AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-97-131

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairman)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Ms Joan McKelvey;** **Appellant represented by [Appellant's representative]**
HEARING DATE:	**August 23rd, 1999**
ISSUE:	**Whether Appellant entitled to re-instatement of Income Replacement Indemnity (IRI)**
RELEVANT SECTIONS:	**Sections 86(1), 106(1) & (2) and 110(1)(c) of the Manitoba Public Insurance Corporation Act ('the 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 FACTS:

On February 26th, 1993, the Appellant was driving his automobile west down a back lane between [text deleted] and [text deleted] in Winnipeg and, as he was about to turn into the parking lot at the [text deleted], another vehicle pulled out of the same lot and side-swiped his car (1st accident).

It was not until April 12th, 1993, that [the Appellant] consulted a chiropractor, [text deleted], complaining about neck pain and stiffness (with a severe headache), shooting pain in his right shoulder, tingling and numbness in his left arm and hand, mid-dorsal pain, mild low back complaints and sore, stiff muscles and joints.

In a report dated April 23rd, 1993, to MPIC, [Appellant's chiropractor] outlined the Appellant's above-mentioned problems and restricted his work activities to "lighter duties only". In the section describing the Appellant's occupation, [Appellant's chiropractor] described him as unemployed. In a report to MPIC, dated December 23rd, 1994, [Appellant's chiropractor] advised that this "patient has residual problems which are difficult to treat" and was still restricting his work activities to "light duties only".

[The Appellant] was involved in a second accident on November 21st, 1995, (2nd accident) and

sustained injuries for which he consulted [Appellant's chiropractor] on November 23rd, 1995. In a report dated December 18th, 1995, [Appellant's chiropractor] chronicled the Appellant's symptoms as "neck pain, right side collar bone pain, mid-back pain, left-sided low back pain, bilateral rib pain with visible bruising, right knee pain and sore stiff muscles and joints". [Appellant's chiropractor] continued to treat the Appellant until April, 1996, when it was mutually decided that chiropractic treatment was not helping but irritating his back. [Appellant's chiropractor] wrote to MPIC that "care may be discontinued because of the lack of results".

On March 5th, 1996, the Appellant consulted [text deleted], his family doctor, who after diagnosing his medical problems as 'neck and back strain - pain and stiffness in neck and mid-back', instructed him not return to his occupation of a sheet metal worker as he could not bend over or lift weights of greater than 15 pounds.

[Appellant's doctor] referred the Appellant to [Appellant's rehab specialist] of [text deleted]. [Appellant's rehab specialist] examined [the Appellant] twice during the month of April and in a report dated April 25th, 1996, comments "Unfortunately I cannot find any pathology to substantiate his complaints of pain". He felt his pains were predominately muscular in origin.

On April 25th, 1996, [Appellant's doctor], after consulting with [Appellant's rehab specialist], recommended to MPIC that [the Appellant] should receive a program of physiotherapy. MPIC sent him to [text deleted], a physiotherapy consultant, to assess his current physical status and his need for a program of physiotherapy treatment. On June 13th, 1996, [Appellant's physiotherapist #1]

reported to MPIC "I am unable to provide an anatomical explanation for [the Appellant]'s ongoing perceived level of impairment. The objective findings were primarily muscular in nature. Based on the disability index [the Appellant] considers himself crippled. This was not substantiated by my examination." He goes on to state that [the Appellant] had essentially been sedentary since his accident and had not performed any significant stretching, strengthening or aerobic exercises and he recommended a specific program of physiotherapy treatment to address his areas of weakness.

MPIC then referred the Appellant to [text deleted], a physiotherapist at [text deleted] Physiotherapy, for a program of treatment as suggested by [Appellant's physiotherapist #1]. [Appellant's physiotherapist #2] reported on August 26th, 1996, that [the Appellant] had improved to the point where he felt he was physically ready to return to any light duty occupation but that he needed further strengthening before he could return to his regular occupation.

The Appellant was unemployed at the time of the November 21st, 1995, automobile accident and a former employer, [text deleted] of [text deleted]., had offered him a job in early November, 1995. In a letter dated January 25th, 1996, [Appellant's former employer] wrote to MPIC confirming his intention to hire [the Appellant]:

> I offered [the Appellant] a job in early November, at that time he had a welding flash and was unable to come to Alberta to work. I returned to [Manitoba] on November 28th, 1995, when I arrived I called [the Appellant] to see if he was able to come to Alberta, at that time he informed me he was in a car accident and would not be able to come. I knew of [the Appellant]'s previous injuries and knew he would only be able to perform light duties, but I

> had a position that he could fill. [the Appellant]'s wage was to be $18.00 per hour, minimum 40 hour work week.

[The Appellant] was prevented from accepting this job due to the injuries he sustained in the 2nd accident and, as he was unemployed at that time, was classified as a non-earner pursuant to the Act and its Regulations for the purpose of determining his IRI benefits.

MPIC pressed [Appellant's former employer] as to what he meant by light duties and in a handwritten memorandum dated April 30th, 1996, he states (the spelling and grammar are [Appellant's former employer]'s):

> The light duties he was hire for are basically helper duties, they include putting together nuts & bolts, picking up garbage around the work site, supplying the men working on the scaffolding with tools & supplies. He would also occasionally need to go for gas and diesel in 5 gal cans. The job does not require heavy lifting and not very often.

MPIC sent this job description to [Appellant's doctor], [Appellant's physiotherapist #1] and [Appellant's physiotherapist #2] and they all agreed that by the middle of summer of 1996 that the Appellant had recovered sufficiently to do this type of light work. Based on the information MPIC terminated [the Appellant]'s IRI as of August 26th, 1996. It is this decision that he has appealed.

THE ISSUE(S):

[The Appellant] argues that he is entitled to the re-instatement of his IRI from the date of his cut-off until he is able to return to his full time employment as a general labourer and as of the date of his hearing he had not attained the capacity to do this type of work.

[The Appellant] qualified for IRI pursuant to Section 85(1)(a) of the Act based on the evidence he would have accepted the job with [Appellant's former employer] but for the intervention of the 2nd accident. In the event the Insured is still entitled to receive IRI 181 days after the accident the Act requires the Corporation to determine an employment for him/her and then adjust the amount of IRI to reflect the income level of the deemed employment. This was done in this case and MPIC classified the Appellant, after looking at his work history, as a general labourer. This section requires the determination of employment must be done in accordance with Section 106, which states:

> **FACTORS FOR DETERMINING AN EMPLOYMENT**
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> 106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.
>
> **TYPE OF EMPLOYMENT**
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> 106(2) An employment determined by the corporation must be an employment that the

victim could have held on a regular and full-time basis or, where that would not have been possible, on a part-time basis immediately before the accident.

[The Appellant]'s work history prior to the 1st accident is set out in a report from [text deleted] dated September 4th, 1996:

EMPLOYER	DATES	DUTIES
[text deleted]	Jul. 94-Sept. 94 (3m)	Fabrication for steel metal buildings
[text deleted]	Aug. 93-Dec. 93 (5m)	Putting up steel on buildings
[text deleted]	Oct. 92-Feb.93 (5m)	Putting up steel on buildings
[text deleted]	May 92-Jul. 92 (3m)	N/A
[text deleted]	Sept. 91-Oct. 91 (2m)	Sheet metal roofing and troughs
[text deleted]	Mar. 91-Jul. 91 (5m)	Sheet metal roofing and troughs
[text deleted]	1986-1991seasonal	Setting up outdoor play ground equipment for [text deleted]

The Appellant had a Grade [text deleted] education and no formal training of any kind. His work experience prior to the accident was that of a general labourer erecting steel buildings. However this work was only part-time or seasonal at best and he was out of work more than he worked in the four years prior to the accident. <u>In the thirty-three months prior to the 2nd accident he was restricted to light duties of a general labourer and had two short term jobs during this period.</u>

The key words in Section 106(1) for this Appeal are "<u>physical ... abilities of the victim</u>." The Appellant was a general labourer, when he worked, but was restricted to light duties only in the

period leading up to the second accident. Given these facts and the parameters of Section 106 the only employment that could properly be determined for the Appellant as of the 181st day following his second accident is that of a general labour restricted to light duties only. The income for this type of employment would have been lower that what he had received based on [Appellant's former employer]'s job offer and the Corporation continued paying him at this higher rate until they terminated his benefits on August 26th, 1996.

We believe that the Corporation was correct in terminating the Appellants IRI benefit as of August 26th, 1996. All of the Appellant's caregivers agreed that he could do light work by late summer of 1996 and that he certainly could do the job offered by [Appellant's former employer] in November of 1995. The obligation of MPIC is to endeavour to return the Appellant to his pre-accident status and they achieved this by the time they terminated his IRI benefit on August 26th, 1996. On that date he was capable of performing light duties of general labourer which he was capable of doing just prior to the 2nd accident.

We must deal with a two-page hand written memorandum from [Appellant's former employer] dated June 10th, 1996 and it reads as follows (the spelling and grammar are [Appellant's former employer]'s):

> To Whom It May Concern.
>
> Concerning my conversation with [text deleted] on April 30/96. [Text deleted] kept asking about light duty jobs around the job site. And while there is a certain amount of light dutys No Company can afford to pay a worker 40 hrs a week to stand around 50% of the time while

waiting for lighter work to do. While [the Appellant] is a very good worker and has a good knowledge of tools & equipment. He has to do a fair amount of actual physical labour to be worth having on the job. Light dutys is a small part of every day activitys. Every job detail on pre-enginered metal Bldgs involves bending over and either picking up bolting together or screwing together or picking up material related to our work. Light duty weights are up to 100 lbs and regular duty weights are up to 300 lbs.

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Description of Weights & Work of Light Duty

Putting together nuts & bolts - Each box of nuts or bolts weight approx 59 lbs

Picking up Garbage - Garbage involves cutoffs from steel beams, metal sheets, plastic bags, wooden crates, insulation & paper. The weight is from oz's to 100 lbs.

Carrying scaffolding and tools to other workers on uneven ground makes even 50 lbs a lot harder to carry.

Picking up a 5 gal can of gas or diesel and holding it up 4 or 5 ft off of the ground while fueling up machinery tends to make 50 - 70 lbs a lot heavier.

When one compares the April 30th, 1996, description of light duties with the June 10th, 1996, one it becomes quite obvious that [Appellant's former employer] has dramatically altered his definition of what constitutes light duties. The June 10th description we believe is a true description of light duties and the second one can only be interpreted as describing regular or heavy duties. We are of the view, as was MPIC, that the Appellant, given his medical limitations as set out by [Appellant's chiropractor], could have performed [Appellant's former employer]'s first description of light duties

but he could not have performed the second one. It was [Appellant's former employer]'s first job description that was the sole basis of [the Appellant] qualifying for IRI under the Act. Had he only provided the later definition of light duties then [the Appellant] would not have qualified for IRI due to the fact that he could not perform the work because of his physical limitations. [Appellant's former employer] gave no reason or explanation of why he changed the job description and we can only assume that he did so to create some mischief. We are not prepared to accept the second definition for light duties advanced by [Appellant's former employer].

It would appear from the file that no prior written notice was given to [the Appellant] that his IRI benefits would be terminated as of August 26th, 1996. Some weeks after the benefits stopped the Appellant asked his Adjuster what happened to them. MPIC wrote to him on November 25th, 1996, advising him that they had done his job evaluation for the 181st day and on the second page of the letter advised him that his IRI benefits had been terminated as of August 26th, 1996, some three months earlier. Sending a notice announcing the termination of a benefit retroactively is not, in our view, the proper or an acceptable way of advising an Insured that his benefit has been terminated. An Insured is entitled to receive written notice of any decision of MPIC that will adversely affect his or her rights under the Act prior to the actual or proposed date. The Insured's right to appeal any decision under the PIP Plan may be put at risk or jeopardised if he or she does not receive a timely notice of the Corporations intention; as well, planning for that termination becomes impossible for the claimant. We are of the view that if any PIP benefit is to be terminated then the Insured is to be given written notice in advance of when MPIC intends to do so. If there were any evidence of fraud or similar impropriety on the part of the Appellant we might adopt a different view, but there is no

such suggestion in the present case. [The Appellant] was not treated fairly when he was provided with his after-the-fact notice and to compensate him for this we are extending his IRI benefit from August 26th, 1996 to the date he was provided written notice informing him of the termination of his IRI benefits namely November 26th, 1996. [The Appellant] is also entitled to interest on this sum as set out in the Act.

DISPOSITION:

The Acting Review Officer's decision of October 24th, 1997, is hereby rescinded and the foregoing substituted therefor.

Dated at Winnipeg this 28th day of October, 1999.