Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-105

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Ms. Yvonne Tavares** **Mr. Wilson MacLennan**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Joan McKelvey.**
HEARING DATE:	**November 14th, 2000**
ISSUE(S):	**(a) Income Replacement Indemnity ('IRI')—whether termination justified;** **(b) Claim for blood pressure medication;** **(c) Claim for permanent impairment of neck and back.**
RELEVANT SECTIONS:	**Sections 83, 84, 106, 109, 110(1)(c) and 110(2)(c) of the MPIC Act and Section 6 of Manitoba Regulation No. 37/94** ***(copies of these sections are annexed to these Reasons)***

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 riding his motorcycle when, at about 2 o'clock in the afternoon on June 28th, 1997, he appears to have run across an oil spill. As a result, his motorcycle flipped over and he seems to have landed on his face and arms. There were no witnesses. He sustained facial scarring and dental damage, as well as multiple lacerations, soft tissue injuries to his neck, back and right hip although, fortunately, no fractures.

At the time of his accident, [the Appellant] was working as a truck driver for [text deleted].

For a short while after his accident, [the Appellant] sought medical attention on an *ad hoc* basis from walk-in clinics but, in July of 1997, was referred by his adjuster at MPIC for psychological assessment and subsequent counselling by [Appellant's psychologist #1] at [text deleted]. He was also referred for physiotherapy to the [rehab clinic #1], where he attended for 15 individual physiotherapy treatment sessions between July 22nd and October 27th, both inclusive, and where he also participated in 32 group pool therapy sessions from July 24th to October 27th, both inclusive, of 1997.

On July 22nd, 1997, [the Appellant's] case manager at MPIC advised him of his entitlement to Income Replacement Indemnity in the amount of $606.03 biweekly, commencing after the seventh day immediately following his accident.

[The Appellant] was involved in a second motor vehicle accident on November 1st, 1997, when, as he drove his car at about 50 kilometres per hour through an intersection, his vehicle was hit by another on the passenger's side. He returned to his physiotherapy program on November 12th, 1997, when his therapist anticipated a further six to eight weeks of treatment to address his most recent soft tissue injuries before having him progress into a daily reconditioning program. Further pool therapy three times per week was also recommended.

On December 5th, 1997, [the Appellant] received a payment of $11,175.05 for the permanent impairment he had sustained in the form of dental damage and, on July 23rd, 1998, a further $12,579.91 with respect to his facial scarring.

On December 23rd, 1997, his adjuster wrote to tell him that the Corporation had completed a 180-day determination pursuant to Section 84(1) and Section 106 of the MPIC Act and had determined an employment for him as a truck driver. His new IRI would be $675.91 biweekly, commencing December 29th, 1997; the adjuster explained to him the manner in which that figure had been calculated. The amount is not in dispute.

Following his second accident of November 1st, 1997, [the Appellant] consulted [Appellant's doctor #1] whose report expresses the view that the increased soreness of which [the Appellant] was complaining in his neck, mid-lower back and between the shoulder blades was a re-aggravation of his earlier injuries, rather than a new injury. [Appellant's doctor #1] suggested a temporary discontinuance of [the Appellant's] rehabilitation program and referred him to [text deleted], a specialist in physical medicine and rehabilitation. [The Appellant] failed to appear for several appointments with [Appellant's physical medicine specialist] and did not return to see [Appellant's doctor #1]. [The Appellant] also failed to keep appointments with [Appellant's psychologist #1] and at the [rehab clinic #1], both on February 2nd, 1998.

On March 12th, 1998, [the Appellant's] case manager at MPIC told him that an appointment had been made for him to undergo an independent assessment on April 13th by [text deleted], a physiatrist. [Independent physiatrist] was provided by the [rehab clinic #1] with a summary from [text deleted], the physiotherapist who had supervised [the Appellant's] reconditioning program. [Appellant's physiotherapist #1's] report outlined the treatments [the Appellant] had received, the exercise programs in which he had participated and the barriers that [Appellant's physiotherapist #1] felt were impeding [the Appellant's] progress. Those barriers included:

1. pain behaviours and self-limitation (guarded movement, grimacing and groaning, etc.);

2. lack of physician continuity - [the Appellant] had had three different doctors since his initial accident; and

3. periodic cancellations, absences or tardiness for scheduled appointments.

Following his assessment of [the Appellant] on April 13th, 1998, [independent physiatrist] provided a 20-page report to MPIC. [Independent physiatrist] opined that [the Appellant] was capable of sedentary or light work and of lifting light-weight objects repeatedly. Current work capabilities would enable the claimant to undertake four hours of work per day, three days per week, to be followed in about three to four months by a six-week graduated return to work. In the interim, problems created by [the Appellant's] apparent depression and deconditioning would need to be addressed. In the latter context, [independent physiatrist] recommended:

1. the use of tricyclic antidepressants along with a graduated, physical reconditioning program, to address [the Appellant's] sleep disorder and fibromyalgia condition;

2. a structured program of physical rehabilitation, directed towards musculoskeletal and cardiovascular conditioning at a centre such as the [rehab clinic #1]. [Independent physiatrist] felt that personnel experienced in the assessment and rehabilitation of chronic pain should be utilized since, due to the complexities of the psychological factors that were apparent, physical rehabilitation would be difficult for both [the Appellant] and his treating practitioners; and

3. chronic pain behavioural management which, while centred around [the Appellant's] general practitioner, could involve a psychologist such as [Appellant's psychologist #1] or even a psychiatrist.

[Independent physiatrist] also recommended strongly that most of the medications [the Appellant] was then currently taking should be discontinued.

On April 13th, 1998, [the Appellant] also underwent a further assessment, this time by the physiotherapy department at [rehab clinic #2]. [Text deleted], the physiotherapist, noted a hypersensitive response to any form of palpation, decreased range of motion of [the Appellant's] cervical and lumbar spine, postural dysfunction, poor balance and flexibility, but no neurological abnormalities. She recommended a strengthening program with improved flexibility, endurance and stabilization components, to be carried out three times weekly for an eight-week period. She also recommended that vocational goals should be determined as soon as possible.

In May of 1998, [the Appellant] was also assessed by [text deleted], a clinical psychologist, and the services of [vocational rehab consulting company #1] were retained by MPIC to aid in [the Appellant's] rehabilitation. In the meantime, [the Appellant] had consulted [Appellant's doctor #2], who had now become his general practitioner.

With the approval of MPIC and at the request of [independent physiatrist], [text deleted], occupational therapist, prepared a Physical Job Demands Analysis report on August 6th, 1998, related to the occupation of a "city pick-up and delivery driver", the work that [the Appellant] had been performing prior to his first accident. [Appellant's occupational therapist #1] explained that, since [text deleted] was no longer in business, she had arranged a job-site assessment at [text deleted], a company performing services similar to those of [text deleted]. The summary of her report indicates that the physical demands of that occupation are classified as Heavy Work and included:

- infrequent handling of up to 75 pounds
- occasional, but potentially repetitious, handling of up to 50 pounds
- rare pulling against 100 pounds

- sitting while driving for intervals of up to one hour
- reaching from ground to overhead level

A team meeting was held on August 18th, 1998, and attended by [Appellant's psychologist #2], [Appellant's occupational therapist #2], [Appellant's physiotherapist #2], [text deleted] (representing [independent physiatrist]), [text deleted], MPIC's adjuster, [text deleted], who appears to have been case coordinator for both [vocational rehab consulting company #1] and [rehab clinic #2], and [the Appellant]. The consensus was that [the Appellant] was not then able to return to the position of an intra-city pick-up and delivery truck driver and that it would take significant time to achieve those expectations. The team recommended that efforts should be made to find a possible work placement for [the Appellant], calling for "lighter demands with a similar or related component". [Appellant's psychologist #2] felt that good improvements had been made in helping [the Appellant] to cope with his pain; he recommended that it was time for [the Appellant] to refocus and start looking beyond the rehabilitation program to the next phase of his life.

Options were discussed for [the Appellant] of working either as a city truck driver or as a dispatcher with a trucking company. [The Appellant] felt that the city driving position would be too stressful and that work as a dispatcher would require computer training and a lot of sitting; he did not feel he could reach the required levels of tolerance.

The final recommendations of the team were that [the Appellant] continue with physiotherapy, psychological counselling and medical monitoring - the latter, with particular reference to increased blood pressure concerns - that a Transferable Skills Analysis be done and that a

community-based work-hardening placement be found for [the Appellant] in the area of trucking or a related field.

Subsequent efforts of [vocational rehab consulting company #1] produced a number of employment opportunities for [the Appellant] who, on November 23rd, 1998, started a two-week trial period of work as a bus driver with [text deleted]. Meanwhile, since [the Appellant] had expressed a desire to drive long distance provided there were no loading or unloading duties required of him, [vocational rehab consulting company #1] arranged a work placement for him whereby he would be driving a semi-trailer between [text deleted] and [text deleted]. Unfortunately, just before that job was due to start, the employer found that this particular contract had been awarded to a lower bidder. The employer [text deleted] also had a contract for driving between [text deleted] and [text deleted], with two drivers spelling each other off in the one vehicle and with sleeping accommodation available for the driver who was off duty. However, [the Appellant] expressed major concerns about the [text deleted] run which, he felt, would have entailed driving longer distances than the [text deleted] run; he was not impressed with the existence of sleeping quarters in the back of the vehicle. [Vocational rehab consulting company #1] therefore referred [the Appellant] back to [independent physiatrist] for reassessment. [Independent physiatrist's] opinion, dated January 5th, 1999, says in part

> …..[the Appellant] is presently functionally capable of working as a long-distance truck driver. The myofascial symptoms he experiences can be aggravating, however, I do not think it limits him functionally in regards to returning to work. In my opinion, the symptoms are mild in nature. Prolonged positions such as driving for long periods can result in increased discomfort, however, this does not limit his ability to work in this capacity…..He has been taught the appropriate self-management strategies to deal with an increase in symptoms…..Once he becomes conditioned as he performs an employment position, the symptoms will gradually decrease…..The medical literature indicates continued activity as a means to reach this goal.
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> Regarding his ability to travel to [text deleted] (with a second driver present), he should be able to function in this capacity, perhaps tolerating this better than the trip to [text

> deleted] where there is no second driver to assist him. This should allow him time for rest breaks and the opportunity to stretch.
>
> It is also my impression the jostling of the truck will not cause harm to [the Appellant's] back, based on my musculoskeletal examination. I could find no physical reason why he would not be able to function in the capacity you describe (i.e., long-distance truck driving), despite his aches and pains.

There is a memorandum on file from [Appellant's MPIC adjuster], which says in part that "based on the report received from [independent physiatrist], it appears he [independent physiatrist] feels that [the Appellant] is at pre-accident status." We do not share that interpretation of [independent physiatrist's] letter of January 5th. [Independent physiatrist] had been specifically asked whether [the Appellant] could perform long-distance truck driving duties but with no heavy loading or unloading duties at either end of his run. It is quite clear that, while [the Appellant] was capable of doing the driving portion of his new task, he had not reached pre-accident status with an ability to do much, if any, heavy lifting. The point, here, is that as a result of the 180-day determination reflected in [Appellant's MPIC adjuster's] letter to [the Appellant] of December 23rd, 1997, and as a further result of subsequent discussions involving [the Appellant] and almost all of his care-givers, the employment that had been determined for him was that of a truck driver without many of the loading and unloading duties normally associated with that work. This was the job that [independent physiatrist] felt [the Appellant] capable of performing, not his pre-accident work.

In late January or early February of 1999, [the Appellant] took some tests to see whether he could qualify as a transit driver, but without success. Assisted by [vocational rehab consulting company #1], he was provided with a number of other employment opportunities but, again, without success—in some cases due either to apparent indifference or lack of candor on his part. MPIC then paid for a course intended to qualify [the Appellant] as a taxicab driver, although the

wisdom and purpose of that might be questioned since it would necessarily entail the frequent lifting of heavy baggage.

On April 5th, 1999, [vocational rehab consulting company #1] advised MPIC that truck driving jobs of which [the Appellant] was capable were certainly available and, on that same date, [Appellant's doctor #2] wrote to MPIC to say, in part, "I see no contra-indication for [the Appellant] to work as a long-distance driver, especially with a co-worker."

Since [the Appellant] appeared shortly thereafter to have become disenchanted with the efforts of [vocational rehab consulting company #1], MPIC arranged for [the Appellant's] rehabilitation to be taken over by [Appellant's vocational rehab consultant] of [vocational rehab consulting company #2].

On April 20th, 1999, MPIC wrote to [the Appellant] to tell him that, since he was now deemed capable of holding the employment that had been determined for him under Section 106 of the Act, his entitlement to IRI would, in the normal course, terminate then. However, MPIC also told him that, since he had lost his pre-accident employment due to the injuries sustained in his accident, he was entitled to a further six months of IRI by virtue of Subsection 110(2)(c). Therefore, he was told, his actual entitlement to IRI would end on October 20th, 1999. [The Appellant] sought an internal review from that decision; that application, though undated, was received by MPIC on June 18th, 1999. It sought continuance of [the Appellant's] IRI, additional benefits for alleged permanent impairments, reimbursement for blood pressure medication and payment for a gymnasium membership. By letter of August 30th, 1999, MPIC's Internal Review Officer denied the appeal and upheld the decisions of the Corporation's claims team. It is from that decision that [the Appellant] now appeals to this Commission.

By May 14th, 1999, [the Appellant] had obtained his taxi driver's licence and had apparently driven a few shifts. One of his problems in obtaining gainful employment was a criminal record which precluded his entry into the United States and also caused the rescision of his taxi driver's licence. He decided to seek a pardon, in the belief that this would remove that barrier.

On June 18th, 1999, [Appellant's vocational rehab consultant] was able to arrange for [the Appellant's] employment by [text deleted], on a two-week trial period, commencing June 21st; MPIC paid for some new boots and coveralls to enable him to start that work. The work at [text deleted] was of the "pin to pin" variety, entailing no heavy labour at either end. Unfortunately, at the end of his trial period [text deleted] was unwilling to hire [the Appellant] on a full-time basis. He had been involved in an accident when he had backed the company's vehicle into someone's fence and, more importantly, it turned out that his work for [text deleted] was not exclusively "pin to pin" but did involve some physical work that [the Appellant] felt incapable of performing. [Text deleted] was of the opinion that [the Appellant] could, in fact, do long-haul "pin to pin" driving, but he had requested that he be given work to do in the city since he did not want to go on the highway. [Appellant's vocational rehab consultant] undertook to focus his efforts on finding "pin to pin" type jobs in which little, if any, physical labour on [the Appellant's] part would be called for.

By July 13th of 1999, MPIC had agreed to fund an application to [text deleted], with a view to enabling [the Appellant] to enter the United States.

On October 4th, 1999, [Appellant's vocational rehab consultant] reported that [the Appellant] had commenced a work trial with [text deleted]; MPIC paid for some work gloves and for [the

Appellant's] meals while he was on his trial runs. [The Appellant] was able to start work with [text deleted] as a full-time employee on October 18th, 1999. He quit working for [text deleted] on January 17th, 2000, because, he says, the work was too painful.

Since the original decision of the Internal Review Officer, dated August 30th, 1999, had referred the questions of high blood pressure medication and a gymnasium membership back to [the Appellant's] adjuster for further consideration, a new decision by [the Appellant's] new case manager was issued on November 8th, 1999, denying each of those benefits. These latter decisions came before the Internal Review Officer on February 25th, 2000, resulting in the award of a six-months' membership at [text deleted] but a further referral back to MPIC's adjuster for investigation into the cause of the hypertension.

On March 28th, 2000, [the Appellant] filed a Notice of Appeal to this Commission, based on the issues of termination of his IRI, an allegedly permanent impairment of his neck and back, and payment for his blood pressure pills.

On August 10th, 2000, following a reassessment of [the Appellant], [independent physiatrist] wrote to [Appellant's doctor #2], noting that [the Appellant] had been given home exercises and stretches to perform, to maintain mobility of his muscles and joints as well as to control related pains. [The Appellant] had told [independent physiatrist] that he was not really doing those exercises. In his letter to [Appellant's doctor #2], [independent physiatrist] suggested certain medications, continued exercises and the possible benefit of acupuncture or soft-tissue needling treatments, or both, but added "I don't see any reason to restrict his work hours or take him out of the workplace. We should be able to provide these kinds of treatment concurrent with his active working lifestyle."

Under date of February 17th, 2000, [Appellant's doctor #2] had written to MPIC's adjuster, noting certain subjective complaints that had been voiced by [the Appellant] on January 17th, 2000, but adding "I have discussed with [the Appellant] that I cannot stop him from working as a long-distance truck driver. [Independent physiatrist], in his letter dated January 5th, 1999, in his opinion states that [the Appellant] is capable of these duties." An X-ray report which accompanied [Appellant's doctor #2's] letter showed no significant bone or joint abnormality.

MPIC, in early September, extended [the Appellant's] gymnasium membership at [text deleted] for a further six months and, since some date in August of this year, [the Appellant] has been working for [text deleted] but only on a part-time basis.

Discussion:

With respect to [the Appellant's] claim for reimbursement for his medication for hypertension, there is at the date of this decision insufficient evidence before us from which we can reasonably conclude that [the Appellant's] high blood pressure finds its cause in his motor vehicle accident. MPIC's case manager in charge of [the Appellant's] claim wrote to the Appellant's current physician, [text deleted], on March 31st of this year seeking further information but, so far as we can tell, has never received a reply. We are therefore obliged to dismiss this aspect of [the Appellant's] claim, but if additional evidence is forthcoming in the future that will establish any chain of causation between the accident and the high blood pressure, it will be open to [the Appellant] to submit that additional information to his adjuster since, under those circumstances, MPIC's file is not permanently closed.

Similarly, we do not have sufficient evidence to suggest any permanent impairment, beyond those for which [the Appellant] has already been compensated. Section 126 of the MPIC Act tells us that a permanent impairment "includes a permanent anatomicophysiological deficit and a permanent disfigurement". X-rays show no skeletal abnormalities, and we can find no evidence of soft tissue injuries resulting in any permanent, structural or other alteration other than the scarring and the dental work already referred to. Quoting from [independent physiatrist's] report of April 13th, 1998:

> According to the American Medical Association's Guide to the Evaluation of Permanent Impairment, 4th Edition (1993), an impairment is *'the loss, loss of use, or derangement of any body part, system or function'*. The presence of pain in the absence of an identifiable somatic cause is not an impairment in itself. Also, *'an individual who complains of pain but who has no objectively validated limitations in daily activities has no impairment.'*

[Independent physiatrist's] findings were in keeping with a temporary, partial disability rather than a permanent impairment. What may initially be perceived as a temporary condition may, of course, be later diagnosed as permanent but, in [the Appellant's] case, such a diagnosis does not appear ever to have been made. From the evidence before us to date, we are obliged to dismiss this aspect of [the Appellant's] appeal as well. Just as with the case of his high blood pressure medication, so with respect to his claim for additional, permanent impairment, the door is always open for [the Appellant] to present his adjuster with new medical reports to support his contention that his neck and back are permanently impaired as a result of his motor vehicle accident.

There is no question that [the Appellant] sustained a temporary impairment leading to his inability to fulfill the duties of his former employment. That is the principal reason why the statute provides for Income Replacement Indemnity. [The Appellant] received IRI under the provisions of Subsection 83 (1)(a) and, after the first 180 days following his accident, he continued to receive IRI under the provisions of Section 84 of the Act. Then, when his adjuster

wrote to him on April 20th, 1999, with the decision that, in MPIC's view, [the Appellant] was now capable of holding the employment that had been determined for him under Section 84, the adjuster, who was Senior Injury Specialist, [text deleted], made an error in [the Appellant's] favour that was perpetuated by the Internal Review Officer. It must be remembered that [the Appellant] had been classified as a "temporary earner". Section 110(2), which is the section under which MPIC apparently decided to continue to pay [the Appellant's] IRI for a further 180 days, is only applicable to a full-time earner or a part-time earner, as those persons are defined in Section 70(1) of the MPIC Act. While it is arguable that the distinction between a "temporary earner" on the one hand, and the "full-time" and "part-time" earners on the other, is likely to create an inequity in many cases, this Commission has no mandate to change the law, which we have to interpret as we find it.

Since we find that MPIC was justified in its view that, as of April 20th, 1999, [the Appellant] was capable of holding employment as a pin-to-pin truck driver, it follows that he has in fact received six months of IRI to which, in law, he was not entitled.

[The Appellant] quit his work at [text deleted] in January of 2000 because he believed that his pain, and resultant disability, rendered him incapable of carrying on. While his belief may be held in good faith, the fact is that it is not supported by his care-givers. For example, [independent physiatrist's] letter of January 5th, 1999, expresses the firm view that [the Appellant] was capable of the duties of a long-distance truck driver. [Appellant's doctor #2], in his letter of February 17th, 2000, echoes [independent physiatrist's] opinion and can find no reason to discourage [the Appellant] from continuing to pursue that occupation. [The Appellant's] chiropractor, [text deleted], in his treatment plan report dated December 31st, 1999, though listing a great number of subjective symptoms described by [the Appellant] when

examined on December 17th, does not suggest that [the Appellant] was not capable of returning to work. [Independent physiatrist], in a more recent report to [Appellant's doctor #2] of August 10th, 2000, while recommending certain medications and therapy for [the Appellant], sees no reason to restrict [the Appellant's] working hours or take him out of the workplace.

By denying [the Appellant's] claim for continued Income Replacement Indemnity, as we must, we make no decision with respect to any rights that he may have to continued therapy in such forms as his medical caregivers may prescribe.

Disposition:

For the foregoing reasons, [the Appellant's] appeal is dismissed.

Dated at Winnipeg this 28th day of November, 2000.

J. F. REEH TAYLOR, Q.C.

YVONNE TAVARES

WILSON MacLENNAN