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Indexed as:
D.M.J.R. (Re)

IN THE MATTER OF an appeal by D.M.J.R.
AICAC File No.: AC-96-6

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[1997] M.A.I.C.A.C.D. No. 44

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), L.J. Goodspeed and
F.L. Cox

Heard: November 17, 1997.
Decision: November 25, 1997.
(16 pp.)

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Issue(s):

- (i) Whether Appellant rendered unable to work by his MVA of December 6th, 1994;
- (ii) Whether Appellant suffered a relapse that rendered him again unable to work from September, 1995 through June, 1996;
- (iii) Whether the Appellant's pre-existing low back condition was exacerbated by his MVA so as to cause such a relapse;
- (iv) Whether the mere subjective complaints of an Appellant are enough to justify payment of Income Replacement Indemnity ('IRI').

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, ss. 81(1)(a), 110(1)(a) and 117(1)
Regulation 37/94, s. 8.

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Appearances:

Manitoba Public Insurance Corporation ('MPIC')
represented by Tom Strutt.
The appellant, D.M.J.R., represented by Andrew Swan.

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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

[para1] The Appellant, D.M.J.R., a [text deleted]-year-old construction worker at the time, was involved in a motor vehicle accident in Winnipeg on December 6th, 1994, when the stationary 1985 Dodge Caravan that he was driving was struck from the rear by a G.M.C. truck.

Work History

[para2] D.M.J.R., at all material times, has been self-employed, working as an independent subcontractor primarily for [text deleted]. His work-site during the months immediately prior to his accident was at [text deleted] in [text deleted] Manitoba, where [text deleted] was involved in the construction of a new, 70,000 square foot school. D.M.J.R. testified that he 'did all the heavy steel exterior studs and the interior drywall', lifting sheets of gyproc weighing 60-80 lbs. He usually got someone to help him with the initial lifting, if necessary. He performed a great deal of heavy work, he said, much of it overhead. D.M.J.R. added that, on that particular job-site, he did most of the interior framing as well, using structural steel studs. A typical working day for the Appellant would find him working about eleven hours. He would do this for six days each week, taking three breaks each day; after four weeks' work he would fly down to his home in Winnipeg for a week's relaxation.

[para3] The Appellant's relationship with [text deleted] as one of its subcontractors had lasted for about twelve years. Prior to that he had worked in a similar capacity for [text deleted] for several years, and prior to that for some five years as an employee of [text deleted]. All of those jobs involved a large amount of heavy lifting and the installation of drywall, steel studding and suspended ceilings.

[para4] The Appellant informed his adjuster at MPIC that he normally works for about six to eight months of the year.

Pre-Accident Back History

[para5] D.M.J.R. testified that he had suffered from a sore back, off and on, for over three years leading up to his motor vehicle accident on December 6th of 1994 ('the MVA'). In particular, he said, he had pulled some muscles in his lower back in 1992; his claim for Workers' Compensation had been denied on the ground that the back injury of which he complained was, as he put it, 'an ongoing problem and hadn't happened instantly'.

[para6] In about May of 1993 D.M.J.R.'s vehicle had also been rear-ended by a small car. The Appellant said, of this 1993 accident, 'I thought nothing of it at the time but, later, when I picked up some cases of soft drinks, I thought I must have strained a muscle again because I started hurting'. Dr. Caners, the Appellant's physician, referred him to a physiotherapist who, he says, attributed his problem to the rear-end collision rather than to the lifting of the cases of soft drinks.

[para7] Then, in late November or early December of 1994, D.M.J.R. again strained his lower paravertebral muscles in the course of his work. He took the next available plane down to Winnipeg, on the following day, and consulted Dr. Caners. Dr. Caners reports that he prescribed analgesics and an anti-inflammatory medication. D.M.J.R. decided to stay in Winnipeg to give his back muscles a chance to heal, since work at [text deleted] would in any event be suspended from December 20th, 1994 until January 3rd, 1995.

Post-Accident Back History

[para8] It was while he was taking that time off work that D.M.J.R. sustained further injury in the MVA; Dr. Caners, who saw the Appellant the next day, describes that injury as 'acute c-spine musculature strain', which was accompanied by neck ache, a poor range of motion of his cervical spine with some spasm in the posterior muscle group of his neck. Dr. Caners advised the Appellant to continue taking the Naprosyn (anti-inflammatory) and analgesics that he was already taking for his earlier, work-related strain.

[para9] On December 15th, 1994, the Appellant was also examined and treated by Dr. Rosalie Pelissier, D.C., who prescribed a course of four treatments over a period of two weeks and felt that return to work by the beginning of January might reasonably be anticipated. However, her next report says that D.M.J.R.'s disability had ended on January 16th, 1994 (she obviously means 1995) and that he had returned to work on the latter date.

[para10] The Appellant consulted Dr. Caners again on February 13th, 1995, at which point he had mild residual neck muscle pain. Dr. Caners expressed the opinion that he did not feel the motor vehicle accident would have aggravated the prior lower back strain, that D.M.J.R.'s neck injury had probably warranted a few weeks recovery, and that the Appellant was well enough to be doing his former job.

[para11] D.M.J.R. filed a claim with MPIC for Income Replacement Indemnity ('IRI'), which was paid to him for the period from December 15th (seven days after his MVA) to January 15th, for a total of \$[text deleted]. That amount was

subsequently increased by a decision of this Commission bearing date June 28th, 1996.

Return to Work

[para12] Upon D.M.J.R.'s return to work at [text deleted], commencing on January 17th, 1995, there was no drywall work waiting to be done - not, at least, by the Appellant, since [text deleted] had been obliged to hire another crew to do that. The Appellant therefore did some of the interior studding, worked on the interior partitioning, and installed some of the metal grid work that would hold light weight acoustic ceiling tiles. This latter work, both before and after his MVA, usually entailed standing on scaffolding and working with his arms above his head.

[para13] In late April or early May of 1995, since his aspects of the work at [text deleted] were effectively complete (although he did return there for the first couple of weeks in August to help install some steel figures and aluminum panels) D.M.J.R. returned to Winnipeg, did a one-day construction job near Kenora, Ontario, took a month's vacation in Winnipeg and then commenced working on an addition to the Winnipeg head office of [text deleted]. This last job entailed putting up the studs, the insulation and assisting with the drywalling. D.M.J.R. testified that, when installing drywall at a commercial or industrial location, he would normally have a crew of three or four helpers; for residential work there would only be himself and his brother. His work at [text deleted] head office did not involve much, if any, heavy lifting of the gyproc sheets; he was primarily using the screw gun with which those sheets are affixed to the studs.

[para14] There followed a couple of weeks' work back at [text deleted] in August of 1995, after which, although offered a job 'fixing up a camp' at [text deleted] by [text deleted], D.M.J.R. decided to take a month off. He testified that he was in Winnipeg for the entire summer with the exception of the two weeks in August and the one day near Kenora.

Cessation of Work, September 1995.

[para15] The Appellant's evidence was that, although he had returned to work on January 17th of 1995, some six weeks after the MVA, by the time he had returned to Winnipeg in early May to start working on [text deleted] head office building he was having problems; he could not lift the gyproc sheets but was using the screw-gun which left him with a sore neck and shoulders. By August of 1995, during his final visit to [text deleted] to finish the outside work, his headaches, which had reappeared, were getting worse and his neck was sore

again. He was offered work in Saskatchewan and in Manitoba but, he says, he felt obliged to turn them down because he was unsure of being able to exert his normal best efforts. His only gainful work between September of 1995 and June 30th of 1996 has been to purchase used or damaged cars, fix them up and resell them.

Post-August, 1995 to June 30th, 1996

[para16] D.M.J.R. acknowledges that his decision to quit working in September of 1995 was not made upon the advice of any physician, chiropractor or physiotherapist but, rather, because he felt that he would be unable to continue doing the kinds of work that he had been doing in the months leading up to his accident. It was not until some time in February of 1996 that D.M.J.R. first appears to have advised MPIC that he had been unable to work since the previous September and was therefore claiming a reinstatement of IRI from that time onwards.

[para17] Counsel for the Appellant submits that it is quite within the bounds of propriety and justice for this Commission to accept the subjective evidence of an Appellant, even if it is unsupported by any medical or para-medical data; we should not disregard a medical or other report merely because its content is limited to a recital of what the patient said to the care-giver, particularly if the victim's complaints to his care-givers are consistent and otherwise credible. We agree. At the same time, if there is other pertinent evidence, we must take that into account as well. In that context, we find the following facts to be significant, in no special order of importance:

- (a) the first time that any mention of headaches and, in particular, of increasingly severe headaches, appears in any medical or similar report concerning D.M.J.R. is in a report from his physiotherapist, to whom he had been referred by Dr. Caners, dated May 9th, 1996;
- (b) he attended at his chiropractor's office only seven times between January 12th, 1995, and January 9th, 1996 - once in each of February and March of 1995, twice in June and three times in November;
- (c) during the period from January 17th to late August of 1995, apart from his vacation time, D.M.J.R. was working and, by his own testimony, doing the very kinds of work calculated to place great stress upon his neck muscles;
- (d) despite being in Winnipeg for almost the entire time after April of 1995, apart from the chiropractic

visits noted in paragraph (b) above D.M.J.R. did not consult his physician, his chiropractor or his physiotherapist, nor any other health professional, at any time between February 13th, 1995 (when Dr. Caners pronounced him 'well enough at this point to be doing his former job') and January 15th, 1996, when he saw Dr. Caners again, this time for an infection of the upper respiratory tract, but making no mention of any neck or lower back pain;

- (e) as noted earlier in these Reasons, Dr. Pelissier had also examined D.M.J.R. on December 15th, 1994 and in mid-January 1995; she had given a return to work prognosis, initially, of early January, and later confirmed that the Appellant had, in fact, returned to his former job on January 16th, 1995, when his disability had ended;
- (f) even on May 9th, 1996, the physiotherapist whom the Appellant had consulted merely recommended that he should receive further education in how to use his body and instruction in a progressive, active exercise program. She noted that 'no treatment sessions have been scheduled at this time'.

[para18] We were provided with other medical reports, from Dr. Caners, from Dr. Ochanska, the Appellant's physician as successor to Dr. Caners, and from Dr. Lesiuk, a specialist in physical medicine and rehabilitation, to whom D.M.J.R. had been referred by Dr. Caners. But those reports are all dated after June 30th, 1996, upon which latter date D.M.J.R. had been involved in a second, rear-ended, motor vehicle accident and they do not, therefore, shed much light upon whether the earlier MVA was the cause of the Appellant's 1995/6 symptoms.

It may, however, be pertinent to note that Dr. Lesiuk, even on November 13th, 1996, after the second accident, reports that, on the basis of current clinical examination, 'there is little to find objectively'; he expresses the view that 'the ongoing symptomatology ... appeared to be primarily mechanical, likely related to the cervical and lumbosacral spondylosis that is apparently present on X-rays done previously'. We are satisfied the the spondylosis to which Dr. Lesiuk refers is of an ongoing, long-term, degenerative nature and not the result of the MVA. Dr. Lesiuk was an independent specialist selected, not by MPIC, but by the Appellant's own physician.

[para19] The file does contain three reports from Dr. Jacqueline Rempel, D.C., of the Lorette Chiropractic Centre, which should be mentioned. The first, dated July 31st, 1996 (again, after the Appellant's second accident), is very brief and, although it speaks of 'functional deficits' and certain limitations on the Appellant's part, gives no clinical data to

support them. The second, undated and unsigned, purports to reflect the impressions or clinical notes of Dr. Pellissier, formerly of the Lorette Chiropractic Clinic, but seems to bear no relationship to the actual reports furnished to MPIC by Dr. Pellissier - indeed, Dr. Rempel's report and those of Dr. Pellissier might well be of two different patients, so disparate are they. There is a subsequent report from Dr. Rempel, dated January 24th, 1997 which describes a process whereby '[D.M.J.R.'s] cervical (and lumbar less so) postural spinal musculotendinous tissues have since the December 6th, 1994 MVA undergone degeneration and atrophy of the skeletal muscle by collagen (fibrous) tissue' and gives a diagnosis of 'chronic cervical and lumbar spinal musculotendinous strain with associated subluxations of C1 to T3 and L1 to L5'. It has to be said that Dr. Rempel's diagnosis is at odds with all other medical, chiropractic and physiotherapy reports that were available to us and, while a mere majority of opinions is not, of itself, determinative of any issue, a careful examination of the content and objectivity of all the reports before us, including those of Dr. Rempel, does not persuade us that her views should be adopted.

Conclusion

[para20] We find that by mid-January of 1995 D.M.J.R. had effectively recovered from the effects of the MVA and that, upon a balance of probabilities, any symptoms that may have caused him to quit work in September of 1995 were attributable to a pre-existing, degenerative condition aggravated by strenuous, eleven-hour-day activity, much of it involving particular stress upon his neck muscles. Complaints of headaches do not surface until 1996, and are difficult to relate to the MVA. The schedule of D.M.J.R.'s chiropractic visits throughout 1995, and the total absence of any other health-related consultations, are not indicative of a man who was suffering from increasingly severe pain and headaches that prevented his continuing to work.

[para21] Counsel for MPIC points out that D.M.J.R.'s income tax returns, which the Appellant had filed with Revenue Canada as an independent contractor, show the following figures:

Taxation Year	Gross Business Income	Net Business Income
1991	\$text deleted	\$text deleted
1992	text deleted	text deleted
1993	text deleted	text deleted
1994	text deleted	text deleted
1995	text deleted	text deleted

[para22] Those figures, it is suggested by counsel, should dispel any thoughts of continuing disability, since the Appellant netted much more in 1995 than he had in 1994. The probative value of those figures depends, to a material extent, upon much of the supporting data that was not available, and while we do not discard them we ascribe only small weight to them.

[para23] While it is clear that the MVA rendered the Appellant substantially unable to perform the essential duties of the employment in which he was engaged at the time of the accident, so as to entitle him to IRI during the period of that disability, it is equally clear that he had regained that ability by January 16th, 1995. We are not persuaded, on a balance of probabilities, that the Appellant suffered a relapse, within the meaning and intent of Section 117(1) of the Act, in September of 1995 or thereafter, and his claim for reinstatement of IRI from September 1995 to June 30th, 1996 must therefore, fail.

[para24] Copies of the relevant sections of the Act and of the Regulations are annexed hereto.

[para25] We make no findings with respect to the Appellant's 1996 motor vehicle accident, which was not part of this appeal.

[Ed. Note: Please see paper copy for four page appendix containing the relevant sections of the Manitoba Public Insurance Commission Act, S.M. 1993, c. 36.]

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