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Indexed as:
A.D. Re)

IN THE MATTER OF an Appeal by A.D.
AICAC File No.: AC-97-20

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[1997] M.A.I.C.A.C.D. No. 16

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Manitoba Automobile Injury Compensation Commission
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C.
and L. Goodspeed
Heard: April 24, 1997.
Decision: April 29, 1997.
(8 pp.)

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Issues:

Entitlement of a non-earner to Income Replacement
Indemnity (I.R.I.)

- (i) during the first 180 days after the motor accident,
and
- (ii) after the first 180 days.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, ss. 85(1)(a), 86(1) and 106.

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Appearances:

Manitoba Public Insurance Corporation ('M.P.I.C.')

represented by Joan McKelvey.

A.D., the appellant, appeared in person.

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MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE
PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING
PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

REASONS FOR DECISION

THE FACTS:

[para1] A.D., aged [text deleted], was in an accident on
April 17, 1996, while a passenger on a Winnipeg Transit bus.
A.D. testified that at the time of the accident he was
propelled forward into the bar on the seat ahead and cut his

nose, then thrown to the floor on his knee, ripping his suit pants; wrenched his hip, shoulder and back and hurt his left hand. In addition, A.D. had undergone surgery by Dr. Jeremy Lipschitz on March 4th, 1996, for the repair of an abdominal hernia; the wound from that operation was still bandaged and open for drainage at the time of the accident when, says A.D., he felt a tearing at that same part of his abdomen.

[para2] After the accident, A.D. was first seen by Dr. Mezaros who had treated him previously for back surgery. Unfortunately, the only written report from Dr. Mezaros, dated May 7th, 1996, is almost totally illegible, but it does not appear to make any reference to the hernial incision at all. We have only the rather vague evidence of the appellant, and an adjuster's note, to indicate that, since Dr. Mezaros's practice was limited to orthopaedic surgery and because of his imminent retirement, Dr. Mezaros referred A.D. to Dr. Patel, a family practitioner. Dr. Patel undertook the general treatment of the appellant and referred him to specialists for neurological (Dr. Dominique) and orthopaedic (Dr. Mayba) assessments. No evidence was presented to us by either party as to the results of those assessments, and Dr. Patel appears to have ignored subsequent requests from MPIC for further information, from which silence we have to assume that nothing of any consequence relating to injuries caused by the motor vehicle accident was discovered by either Dr. Dominique or Dr. Mayba. The appellant testified that he told Dr. Mezaros and Dr. Patel about all his injuries, including the tearing feeling in his hernia incision, although neither of them makes mention of it in any written report. The appellant believed that the reason there was no specific mention of the injury to the hernia by Drs. Patel and Mezaros was that each of them knew that the appellant was under medical care by the surgical specialist, Dr. Lipschitz, and did not feel the need to refer specifically to this injury. A.D. voiced the further opinion that Dr. Mezaros, in particular, being an orthopaedic specialist, would not have directed his mind to any other field of medicine. Having no evidence on the point, we prefer not to speculate.

[para3] A.D. did not return to Dr. Lipschitz until May 14th, 1996, when, because of continuing pain in his abdomen, he did return and was told by Dr. Lipschitz that he required further repair to the hernia. Dr. Lipschitz's report, quoted at greater length later in these reasons, makes clear his opinion that the motor vehicle accident probably did cause the hernial recurrence which, in turn, made the second surgical intervention necessary.

[para4] A.D. is claiming that because of the transit bus accident his hernia incision was reopened and this injury necessitated further surgical repair in December 1996, preventing him from gainful employment. A.D. claims, also, to have been suffering from neck, back and hip pain, as well as

stomach problems and numbness to his left hand - ailments allegedly caused by the same accident and from which, he says, he still suffers and which have prevented him from employment up to the present time. While Dr. Patel's report, undated but presumably prepared in late July or early August of 1996, makes mention of the possibility of cervical or radicular neuropathy, or both, there is no reliable evidence to indicate any such effect stemming from the motor vehicle accident and, as noted earlier in these reasons, there is a significant absence of supporting evidence from the two specialists to whom Dr. Patel referred A.D., to tie in any neurological or musculoskeletal problems of the appellant to the accident. We are left, therefore, with the re-injured hernia as the basis for our decision.

THE LAW:

[para5] The relevant section of the MPIC Act related to the entitlement of a non-earner (as defined in Section 70 of the Act) to receive income replacement indemnity ('I.R.I.') during the first 180 days following the accident reads as follows:

"Entitlement to I.R.I. for first 180 days

85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

(a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;"

[para6] A non-earner, in order to qualify for I.R.I. during that first 180 days, must establish, upon a reasonably strong balance of probabilities, that, but for the accident, he/she would have been employed in an occupation for which he/she was qualified. We have made it clear in an earlier decision that a firm promise of employment, while obviously the best kind of evidence, is not an essential prerequisite to a claim under Section 85(1) (a); a strong likelihood that employment would have resulted in the absence of motor-vehicle-based injury will normally suffice. So, we must ask ourselves whether that likelihood existed in A.D.'s case.

[para7] At the time of the accident A.D. was not employed but was receiving Workers' Compensation by reason of a previous work-related injury. In February, prior to the accident, he had applied for a job at [text deleted] in Winnipeg. Subsequent to that preliminary job interview, he left the Province for a visit to Montreal. When he returned to Winnipeg later that month, he learned that he was slated for surgery to repair an abdominal hernia on either March 1st or

March 4, 1996, - the evidence seems to indicate both dates, but the point is of no consequence.

[para8] A review of the evidence regarding A.D.'s potential employment by [text deleted] indicates that, at best, the owner of that company, [text deleted], was prepared "to try him out". However, A.D. was out of the province when [text deleted] tried to contact him and did not make himself available for work, nor could he have taken employment because of his need to undergo surgery. Employment by [text deleted] was, therefore, not precluded by A.D.'s injury on the bus. On a broader plain, we are not convinced that a victim who has not been gainfully employed since 1989 except, briefly, as a security guard, who has apparently been unable to find work at all since 1991, and who is still drawing Worker's Compensation by reason of his earlier disability, can credibly be heard to say that his accident prevented him from an employment that he would otherwise have held.

[para9] For the foregoing reasons, A.D.'s claim for I.R.I. during the first 180 days following his accident was disallowed by MPIC - a decision with which we concur.

[para10] The second issue before us is that of A.D.'s entitlement, as a non-earner, to I.R.I., commencing on the 181st day after his accident. The relevant section reads as follows:

"Entitlement to I.R.I. after first 180 days.

86(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section 106, and the non-earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident."

[para11] In the context of Section 86(1), the question that we have to address is whether the motor vehicle accident was the cause, or the material contributing cause, of the recurrence of the hernia, giving rise to the continuing pain and disabling the appellant from taking up employment. The onus is on the appellant to establish upon a balance of probabilities the chain of causation between his accident on the bus and the disabilities from which he claims to be suffering.

[para12] Mr. Strutt, the Acting Review Officer at the time of the Internal Review in July 29th, 1996, referred to the issue of I.R.I. commencing on the 181st day after the accident. In his decision he indicated that I.R.I.

compensation was dependent upon medical material that would indicate that because of the accident the appellant was unable to hold employment.

[para13] The status of A.D.'s health was outlined in the report of Dr. Lipschitz, dated October 21, 1996 which reads, in part as follows:

"The above patient has cirrhosis of the liver and underwent a incisional hernia repair on March 4, 1996. The postoperative course was prolonged by his underlying cirrhosis of the liver. He did have drainage of ascitic fluid through his wound, and he was discharged from the hospital on March 9, 1996. Unfortunately, he was readmitted on March 11, 1996, with serious drainage from his wound and this resolved on Spironolactone and Lasix. The wound drainage was decreasing, and there was no evidence at that time of a recurrence of his hernia. He was discharged from hospital on March 26, 1996.

He subsequently suffered a motor vehicle accident when he was a passenger on a bus, and felt a tearing at the site of the incisional hernia repair at the time of the accident. He bled through the wound. He was seen in the clinic on May 14, 1996 at which time there was obvious evidence of a hernial recurrence. Of note is that when he was seen in clinic on April 2, 1996 his wound was healing satisfactorily, and there was no evidence of serious drainage, and there was no clinical evidence of recurrence of his hernia.

The symptoms described at the time of the accident would be compatible with the hernia recurring at that time. It is difficult to predict whether the hernia would have eventually recurred in the absence of the accident, as he does have underlying cirrhosis of the liver and had serious drainage through the wound. As both had resolved, there was no evidence of recurrence at that time, and I was hopeful that it may not recur." (Italics added.)

[para14] The medical evidence supporting the proposition that A.D.'s injury was caused by the accident is found in Dr. Lipschitz's report, particularly in the italicized portion quoted above.

[para15] Causation is not always based upon exact scientific principles; one must apply experience and conventional wisdom along with proof based on a balance of probabilities. There is some dispute about the absence of references to the abdominal injury on the initial medical report and the delay in reporting the injury to the attending surgeon. It is our experience that all complaints reported by appellants are not always documented and a matter may well not

be reported when it is already under treatment by another specialist. As well, experience dictates that a delay in complaint does not necessarily negate the relationship between the trauma and injury.

[para16] The Commission is of the view that A.D. had a significant trauma at the time of the accident and there is no evidence of any significant event after the accident contributing to the appellant's condition despite his numerous underlying health problems. In that the medical findings of Dr. Lipschitz are uncontradicted, we are persuaded that the evidence establishes, on a balance of probabilities, that the motor vehicle accident was the cause of the re-injury of his abdominal hernia, disabling A.D. from accepting any employment that would have been determined for him as of October 15th, 1996, (the 181st day after his accident) pursuant to the provisions of Sections 86(1) and 106 of the Act.

DISPOSITION:

[para17] The decision of the Internal Review Officer of October 10th, 1996 is therefore amended and A.D. is found to be entitled to I.R.I. pursuant to Sections 86(1) and 106 of the Act, from October 15th, 1996, until January 31st, 1997, by which latter date he would, in the normal course, be expected to have reached pre-accident status. I.R.I. benefits beyond January 31st, 1997, will only be payable if Dr. Lipschitz is prepared to render his considered opinion that his patient did not attain pre-accident status (in the limited context of the repaired hernia) until some specified, but later, date, in which case I.R.I. benefits will cease on the latter date.

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