled to an IRI when the victim is able to hold the employment that he held at the time of the accident. It is clear from all of the information provided to the Commission and from the Appellant's own testimony that it takes him significantly longer to do his farming duties now than prior to the accident due to the shoulder injury which he sustained in the motor vehicle accident. Accordingly, the Appellant cannot be said to be able to hold the employment that he held at the time of the accident if it takes him twice as long to complete the duties as compared to before the accident. The Commission finds that if the Appellant was in a competitive work environment, he would not have been able to hold the employment. He has only been able to continue with his farming operation because he is a self-employed individual. We find that there cannot be a different standard for employed versus self-employed individuals. The Commission finds that the Appellant cannot do the same amount of work that he did at the time of the motor vehicle accident and therefore he is not able to hold the same employment that he held at the time of the accident.

With respect to the Appellant's carpentry work, the Commission finds that pursuant to Section 83(1) of the MPIC Act, there was a loss of employment that the Appellant would have held if the accident had not occurred. On the basis of the evidence submitted, the Commission finds that there was a promised employment with [text deleted] for the Appellant to do carpentry work on his cabin. That employment was lost after the accident due to the Appellant's inability to do that work as a result of the injuries he sustained in the accident. Accordingly, the Commission finds that the Appellant has established an entitlement to IRI benefits for the promised employment with [text deleted].

With respect to a loss of income for [text deleted], the Commission finds that there was insufficient evidence to establish that employment was a going concern. There was no evidence presented at the hearing to establish that the carpentry work with [text deleted] would have continued beyond 2006. The letter from [text deleted] filed in evidence made no reference to any ongoing contract with the Appellant. As a result, the Commission finds that the Appellant has not established, on a balance of probabilities, that there was an entitlement to IRI benefits respecting any loss of income for carpentry work with [text deleted].

As a result, the Appellant's appeal is allowed in part and the Internal Review Decision dated June 23, 2009 is therefore, amended accordingly.

Dated at Winnipeg this 21st day of October, 2010.

YVONNE TAVARES

NEIL COHEN

DEBORAH STEWART