Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-96

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** **Ms Joan McKelvey** **the Appellant, [text deleted], appeared in person, accompanied by his wife, [text deleted]**
HEARING DATE:	**April 30th and June 18th, 1998**
ISSUE:	**Whether MPIC justified in terminating Appellant's benefits for non-compliance.**
RELEVANT SECTION:	**Section 160 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

The Appellant, [text deleted], a [text deleted] year-old truck driver in the employ of [text deleted] at the time, was involved in a motor vehicle accident on December 28th, 1995 in the [text deleted]. He was driving his [text deleted] car when it was struck on the left side by a moving van. Although [text deleted] was wearing his seatbelt and shoulder strap, with the head rest

raised, his forehead apparently struck the windshield of his vehicle, causing small glass cuts to his forehead and breaking his eyeglasses. He complained of pain at the top and posterior of his head, the posterior of his neck and both shoulders, right and left jaws, low back, left knee and left leg, and of a cut to the right index finger. He was taken by ambulance to the [hospital] where X-rays were taken and [the Appellant] was given a soft neck collar; his vehicle was apparently written off. [the Appellant] was initially examined on December 29th, 1995 by his family physician, [text deleted], who diagnosed soft tissue injuries to neck, shoulders, chest wall, lumbosacral sacral spine and the left knee. [Appellant's doctor] prescribed the application of heat, rest, 292 tablets, muscle relaxants and physiotherapy.

[The Appellant] was next seen by [text deleted] , a specialist in orthopaedic surgery who, after examining [the Appellant] and analyzing the X-ray results, found no fractures nor any dislocations, no bone nor joint abnormality in any of the left knee, the cervical spine, the thoracic spine or the lumbosacral spine. [Appellant's orthopaedic surgeon] advised [the Appellant] to remove the cervical collar several times each day, to continue applying heat to the soft tissue at points of discomfort, and to restrict some of his activities during physiotherapy. At the time of a second examination by [Appellant's orthopaedic surgeon] on February 2nd, 1996, [the Appellant] stated that he had fallen on stairs at his home on February 1st and had injured his left hand. X-rays showed a fracture at the base of the middle phalanx of the left fifth finger, and [Appellant's orthopaedic surgeon] therefore taped [the Appellant's] left fourth and fifth fingers together and advised him to remain off work for this latter reason.

[The Appellant] was seen for the third time by [Appellant's orthopaedic surgeon] on March 4th, where X-rays were again taken of [the Appellant's] right knee. [Appellant's doctor's] report of that examination indicated that progress had been satisfactory; prognosis was good; no permanent impairment nor any sequelae to the patient's musculoskeletal system were anticipated and [the Appellant] required no further physiotherapy. [Appellant's doctor] added that, in his opinion, [the Appellant] should be fit and able to return to his usual activities and work by April 1st of 1996.

However, despite that opinion from the orthopedic consultant, [the Appellant] continued to attend upon his regular practitioner, [text deleted], who had already seen him on January 24th, February 2nd, February 15th and March 4th, and who examined him again on April 4th, April 29th, May 30th and June 27th of 1996. During all or part of that time, [the Appellant] was also attending for physiotherapy and, finding that those sessions were too painful and vigorous for him, sought and received acupuncture and other more passive treatments instead. As well, he was using an Obus Forme seat, wrist tensor support, a lumbar corset, a body pillow, a McKenzie cervical roll, a 65 centimeter therapeutic exercise ball, a digiflexor hand and finger exerciser, a high back Obus Forme support with extra roll, and right knee bolster with right knee support. All of those orthotic aids seem to have combined, along with his acupuncture and medication, to give [the Appellant] a slow, moderate improvement in his overall condition. Throughout this period, [the Appellant] received income replacement indemnity from MPIC, which also paid for his treatments, medication and travel expenses.

[The Appellant] was sent by MPIC for an independent examination on August 28th, 1996 by [text deleted], a physiotherapy consultant, whose recommendations, in his report of September 12th, 1996 may be summarized this way:

1. although [the Appellant], in completing certain questionnaires, appeared to consider himself to be crippled, his perceived functional limitations were not in proportion to objective findings. His neurological exam had been normal and he had a reasonably full, functional range of motion - albeit with complaints of discomfort;
2. although still taking Amitriptyline, [the Appellant] complained of waking every two hours and it might be appropriate for his physician to review the then current dosage;
3. any damage to [the Appellant's] right knee would have been the result of the fall down his stairs and was unrelated to his motor vehicle accident;
4. since [the Appellant] had switched from a physiotherapy program focusing on strengthening to one of a mainly passive nature, treatment at a frequency of six times per week for acupuncture with heat and stretching every other day was, in [independent physiotherapist's] opinion, excessive. At this stage of his rehabilitation (more than eight months after his injury) an aggressive strengthening and stretching program was essential. Similarly, the home exercise program was lacking in several respects and full restoration was not likely to be accomplished with the then current program;
5. in [independent physiotherapist's] view, [the Appellant's] past history had major significance since, following a 1988 work-related accident, [the Appellant] had not rejoined the workforce until 1993, at which point [the Appellant] himself felt that he had recovered to less than 50% of his pre-accident status;

6. [the Appellant] would best benefit from a work-hardening program within a multi-disciplinary centre where he would be closely supervised during the performance of flexibility, strengthening and job-related tasks as well as being counselled with respect to pain issues. The difference between hurt and harm must be emphasized, said [independent physiotherapist];
7. a time frame of six to eight weeks would be appropriate for the work-hardening program, to be followed by a return to work.

On November 13th, 1996, MPIC wrote to [the Appellant], terminating his benefits on the ground that he had "knowingly provided false and inaccurate information to the Corporation". It transpires that this boiled down to an excessive claim for travel expenses in the total sum of $29.78, for which MPIC was claiming reimbursement. In addition, MPIC had apparently determined that, by November 13th of 1996, [the Appellant] was, in any event, again capable of holding the employment that he had held at the time of his accident, and this formed the second ground for the Corporation's termination of his benefits.

[The Appellant and his wife] had consulted [text deleted], their solicitor, who sent a lengthy letter of November 13th to the President of MPIC, giving a detailed background of his client's situation and seeking an immediate review of the Corporation's decision. As a result, a meeting was held between [Appellant's solicitor] and three senior members of MPIC's Personal Injuries Claims team - [text deleted]. [The Appellant] had apparently been invited to join that

meeting but had elected to leave matters in the hands of his solicitor, simply holding himself ready to join the meeting if requested.

At that meeting, MPIC agreed to reinstate [the Appellant's] income replacement upon the following conditions, which were confirmed by way of a letter from [Appellant's solicitor] to MPIC of December 19th, 1996:

1. that [the Appellant] would furnish MPIC with his Workers Compensation Board claim file within a reasonable time;
2. that [the Appellant] would attend for a reassessment by [independent physiotherapist];
3. that [the Appellant] would provide full disclosure to [independent physiotherapist] and would participate and cooperate fully with [independent physiotherapist];
4. that MPIC, having received reports from [independent physiotherapist] and [Appellant's doctor], would submit those reports to its medical services team for a further assessment of [the Appellant's] claim.

[Appellant's solicitor's] letter went on to say that [the Appellant] was in full agreement with the providing of his Workers Compensation claim file to MPIC; [the Appellant] had, himself, a file that he would be happy to turn over to the Corporation, but MPIC would have to obtain any additional material directly from the Workers Compensation Board. [Appellant's solicitor] purported to add a further condition to the foregoing points of agreement, that [the Appellant's] cheque would be processed immediately and MPIC would make that cheque available for [the Appellant] by noon of the following day, to include income replacement from the date of his last

cheque. [Appellant's solicitor] also added that his client insisted that the Corporation process [the Appellant's] claim for a lost watch and ring. These two conditions had not been raised nor agreed upon at the December 13th meeting and had no binding effect on the parties.

[Appellant's solicitor's] letter went on to reaffirm [the Appellant's] willingness to cooperate and his anxiety to return to work. "He has previously agreed, and agrees now, to attend to whatever program of rehabilitation is recommended to him provided that same meets with the approval of his medical advisors."

[The Appellant] did, in fact, receive a cheque to cover his income replacement indemnity up to the date agreed upon at the December 13th meeting and received income continuing thereafter up to the 13th of January 1997.

On January 17th, 1997, [independent physiotherapist] wrote to [text deleted] at MPIC, to report that, while [the Appellant] had attended at [independent physiotherapist] clinic January 14th, accompanied by his wife, [the Appellant] had informed [independent physiotherapist] that he chose not to be reassessed. [The Appellant] apparently advanced reasons for this refusal that predated the December 13th meeting and the undertakings given on his behalf by [Appellant's solicitor]. During his evidence before this Commission, [the Appellant] emphasized his view that agreements made on his behalf by his lawyer were not binding upon him; these, in his view, were [Appellant's solicitor's] agreements but not those of [the Appellant] himself. The law,

however, is clear that all such reasonable undertakings as those given by [Appellant's solicitor] on [the Appellant's] behalf are, indeed, binding upon the client.

The reasons for the need for [the Appellant's] reassessment by [independent physiotherapist], and for the production of the Workers Compensation Board file, had been made very clear to [Appellant's solicitor] and, we have to assume, communicated by [Appellant's solicitor] to his client.

In light of [independent physiotherapist's] report of January 17th and the fact that nothing had been produced by [the Appellant] or his counsel in the form of a Workers Compensation Board file (other than a copy of a letter of January 4th, 1990 from W.C.B. addressed to [the Appellant], terminating his temporary total disability benefits as of December 31st, 1989) MPIC wrote to [the Appellant] on January 23rd, 1997 advising him that his income replacement benefits were being terminated.

[Appellant's solicitor], on [the Appellant's] behalf, applied for an internal review of that decision. That review was conducted by [MPIC's Internal Review Officer] on May 6th, 1997, and resulted in the earlier decision of MPIC being confirmed. It is from the decision of [MPIC's Internal Review Officer] that [the Appellant] now appeals.

In the course of his evidence, [the Appellant] testified that he had not felt it necessary to produce any Workers Compensation Board material because, in discussions with [text deleted], MPIC's

Senior Counsel and Corporate Secretary, he had learned that [MPIC's Senior Counsel and corporate Secretary] already had the Workers Compensation Board file in his possession. If we understood [the Appellant] correctly, he was also alleging that [independent physiotherapist] had been provided with his Workers Compensation Board file. These allegations were so much at odds with the material provided to us by MPIC that we felt it necessary to adjourn the initial hearing of [the Appellant's] appeal to the first date when [MPIC's Senior Counsel and corporate Secretary] and [independent physiotherapist] could be available to give their own, oral testimony and submit to cross-examination by [the Appellant]. [The Appellant] also indicated an intention to call [Appellant's solicitor] to give testimony on his behalf. However, although the hearing was reconvened on June 18th, and although the sworn testimony of [MPIC's Senior Counsel and corporate Secretary] and [independent physiotherapist] flatly contradicted the earlier evidence of [the Appellant], [the Appellant] declined the opportunity to ask any questions of either of them, and also declined the opportunity to make any further submissions. He said, simply, "I'm happy with the answers I got".

What, then, are the relevant facts with which we are faced? They may be summarized as follows:

1. despite the undertaking given on behalf of [the Appellant] at the meeting of December 13th, 1996, neither [the Appellant] nor his counsel provided any portion of the Workers Compensation Board file respecting his earlier, industrial accident, save only for the letter of January 4th, 1990 which had apparently been provided by [the Appellant's] counsel in the early stages of the claim and long before December 13th, 1996. Suggestions by [the

Appellant] that MPIC personnel had, in some fashion, improperly obtained material from that file are totally without foundation - a fact supported by a report from the Workers Compensation Board itself of which [the Appellant] was fully aware;

2. despite the undertaking given on his behalf by [Appellant's solicitor] and, so far as we can tell, also explained to [the Appellant] by [independent physiotherapist] at their meeting of January 14th, 1997, [the Appellant] refused to participate in a functional reassessment by [independent physiotherapist] and gave, as his reasons for that refusal, grounds that, in the respectful view of this Commission, are quite without merit;

3. prior to that refusal, [the Appellant] had in fact received a cheque for $3,653.78, representing the income replacement indemnity covering the period from the date of his previous cheque up to and including December 19th, 1996. He cashed that cheque but did nothing to live up to his end of the bargain;

4. his own physician, [text deleted], had reported that [the Appellant] had made a satisfactory recovery from all injuries sustained in his December 28th, 1995 motor vehicle accident, except for some soft tissue strain to his lumbosacral spine which, in the view of [Appellant's doctor], would undergo a complete recovery following successful completion by [the Appellant] of a work hardening program of six to eight weeks duration. By that point, said [Appellant's doctor], [the Appellant] would have returned to his pre-accident status. With that full knowledge, [the Appellant] appears to have taken no steps towards undergoing a reassessment, followed by the work hardening program that [Appellant's doctor] and [independent physiotherapist] had so strongly recommended.

The only section of the MPIC Act that is relevant to this appeal is Section 160, of which a copy is annexed to and intended to form part of these Reasons. In the view of this Commission, [the Appellant's] acts and omissions fully justify the termination of his benefits by MPIC under Subsections (d), (e), (f) and (g) of Section 160. He refused to undergo an examination by [independent physiotherapist]; he did not make himself available for treatment recommended by both [independent physiotherapist] and [Appellant's doctor]; for that same reason, and also by exaggerating the nature and extent of his injuries and discomfort, and by insisting upon passive forms of therapy rather than the more active and aggressive forms that were clearly called for, he prevented or delayed his own recovery and, by refusing his cooperation with [independent physiotherapist], he also failed to participate in the rehabilitation program that would have been made available to him at the cost of MPIC.

There were suggestions in MPIC's file of fraud on [the Appellant's] part, but the evidence in that regard was minimal and we have paid no heed to it at all.

It must be added that the relationship between [the Appellant and his wife], on the one hand, and various representatives of MPIC, on the other, appear to have proceeded from a poor start: we heard allegations from [the Appellant and his wife] of unjustifiable delays and cavalier treatment; we read allegations by MPIC that suggest dishonesty on the part of the claimants. It is not necessary for us to decide those aspects of this claim, despite the existence of evidence tending to support both sets of allegations. Our role is necessarily limited to determining whether or not MPIC was justified in terminating [the Appellant's] income replacement indemnity and other

benefits when it did so by way of [text deleted's] letter to [the Appellant] of January 23rd, 1997. We have no hesitation in finding that the termination was justified for the reasons outlined above. The decision of MPIC's Internal Review Officer of May 27th, 1997 is therefore, confirmed.

Dated at Winnipeg this 24th day of June 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED