

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]

AICAC File No.: AC-97-105

PANEL: Mr. J. F. Reeh Taylor, Q.C. (Chairperson)
Mr. Charles T. Birt, Q.C. Mr. F. Les Cox

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC') represented
by
Ms Alexandra Nelson
the Appellant, [text deleted], was represented by [Appellant's
representative]

HEARING DATE: March 10th, 1998

ISSUES:

1. Whether Appellant entitled to additional impairment benefits;
2. Whether Appellant entitled to continued income replacement.

RELEVANT SECTIONS: Sections 174, 84(1), 106 and 83(1)(a) of the 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

[Text deleted], the Appellant was an intoxicated pedestrian when, at 5:30 in the afternoon on the 31st of October 1996, he was walking down a back lane near [text deleted] when he apparently ran into the right side of a motor vehicle. He sustained fractures of the left scapula, the left tibia

and of the left surgical neck.

At the time of his accident, [the Appellant] was employed as a car wash attendant by [text deleted]. Because of his initial disability, his income replacement indemnity was established at \$155.07 bi-weekly although, since he was in receipt of social assistance from the [text deleted], he completed an assignment of benefits in favour of the [text deleted] Social Services Department to become effective on November 21st of 1996.

[The Appellant's] employment at [text deleted] was on a part-time basis, in that he reported to work when asked to do so but had no assurance of full-time employment, as became apparent from subsequent events. He testified that, in the course of his work at the car wash, he was required to use a metal wand through which water would pass under pressure with which to spray the exterior of vehicles passing through and, as well, was required to vacuum the interiors of vehicles and, sometimes, was engaged in the final wiping down process after initial drying. The water would be under pressure of 50 to 65 pounds per square inch. He would also have to lift chains weighing about 10 pounds, attaching them to the underside of vehicles being towed through the car wash.

For the treatment of his skeletal problems, [the Appellant] was treated by [text deleted], an orthopaedic surgeon who, amongst other procedures, inserted a rod in the left tibia on a permanent basis; no surgery was felt to be necessary for the fractured scapula. By the 27th of January 1997, [Appellant's orthopaedic surgeon] reported to MPIC that the several fractures were healing nicely but that [the Appellant] could only operate with less than full function and,

indeed, with significant limitation in function; he was unable to ambulate with aids, said [Appellant's orthopaedic surgeon], and this condition was expected to continue for another three months.

On the 17th of March 1997 a further report from [Appellant's orthopaedic surgeon] notes that [the Appellant] was "now almost completely recovered" and "recovered from fractures" as of March 1st, 1997. Based almost entirely upon that last report from [Appellant's orthopaedic surgeon], MPIC wrote to [the Appellant] on May 28th to say that it had terminated his income replacement benefits as of May 7th, 1997 although, the Corporation noted, [the Appellant] might well be entitled to additional benefits for permanent impairment, particularly as a result of the surgical scar on his left leg.

[The Appellant] appealed from the decision to terminate his income replacement and MPIC's Internal Review Officer, by letter of August 12th, 1997, confirmed that decision. As the Internal Review Officer puts it:

....I understand your client preferred to stay on social assistance because his benefits were more than his income replacement indemnity entitlement. I understand further that he began working in June 1997, shortly after his income replacement benefits were terminated.

There is no indication in any of the material on file that your client requires retraining of any kind. He is, accordingly to [Appellant's orthopaedic surgeon], capable of working full duties and has been capable of doing so for several months. [Appellant's orthopaedic surgeon] does not mention any work related restrictions at all....

[the Appellant], through his solicitor, [text deleted], then filed a second request for an internal review, this time related to a decision by [the Appellant's] Adjuster, awarding him the sum of \$8,331.04 for the permanent impairment resulting from the scarring to [the Appellant's] left leg. That decision was also confirmed by the Internal Review Officer. [Appellant's solicitor] then filed a Notice of Appeal on behalf of [the Appellant], claiming "additional impairment benefits due to bodily injuries which prevent him from earning a livelihood". However, counsel for MPIC points out - quite correctly, in our respectful view, that although the most recent report obtained by this Commission from [Appellant's orthopaedic surgeon], under date of April 13th, 1998, does indeed describe what appear to be certain permanent disabilities unrelated to the scarring for which [the Appellant] has already been compensated, this Commission has no jurisdiction to deal with those additional claims since they have yet to be the subject of even an initial decision by MPIC, let alone a decision by an Internal Review Officer.

Turning, now, to [the Appellant's] claim for continued income replacement indemnity, counsel for MPIC makes a further point with which we concur, namely: [the Appellant], a part-time employee at the time of his accident, directly or indirectly received income replacement indemnity payments from October 31st, 1996 to May 7th, 1997 - a period in excess of 180 days. That being so, Section 84(1) of the MPIC Act requires two questions to be answered:

- (a) what is a proper employment to be determined for [the Appellant] pursuant to Section 106 of the MPIC Act; and
- (b) was he unable, because of his accident, to hold that employment as of the 180st day following his accident, either for a specific length of time or indefinitely thereafter?

Those are questions that should be answered, at least initially, by [the Appellant's] Adjuster at MPIC since, in our view, we lack the jurisdiction to deal with any matter that has not yet been the subject of any decision by the insurer.

Both aspects of [the Appellant's] appeal will, therefore, be referred back to the Claims Adjuster responsible for the management of [the Appellant's] claim. Should [the Appellant] and his counsel be unwilling to accept the Adjuster's decision, either with respect to any additional impairment award or with respect to [the Appellant's] entitlement to continued, or renewed, income replacement indemnity, since neither of those matters has yet been dealt with at the internal review level they will need to proceed there before returning to this Commission with a new Notice of Appeal.

Dated at Winnipeg this 11th day of May 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

F. LES COX