Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-98-106

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;** **the Appellant, [text deleted], appeared on his own behalf**
HEARING DATES:	**September 17th, 1998 and July 27th, 1999**
ISSUE:	**Whether Appellant entitled to income replacement indemnity ('IRI').**
RELEVANT SECTIONS:	**Sections 70(1), 83, 84 and 110 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

On the 20th of July 1994, at approximately 2:30 o'clock in the morning, [the Appellant] was driving his [text deleted] automobile in an easterly direction on [text deleted], coming to a full stop at a railroad crossing sign. As he tells it in his application for compensation:

> I checked both directions and, seeing nothing, proceeded slowly across the tracks. About half-way through the crossing, I heard a muffled noise and looked out through the driver's side window where I saw a large silhouette. I felt an impact and accelerated across the intersection where I came to a stop and realized that I had just been hit by a train.

The first available medical report, which was prepared by [Appellant's doctor], gives the results of an examination that took place on September 21st, 1994. It simply notes "soft tissue musculo-ligamentous injury of back", indicates that [the Appellant] was obtaining some relief from his pain by attending for physiotherapy twice weekly, recommends the continuance of those treatments and that [the Appellant] should abstain from lifting or pushing weights beyond 20 pounds. Since, [text deleted], he was working in general construction as a labourer at the time of his accident, that weight limitation obviously inhibited his return to work.

From September of 1994 through March of 1995, [the Appellant] seems to have tried several times to go back to work, but each such effort was thwarted by pain which, despite the absence of objective findings in most of the earlier medical reports, seems clearly to have had its origins in his collision with the train. During that same period, the Appellant continued to attend for physiotherapy, of which he received some 60 treatments; he received chiropractic treatments for three or four weeks but quit those because, he felt, they were not improving his condition at all.

MPIC referred the Appellant to [rehab clinic] in [text deleted] for a multi-disciplinary screening evaluation. He attended there on April 6th and 7th, 1995, where he was assessed in both the physiotherapy and occupational therapy departments. [Rehab clinic] recommended a fast-track physiotherapy program to include education in lumbar stabilization, Biodex strength training and a universal gym program. They also recommended an individualized work hardening program. Both programs would be spread over a period of four to six weeks.

MPIC concurred and brought [the Appellant] to [text deleted] to attend a work hardening program at [rehab clinic] from April 10th to May 12th, 1995. In the course of that program he demonstrated improvement in the areas of positional endurance, quality of movement, overall work tolerance and body mechanics. He was giving training and reinforcement in proper stretching techniques and education in lumbar stabilization. It should, perhaps, be noted that he was discharged from the universal gym portion of his program, due to his frequent tardiness in attending. The Biodex training portion of the program was also discontinued since he constantly pushed himself beyond the limitations that had been set for him, thus retarding his progress. Despite that, upon completion of the program his caregivers at [rehab clinic] reported that his work capabilities matched the critical, physical demands of his work as a carpenter's assistant/construction labourer. [Rehab clinic] felt that he should participate in a three-week work trial, remaining in touch with them on a weekly basis to discuss any difficulties that might arise. [Rehab clinic] also recommended continued physical training and the use of stretching techniques that he had learned during the work hardening program.

[The Appellant] testified that, although the [rehab clinic] program had helped him somewhat, about five or six weeks thereafter the intensity of his pain returned. The pain of which [the Appellant] was complaining and, to a much lesser extent, still complains, seems to be centered on his lower back, radiating to the buttocks.

His family physician notes, on June 22nd, 1995, complaints of back pain for the preceding two weeks, "more on the left side at first and then on the right side, like shooting pain". [Appellant's doctor] prescribed Tylenol #2 and Restoril. In a subsequent examination of August 1st, 1995,

[Appellant's doctor] says that the Appellant "does not feel able to return to work". Neither of these two assessments contains records of any objective findings to support the subjective complaints of [the Appellant].

The file provided to us contains a memorandum, dated February 19th, 1996 and signed by [Appellant's doctor], which reads "He (*[the Appellant]*) can go back to work assuming that his CT scan of the back is normal". [Appellant's doctor] was referring to a CT scan apparently performed at a chiropractic facility and interpreted by [text deleted], chiropractor. [Appellant's chiropractor #1's] interpretation speaks of a broad-based disc bulge at the L4/L5 and L5/S1 levels of [the Appellant's] spine; it also documents facet hypertrophy at L5/S1. [Appellant's doctor], partly in response to a request from [the Appellant] for a second opinion, and partly because [Appellant's doctor] himself had no training in the interpretation or reading of CT scans, referred [the Appellant] to [text deleted], an orthopaedic surgeon, with respect to the Appellant's persistent back pain.

Meanwhile, on February 5th and February 20th, 1996, [the Appellant's] adjuster had written to him to say that MPIC would be paying no further IRI beyond February 7th, other than for the two days (February 13th and 14th) when he was in [text deleted] for his CT scan. He filed an application for a review of the decision reflected in those letters on March 11th, 1996. The adjuster's decision was based upon the opinions of [Appellant's doctor] and [Appellant's chiropractor #2] that the Appellant was capable of at least a graduated return to work.

[Appellant's orthopaedic surgeon #1] examined the Appellant on May 13th, 1996, at which point [the Appellant] had not worked since November, 1995. [Appellant's orthopaedic surgeon #1], in a comprehensive report bearing date June 3rd, 1996, noted good lumbar range of motion throughout, save only for a slight restriction of extension at 20 degrees; forward flexion was carried out, bringing finger-tips to ankles, with no deviation of the trunk to right or left and with smooth recovery to upright position; no tenderness in the midline ligaments nor in the paravertebral muscles of the lumbar spine was apparent; there was some tenderness in both buttocks on very firm pressure but no neurological abnormality in the lower limbs. Hip joints, also, showed no restrictions nor any local tenderness. [Appellant's orthopaedic surgeon #1's] examination of the X-ray and CT scan films caused him to comment that, although the films were of very poor quality, there was no convincing evidence of lateralization to suggest disc herniation. He commented that, although there was a mild degree of bulging of the intervertebral discs at L4/L5 and, perhaps, L5/S1, that did not indicate pathology and the CT scan appearance did not necessarily reflect the outcome of injuries sustained in the motor vehicle accident referred to above. [Appellant's orthopaedic surgeon #1] also makes reference to an earlier report, dated January 18th, 1995, by [text deleted], an orthopaedic surgeon, who had diagnosed a recent strain or synovitis of the right hip joint and had prescribed an anti-inflammatory medication. [Appellant's orthopaedic surgeon #2] had felt that [the Appellant] would be able to carry on his usual work activities, with some restrictions; he had found no abnormality on examination of the dorsal lumbar spines.

In sum, [Appellant's orthopaedic surgeon #1] diagnosed a moderate degree of musculigamentous strain related to the lumbar area of [the Appellant's] spine and right hip joint. He recommended

no specific treatment. While agreeing that [the Appellant's] continuing complaints of back and right hip pain appeared to relate to injuries sustained in his motor vehicle accident, [Appellant's orthopaedic surgeon #1] said that there was very minimal loss of function in the lumbar spine and no loss of function in the right hip joint.

> No specific treatment has been recommended because the patient appears to have made a good functional recovery, albeit with residual symptoms…..It was my recommendation that the patient should attempt to return to his regular job with particular care to avoid injury and that he should persist at least through the summer of 1996. If he felt that he was unable to continue, then it would be reasonable to consider retraining to lighter employment. If he is unable to continue working as a carpenter and labourer, it can be concluded that his disability arises out of the injuries sustained in July, 1994, although note should be made that there appeared to be minimal loss of function in the injured areas, only the patient's subjective symptoms of pain and spasm.

[Appellant's orthopaedic surgeon #1] felt that the Appellant's long term prognosis should be satisfactory with good prospects of full recovery.

Following [Appellant's orthopaedic surgeon #1's] report, there was no additional medical information available to us at the time when [the Appellant] first appeared before this Commission on September 17th, 1998. (We note, in passing, that [the Appellant] had filed an application for an internal review of his injury claim decision on March 11th, 1995 and that, since that date he appears to have been trying to obtain a review decision from the Corporation, but without success. He therefore filed a Notice of Appeal to this Commission and we decided to treat MPIC's non-decision as a denial of his claim, since we felt it patently inequitable to keep the matter in suspended animation any longer.) In view of the time that had elapsed between [Appellant's orthopaedic surgeon #1's] report and the date of [the Appellant's] initial hearing, we adjourned that hearing in order to refer him to [independent rehab specialist] of [text deleted],

for an independent assessment. That took place on October 19th, 1998 and [independent rehab specialist] provided us with a comprehensive report dated October 26th, 1998. That report, after reviewing [the Appellant's] medical history, contains the following salient points:

(a) [the Appellant] was complaining of intermittent pain, lasting for about three and a half days, rendering him unable to walk, sit or stand for long periods of time. The pain was present in his groin with tightness in the thigh area. He felt that the buttock muscles were the major source of his problems. He reported good and bad days and that he moderated his activities according to how he felt on any particular day;

(b) [independent rehab specialist] found slight tightness of the trapezius muscle but no active trigger points; similarly, the Appellant's posterior cervical muscle had tight bands, although he denied any tenderness or pain there. His lower back still had tight bands in the paraspinal muscle, but there was no referred pain and, therefore, no active trigger points. The Appellant had good mobility of shoulders, elbows, wrists and hand, hips, knees and ankle; slightly decreased rotation of his neck in lateral flexion;

(c) because [the Appellant's] symptoms were more prominent on one side, [independent rehab specialist] measured his leg length and found his right leg to be slightly shorter than the left by about one-half a centimetre;

(d) [independent rehab specialist] found no neurological deficits;

(e) "at the time when I was examining this gentleman on October 19th, 1998 the only positive findings I have is that he still has some tightness in his paraspinal muscle as well as his gluteal muscles. There is no evidence of active trigger points so there has been considerable improvement in the objective findings of his back. Even though he has mild

> degenerative changes in his back I do not think that is what is contributing to his pain. The pain is of muscle origin and I explained this to him."

[Independent rehab specialist] expressed the view that further physiotherapy or chiropractic treatments would not be indicated and that [the Appellant] should be able to return to a moderately heavy physical activity as long as he continued with aerobic conditioning and a stretching program. She did not anticipate any permanent disability.

In response to a further inquiry from this Commission, [independent rehab specialist] offered the following comment:

> I see from the information submitted by [rehab clinic] in 1995 that at the end of their work hardening treatment they felt he had clearly improved significantly and the only problem at that time was his endurance. In 1996 I feel that his problems were more related to endurance and because of the findings of the degenerative changes in his back by then I cannot honestly say that it was the motor vehicle accident which was causing his symptoms as of 1996.

DISCUSSION:

Although [the Appellant] was at pains to emphasize that he had done everything that he had been asked to do, the fact is that his medical and paramedical record is indicative of someone who might be termed a difficult patient. From a time shortly after his accident he has been advised by all of his caregivers that he must remain active and continue with stretching and strengthening exercises but, although apparently agreeing to do so, it is far from clear that he actually followed through with that. As noted above, although he demonstrated improvement in all areas during his work hardening program he pushed himself beyond reasonable limits and was constantly late

in his universal gym program, causing him to be discharged from that and from physiotherapy. He was also discharged from his chiropractic program for non-compliance, although [the Appellant] himself says that he quit chiropractic treatments because they were doing him no good. It is also noteworthy that, on December 13th, 1995, [the Appellant's] chiropractor, [text deleted], anticipated that he would be "close to normal functioning within the next 30 to 45 days or so". [Appellant's chiropractor #2], along with almost every other one of [the Appellant's] caregivers, appears to have found him argumentative, hard to reason with and constantly trying to rationalize why he should not return to work. [Appellant's doctor's] note of February 19th, 1996, to the effect that [the Appellant] could return to work provided his CT scan were normal, is also significant. [Appellant's orthopaedic surgeon #1], while noting the mild bulging disclosed by that CT scan, does not regard either the results of the CT scan or, indeed, the result of his entire examination of the Appellant, as disclosing any material abnormality. He has no particular recommendation for treatment or medication to offer; reports that the Appellant had good functional capacity, albeit with minor symptomatology.

It is also of note that, apart from the independent assessment requisitioned by this Commission, we have no further medical information before us following [Appellant's orthopaedic surgeon #1's] report of June 3rd, 1996. No treatment or other medication appear to have been prescribed by [Appellant's doctor]; there has been no referral to any other specialist nor any other objective evidence that would support [the Appellant's] absence from the workplace. [the Appellant] says that he saw [Appellant's doctor] some ten days after his assessment by [Appellant's orthopaedic surgeon #1], and that he was then complaining of extreme pain and inability to work. However, [Appellant's doctor] apparently assured the Appellant that the problem was not serious; once

again, he prescribed no further treatment nor any medication. [The Appellant] has seen [Appellant's doctor] on a number of occasions since then, but we have no further report available to us.

DISPOSITION:

The hearing of [the Appellant's] appeal was not resumed until July 27th, 1999, primarily because, although [the Appellant] advised this Commission on a couple of occasions that he wished to adduce some additional, medical evidence, that evidence was never forthcoming and we ultimately concluded that, unless we fixed a date for its resumption, that appeal would never be finalized. At that resumed hearing, counsel for MPIC confirmed her earlier advice to the Commission that, since the determinative report from [Appellant's orthopaedic surgeon #1] had not been rendered until the spring of 1996, she was prepared to recommend that [the Appellant's] IRI be continued up to that point. We are of the view that this recommendation is entirely reasonable. [Appellant's orthopaedic surgeon #1's] report bears date June 3rd, 1996, and it is safe to assume that, in light of the vagaries of Canada Post, MPIC would not have received it until June 6th at the earliest. [The Appellant] will be entitled to have his IRI continued to this latter date, if that has not, in fact, already been effected. The usual provision for interest on the delayed payment will, of course, apply.

Dated at Winnipeg this 23rd day of August, 1999.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED