Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [text deleted]
AICAC File No.: AC-97-128

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mrs. Lila Goodspeed** **Mr. F. Les Cox**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by** **Mr. Tom Strutt** **[Text deleted], the Appellant, appeared on his own behalf**
HEARING DATE:	**February 27th, 1998**
ISSUE:	**Whether Appellant entitled to compensation for loss of promotion due to MVA.**
RELEVANT SECTIONS:	**Section 81(1)(a), 81(2)(a), 82(1) and 110 (2) of the MPIC Act ('the Act') and Section 2(a) of 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 Appellant], riding his bicycle at the time, was in collision with a motor vehicle on the 20th of June 1996 in the [text deleted]. He sustained injuries in the form of a shoulder separation, abrasions to his right shoulder and left knee, a contusion to his occipital scalp with some cervical spasm and posterolateral knee pain which was later diagnosed as a meniscal tear in his left knee, requiring arthroscopy.

His third degree separation of the right shoulder and his knee problem both required surgery and, since each of those injuries resulted in a measure of permanent impairment, [the Appellant] was awarded a total of 10.55% of the indexed maximum of $104,138.00, or a net sum paid to him of $10,986.56. That amount is not in dispute, nor is the income replacement indemnity that [the Appellant] was paid by MPIC for the period during which he was necessarily away from work as a result of his injuries.

The issue, here, has its origin in the fact that, at the time of his accident, [the Appellant] was employed by [text deleted] in its pump department, where he was in training to become manager of that department. It was, in fact, a near certainty that, upon the retirement of the gentleman who, at the time, occupied the position as manager of that department, [the Appellant] would have assumed that position had his accident not occurred. We accept that proposition without hesitation.

Unfortunately, following his accident of June 20th, 1996 [the Appellant] was unable to resume his duties in the pump department and was assigned to temporary duties in the quotations department - a position that appears, now, to have become reasonably permanent. It was on September 11th of 1996 that [text deleted] wrote to [the Appellant] on a more formal basis, to tell him that the company could no longer continue to hold open his job in the pump department, and was obliged to make alternative arrangements there. Other evidence indicates quite clearly that this corporate decision was made primarily because of uncertainty in the date when [the Appellant] would be able to resume his full duties in the pump department. That uncertainty stemmed, at least in large part, from two factors:

(a) the accident had happened in June. At that point, and even through July, the company would have been willing to wait for two or three months to allow [the Appellant's] injuries to heal. However, it was not until August that an appointment was made for him to be examined by the surgeon, [text deleted], and it was not until some time in September of 1996 that [Appellant's surgeon] actually suggested surgery; allowing for a reasonable and normal recovery time following that surgery, including a subsequent procedure for removal of the surgical pins, would have entailed a longer delay in [the Appellant's] return to work than the company felt it could reasonably allow; and

(b) [The Appellant's] medical advisors were not willing, in any event, to guarantee him better than a 50% chance of complete restoration to his pre-accident status. The job that he was doing at the time of the accident, and the job for which he was in training, required a fair amount of lifting and other physical work, and his employer wanted to be sure that he would be able to perform that work.

[the Appellant] gave evidence, supported in part by a letter from his employer, to the effect that it was MPIC's failure to authorize his surgery promptly that was the cause of the uncertainty and the resultant loss of his promotion. We do not believe it necessary to examine in great detail, in these Reasons, the exact chronology, course of conduct and correspondence in which [the Appellant's] medical advisors and those of MPIC were engaged, nor the discussions in which [the Appellant's] adjuster at MPIC was involved. Enough to say that we have considered very carefully that entire chronology and are not persuaded that the loss of [the Appellant's] promotion was something that can be laid at the door of MPIC. [the Appellant] is critical of alleged delays on the part of MPIC's adjuster or its medical team, or both, in approving his surgery

but, from a careful analysis of his own evidence and the material on file, it is not apparent that there was in any inordinate delay. There certainly seem to have been certain misunderstandings on both sides of the fence, but nothing beyond that.

At the same time, it is quite clear that [the Appellant] did, indeed, lose the possibility - indeed, the near certainty - of a valuable promotion within the pump department of [text deleted], which brings us to the real issue: is there, within the Act or Regulations, any provision for benefits for the loss of prospective, increased earnings, whether from anticipated promotion or otherwise when that loss results from a motor vehicle accident. Regrettably, we can find no such provision. It is not within our power to increase [the Appellant's] income replacement indemnity ('IRI') retroactively, since the Act and Regulations make it very clear that income replacement indemnity has to be calculated upon the basis of a claimant's earnings in effect at the date of the accident. Were it otherwise, it would not only be someone in [the Appellant's] position who could claim additional benefits; anyone who could support the proposition that, in the foreseeable future, his earned income was likely to have increased had it not been for a motor vehicle accident would be entitled to additional benefits. That, indeed, may well be seen as a perfectly equitable position, but unfortunately there is no such provision in the legislation.

[The Appellant's] employer has moved him to another position but, fortunately, without any reduction in his pre-accident pay. He has been paid the maximum that appears to be allowable for his impairment under Section 127 and for IRI under Section 81 of the Act ands present appeal must, therefore, fail. [The Appellant] is not helped by the language of Section 82, which is reproduced (together with all other sections of the Act and Regulations referred to above)

as an Appendix to these Reasons. The vital words of Section 82 are 'at the time of the accident', and they prevent [the Appellant] from qualifying for additional IRI.

DISPOSITION:

[The Appellant's] appeal is dismissed and the decision of MPIC's internal review officer of October 21st, 1997 is, therefore, confirmed.

Dated at Winnipeg this 6th day of March 1998.

J. F. REEH TAYLOR, Q.C.

LILA GOODSPEED

F. LES COX