Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-25

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Ms. Yvonne Tavares** **Mr. Colon C. Settle, Q.C.**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Joan McKelvey;** **the Appellant, [text deleted], was represented by [Appellant's representative]**
HEARING DATE:	**July 20th, 2000**
ISSUE:	**Termination of Income Replacement Indemnity ('IRI')—whether premature**
RELEVANT SECTIONS:	**Section 110(1)(a) of the MPIC Act and Section 8 of Manitoba Regulation 37/94**

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], [text deleted], has been engaged in the construction industry since shortly after reaching his [text deleted] year of age. While working in Ontario in the early winter of 1984, aged [text deleted], he sustained seriously injuries from a fall off four stories onto his back, on a pile of broken concrete and other rubble. He eventually returned to work, although with lighter tasks, for the same employer who encouraged him to become interested in blueprint work and layouts.

[The Appellant] moved to [text deleted] in 1990 and, although he experienced frequent exacerbations of pain in his lower back, he does not appear ever to have been off work for any extensive periods as a result. He did have a significant exacerbation of his low back pain in the summer of 1993, following an attempt to lift a framed wall.

In September 1994, while he was working on a residential roof, a sudden gust of wind lifted the sheet of plywood upon which he was standing, flipping him backwards into the air and on to his back on the lower portion of the roof. Following this latter injury he started to receive workers' compensation. The Workers Compensation Board ('WCB') arranged for him to take an architectural drafting course followed by eight months of training, during which time WCB topped up the modest wages he was earning to the level to which he was entitled under The Workers Compensation Act. [The Appellant] then started at [text deleted] as a draftsman but, having apparently impressed the owner with his potential, was moved after a couple of months into the estimating side of that company's business. At or about the end of the eight months' training term, [text deleted] moved its operations to [text deleted], Manitoba, and the resultant reorganization of that company's personnel left [the Appellant] without work. He testified that it was not the prospect of a rather lengthy commuting between [text deleted] and [text deleted], with the possibility of further discomfort to his back, that discouraged him from moving to [text deleted] but, rather, the effect of the internal reorganization of the company that made it less attractive.

In March of 1999 [the Appellant] started working with [text deleted], spending most of his time running the computer drafting department and, to a lesser extent, working as an estimator. He testified that the company was growing and he loved his work which was active, although not

physically very strenuous. [Text deleted] makes and installs custom-designed woodwork such as office fixtures and other 'built-in' items for both residential and commercial buildings. On May 8th, 1999, the accident occurred that gives rise to the present appeal. He was riding his motorcycle south on [text deleted] when a truck pulled out suddenly from a parking lot, stopping in the middle of the highway with its stern blocking [the Appellant's] lane. He was unable to swerve far enough to avoid hitting the truck, because a car on his immediate right had paused, prior to making a right turn itself. [The Appellant] injured his right shoulder, back, right wrist and left knee.

For a short while immediately following this last accident, it appeared both to [the Appellant] and to his medical caregivers that his most serious injury was to his left knee, for which he was treated by [text deleted], an orthopedic specialist at [hospital #1]. His leg was placed in a cast and he was obliged to use crutches for a week or so, until the cast was replaced with a knee brace which he continued to wear for some time. In due course, [the Appellant's] problems with his knee, shoulder and wrist appear to have been largely, if not quite totally, resolved.

[The Appellant] had been examined by [Appellant's doctor #1] at the [hospital #2] immediately after his May 8th accident. [Appellant's doctor #1's] report notes, amongst other matters, a mild compression deformity involving the superior end plate of T-12 in the lumbosacral spine, although it was uncertain whether this was a recent or old injury; clinical correlation was recommended.

[The Appellant] returned to work for [text deleted] on May 18th, although still in considerable pain and frequently taking Tylenol No. 3 tablets that had been prescribed for him by his family physician, [text deleted]. WCB had provided [the Appellant] with several devices in order to

make his workplace more comfortable, and these were of continuing value to him following his May 8th, 1999, accident. [The Appellant] testified that, knowing there were other people at his workplace who were dependent upon his productivity, he had tried very hard to return to work. He appears to have succeeded in doing so, at least for about 75% of his normal working hours, from May 18th to August 19th, 1999, by which point the pain in his lower back had made it impossible for him to carry on with his work. He testified that his job, while not very strenuous physically, was very demanding intellectually; it required a high degree of concentration and accuracy, since even small errors in drafting or in estimating could cost his employer substantial amounts of money. He was unable to sit or stand in one place for any length of time, was distracted most of the time by his pain or, alternatively, made drowsy by an overabundance of codeine.

[The Appellant's] employer told MPIC that [the Appellant] had missed some 21 hours of normal working time between May 16th and June 7th, both inclusive, of 1999, but was satisfied that he was making a genuine attempt to work. There is no suggestion that he was at any time malingering. It is noteworthy that, although the president at [text deleted] was obliged to hire someone else to fill in for [the Appellant], the company confirmed that his job was still open for him to return to; he had not quit the job but was simply unable to do it properly until his back problems had been resolved.

The report of a CT scan performed upon [the Appellant's] thoracolumbar spine on August 24th, 1999, reflects, in part, these findings:

> On the scout lateral film there appears to be mild loss of height of the superior endplate of the T-11 and T-12 vertebral bodies consistent with old, mild, compression deformities. The findings would be better evaluated on plain films as clinically indicated.

> At the L-4/L-5 level, there is a small shallow right posterolateral disc herniation without spinal stenosis. The disc material contacts the right L-5 nerve root without convincing evidence of compression of the right L-5 nerve root but I cannot entirely exclude the possibility of very mild compression or irritation of the right L-5 nerve root. Clinical correlation is recommended. The disc herniation is largely unchanged from February, 1995.
>
> At the L-5/S-1 level, there is a small central disc herniation without spinal stenosis or nerve root compression. The disc herniation appears to have developed since February 1995.
>
> No other abnormality or pathology was identified.

On October 4th, 1999, [the Appellant's] adjuster at MPIC wrote to him, to say that he had had his income topped up from May 16th to August 19th, and had received full Income Replacement Indemnity since that last date. MPIC had now reassessed his claim and, upon the basis of an opinion rendered by [MPIC's doctor] of MPIC's Medical Services team, was of the view that neither his spinal fracture nor his disc problem would preclude his returning to his duties as a computer draftsman. MPIC would, therefore, continue his Income Replacement only to October 28th, at which time it would terminate. Meanwhile, MPIC would have an occupational therapist assess his work environment to put in place any ergonomic devices that might be helpful.

The opinion of [MPIC's doctor] upon which the adjuster relied seems to have been proffered orally, but was confirmed by a brief memorandum from [MPIC's doctor] to the adjuster dated October 14th. [MPIC's doctor] indicated that he, in turn, was relying primarily upon information obtained from [Appellant's doctor #2], [text deleted] Physiotherapy, [Appellant's orthopedic specialist #1] and [hospital #2]. At that juncture, the medical information available to [MPIC's doctor] may be summarized this way:

Reports of [Appellant's doctor #2]

[Appellant's doctor #2's] initial health care report described his examination of [the Appellant] on May 20th, 1999. He reported a scar on [the Appellant's] neck of 2.5 cm by 5 mm, tenderness at the tip of [the Appellant's] left elbow, the left leg in a leg brace and pain in low back over T-12. His initial diagnosis, as it relates to this appeal, was a compression fracture at the T-12 level. [The Appellant] was capable of less than full function due to symptoms and/or functional deficits, but [the Appellant] had, in fact, returned to work on May 18th, 1999. He was being referred to [Appellant's orthopedic specialist #1] with respect to his left leg and his history of chronic back pain was likely to delay his recovery.

[Appellant's doctor #2] had referred [the Appellant] for physiotherapy with respect to his back on June 29th, 1999. (Prior to that, his physiotherapy had been directed only towards his knee.)

In a further report to MPI of August 13th, 1999, [Appellant's doctor #2] reports that [the Appellant] is not improving, is experiencing sleep disturbance, is using Tylenol No. 3 and still has significant functional limitation in his range of motion. He required a left knee brace to assist his walking but his back pain was his main problem. [Appellant's doctor #2] had prescribed physiotherapy three times a week and acupuncture as well as the Tylenol No. 3 with codeine. [The Appellant] had been off work since about August 8th; he was unable to sit for any length of time.

Finally, [Appellant's doctor #2's] clinical note of September 15th, 1999, says "CT shows T-11 and 12 compression; new L-5/T-1 disc; going to physio; back pain; using six or more Tylenol No. 3 daily."

Evidence of [text deleted] Physiotherapy

While [the Appellant] had been attending here for treatments since May 21st, 1999, on referral from [Appellant's orthopedic specialist #1], it was not until July 2nd that his physiotherapist started treating his thoracolumbar area at the request of [Appellant's doctor #2]. On this latter date he started to receive treatments aimed at reducing his pain and muscular tightness, and to increase his range of motion and functional capacity. His therapist anticipated treatments at a frequency of three times a week with a reassessment after four to six weeks. The therapist had been told by [Appellant's doctor #2] that this was a new fracture as there was no evidence of any similar fracture on x-rays taken before [the Appellant's] motor vehicle accident.

The therapist's report of July 14th makes no mention of back problem but, on July 21st, she reports that [the Appellant's] main complaint was increased lumbar pain and decreased function due to that pain. His lumbar range of motion remained very limited; she noted reactive spasm of his thoracolumbar paravertebral muscles bilaterally and was beginning a trial of acupuncture in an attempt to relieve some of that lumbar pain.

Similarly, the therapist's report of August 4th reflects continued limitations of range of motion, and "acutely tender with reactive spasm at the T-12 to L-3 region." Indicating that she would continue treatments at three times per week and would reassess six weeks later, the therapist noted that [the Appellant's] lumbar pain was very limiting.

By September 9th, his physiotherapist reports that "subjectively, he notes marked increased pain and decreased function due to lumbar pain. On examination, lumbar range of motion remains extremely limited. Muscular tightness is noted bilaterally—gluteous and thoracolumbar and paravertebrals—but no reactive spasm."

The last physiotherapy report before the termination of [the Appellant's] Income Replacement bears date September 28th. While it reflects a decrease in reactive spasm of the Appellant's lumbar paravertebral muscles, there was little change in active range of motion. [The Appellant] had to push up off his thighs in order to return from flexion; tenderness remained at L-2/3 and in the lumbar paravertebral muscles. The therapist said she would continue to treat him three times a week with emphasis on strengthening and dynamic lumbar stabilization. She would reassess him in four weeks and suggest a possible reference to an orthopedic or neurological consultant if there was no change. She raised the question of a work-hardening program, although no one seems to have followed that suggestion.

Evidence of [Appellant's orthopedic specialist #1]

By October 4th, MPIC had only received one report from [Appellant's orthopedic specialist #1]. It was dated June 17th, 1999, and makes clear that [the Appellant] had seen [Appellant's orthopedic specialist #1] primarily for his left knee which, at that point, had created a significant limitation in function. Symptoms were reported as "multiple injuries—most important for which he has seen me is left knee. Also injured left shoulder, left wrist and back, all of which has settled down." [Appellant's orthopedic specialist #1] had prescribed a brace and physiotherapy. He expressed the view that [the Appellant] was, at the time of that examination, unable to work at any job.

[Hospital #2]

[The Appellant] was taken here immediately following his accident, complaining of pains at his neck, left shoulder, left knee, right hand and low back. He had told the examining physician of his previous, chronic, low back pain. X-rays had shown a mild compression deformity involving

the superior endplate of T-12; it was uncertain whether this was recent or old. [The Appellant] had been discharged the same day, after being given a knee brace and injections of morphine.

It was on the basis of the foregoing reports that [MPIC's doctor] said:

> Based on this information, the T-11/12 fracture and disc problems would not preclude [the Appellant] from performing his duties as a computer draftsman. It is my opinion that there is insufficient medical information to support an occupational disability being present as a result of a medical condition arising from the motor vehicle accident of May 8th, 1999. It may be helpful to have an occupational therapist assess the client's work environment and put in place any ergonomic devices that may be beneficial.
>
> He may be entitled to a permanent impairment for the T-11/12 fracture, but he would require a bone scan to determine whether this fracture is related to the motor vehicle accident.

Following [MPIC's doctor's] recommendation, the services of [text deleted], an occupational therapist, were retained. She attended at [text deleted] on October 14th with [the Appellant] and his employer, [text deleted]. Her report describes in some detail the physical and other demands of [the Appellant's] work, reiterates the apparent need for a high level of concentration and attention to detail, reflects [the Appellant's] advice that he was ingesting three Tylenol No. 3 at a time and concludes that the physical demands of his job were for sitting, standing and walking within the office and plant, occasionally to or within a job site, and that his work was consistent with the sedentary-light work classification. She apparently had no other recommendations.

On or about November 17th, 1999, [the Appellant] filed an application for an internal review of the decision to terminate his income benefits.

Meanwhile, [the Appellant] had been referred by [Appellant's doctor #2] to another orthopedic specialist, [Appellant's orthopedic specialist #2], who, in turn, had arranged for a bone scan to be

performed on November 3rd, 1999, primarily with a view to determining whether the fractures at T-11/12 were old or new.

[Appellant's orthopedic specialist #2's] report of December 3rd, 1999, reflects:

- Complaints of pain in the thoracic and lumbar areas, constantly present day and night;
- Physiotherapy had been tried but was not helpful;
- Straight leg raising was 90% bilaterally;
- X-ray of lumbosacral spine from August 17th not significant;
- CT scan of August 20th, covering thoracic and lumbar spine, raised questions whether there were, in fact, compression factors at T-11 and T-12; [Appellant's orthopedic specialist #2] felt that this could only be diagnosed by viewing the scout films, which were small and not very specific;
- Disc prominence at L-4/5 and L-5/S1 was evident, although no significant nerve root compression was demonstrated.

[Appellant's orthopedic specialist #2] added that he wished to find more documentation and would have lateral tomograms done of the thoracolumbar area as well as a routine x-ray of the lumbar spine. He would send for the bone scan done on November 3rd at [hospital #3], which would help him determine whether or not there had been a recent injury to the thoracolumbar spine. "Unfortunately this would be a hot area for a year or two after an injury so it might prove specifically that the compression occurred this year."

On December 14th, 1999, [Appellant's orthopedic specialist #2] reported that [the Appellant] was still complaining of pain and that the lateral tomograms did, indeed, confirm that there had been a fracturing of the superior endplates at T-11 and T-12. He would attempt to treat that condition.

On December 30th, 1999, [Appellant's doctor #2] issued a report, addressed "To whom it may concern" respecting [the Appellant], which simply said, "The above is not able to work due to the injuries sustained in his most recent motor vehicle accident."

The reports of [Appellant's doctor #2] and [Appellant's orthopedic specialist #2] were then referred back to [MPIC's doctor], who expressed the view that the results of the bone scan "clearly indicate that changes noted at T-11 and T-12 did not develop as a result of the May 8th, 1999, motor vehicle collision. If an acute injury had occurred to the T-11 and T-12 vertebral bodies, then the bone scan would have identified and increased in uptake of the radioisotope at these levels." [MPIC's doctor] referred, in particular, to a report prepared for the Workers Compensation Board by [WCB's doctor] on July 9th, 1996, wherein [WCB's doctor] mentions

> …the history of injury in 1987, resulting in multiple compression fractures, which appear to have been thoracic, with frequent exacerbations of low back pain complaints since…

[MPIC's doctor], in expressing the view that [the Appellant] would not qualify for a permanent impairment award pertaining to those abnormalities, added that he had seen nothing to alter his earlier opinions respecting [the Appellant's] claim.

[MPIC's doctor] discussed [the Appellant's] condition with [Appellant's doctor #2] on January 26th, 2000. [The Appellant] had recently presented to [Appellant's doctor #2's] office in a fair amount of pain and with an altered gait. [Appellant's doctor #2] had stated that the bone scan performed in November 1999 did not identify any abnormalities and, said [MPIC's doctor],

[Appellant's doctor #2] had also said he had not identified a medical condition arising from the motor vehicle accident that would be in jeopardy of further injury if [the Appellant] returned to his pre-collision occupational duties. In other words, said [MPIC's doctor], if [the Appellant] requested medical clearance to return to his pre-collision occupational duties, [Appellant's doctor #2] would provide this. We note that this latter conclusion is that of [MPIC's doctor], not of [Appellant's doctor #2] who, in a letter of March 14th, 2000, says very clearly that, in his opinion, [the Appellant] had not yet (March 14th, 2000) reached a point in his treatment where it was feasible for him to return to work. As [Appellant's doctor #2] puts it,

> It is true that he [the Appellant] has a long history of workers' compensation-related back problems, but he was working at the time of the accident. Since the accident he has had increased pain and has not worked much. He tried to go back to work, but missed too much time.
>
> It is true that other than the compression fractures and the disc bulging on CT, there isn't much objective evidence of pain and disability, but there often isn't in back injuries.

On February 22nd, 2000, MPIC's Internal Review Officer confirmed the decision of the adjuster to discontinue [the Appellant's] Income Replacement Indemnity benefits at October 28th, 1999.

In a letter of May 12th, 2000, addressed to [the Appellant's] counsel, [Appellant's orthopedic specialist #2], after outlining the symptoms of which [the Appellant] complained when last seen on March 17th, 2000, makes the following significant comments:

> It was my impression that this gentleman did indeed have some thoracic and low back pain which could be related to his accident.
>
> The lateral tomograms done at the [text deleted] did indeed confirm the fracturing of the superior endplates of T-11 and T-12…it is my opinion that these fractures likely occurred at the motorcycle accident of May 8th, 1999.
>
> The assessment of [the Appellant] is made more difficult by the fact that it appears to me that he has some elements of his complaints which are difficult to explain on any organic basis. He certainly does, however, have organic bases for complaint in his lower thoracic and lumbar spine, with possible radiation of pain from there. I can understand how this would make it difficult for him to do

> essential duties of his employment such as being a technical draftsman-estimator. If he has to work in a bent-over position, or if he has to be in an upright position for any prolonged period of time or put force through his spine, this could be most difficult.

[The Appellant] testified that [Appellant's orthopedic specialist #2] had recently referred him to [text deleted], another orthopedic surgeon, who specializes in problems of the spine and who had seen him some three weeks prior to the hearing of his appeal. [Appellant's orthopedic specialist #3] was arranging for a magnetic resonance imaging scan to be performed, and had also referred him to the [text deleted] Clinic at the [text deleted]. He would be returning to see [Appellant's orthopedic specialist #3] once the MRI had been completed. There is a lengthy waiting list, both for assessment and treatment at the [text deleted] Clinic and for the diagnostic services of the MRI equipment.

Evidence of [Appellant's domestic partner]

[Text deleted] has been [the Appellant's] domestic partner for some nine years. She testified that, prior to his accident, while employed by [text deleted], [the Appellant] had been at work every day, staying late when asked and obviously enjoying his work to the full. He had walked quite long distances every day, even in mid-winter and, not infrequently, twice daily, in order to keep himself fit and mobile. He had always been an extremely hard and enthusiastic worker. Since his accident and even currently, [the Appellant] has to take pills to enable him to help her do those things that he could easily do before. She observed that he can not sit comfortably for very long—15 to 20 minutes seems to be his maximum. She was concerned by the quantity of Tylenol with codeine that he takes; she believes this prevents him from any serious concentration and its analgesic effects are not long-lasting. The result of his pain and diminished ability to be of help to her had placed great stress upon their relationship—"I get cranky with him because

I'm already holding down two jobs, and yet I know that he is trying hard and does the best that he can."

Submission of Counsel for the Appellant

[Appellant's representative], on behalf of [the Appellant], submits that when [MPIC's doctor] first expressed his views in October of 1999, the reports on which he based those views were inconclusive at best, and did not support a decision to terminate the benefits to which [the Appellant] had already been found entitled. The [hospital #2] report was merely that of an emergency room, which had found nothing life threatening, had given [the Appellant] a shot of pain killer and sent him home. [Appellant's orthopedic specialist #1] had dealt exclusively with [the Appellant's] left knee and had only referred glancingly to "multiple injuries" including back pain. The physiotherapist's report had reflected sufficient concern to suggest a possible orthopedic or neurological consultation and the need for a work-hardening program, all of which had apparently been ignored by the insurer; the most recent report from [Appellant's doctor #2] at that stage (a report of August 13th, 1999) gave his opinion that [the Appellant] might be able to work in a supernumerary position but had less than full functional capabilities and could certainly not work his full duties.

[Appellant's representative] points to the reports of [Appellant's orthopedic specialist #2] and, in particular, to that of May 12th, 2000, referred to above, and argues that there was not, as of October 28th, 1999, nor even today, adequate ground to discontinue the Income Replacement Indemnity to which [the Appellant] had clearly been entitled from the seventh day following the date of his accident.

[Appellant's representative] emphasizes that, despite [the Appellant's] prior injuries, the fact is that he could and did work diligently at his last job for some few months prior to his motor vehicle accident; his employer still wants him back.

Submission of Counsel for MPIC

Ms. McKelvey submits that [the Appellant's] income replacement benefits were properly terminated under Section 110(1)(a), in that he was able to hold the employment that he had held at the time of the accident. She refers the Commission to Section 8 of Manitoba Regulation No. 37/94, which reads as follows:

> 8. A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident, or that the victim would have performed but for the accident.

She directs the attention of the Commission to the views expressed by [MPIC's doctor] and, in particular, to [MPIC's doctor's] strongly held view that [the Appellant's] present symptomatology quite probably relates to his pre-existing back condition. The information obtained from [Appellant's doctor #2's] most recent report does not clearly indicate whether or not [the Appellant's] symptoms are causally related to the collision in question. As [MPIC's doctor] puts it, "It appears that [Appellant's doctor #2] causally relates [the Appellant's] symptoms to the MVC in question based on the fact that [the Appellant] has had more back pain and a difficult time working since the collision." It is [MPIC's doctor's] view that it is neither valid nor logical to base causation upon the severity of symptoms and subjective responses to those symptoms. The disc prominence mentioned by [Appellant's doctor #2] is probably the same disc abnormality that was present at the time of [the Appellant's] examination by [WCB's doctor] in July of 1996.

Ms. McKelvey submits that, even had the fractures noted at the T-11 and T-12 levels of [the Appellant's] spine been caused by his motor vehicle accident in May of 1999, [MPIC's doctor's] expressed view is that the natural history of such problems would have resulted in a sufficient healing, by October of 1999, to allow him to return to work—with some discomfort, perhaps, but not disabling.

Ms. McKelvey also points to the fact that even [Appellant's orthopedic specialist #2] does not speak of total inability of the Appellant to return to work; he merely says that [the Appellant] should be careful in lifting and bending, and that he can understand that [the Appellant] might find his work more difficult. He does not say that the job can't be done.

Ms. McKelvey also notes that, although [the Appellant] did try to return to work, he has made no such attempt for almost a year. She respectfully submits that this Commission should not rely upon the opinion of [Appellant's doctor #2] who, to quote [MPIC's doctor], apparently "will base his decision on a return-to-work date on when [the Appellant] feels he is ready to return to work."

Discussion

We are indebted to counsel for referring us to certain portions of Mr. Richard Hayles's text on Disability Insurance -- Canadian Law and Business Practice (1998 Thomson Canada Ltd., Scarborough, Ontario). We quote certain portions of that text which seem relevant to the present appeal:

> Crippling pain, with minimal or no organic origins, is the source of a significant proportion of long-term disability claims. In some cases there is no discernible source for the pain at all; in other cases the pain originates in an accidental injury…

> A survey of the reported disability insurance cases brings to light many instances in which there is a marked discrepancy between the extent of the insured's physiological problem and the severity of the pain he reports. Physicians experienced in the treatment of pain have stated that it is common that the objective findings do not correlate with the patient's pain, and admit that medical understanding of the etiology of pain is still in its early stages.
>
> Courts have recognized that pain is subjective in nature. They have also acknowledged that there is often a psychological component in chronic pain cases. Nevertheless, the lack of any physical basis for pain does not preclude recovery for a total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In McCulloch v Calgary, Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:
>
> > In my view it is not of any particular importance to determine the precise medical nature of the plaintiff's pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends upon many factors, including the psychological make-up of that person.
>
> In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.
>
> The courts are well aware that problems secondary to pain often contribute to the insured's disability. Examples include sleeplessness, with its associated fatigue and inability to concentrate, as well as the distraction which results when the insured has to direct much of (his) energy and attention to coping with pain. In other cases, the insured's incapacity is exacerbated by drugs which he needs to deal with his pain…
>
> An insured is considered disabled if his pain prevents him from performing work to the standard of a reasonable employer. This means that if the type of job under consideration is normally full-time, the insured must be able to work a full day consistently and regularly, and the courts do not expect the insured to find an employer who will accommodate his need for frequent breaks, flexible hours, special equipment and other departures from the normal conditions of work unless there is evidence that such employers actually exist.

The learned author cites judicial precedent for each thesis noted above. In particular, but by no means exclusively, we refer to the cases of Renouf v Standard Life Assurance Co. (1996), [1997] ILR 1-3395; Richardson v Great-West Life Assurance Co. [1996] ILR 1-3376; MacEachern v

Co-op Fire & Casualty (1986) 19 CCLI 189 and affirmed by the Nova Scotia Court of Appeal at (1987) 25 CCLI 168; and the McCulloch v Calgary case referred to above, reported at (1985) 15 CCLI 222 .

Patently, the task of this Commission is made much more difficult in the present case by [the Appellant's] several pre-accident back injuries. Even now, there is minimal compelling evidence to establish, one way or the other, whether the problems that seem to have plagued [the Appellant] since May 8th, 1999, are causally related to his accident of that date, or whether the injuries he sustained in May 1999 have long since healed and his continuing pains are sequelae from his earlier accidents. It may well be that the magnetic resonance imaging that [Appellant's orthopedic specialist #2] has requisitioned for [the Appellant] will give the Appellant's care-givers a clearer answer to that vexed question. There is an even stronger probability that the experts at the [text deleted] Clinic, even if unable to effect a permanent cure, will be able to restore [the Appellant] to a condition in which he can return to his former employment. Pending those two events, we find from the evidence available to us to date that, on a balance of probabilities, the organic basis for [the Appellant's] complaints in his lower thoracic and lumbar spine, with possible radiation of pain from there, has its origins in his motor vehicle accident of May 8th, 1999.

We base that finding upon two factors in particular:

- The opinion of [Appellant's orthopedic specialist #2] expressed in his letter of May 12th, 2000—an opinion which he may wish to vary once he has the results of the MRI but which, until then, should be adopted;

- [the Appellant's] work history. This is a man who, with a mere grade [text deleted] education, appears to have worked diligently for all of his life since leaving school, doing so in physically demanding situations until his first, serious accident. Even after that four-storey fall, [the Appellant] did not lie back on his oars; rather, he returned to his workplace as soon as it was physically practicable for him to do so. He later completed the retraining offered him by The Workers Compensation Board, qualifying for full-time employment in work demanding a high level of attention to detail. He obviously impressed his employer with his dedication. In sum, we find his evidence credible and, whatever may have been the cause of his continued pain, we find his complaints genuine and the opinions of his current care-givers valid.

This, in our respectful view, is clearly one of those cases to which Mr. Hayles, in his text quoted above, made reference. From the evidence before us, we find that the pain experienced by [the Appellant] since he was last employed has prevented him from performing work to the standard reasonably required by his employer, and that his incapacity was exacerbated by the analgesics that he has been taking to help him deal with that pain. It is, we hope and believe, probable that his present care-givers and the specialists at the [text deleted] Clinic will enable him to return to work within a reasonable time. Until then, or until [Appellant's orthopedic specialist #2] is able, upon the basis of MRI or other diagnostic reports, is able to express the view that the fractures described above pre-dated the Appellant's motor vehicle accident of May 8th, 1999, [the Appellant's] Income Replacement Indemnity will be restored.

Disposition

Manitoba Public Insurance Corporation shall reinstate [the Appellant's] Income Replacement Indemnity, from October 29th, 1999, with interest at the statutory rate.

Dated at Winnipeg this 1st day of August, 2000.

J. F. REEH TAYLOR, Q.C.

YVONNE TAVARES

COLON C. SETTLE, Q.C.