Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-103

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C. Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by** **Mr. Tom Strutt** **[Text deleted], the Appellant, was represented by [Appellant's representative]**
HEARING DATE:	**January 20th, 1998**
ISSUE(S):	**1. Whether the Appellant was self-employed and, if so, in what capacity;** **2. Whether Appellant entitled to reimbursement for costs of labour to repair his rooming houses which his injuries prevented him from completing in person.**
RELEVANT SECTIONS:	**Sections 85, 86 and 106 of the MPIC Act; Section 8 of Regulation 37/94, and Section 18 of Schedule C to Regulation 39/94**

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 FACTS:

[The Appellant] was [text deleted] years of age when, on April 4th, 1996, he was

involved in a motor vehicle accident; his vehicle was rear-ended. He attended upon [Appellant's doctor] that same day and was diagnosed as having sustained acute cervical and lumbar spine strain and acute anxiety reaction. [Appellant's doctor] prescribed Tylenol, hot bath soaking and rest from work until improved; he referred [the Appellant] to the [physiotherapy clinic] for physiotherapy. [Appellant's doctor] also recommended a series of home exercises. [The Appellant], who had been involved in an earlier motor vehicle accident in 1993, had been treated with physiotherapy in 1993 and 1994, and had been taking non-steroid anti-inflammatory drugs up until September of 1994. [Appellant's doctor], at his April 4th, 1996 examination of the Appellant, noted a certain tremor of limbs from the emotional shock of the accident, together with stiffness and limited range of movements of the neck and low back, with muscle spasms of those two areas and tenderness of the para-spinal muscles on palpation.

[The Appellant] had worked as a labourer and as an appliance repairman but, by the date of his accident on April 4th, 1996, had retired from his last employment and was looking after a couple of parcels of residential realty that he had purchased in or about 1986. The one parcel was a duplex at [text deleted]; the other was a three-storey building at [text deleted] which, at the time he purchased it, had consisted of a five suite rooming house but which he had converted into three separate suites, one on each floor. [The Appellant's] financial records reflect operating losses (not including capital cost allowance) in each of the years 1992-1996. It is [the Appellant's] contention that he is a self-employed carpenter, he sustained injuries to his right shoulder and elbow in his motor vehicle accident that have prevented him from earning the income that he would otherwise have earned, and that he has had to expend large amounts of money to pay other people for work on his rental properties that he, himself, would have

performed had it not been for his injuries. More specifically, we have identified various items which, if [the Appellant's] claim is valid, represent work for which he allegedly paid to have done by others - work which, but for his accident, he says he would have completed himself. The total amount that he claims to have paid out in that context is $3,205.00, made up as follows:

Labour for laying linoleum at [text deleted]	$100.00
Labour for painting at [text deleted]	575.00
Labour for painting at [text deleted]	325.00
Labour for roofing at [text deleted]	1,100.00
Labour for laying linoleum, repairs and painting at [text deleted]	1,l05.00
Total	$3,205.00

There are other expenses claimed by [the Appellant], some of which relate to work done on his own residence, some of which was done after he had, in our view, regained pre-accident status, and there are some claims for loss of rentals that we are not prepared to consider since, patently, the vacancies in a couple of his suites do not stem from his motor vehicle accident. The vacancies may have been due to the fact that repairs were needed in order to make the premises rentable, but that fact is not accident-related.

The issues in this appeal are these:

(i) was [the Appellant] a full-time or part-time, self-employed earner at the time of his motor vehicle accident, as he submits, or was he a non-earner?

(ii) if he was self-employed, what was the nature of that employment?

(iii) if he was self-employed, whether on a full-time or part-time basis, during what period following his accident was he rendered entirely or substantially unable to perform the essential duties of that employment?

(iv) if he was a non-earner, what employment would properly have been determined for him under Section 106 of the Act (copies of any statutory provisions referred to in these Reasons are annexed hereto);

(v) if he was a non-earner, was he unable, for any period following the 180th day after his motor vehicle accident, to hold the employment determined for him under Section 106?

[The Appellant's] counsel submits that the Appellant was a self-employed carpenter or, if not a carpenter, then at least self-employed in one or another of the building trades. He bases that proposition upon the fact that [the Appellant], in his capacity as owner of three rental properties, spent a certain amount of his time in each year performing sundry repairs and redecorations to those properties. He points out that [the Appellant] was far from a passive investor, able to sit back and enjoy an interrupted cash flow from his investments; the fact is, he submits, that the nature and location of those rooming houses did not always attract the most desirable tenants, with the result that [the Appellant] was frequently called upon to repair damage caused by vandalism or carelessness. That may be so although we note, in passing, that $1,100.00 of the expenses attributable to those rooming houses in 1996 relates to roofing repairs which are not attributable to the acts or omissions of any tenants. In any event, we find that [the Appellant] was a non-earner: he provided neither goods nor services to his tenants, other than his statutory obligation to maintain the premises in a habitable condition and, by so doing, was merely maintaining his own assets. In our view, the use of the term 'self-employed' in the Act has

reference to those who, while acting as independent contractors, are in fact working for others rather than for themselves.

Since there was no employment that [the Appellant] would have held during the first 180 days following his accident, he does not fall within the provisions of Section 85 of the Act and, therefore, we are obliged to find that he is not entitled to any income replacement during that period.

In order to determine whether [the Appellant] should be entitled to any income replacement after the first 180 days following his accident, we must first determine an employment for him under Section 106 of the Act and, having done so, must then decide whether he was not able to hold that employment because of injuries sustained in the accident.

Having carefully considered [the Appellant's] own testimony, in which he describes himself as a carpenter, we would be prepared to adopt that classification for him under Section 106 of the Act but, since he has no journeyman's papers nor any other form of certification, and since he did not actually work as an employed carpenter, we would regard him more as a handyman having some basic carpentry skills and he would therefore be classified at Level 1 of that occupation.

The question then arising is whether he sustained injuries in his motor vehicle accident of April 4th, 1996 of such a nature as to preclude his performance, at any time after the 180th day following his accident, of the essential duties of that deemed employment.

[Appellant's doctor], in his report of March 17th, 1997 and in his clinical notes of which copies were attached to that report, reflects acute cervical and lumbar spine strain in his examination of the Appellant on April 4th of 1996, the date of the accident. A few days later, on April 8th, [the Appellant] had complained of pain at the back of his neck and shoulders, but that is the last occasion upon which any shoulder pain was mentioned in the course of a medical examination. [The Appellant] was examined by [Appellant's doctor] on August 22nd and September 16th of 1996, but appears to have made no mention of a sore shoulder nor of any problem with is right arm or elbow. It is not until March 4th of 1997 that the shoulder and elbow pains are mentioned again, and it perhaps noteworthy that, a few days prior to that, [the Appellant] had seen his adjuster, had filed a long form of claim and had been told that medical information to corroborate his claim would be needed. Even then, although [the Appellant] certainly told [Appellant's doctor] on March 4th of pain in both shoulders (not merely the right one, as he told this Commission) and his elbow, [Appellant's doctor's] report notes that X-rays of the right shoulder were negative and that right shoulder movements were full and pain free. [The Appellant] apparently told [Appellant's doctor] that, although he was, indeed, pain free in that part of his anatomy, he was afraid of attempting heavy work such as plumbing or carrying ladders because he might injure himself. There is no suggestion that he was not able to do the heavy work but, rather, that he was reluctant to undertake it.

[Appellant's doctor's] report of March 17th, 1997 also contains the statement that "[the Appellant] was totally disabled since the 4th April 1996. He did start light duties since the beginning of December 1996, but is unable to undertake a regular carpenter's job as yet". That

statement, of course, does not purport to reflect [Appellant's doctor's] professional opinion but merely repeats a statement made to him by [the Appellant].

[The Appellant] was apparently involved in another motor vehicle accident on July 27th, 1996 but, just as was the case in the accident now under review, his initial report denies any personal injuries. It was not until February of 1997 that [the Appellant] did file a claim for benefits under the Personal Injury Protection Plan, based upon his April 4th, 1996 accident, and even then he makes no mention of injury to his shoulder although he does refer to his right arm and elbow.

From a detailed analysis of [Appellant's doctor's] notes and report, we do not find any real corroboration of [the Appellant's] claim that the injuries he sustained in his accident of April 4th, 1996 resulted in any material disability that continued after October 1st, 1996, the 180th day following that accident.

Turning, now, to the report of [text deleted], athletic therapist at the [physiotherapy clinic], dated May 29th, 1997, we find a diagnosis of a rotator cuff strain. [The Appellant] had been referred to [Appellant's athletic therapist] by [Appellant's doctor], whose covering note said, merely:

"Motor Vehicle Accident

Mild Cervical Spine and Lumbar Spine Strain

Previous MVA C-Spine Injury Sept 93, X-ray 1993 -

Servical Spondylosis C5-6, 6-7.

Pl. assess and treat accordingly. Thanks [Appellant's doctor]."

[Appellant's athletic therapist] points out that [the Appellant's] problems were not clear cut. The C-spine injury was probably exacerbated by pre-existing osteoarthritis of the lower spine segments C5 to C7. As well, he suffered a lumbo-sacral sprain which further extended treatment time.

Since [the Appellant] assures us that he was wearing his seatbelt at the time of the accident and that no part of his body came into unusual contact with any part of his vehicle, it is difficult to imagine how he could have sustained a rotator cuff injury in the course of that accident. From all of the foregoing evidence, and particularly the facts that [the Appellant] did not complain of any shoulder problems until a long time after his accident, we find on a strong balance of probabilities that any injuries he may have sustained in his April 4th, 1996 accident had been resolved, and that he had reached pre-accident status by October 1st, 1996. We find, further, that if he has indeed sustained a rotator cuff strain, that injury is highly unlikely to have been caused by his accident of April 4th, 1996.

DISPOSITION:

That being the case, we are unable to find that any motor vehicle accident -related injury would have prevented him from performing the essential duties of the deemed employment of a handyman-carpenter at any time following 180 days after his accident. It follows, therefore, that [the Appellant's] appeal must be dismissed.

Having said that, we are constrained to add that it seems inequitable to us that, although [the Appellant] does appear to have been obliged to hire other people to do at least some of the work that he would otherwise have done himself, and that the need to incur those expenses was probably caused by his motor vehicle accident, the fact that he was a non-earner at the time of the accident places him outside the circle of those entitled to benefits. If, for example, we had been able to find that he was indeed self-employed, as he claimed, then we might well have been able to find him entitled to reimbursement for some, at least, of the expenses that he would have incurred in paying somebody else to do part of his job. However, we have no mandate to change the legislation or the regulations and are obliged, not without a modicum of reluctance, to confirm the decision of MPIC's internal review officer.

Dated at Winnipeg this 29th day of January 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED