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Indexed as:  
J.M. (Re)

IN THE MATTER OF an appeal by J.M.  
AICAC File No.: AC-97-33

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[1997] M.A.I.C.A.C.D. No. 23

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Manitoba Automobile Injury Compensation Appeal Commission  
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C.,  
and L. Goodspeed  
Heard: June 12, 1997.  
Decision: June 27, 1997.  
(5 pp.)

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Issue:

Termination of Income Replacement Indemnity benefits  
( 'IRI' ) - whether justified.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.  
36, s. 160, subs. (c), (e), and (g).

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Appearances:

Manitoba Public Insurance Corporation ( 'MPIC' ) represented by  
Joan McKelvey.

J.M., 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] J.M., who was then a fork-lift operator in the  
employ of [text deleted], was involved in a motor vehicle  
accident on May 9th, 1996. His family practitioner at the St.  
James Medical Clinic, Dr. J. Swain, diagnosed right and left  
paraspinal and trapezius muscle strain. He received income  
replacement indemnity payments and physiotherapy benefits from  
May 17th until August 8th of 1996, upon which latter date MPIC

terminated those benefits by reason of J.M.'s non-compliance with the physiotherapy and graduated return to work programs that had been prescribed for him and to which he had agreed. It is from that decision that J.M. now appeals.

[para2] In addressing the issue of whether or not the termination of J.M.'s benefits was justified, it is necessary to examine, firstly, the bases upon which MPIC arrived at the conclusion that he had failed to comply with the programs and, secondly, the reasons underlying J.M.'s non-compliance.

[para3] MPIC based its decision, in part, upon J.M.'s past pattern of sporadic compliance, which had resulted in a warning letter being sent from MPIC to J.M. on July 11th of 1996 reminding him that the continuance of his benefits would be jeopardized if he failed to comply with the prescribed program. There is no doubt that that warning letter was justified; J.M.'s attitude towards his rehabilitation, at least up to the beginning of July, seems to have been somewhat cavalier.

[para4] J.M. did, however, commence his gradual return to work program on July 2nd, as scheduled, and continued doing so for the next two days, working for two hours per day. At the end of his shift on July 4th, he says, he experienced increased back pain which he tried to report to his foreman and to the nursing station at his place of employment. He testified that, being unable to find anyone to whom to report, he went directly to the St. James Medical Clinic where, in the absence of Dr. Swain, he was seen by Dr. P. Muncner. Dr. Muncner authorized him to remain off work until he could be assessed by Dr. Swain on her return from vacation on July 7th. On the latter date, Dr. Swain reported that J.M. "...was complaining of new onset of right lower quadrant pain radiating to the umbilicus with an umbilical hernia which had not been present in the past". Dr. Swain therefore authorized another two weeks absence from work until July 22nd. Since [text deleted] plant was closed for summer vacation from July 18th to August 9th of 1996, the result was that the earliest date upon which J.M. could have returned to work was Monday, August 12th, 1996.

[para5] J.M. returned to Dr. Muncner on July 25th, regarding his continuing abdominal pain. Dr. Muncner made arrangements for a CT Scan, which was scheduled for October 17th of 1996, and appears to have authorized J.M. to discontinue all physiotherapy from July 25th until October 17th. J.M. testified that he understood Dr. Muncner to be telling him that he did not have to return to work until after the CT Scan - advice which J.M. seems to have been quite happy to accept.

[para6] J.M. had asked Dr. Muncner for a formal report

that he could give to his adjuster, but says that he was told that the report had to be requisitioned by MPIC. In fact, Dr. Muncner did not forward a medical report to MPIC, nor did the insurer request one, to clarify the medical status of J.M.

[para7] As a result, and in the bona fide belief that J.M. had discontinued his physiotherapy and had also quit his graduated return to work program, both without good reason, MPIC notified J.M. by letter of August 6th, 1996 that his benefits would be terminated, effective on August 8th.

[para8] J.M. attempted to challenge that termination but, despite his efforts to obtain confirmation that Dr. Muncner had authorized him to quit physiotherapy temporarily, it was not until the 31st of January 1997, after filing a formal complaint with the College of Physicians and Surgeons, that J.M. was able to obtain any kind of confirmation of the advice given him by Dr. Muncner on July 25th of the previous year.

[para9] By the same token, [text deleted] was not willing to re-admit J.M. to a graduated work program without the continued involvement of, and contribution from, MPIC; since the insurer had already terminated J.M.'s benefits by August 12th - the earliest date upon which J.M. could have returned to work in any event - he could neither return to work nor, upon the advice of Dr. Muncner, renew his physiotherapy treatments.

[para10] It is not necessary for us to make a finding as to whether J.M.'s interpretation of the advice given him by Dr. Muncner was rational or whether it was mere wishful thinking. The fact is that, even if Dr. Muncner had made it clear that J.M. could return to work on August 12th, by that time it would have been too late; MPIC had already discontinued the benefits.

[para11] Dr. Swain, in a report prepared for this Commission under date of June 10th, 1997, tells us that the natural history for complete resolution of an injury of the kind caused to J.M. by his motor vehicle accident would have been from six to twelve weeks. We find that, if J.M. had recommenced his program after the extended rest time from July 4th to the plant opening date of August 12th, the strong probability is that he would have reached pre-accident status and would have been able to return to work on a full-time basis within the period indicated by Dr. Swain.

[para12] Since a large part of J.M.'s problem stems from the failure of Dr. Muncner to respond in a timely fashion or, indeed, at all, to requests for confirmation of his advice to the Appellant, equity dictates that J.M. should be allowed his IRI benefits for the seven weeks that would have been involved in his graduated return to work program, had he received that

supporting medical evidence and been allowed to return in a timely fashion to his graduated return to work program.

DISPOSITION:

[para13] We therefore rescind the decision of the Internal Review Officer of March 7th, 1997 and find J.M. to be entitled to the continuance of his income replacement indemnity from August 9th up to and including September 27th, 1996.

[para14] Dr. Swain's fee of \$125.00 for her report of June 10th, 1997 will be for the account of the insurer.

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