Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-99-40

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 Mr. Keith Addison;** **the Appellant, [text deleted], appeared on his own behalf**
HEARING DATE:	**September 3rd, 1999**
ISSUE(S):	**1. Whether Appellant able to return to former, full-time duties when income replacement indemnity ('IRI') terminated;** **2. whether Appellant entitled to reinstatement of IRI.**
RELEVANT SECTIONS:	**Section 81(1) 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] was the victim of a motor vehicle accident on March 9th, 1997. When initially seen at the [hospital] that day, he was diagnosed with a fracture of the left clavicle and bruising of the left side of his chest. The accident occurred because [the Appellant] was apparently unable to stop his cab at a railroad crossing, with the result that the driver's side of his cab was hit by a train and the vehicle was dragged for some 40 feet or more before the train was able to

come to a stop. He was stuck inside the taxi and the rescue team had to remove its door before they could get him out.

At the time of his accident [the Appellant] had been driving cab for about ten years and, for quite some time before the accident, had primarily been engaged in handi-transit work for about one month in three, working twelve-hour shifts, five to six days per week.

The fracture at the lateral end of [the Appellant's] left clavicle did not unite within the normal timeframe - indeed, the evidence was that the bone had not fully reunited until about March of 1998, even then leaving residual symptoms of impingement.

Further X-rays of [the Appellant's] left ribs were taken in July of 1997, and a report to MPIC by [text deleted], orthopaedic specialist to whom MPIC had referred [the Appellant], indicated that the accident had also caused a fracture of the anterior end of the sixth rib which, by July 1997, appeared to have united.

By November of 1997, and upon the suggestion of [Appellant's orthopaedic specialist], [the Appellant] was referred by his general practitioner, [text deleted], to [text deleted] Physiotherapy Clinic for "left shoulder physio disunited fracture of clavicle distal 1/3". By that time, [the Appellant] was still experiencing pain at the superior aspect of his left shoulder and into the arm, the left bicep and deltoid muscles had atrophied, the range of motion of his left shoulder was slightly limited in both flexion and abduction and, on resisted movements, abduction and internal rotation were weak and painful.

On April 27th, 1998, [the Appellant's] Case Manager at MPIC wrote to [the Appellant] to tell him that his IRI benefits would cease retroactively to March 8th, 1998. That decision appears to have been based upon:

(a) the fact that, on March 24th, 1998, [the Appellant's] physiotherapist had reported that the Appellant's clavicle had "recently begun to unite", although he still needed physiotherapy treatments. She had also reported that, provided the Appellant could take a break or two during his twelve-hour day, she felt him capable of functioning fully as a cab driver for twelve-hour shifts, six days per week;

(b) [Appellant's doctor] had reported on February 11th, 1998 that [the Appellant] had been working at a level of eight hours per day from January 26th, 1998 onwards, and [Appellant's doctor's] opinion was that the Appellant should progress to ten-hour days until February 22nd before resuming twelve-hour shifts; and

(c) MPIC's medical services team, upon reviewing his file, could find no objective medical evidence that would prevent the Appellant from working his regular shift as a cab driver.

[The Appellant] appealed from that decision to MPIC's Internal Review Officer who, on September 2nd, 1998, wrote to [Appellant's orthopaedic specialist], and to [Appellant's doctor], seeking updated medical reports respecting the Appellant. [Appellant's orthopaedic specialist] responded, on September 24th, 1998, that he had not seen [the Appellant] since March of that year, at which point [Appellant's orthopaedic specialist] had been of the view that "in due course ([the Appellant's]) condition should improve enough for him to return to work as he did in the

past, initially on a part-time basis and subsequently on a full-time basis". [Appellant's doctor] replied on September 30th, as follows:

> [The Appellant] was seen regularly every month. He still complains of pain in his left shoulder, but the pain gets better with rest. Shoulder abduction is complete and he has no tenderness. He is currently working two full days and then takes a day off. He manages to work eight to twelve-hour/day. He is advised to continue his home exercises and take Tylenol 3 for pain as needed.
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> In my opinion long term prognosis is good.

The Internal Review Officer wrote to [Appellant's doctor] again on November 9th, seeking "objective findings with respect to this patient". [Appellant's doctor] responded, simply, that

> [The Appellant] has mild tenderness of anterior shoulder. He has full abduction and rotation of shoulder. His shoulder pain is aggravated when he works and better with rest.

The Internal Review Officer then, on January 6th, 1999, confirmed the decision of MPIC's Case Manager, terminating [the Appellant's] IRI benefits as of March 8th, 1998. It is from that decision of the Internal Review Officer that [the Appellant] now appeals.

At the hearing of this appeal, it quickly became apparent that the case developed by [the Appellant] differed somewhat from that which was reflected on MPIC's file. It was no longer a question of whether [the Appellant's] clavicle had reunited nor was it a question of decreased range of motion. The question was, rather, whether [the Appellant] had regained his former ability to lift baggage, wheel chairs, bags of groceries and other fairly heavy materials that frequently accompanied his passengers, using his left arm and turning that arm and hand while lifting.

The evidence of [the Appellant], which we accept, included the following points:

1. his shoulder abduction capacity is complete, and has been so since mid-to-late-September, 1998;
2. he still works part-time, in that he has to take one day off in order to rest after two days of work;
3. he has reduced his intake of Tylenol 3 from 10 - 15 per day to 3 - 4 per day when working. On his days off he only needs to take one tablet daily;
4. on trips to the airport, when a passenger has two bags, [the Appellant] has to pick them up one at a time with his right arm. He can lift his left hand and arm alone reasonably well, and without much discomfort, but when he has to turn his arm outwards while lifting or carrying anything of even moderate weight, the resultant pain gives him major difficulties. The pain, he said, is at the top of his left bicep and at the top of his left shoulder;
5. his earned income in 1997 was between $15,000.00 and $16,000.00; in 1998, in all (and including IRI that he received in January through March, his total income was about $10,000.00. He ascribes that decrease entirely to the injuries sustained on March 9th, 1997, and points to his assiduous pre-accident work history to support his contention that his absences from the workplace following his accident were not voluntary;
6. he continues to do his prescribed exercises twice daily for approximately fifteen minutes, usually between 10 and 11 o'clock A.M. and when he gets home at the end of his shift which runs from 4 P.M. to 4 A.M.;
7. while he still feels the need to take one day off after each two consecutive days of work, he is only seeking compensation for the days that he was obliged to take off work in 1998

and for the two to three unworked hours that he was obliged to miss out of each twelve-hour shift.

We do not have evidence before us that would enable us to calculate the number of days, or the number of hours in any given day, that [the Appellant] had to miss between March 8th and December 31st, 1998, as a result of his motor vehicle accident. However, we accept the fact that he probably did miss one working day out of every three, and that his working shifts during that same period may well have been reduced from the normal twelve to something less than that. It would be extremely difficult, if not impossible, for an accurate calculation to be made of the exact amount by which [the Appellant's] net, pretax income was reduced by reason of his motor vehicle accident during the portion of 1998 for which he seeks compensation. That which is capable of accurate determination is the period from March 8th, 1998 (the effective date of termination of his IRI) until, say, April 30th, 1998, the date when he may safely be presumed to have received the Case Manager's letter advising him of that termination. In the absence of fraud, some willful act or omission such as is described in Section 160 of the Act, or other patent malfeasance on the part of a claimant, we are of the view that a retroactive termination of benefits is inequitable. A victim is entitled to at least some notice that income or other benefits are about to cease. [The Appellant] is entitled to IRI for that seven and one-half week period at the rate that he was previously receiving, namely $582.01 bi-weekly.

The remainder of 1998 contained 35 weeks. Accepting [the Appellant's] further evidence that his working time was reduced by approximately one-third, we find that he is entitled to a further

11.7 weeks of income replacement indemnity for the period between April 30th and December 31st, 1998.

[The Appellant's] claim is therefore referred back to MPIC for calculation and payment of the foregoing amounts, and with direction that the Appellant be referred to [text deleted], orthopaedic specialist, for an assessment of the possibility of a permanent impairment or, alternatively, a treatable impingement affecting the Appellant's supraspinatus muscle and related tendon resulting from the accident of March 9th, 1997.

Dated at Winnipeg this 5th day of November, 1999.