

@B00000173,MAIC
@1
@Z19990722
@2

Indexed as:
G.M.K. (Re)

IN THE MATTER OF an appeal by G.M.K.
AICAC File No.: AC-99-11

@3

[1999] M.A.I.C.A.C.D. No. 27

@4

Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C., and
L. Goodspeed
Heard: June 18, 1999.
Decision: July 22, 1999.
(14 paras.)

@6

Issue(s):

Partial incapacity - claim for reinstatement, and
increase in quantum, of Income Replacement Indemnity
('IRI').

@5

Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993,
c. 36, ss. 81(1), 81(2), 107, 109 and 117(1).

@8

Appearances:

The appellant, G.M.K. appeared on his own behalf.
Manitoba Public Insurance Corporation ('MPIC') represented by
Dean Scaletta.

@7

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, G.M.K., carries on a mixed farming
operation on some four thousand acres that he, his mother and
his brother own between them. G.M.K. and his brother have
herds of up to ninety cattle each and, in addition, G.M.K.
farms grain, including some specialty crops.

[para2] On May 6th, 1995, G.M.K. was involved in a motor
vehicle accident in which he sustained a trans-scapoid

fracture and a lunate dislocation, accompanied by median nerve numbness. He underwent surgery on May 10th, 1995, followed by extensive physiotherapy. His surgeon at that time was Dr. Longstaffe.

[para3] G.M.K. started to receive Income Replacement Indemnity of about \$[text deleted] per month, from the 7th day following his accident.

[para4] Dr. Longstaffe departed and Dr. Rennie assumed conduct of G.M.K.'s treatment. Dr. Rennie performed a second surgery on G.M.K.'s hand on December 17, 1996, since x-rays had revealed a non-union of the right scaphoid which resulted in the need for bone grafting surgery.

[para5] Initial reports following that second surgery seemed to indicate that it had been successful since a solid union of the scaphoid bone appeared to have taken place and, although full recovery had not been realized by April 8th, 1997, Dr. Rennie anticipated no long term residual effects. It should be noted, here, that G.M.K.'s physiotherapist had emphasized that the high demand strength and motion loads placed upon G.M.K.'s wrist by his occupation should not be lost sight of. By May 6th, 1997, G.M.K. seemed able to demonstrate a wrist-strength in his right wrist equal to about 75% of the strength of his left wrist. He was still experiencing right wrist pain at the extremes of movement which, Dr. Rennie felt, was due to the presence of scar tissue. Dr. Rennie indicated a belief that G.M.K. would be capable of resuming his farming duties on or about August 13th, 1997. That opinion resulted in a decision from G.M.K.'s adjuster at MPIC, terminating his Income Replacement Indemnity as of August 13th of that year. By that point, G.M.K.'s IRI benefits had already been reduced by 50%, based upon earlier reports of G.M.K.'s apparent partial recovery.

[para6] On September 5th, 1997, G.M.K. attended at the office of Dr. Anozie at the Interlake Medical Centre in Arborg, Manitoba. Dr. Anozie arranged for new x-rays which clearly showed "an old ununited scaphoid fracture. The scapho-lunate joint is widened and unchanged. Degenerative changes are present at the radiocarpal joint, and have progressed from before."

[para7] In response to Dr. Amozie's letter of September 16th, Dr. Rennie responded on October 6th to indicate that he would be pleased to re-examine G.M.K. if requested. It was not until April 9th, 1998 that such a re-examination actually occurred and, as a result of it, Dr. Rennie reported on April 14th, 1998 that the new x-ray showed "bone resorption at the sight of the previous bone graft in his right scaphoid and the recurrence of his non-union." Dr. Rennie added that G.M.K. had been offered revision surgery but "is uncertain whether he

wishes to proceed. At the present time, he continues to work." A reluctance on G.M.K.'s part would not have been surprising, given the apparent failures of the first two surgical interventions.

[para8] In subsequent discussion and correspondence between Dr. Rennie and Ms. Kathy Baldwin, a rehabilitation consultant whose services were retained by MPIC for G.M.K.'s benefit, it appears that Dr. Rennie confirmed G.M.K.'s ongoing symptoms of pain, the diagnosis of non-union of his right scaphoid and the recommendation of further surgery with an anticipated success rate of 80 - 85%. A report from Dr. Rennie of April 29th, 1998 contains this comment:

I have indicated to him that he could continue with his duties as a self-employed farmer using a splint when he needed it for pain control and that he is unlikely to cause his wrist further harm unless he suffers a major injury. The activities which he is unable to do would be those that are specifically limited by pain. I do not believe there are any other conditions not related to the motor vehicle accident that are impacting on the wrist.

[para9] A further report from Dr. Rennie dated June 9th, 1998 contains the following comments:

It should be noted on the visit of June 8th, 1998 that he was having increased problems working. He has a decreased range of motion of his right wrist and grip strength on the right is 50% of the left.

In my opinion, he is fit for light duties only. He is considering whether to undergo further surgery to his wrist and therefore he will remain fit for light duties only until further notice or until he decides to undergo a further surgical procedure on his wrist.

[para10] MPIC also retained the service of Mr. Richard Broadhurst, an occupational therapist, who attended at the appellant's home on June 19th to conduct a functional capacity evaluation. Somewhat surprisingly, Mr. Broadhurst reported his opinion that G.M.K. was able to complete 74% of his duties. We say 'surprisingly', in light of Dr. Rennie's report of June 9th and a further opinion expressed by Dr. G.A. Robertson, a specialist in reconstructive surgery at The Manitoba Clinic, of January 7th, 1999 in which he says:

Continuing ongoing problems with his right wrist necessitate restricting to light duties only - no more than 10 to 15 pounds with right upper limb.

[para11] We are constrained to say, with great respect to Mr. Broadhurst, that any real knowledge of the manifold duties

of someone engaged in mixed farming seems to render Mr. Broadhurst's methodology unrealistic. As MPIC Internal Review Officer, Mr. Kumka, puts it, "... the nature of your mixed farming operation is that your ongoing disability has an effect on the overall operation which is not necessarily measurable by either the amount of monies you have expended for replacement labour or the financial bottom line" - nor, we might add, by ascribing a given percentage to each physical activity, totalling those percentages and concluding that the result allows a man to farm.

[para12] Mr. Kumka went on, in his decision, to say that, in the normal course, MPIC would have reimbursed G.M.K. for the cost of replacement help required. However, both G.M.K. himself and Ms. Kathy Baldwin, the rehabilitation consultant of MPIC, had confirmed that the nature of the mixed farming operation and the fact that G.M.K. had exhausted many of the avenues available to obtain help made that approach impractical. It was open to Mr. Kumka to direct the insurer's claims team to determine an employment for G.M.K. as at the second anniversary of his accident, pursuant to Section 107 of the MPIC Act and taking into account the provisions of Section 109 of the Act. However, although Mr. Kumka's decision does not specifically say so, he effectively decided (wisely, in our view) to treat G.M.K.'s situation as one falling within the purview of Section 117(1)(a) - that is to say, as a relapse within two years after the date when the appellant had last received IRI. - and therefore rescinded the adjuster's decision and directed that G.M.K.'s IRI benefits be reinstated from September 5th, 1997 on a 50% basis. He adopted the 50% basis since that had been the effect of the previous decision of MPIC's adjuster on May 7th, 1997, from which G.M.K. had not appealed. The September 5th, 1997 date had been adopted since that was when G.M.K. had attended upon Dr. Anozie. We are of the view that the decision of Mr. Kumka with respect to both the quantum and the commencement date of the reinstatement of IRI benefits makes those two matters proper subjects for disposition by this commission.

[para13] G.M.K. testified that, when fully functional, he normally works a fourteen-hour day, doing most of his own repairs. There is a limited amount of machinery he can now operate but others that he cannot. For example, he is unable to weld any more, since his right hand is too weak and his left hand is not skilled enough. For that, and for other chores such as the spraying of speciality crops, he has to hire outside personnel with particular skills or do without the crop altogether. It is primarily in the context of the cattle farming that G.M.K. experiences the greater measure of his difficulties and that, he testified was really the only aspect of his farm that made good money; it would normally occupy three quarters of his year.

[para14] G.M.K. testified that Dr. Robertson had referred him to another specialist, Dr. Robert Turner, who had advised him that in about five years he may need to undergo fusion of the bones surrounding the fracture, and then five years later a further fusion of the entire wrist. While we agree with Mr. Kumka's decision to reinstate G.M.K.'s IRI, we find that a 25% reduction would have been more appropriate. We find that the reinstatement, subject to that reduction, should continue to the present time and hereafter, pending such further assessment and recommendations as may be forthcoming from Drs. Robertson and Dr. Turner, for which latter purpose the matter is referred back to G.M.K.'s adjuster at MPIC.

@1

@XQL @XUpdate: 20000627
qp/d/qltln
@H
MVRT
@1<QLDATE C=20000627 U=20000919>