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Indexed as:
W.V.C. (Re)

IN THE MATTER OF an appeal by W.V.C.
AICAC File No.: AC-98-22

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[1999] M.A.I.C.A.C.D. No. 58

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

Heard: December 16, 1998.
Decision: February 23, 1999.
(61 paras.)

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Issues(s) :

1. Whether personal care assistance benefits properly terminated;
2. Whether income replacement indemnity benefits properly terminated; and
3. Whether Appellant entitled to continuing rehabilitative treatment.

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Relevant Sections:

Sections 70, 83, 84, 107, 110(1)(a), 131 and 138 of the MPIC Act ('the Act'), Sections 6 & 8 of Manitoba Regulation #37/94, and Section 2 (plus Schedule A) of Regulation # 40/94.

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Appearances:

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

The appellant, W.V.C., was represented by Robert Campbell.

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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] On June 30th, 1994 W.V.C. was driving north on

Keewatin Avenue crossing the intersection of Burrows Street on a green light when a car running the red light struck his right rear bumper. W.V.C. testified that the collision caused his car to take a 180-degree spin and end up with its front wheels on the sidewalk. W.V.C. was able to get himself out of the car and lie down on the boulevard for a few moments, after which he was able to drive his car to a family member's home and report the accident to the police. The driver of the other vehicle had disappeared. W.V.C.'s vehicle, purchased some six months previously for about \$900.00, was apparently written off.

[para2] W.V.C. testified that he had hurt his right knee when jamming on his brakes, that his eyeglasses were bent, that his seat belt had tightened up and given his body "a good yank". Shortly after the accident, he said, he had felt a burning in his right leg and soreness in his groin, scrotum and buttocks. He reported to his family physician, Dr. H. Johnson on July 4th, 1994 where he was diagnosed with the following injuries. "Neck & back strain & contusion & strain, R (right) knee". (It is perhaps noteworthy that these quoted items continued to be the only complaints and diagnosis recorded by Dr. Johnson until December 15th, 1994, when W.V.C. is reported for the first time to have complained of headaches.) He was treated with heat to the neck, back, and right knee, prescribed Robaxacet and Tylenol 3, and referred for physiotherapy treatment. Dr. Johnson determined that he was unable to return to work for the time being.

Post-MVA Medical History

[para3] W.V.C. started physiotherapy treatments on July 11th, 1994. Mr. Evans, W.V.C. and his Adjuster, Mr. Chris Marlatt, reported slow but steady progress until in early May of 1995, as W.V.C. puts it he "blew his knee" while exercising. Three hours later, he testified, his knee had swollen so much that he went to see Dr. Johnson, who advised him to avoid physiotherapy for the following two weeks.

[para4] Meanwhile, on August 11th, 1994, W.V.C. was examined by Dr. F. K. Shariff, an orthopaedic specialist at the Manitoba Clinic, on a reference from Dr. Johnson. Unfortunately, no report from Dr. Shariff, either directly or indirectly through Dr. Johnson, seems to be available, but Dr. Shariff did arrange for W.V.C. to be referred to Dr. Eggertson, a neurologist, in order to arrange for a myelogram, the results of which proved to be normal. The results of a CT Scan of W.V.C.'s lumbar spine also proved normal.

[para5] W.V.C. started to develop significant bladder dysfunction and erectile dysfunction "some time after" his motor vehicle accident. The evidence as to just when these problems developed is vague. It was primarily because Dr.

Shariff had voiced a suspicion that W.V.C.'s knee problem might be related to a 'gouty synovitis' that W.V.C. was referred to Dr. Thomas Morgan, a specialist in urology by Drs. Johnson and Eggertson, who felt that W.V.C.'s body might be retaining an excess of uric acid, having a tendency to collect in the joints and thus, perhaps, causing W.V.C.'s knee problem. It is only in Dr. Morgan's report of May 24th, 1995, about eleven months after his motor vehicle accident, that we find any professional mention of complaints by W.V.C. of bladder dysfunction, occasional incontinence and, as well, erectile dysfunction. Dr. Morgan's report, and a perusal of his clinical notes, both reflect serious doubt on Dr. Morgan's part that any injuries sustained by W.V.C. in his motor vehicle accident could have caused the bladder and erectile problems of which W.V.C. was complaining. As Dr. Morgan put it in his report "certainly all investigations to date have proved negative. Nonetheless, further tests are scheduled." Those further tests, in the form of urodynamic studies carried out by Dr. R. Bard on September 1st, resulted in a further report from Dr. Morgan of September 18th, 1995. That report suggested that there might be an "upper motor neuron injury", that is to say, damage to some of the nerve fibres in the spinal cord. Dr. Eggertson had apparently told W.V.C. that he might have a "spinal cord contusion".

[para6] In the interim, W.V.C. had also been referred by Dr. Johnson to Dr. Auty, another neurologist, whom he apparently saw on December 7th, 1994, but unfortunately we were not provided with any report from Dr. Auty.

[para7] Dr. Johnson then referred W.V.C. to Dr. Douglas Birt, another orthopaedic specialist, who examined W.V.C. on the 6th of October 1995. Dr. Birt reported "musculoligamentous strain of lumbosacral spine; sprained right knee - previous ligamentous surgery; strain of right hand. No specific orthopaedic treatment indicated. Had appointment to see Dr. Arneja at the Rehab Hospital re: other treatments. No invasive treatment indicated". Dr. Birt added the opinion that W.V.C. was not capable of resuming his main occupation, that his disability was a result of the automobile accident and that the end of that disability was, at the time, indefinite.

[para8] Dr. Eggertson had referred W.V.C. to Dr. Arneja, a specialist in rehabilitative medicine, who examined W.V.C. on the 23rd of November 1995. Dr. Arneja reports that he had seen W.V.C. "in the clinic for management of neck pain; pain radiation to medial three fingers of right hand and low back pain". Dr. Arneja prescribed general neck and back stretching and range of motion exercises and recommended investigations to rule out inflammatory arthritis. The only active treatment recommended by Dr. Arneja consisted of home exercises. In a later report to Dr. Eggertson, dated February 26th, Dr. Arneja

outlined all of the numerous tests that had been administered to W.V.C., all of which produced essentially normal results. Dr. Arneja concluded with his impression that:

[W.V.C.] has mechanical low back pain syndrome, does not have any active trigger points at present. I am wondering that his upper motor neuron signs are due to cortical/brain stem or cord lesion and this should be further investigated. I discussed with [W.V.C.] that he should see you for further neurological assessment and investigations like evoked potential and CT Scan of the brain. In the meantime, I encouraged him to do range of motion exercises of the neck and back, followed by gentle stretching and strengthening exercises to improve the mobility and the strength of the paraspinal muscles.

[para9] On December 20th, 1995 W.V.C. was examined by another urologist, Dr. Robert J. Bard, to whom he had been referred by Dr. Morgan. W.V.C. had complained of urinary frequency, with episodes of sudden incontinence. He had also complained of some numbness and paraesthesia in the penis and scrotum. Dr. Bard reported that with one exception, the results of all tests and examinations that he had performed were normal. The only possible exception was that, although W.V.C.'s urinary flow was normal, the filling of the bladder was associated with unstable bladder contractions. Dr. Bard therefore placed W.V.C. on the drug Ditropan which had a dramatic effect; W.V.C.'s voiding frequency had improved and, by February 9th, 1996, he was no longer incontinent. Dr. Bard offered the opinion that W.V.C. appeared to have detrusor hyperreflexia on the basis of the motor vehicle accident. Dr. Bard added that "this would be consistent with a cord injury, and would suggest that the injury to the cord was above the sacral cord level. He anticipated that this would be a permanent deficit and that W.V.C. might be dependent on anticholinergic agents for the rest of his life. However, said Dr. Bard, before committing him to that he suggested that the anticholinergic agents be discontinued in six months to one year, to see whether W.V.C. was still dependent upon them.

[para10] Despite the foregoing report from Dr. Bard, a report from Dr. Johnson dated March 8th, 1996 reports that W.V.C. complained that he had "continued to be disabled from the time of the accident, with there being very little difference in what he could or could not do right up to the present. His mobility has remained about the same. His bladder symptoms, that is, his urinary incontinence and his bladder discomfort and intermittent hematuria have become worse."

[para11] On April 10th, 1996 W.V.C.'s Case Management Team at MPIC had decided to refer him to Dr. Ian Altman, a clinical psychologist, partly because the symptoms of which W.V.C. was

complaining seemed to be out of all proportion to any clinical, physical signs, and partly because W.V.C. obviously needed help in coping with his pain and controlling his feelings of frustration and anger. Meanwhile, Drs. Arneja and Eggertson were apparently continuing to explore the possibility that W.V.C. might have sustained some spinal cord injury.

[para12] Dr. Altman's report to MPIC of May 21st, 1996, after detailing the symptoms complained of by W.V.C., both physical and emotional, noted that the "medical reason for a number of the physical complaints described have yet to be determined". Dr. Altman felt that W.V.C. could benefit from counselling that focused on pain and stress management. In a subsequent discussion on June 13th, 1996 with W.V.C.'s Adjuster, Dr. Altman expressed the view that this was a critical period for W.V.C. who could be at risk if his volatility continued. "At present he is extremely explosive and is greatly agitated by the lack of progress in his case." W.V.C. appeared to be continually focused upon his alleged ill-treatment by MPIC at the onset of his claim, said Dr. Altman.

[para13] In the latter part of June 1996, MPIC retained the services of Northern Rehabilitation & Consulting Services Inc. ('NRCS') to assist with the coordination of W.V.C.'s rehabilitation. Dr. Johnson agreed with NRCS that a functional capacity evaluation and an occupational therapy home assessment would be beneficial in determining W.V.C.'s physical capabilities and safety in the home environment - tests made somewhat more urgent by the imminent arrival of a new baby in the C. home. Dr. Johnson had also indicated to NRCS that W.V.C.'s original diagnosis post-injury was difficult to explain. While W.V.C. had suffered from a back strain, that diagnosis did not coincide with his symptoms of urinary incontinence, paraesthesia in his right arm and leg, numbness in his mouth and difficulty initiating and maintaining an erection. Essentially all of the tests administered to W.V.C. in the interim had proven to be inconclusive for a diagnosis of his claimed symptoms, save only for Dr. Bard's belief that W.V.C. had sustained some spinal cord contusion which, in turn, was the probable source of his bladder problems.

[para14] Upon completion of the occupational therapy home assessment, NRCS recommended the purchase of some eleven items of equipment for W.V.C.'s home use, along with a referral of W.V.C. to the Pain Clinic at Winnipeg Health Sciences Centre. On the 18th of July 1996, W.V.C. underwent a CT Scan of his spine which showed no abnormal signal nor cord expansion. However, due to an incomplete result (W.V.C.'s shoulders were too broad to enable him to fit into the MIR machine) W.V.C. was subsequently referred to the North Memorial Medical Centre

(a division of the Mayo Clinic) near Minneapolis, Minnesota, where the attending physician was Dr. Ray Hackett. Following a complete MRI of the brain and total spine, North Memorial Medical Centre reported negative examinations of the brain, thoracic spine and lumbar spine. In the cervical spine there was moderate stenosis of the right C6-7 foramen that could contribute to a right C7 radiculopathy. Confirmation of that finding and further evaluation by CT Scan of the lower cervical spine was recommended, if intervention was contemplated. The radiologist reported that:

The cervical spine is normal in alignment, both marrow signal and vertebral body morphology. The cord is normal in morphology. There is no gross cord signal abnormality, although subtle cord lesions could easily be missed on this study. Visualized posterior fossa structures and the region of the foramen magnum are normal. The paraspinal soft tissues are unremarkable.

[para15] Dr. Hackett concluded his assessment with the following statement:

The patient does have some urgency findings, but has no uninhibited contractions and he voids in a coordinated fashion with an intact bulbocavernosus reflex. My interpretation is that this is consistent with an intact sacral spinal cord, and intact communicating between the pontine spinal cord level and the sacral spinal cord level

[para16] Meanwhile, on July 31st, 1996 W.V.C. had been referred to Dr. C. Hoy a psychiatrist and specialist in Rehabilitation Medicine in the Faculty of Medicine at the University of Manitoba and at the Rehabilitation Hospital in Winnipeg. That reference was made by NRCS at the request of Dr. Johnson. Dr. Hoy was asked to assess W.V.C.'s physical complaints, which Dr. Eggertson had diagnosed as "severe myofascial pain syndrome" and, more particularly, to assess W.V.C.'s physical status secondary to his injuries sustained in his motor vehicle accident.

[para17] On August 8th, 1996 NRCS delivered to W.V.C., at his home, all of the equipment that they had recommended to make his domestic tasks easier. W.V.C. was seen by Dr. Hoy on October 10th, 1996. Dr. Hoy, in a very detailed, eight-page report of that date, summarizes his impressions as those of chronic pain syndrome, deconditioning, sleep disturbance, anxiety, urinary incontinence (not yet diagnosed) and an old right knee injury. More specifically, Dr. Hoy found no evidence of any upper motor neuron injury as would be expected with either a spinal cord or brain injury. He went on to say, in part:

I am a little suspicious that the bladder investigations are misleading. I would suggest, for clarification, that he be referred to another centre for urodynamic studies as well as urological consultation. I would also advise getting a proper MRI of the brain and spinal cord.....This should help clarify whether or not there is a brain or cord injury with regards to his "upper motor neuron" symptoms. It is my suspicion that the bladder and difficulties may have another explanation other than upper motor neuron problems. Indeed, Dr. Doug Eggertson found the same physical findings as I have done today, and it is apparent that he does not believe there is an upper motor neuron aspect of the present problems.

Dr. Hoy reports that he had advised W.V.C. that "much of his stated pain experience is not concordant with the emotional or physical manifestations that I have witnessed today. Specifically, he does not look or behave like a person who is in as much pain and discomfort as he says that he is.....Also, based on today's assessment, I am unclear as to why he is wearing a wrist orthosis on the right hand.....He is also wearing one of the high quality knee orthoses,The right knee that I have examined today does not look like it would be benefiting much from the present brace.....In my opinion, the use of the right wrist orthosis as well as the right knee orthosis should be discontinued immediately.

[para18] Dr. Hoy concluded his October 10th, 1996 report by saying that the successful rehabilitation of W.V.C. would require an intensive effort on the part of the coordinating physician.

[para19] Dr. Hoy's report was made prior to W.V.C.'s visit to the Minnesota Clinic, where Dr. Hoy's recommendations were, indeed, carried out, and where all results reflected what can only be described as a surprising state of normalcy.

[para20] On October 24th, 1996, in a discussion with a rehabilitation consultant from NRCS, Dr. Johnson said that he had permitted W.V.C. to discontinue the use of the two braces - right knee and right wrist - W.V.C. continued to use them because, he said, he had fallen without the knee brace and felt his grip strength was improved with the wrist brace. Dr. Johnson also voiced his opinion that W.V.C.'s right knee problems were likely related to his motor vehicle accident. On October 31st, 1996 NRCS wrote to Dr. Birt for clarification and with a series of additional questions, all related to W.V.C.'s right knee. Dr. Birt's response may be summarized this way:

(a) on examination, there was no free fluid nor effusion

in that knee, although W.V.C. had a positive anterior drawer sign on the right, indicative of laxity or weakness to his anterior cruciate ligament. He was also mildly tender over the medial and lateral joint lines. Manipulative McMurray test was negative; no redness or swelling about the right knee. Left knee completely normal;

- (b) W.V.C. had an unstable right knee with ongoing irritation. The nature of the surgical procedure some ten years prior was unclear, but W.V.C. must have had problems with his knee before and Dr. Birt wondered if there was no some cartilage articular damage prior to the motor vehicle injury;
- (c) when examining W.V.C. on October 6th, 1995, Dr. Birt had not found any pathology that might suggest further treatment. If W.V.C. continued symptomatic, he might need new X-rays of his right knee and possible arthroscopic evaluation;
- (d) with ongoing knee pain, there was always the possibility of gout. Without substantive evidence of increased uric acids or crystals removed from the knee, he would not accept a diagnosis of gout. The knee pain was probably a combination of trauma-related and perhaps some pre-existing condition that had now become more symptomatic;
- (e) from an X-ray report of July 7th, 1994, there appeared to be no significant bone or joint abnormalities, no evidence of fracture and no evidence of degenerative wear in the right knee;
- (f) Dr. Birt did not feel that he could say, with any confidence, whether all of the present knee symptomatology was related to the 1994 accident and, if any was thus related, how much of it.

[para21] In a subsequent letter of November 19th to NRCS, Dr. Hoy reiterated his earlier opinion that the kind of brace that W.V.C. had been wearing on his right knee was unnecessary but that, if any bracing were needed at all, it would only be a polypropylene brace with velcro closures above and below the knee. He felt that W.V.C.'s degree of instability was quite manageable with strengthening exercises for the quadriceps and hamstring muscles. The polypropylene sleeve would also add to enhancing W.V.C.'s ability to concentrate on contracting those muscles when walking.

[para22] A team meeting was held at the Rehabilitation Hospital on January 24th, 1997, involving Dr. Hoy, Dr. Altman, Dr. Johnson, Mr. Chris Marlatt, Ms Marnie Lafreniere

(rehabilitation consultant with NRCS) and a secretary. After what appears to have been a lengthy and careful discussion of W.V.C.'s continuing problems, the following steps were decided upon:

1. Dr. Hoy would refer W.V.C. to PAR Health Services for physical reconditioning;
2. Drs. Altman and Hoy would refer W.V.C. to Dr. El-Khatib, a clinical psychologist particularly skilled in helping people to deal with pain;
3. Dr. Hoy would contact Dr. Birt with respect to a new orthopaedic assessment of W.V.C.;
4. Dr. Hoy would arrange for an assessment of W.V.C. by Dr. Gill, a neuropsychologist; and
5. Ms Lafreniere would contact Dr. Bard, the urologist, to discuss his assessment and plans for treatment of W.V.C.'s bladder symptoms.

[para23] It also seems to have been determined that Dr. Hoy would continue to act as the medical coordinator, maintaining communication with Dr. Johnson - particularly with respect to changes in medication.

[para24] On February 17th, 1997 Dr. Bard reported that he had no plans to adjust W.V.C.'s therapy. He expressed the opinion that, despite his bladder problem, W.V.C. was certainly rehabilitable with respect to his other problems and that, other things being equal, his bladder dysfunction would not keep him from seeking employment.

[para25] On February 19th Dr. Hoy, in one of a series of regular reports to Dr. Johnson, described a low demand test that he had given W.V.C., the resultant discomfort claimed by W.V.C., and Dr. Hoy's own reaction that "It is hard to imagine that he would have been put into such physical discomfort with a minimal effort test such as he did". Dr. Hoy set out a plan to initiate W.V.C. into a walking program to be done every morning in a shopping mall, as a "warmup" toward the work hardening program or functional restoration program in which he would be involved with PAR Services.

[para26] On February 24th, 1997 Dr. Altman, in a report to NRCS, noting W.V.C.'s belief that he had been seriously injured and was permanently disabled, pointed out that all test results would appear to rule out any spinal cord injury "and now place your client [(W.V.C.)] in the position of being able to actively pursue physical rehabilitation". Since W.V.C. was now to become involved with Dr. Hoy and the PAR treatment program, Dr. Altman felt that it made more sense to

transfer W.V.C.'s care to a psychologist connected with that program.

[para27] In a report of March 5th, 1997, Dr. Doug Birt recommended a new X-ray of W.V.C.'s right knee and tibia, and the need to rule out traumatic chondromalacia lateral femoral condyle. He proposed, also, a right knee arthroscopy and arthroscopic surgery with camera. In a letter to NRCS on March 14th, 1997, Dr. Birt added that W.V.C.'s arthroscopic surgery was slated for April 4th, that he had not examined W.V.C.'s right wrist and no particular complaints had been made in the latter context by W.V.C. Dr. Birt felt it reasonable to persist with a functional restoration program, provided W.V.C. was not getting more symptomatic in his right knee. He could not state that W.V.C. was suffering from gout in that knee until a better assessment of crystalline synovitis vs. mechanical derangement had been forthcoming following the arthroscopy.

[para28] A report from Dr. Daryl Gill, neuropsychologist, bearing date March 7th, 1997, concludes that W.V.C. was generally functioning within normal limits, that although there was a possibility that he had sustained a mild brain injury any resultant cognitive symptoms had already resolved, but that he had suffered a loss of self-esteem, intermittent periods of depression and only partially successful pain management. Dr. Gill recommended that vocational planning be a related component of W.V.C.'s rehabilitation program and that W.V.C. increase his own sense of control or investment in his occupational and physical therapy, such as consulting with his therapist about recreational and other practical issues. He felt that W.V.C. appeared to be motivated.

[para29] W.V.C.'s caregivers continued to hold regular team meetings, at most of which W.V.C. himself was also present. Meanwhile, on April 9th, 1997, W.V.C. was referred at Dr. Hoy's suggestion to Dr. H. Dubo, another member of the Rehabilitation Medicine Department at the Rehabilitation Hospital, with a view to either confirming or ruling out the likelihood of spinal cord injury or contusion. Unfortunately, no written report from Dr. Dubo was made available to us but, it seems clear from other material on the file, Dr. Dubo had agreed with Dr. Hoy's diagnosis of myofascial pain syndrome and that W.V.C.'s bladder dysfunction was not a result of any contusion or other injury to W.V.C.'s spinal cord. Both Dr. Hoy and Dr. Dubo seemed to agree that myofascial pain of the pelvic muscles might cause bladder irritability, along with pain in the coccyx area and limited sitting tolerance, all of which were matters complained of by W.V.C.

[para30] The Appellant underwent arthroscopy on his right knee on April 4th, 1997. Dr. Birt, who had performed the surgery, reported that there was no intra-articular pathology.

Upon being examined by Dr. Hoy on April 16th, while W.V.C.'s right knee was still moderately swollen from his surgery, no infection was noted, the knee was not warm nor tender, and Dr. Hoy advised W.V.C. to continue walking within the tolerances of discomfort and not to slow down. W.V.C. was advised by Dr. Hoy to return to physiotherapy and to pursue his rehabilitation program within the following few days. By April 23rd, the knee appeared to be well healed and the swelling almost gone. Reporting on a further examination of W.V.C. on May 7th, 1997, Dr. Hoy indicated that the bladder issues seemed to remain W.V.C.'s main focus; the right knee had become less problematic, although W.V.C. continued to walk with a slight limp but without using the knee brace. W.V.C. appeared to be largely pain-free, although with mild tenderness in the lumbar spine and coccyx areas. W.V.C. had described one incident when his "whole leg" gave way from the inguinal region down to his right foot; Dr. Hoy felt that, if that had happened, it was more consistent with musculoskeletal deconditioning and/or pain behaviour rather than having any neurologic cause.

[para31] Despite W.V.C.'s continued complaints, records of subsequent team meetings make it clear that his caregivers were pleased with the apparent progress of his physical conditioning; the only person who did not believe that he had made substantial improvement was W.V.C. himself - on June 24th, 1997 he advised his Adjuster that, despite all of his therapies, he was not feeling any better, his right shin become 'real painful' from walking and was tender all the time within pain radiating into his toes, his abdomen was very painful and he had stabbing pains in his right groin area, radiating up to his rib cage; driving his car had also become painful, aggravating his right leg. His Adjuster agreed to set him up with a cab account, to avoid any difficulty getting to therapy. His caregivers found it necessary to discuss issues of his non-compliance with parts of his program, and the possibility that factors other than his rehabilitation might be motivating him, particularly since MPIC was continuing to pay him personal care assistance benefits. By June 30th, W.V.C. said he had developed severe chest pains while in occupational therapy, with increased pain in the testicles, penis and right shoulder.

[para32] Because W.V.C. was now starting to complain of blurred vision, Dr. Johnson then referred him to Dr. Michael Harley, an ophthalmologist, who saw him on July 8th, 1997. Dr. Harley's summary reads, simply: "Normal eye examination today. His visual symptoms are cerebral in origin." The latter sentence seems capable of two interpretations: W.V.C. elects to believe that it points to physical brain damage resulting from his accident, but it must be said that there is no clinical evidence of that.

[para33] The following weeks seem to reflect increased tension and discord between W.V.C., on the one hand, and his caregivers, on the other. The greatest barrier to his improvement, in Dr. Hoy's view, was W.V.C.'s lack of attendance due to apparently conflicting appointments and a recent illness.

[para34] W.V.C. had written to his Adjuster, Mr. Marlatt, on July 2nd and Mr. Marlatt, after several unsuccessful attempts to set up a meeting with W.V.C., wrote to him on July 15th. Mr. Marlatt explained, clearly and capably, that the objective of MPIC and all of W.V.C.'s caregivers was to return him to a level of functional ability consistent with that of his pre-accident physical status. Acknowledging that that goal had not yet been reached, Mr. Marlatt emphasized the need for W.V.C.'s continuing cooperation and effort, so that once his functional capabilities had been restored, an effort could be made to identify realistic options for vocational placement.

[para35] It should be noted, at this juncture, that the term position occupied by W.V.C. at the time of his accident, had come to an end, and the position itself had apparently been terminated.

[para36] Also on July 15th, 1997, NRCS reported to Dr. Hoy that W.V.C. continued to complain of a "giving away" sensation in his right knee, that his left knee was also starting to "give out", with pain radiating from the pelvis down both legs to both knees, that he had experienced dizzy episodes and had almost, but not quite, fallen off the side of a stationary bicycle, that the use of increasing weights in occupational therapy had increased his pelvic/bladder problems, that Dr. Harley had told him his blurred vision was a result of a brain injury, that he was losing the grip strength of his right hand and that, after leaving occupational therapy the previous week, he had complained of chest pain and felt that he was "dying" although the results of an EKG were quite normal. As will be apparent from all of the foregoing, some of these reported symptoms were brand new, others were of a continuous nature. W.V.C. was also reporting complete dependence for all household and outdoor activities, and his caregivers were patently starting to conclude that, as a report from NRCS of July 15th, 1997 puts it, "[W.V.C.] has secondary financial gains to remain dependent on others for assistance with activities of daily living as C.e (his companion) is receiving personal care assistance. For [W.V.C.] to be independent, this would mean significant family income loss." He was apparently becoming increasingly non-compliant with his program, leaving PAR Health Services early allegedly to attend appointments with Dr. Johnson, when in fact he seldom made scheduled appointments and usually saw Dr. Johnson on a walk-in basis.

[para37] On July 17th, 1997 W.V.C. was referred by NRCS to Dr. Canvin, a specialist in rheumatology, who was asked for her clinical impression of W.V.C.'s physical findings and diagnoses for them. Dr. Canvin was also asked whether, in her opinion, those findings could be directly related to W.V.C.'s motor vehicle accident injuries from June 30th of 1994.

[para38] While awaiting Dr. Canvin's report, W.V.C.'s caregivers held a further team meeting on July 23rd, 1997. The notes of that meeting make it clear that the medical team, including Drs. El-Khatib and Hoy, felt that W.V.C. was exhibiting many behaviours consistent with the medically accepted definition of malingering. W.V.C.'s health care team (consisting, at that point, of Dr. Hoy (psychiatrist), Dr. El-Khatib (psychologist), Ms Lesley Milne (physiotherapist), Ms Elaine Huzel (occupational therapist), Ms Lafreniere (rehabilitation consultant) and Mr. Marlatt (MPIC's Case Manager) decided upon the following steps:

1. W.V.C. would continue to attend PAR for physical therapy, but on a much reduced basis both as to time and the effort required of him; his therapy would consist of pool exercises, a walking class and the moderate use of the exercise bicycle;
2. Ms Huzel and Dr. Hoy would work out a schedule to measure W.V.C.'s physical abilities objectively over the course of the following four to six weeks, by way of a functional capacity evaluation, reducing his involvement in occupational therapy thereafter;
3. Ms Lafreniere would complete a Transferable Skills Analysis to identify suitable employment for him in light of his level of education, physical abilities, aptitude, job availability and experience;
4. MPIC would proceed, in September of 1997, to make a two-year determination pursuant to Section 107 of the MPIC Act

[para39] On July 24th, 1997 Dr. Hoy, in reporting to Dr. Johnson with respect to his most recent assessment of the Appellant, indicated a largely normal examination and concluded:

Overall, I am at a loss to explain why he keeps having these reoccurring physical ailments that are difficult to substantiate. There is a mild amount of swelling in the right knee at this time, and it may well be that this represents plicae syndrome. The problem is minor and he can continue on with his functional restoration program with the goal towards returning to work.

[para40] At the end of July, 1997, PAR Health Services seriously considered discharging W.V.C. from their entire program due to what they termed his "inappropriate behaviour and poor effort. He bad-mouths the therapists and caregivers...." They allege that he was making up stories that he had slipped and fallen by the pool and continued to exhibit malingering behaviour. However, after further consultation with Dr. El-Khatib, they agreed to continue with the physiotherapy portion of W.V.C.'s program, including pool classes, walking, exercise bike and stretching and strengthening exercises. They decided to discontinue occupational therapy due to W.V.C.'s strong resistance to it.

[para41] Dr. Canvin's report, dated September 2nd, 1997, was received by NRCS on September 17th. Her detailed report concluded that:

1. as to his right knee pain, the onset of those symptoms did not seem associated with his motor vehicle accident and Dr. Canvin was unclear as to how the strain of his reported injury would actually be associated with those repeated episodes, especially in the face of a normal arthroscopy. She felt that his knee pain was likely attributable to gout;
2. as to his more generalized pain, although he had had an extremely severe accident and had been left with certain gait abnormalities and pain which precluded him from sitting down for any prolonged periods, there was a paucity of major findings. She wondered whether an attendance at the Pain Clinic might be helpful. Despite W.V.C.'s perceived generalized pain, she found no evidence of a fibromyalgia process and could see no reason why he should not continue participating in his reconditioning program. He seemed to need gait re-education but problems with his probable gout should not cause any difficulties with his physiotherapy as long as his knee were not actively inflamed during that therapy. She did not think that gouty episodes alone would preclude him from employment.

[para42] On September 4th, 1997 Dr. Hoy and Ms Elaine Huzel performed a functional capacity assessment of W.V.C. Dr. Hoy's resultant report, bearing that same date, describes in detail the results of numerous tests given to W.V.C., who was described on this occasion as being very cooperative and appearing to try his best. Dr. Hoy's conclusions may be summarized this way:

1. according to the Canadian Classification and

Dictionary of Occupations, W.V.C. was able to perform physical demands at the heavy demand level;

2. more conservatively, however, his physical demand level would be classified as "medium";
3. W.V.C. had reached his pre-injury physical level although he continued to have a multitude of somatic complaints, many of which did not appear to have a clear somatic cause;
4. if he were to return to work in his then present condition, the occupational demands would permit him to become reconditioned at the work site and enjoy a full return to work.

A few days later, Dr. El-Khatib indicated that, although W.V.C. was resistant to the idea of a return to work, there were no known psychological conditions that would prevent it.

Appellant's Pre-accident Occupation

[para43] At the time of his motor vehicle accident, W.V.C. was a temporary employee, working as an expeditor at [text deleted ('[text deleted]')]. He had worked for four months under a six-months term contract. Following his accident, he had tried to return to work for a day or two but, since he was obviously not well enough, his supervisor had sent him home. In his testimony, he said that his job required walking and climbing to locate bus parts in [text deleted] warehouse; although he was not required to move or lift heavy parts himself, the parts had to be moved around on the shelf and then moved by a forklift to wherever they were required. He testified that his duties consisted primarily of data entry and internal communication - that is to say, finding out from each department manager what parts were going to be needed and making sure that the parts got to their proper destinations. [text deleted] advised Ms Lafreniere that W.V.C.'s position involved "80-85% of the shift standing, climbing a ladder to retrieve parts weighing five to ten pounds, and 15-20% of the shift working at the computer terminal". It was the view of Dr. Hoy and Ms Huzel that W.V.C. could complete the demands of that job without difficulty and that any right knee problems that W.V.C. might encounter in climbing stairs could not be attributed to the injuries he sustained in his motor vehicle accident on June 30th, 1994 but would stem from gouty arthritis.

[para44] J.T., Labour Development Manager at [text deleted], confirmed that W.V.C.'s pre-accident job would have been terminated at the end of his six-months term, regardless of his motor vehicle accident, due to downsizing at [text deleted]. However, had his employment at [text deleted]

continued, the employer would have been willing and able to modify his computer work station so that, if he preferred to stand rather than sit at the computer, he would have been able to do so.

Termination of Benefits

[para45] On September 12th, 1997, Mr. Marlatt wrote to W.V.C. to advise him that MPIC was satisfied that he was then capable of performing his pre-accident employment and was also no longer in need of personal assistance domestically. Mr. Marlatt's letter went on to say that MPIC would extend his personal assistance funding to September 30th and his income replacement indemnity to October 19th of 1997; Dr. El-Khatib would remain available to W.V.C. for support counselling; NRCS would remain available to help him in resume preparation, interview skills, training and assistance in identifying prospective employment; NRCS or PAR Health Services would remain available to instruct him on how to engage in his activities of daily living more effectively. Mr. Marlatt also made it clear to W.V.C. in subsequent discussions and correspondence that he might well be entitled to some award for permanent impairment due to the possibility, at least, of a micro-lesion affecting the spinal cord of the kind suggested by Dr. Bard.

[para46] W.V.C. appealed from that decision to MPIC's Internal Review Officer, who confirmed it, and it is from the latter decision that W.V.C. appealed to this Commission by way of a Notice bearing date March 14th, 1998.

Permanent impairment award.

[para47] On June 9th, 1998, Mr. Marlatt wrote to W.V.C. to tell him that W.V.C.'s bladder dysfunction had been given an impairment rating of 5%, pursuant to paragraph 18(b)(ii) of Division 4 of the Schedule to Manitoba Regulation No. 41/94. Since the maximum impairment entitlement, at the date of W.V.C.'s accident, was \$100,000.00, he was paid \$5,000.00. Dr. Hoy, who also gave evidence at the hearing of W.V.C.'s appeal, testified that, in his opinion, it was highly unlikely that a motor vehicle accident could cause a micro-lesion of sufficient substance that it would be missed by a magnetic resonance imaging. Since both MRI tests given to W.V.C. had revealed no such lesion, contusion or other, similar damage, Dr. Hoy felt that he had to discount the possibility of W.V.C.'s bladder problem having been caused by a micro-lesion resulting from the motor vehicle accident.

Quality of care.

[para48] W.V.C. is highly critical of what he seems to regard as his mistreatment at the hands of MPIC. While it is

true that there was not total unanimity at all times amongst all of the medical and paramedical caregivers as to the etiology of his complaints and their proper treatment - hardly surprising, in light of the number of those caregivers - it seems appropriate to point out that, between the date of his motor vehicle accident on June 30th, 1994 and September 12th, 1997, W.V.C. had been examined and, in many cases, treated, by the following caregivers at the expense of MPIC:

1. Dr. H. Johnson, family practitioner
2. Dr. F. K. Shariff, orthopaedic surgeon
3. Dr. A. Auty, neurologist
4. Dr. D. Eggertson, neurologist
5. Mr. Doug Evans, physiotherapist, Westbrook Physiotherapy & Sports Injuries Clinic
6. Dr. T. R. Morgan, urologist
7. Dr. D. Birt, orthopaedic surgeon
8. Dr. R. J. Bard, urologist
9. Dr. A. Arneja, psychiatrist
10. Dr. I. Altman, psychologist
11. Ms Marnie Lafreniere, rehabilitation consultant, NRCS
12. Ms Michele Gibb, occupational therapist, NRCS
13. Dr. R. Hackett, urologist, Minneapolis
14. Dr. J. M.G. Canvin, rheumatologist
15. Dr. C. Hoy, psychiatrist
16. Dr. A. El-Khatib, neuropsychologist
17. Dr. D. Gill, Clinical Psychologist, occupational therapist
18. Ms Elaine Huzel, occupational therapist, PAR
19. Ms Leslie Milne, physiotherapist, PAR
20. Dr. H. Dubo, psychiatrist
21. Dr. B. McClarty, specialist MRI

22. Dr. C. J. Cruz, radiologist

23. Ms Gail Archer-Heese, occupational therapist, PAR

The Issues

[para49] The issues before us are simply stated:

- (i) was MPIC justified in terminating W.V.C.'s personal care assistance benefits as of September 30th, 1997?
- (ii) was MPIC justified in terminating W.V.C.'s income replacement indemnity, as of October 19th, 1997? and
- (iii) is W.V.C. entitled to continuing, rehabilitative treatments?

The Law

[para50] For the purposes of the present appeal, the Manitoba Public Insurance Corporation Act ('the Act') defines a 'victim' as a person who suffers bodily injury caused by an automobile or by the use of an automobile. Dealing, first, with W.V.C.'s claim for continued personal care assistance, Section 131 of the Act provides that:

Reimbursement of Personal Assistance Expenses

Subject to the regulations, the Corporation may reimburse a victim for expenses of not more than \$3,000.00 per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of every day life without assistance.

[para51] Section 2 of Manitoba Regulation 40/94 provides:

Reimbursement of Personal Home Assistance under Schedule A

2. Subject to the maximum amount set under Section 131 of the Act, where a victim incurs an expense for personal home assistance that is not covered under Health Services Insurance Act or any other Act, the Corporation shall reimburse the victim for the expense in accordance with Schedule A.

[para52] Schedule A forming part of Regulation 40/94 sets out a form of grid system allocating a certain number of points to each area of daily life that a victim is either

wholly or partly incapable of performing by reason of injuries sustained in a motor vehicle accident. The total number of points thus allocated must exceed 4 out of a possible 27 in order for the victim to become entitled to any compensation. A thorough assessment of W.V.C.'s functional abilities and needs conducted by Dr. Hoy, Ms Elaine Huzel (occupational therapist) and Ms Leslie Milne (physiotherapist) on September 9th, 1997 resulted in a grid score of 0. No reliable evidence was adduced before this Commission to indicate that the foregoing assessment was materially in error, and this facet of W.V.C.'s claim must, therefore, be dismissed.

Claim for Reinstatement of Income Replacement Indemnity

[para53] Section 110(1)(a) of the Act reads, in part, as follows:

Events that end entitlement to IRI

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;.....

[para54] Was W.V.C., at the date of termination of his IRI, able to hold his former employment had it been available to him? We are of the view, upon a careful reading of all of the reports referred to above and consideration of the oral testimony given to us by W.V.C. and Dr. Hoy at the hearing of W.V.C.'s appeal, that by October 30th, 1997 (if not sooner) W.V.C.'s physical condition had, in fact, been restored to the point at which he could have returned to his former employment, had it been available for him. Despite Dr. Bard's initial suspicion that W.V.C. might have sustained some upper motor neuron lesion of his spinal cord, all of the available neurological and radiological evidence persuades us, on a strong balance of probabilities, that W.V.C. did not sustain any spinal cord injury. In any event, we find that his bladder dysfunction, even if caused by his motor vehicle accident (an hypothesis that we find to be doubtful in the extreme), by no means renders him unemployable. That condition seems to have been brought well under control by medication and any place of potential employment for W.V.C. would need only to have readily available washroom facilities to enable him to cope with any resurgence of his bladder dysfunction.

[para55] As to W.V.C.'s problem with his knee, while it may well be that his early symptomatology was indeed related to his motor vehicle accident of June 30th, 1994, numerous and careful examinations of that knee have not disclosed any pathology requiring specific treatment. Neither X-rays taken

on March 5th, 1997 nor arthroscopic surgery performed on April 4th, 1997 disclosed any pathology requiring treatment of any kind. Professor Canvin, medical specialist in rheumatic diseases, although noting that W.V.C.'s history was consistent with gout, commented that "the onset of his symptoms in his right knee do not seem associated with his motor vehicle accident and I am unclear as to how the strain of his reported injury would actually be associated with these repeated episodes, especially in the face of a normal arthroscopy." There has been no documentation of crystals in W.V.C.'s right knee joint and the presence of a gouty synovitis therefore remains unproven. Even if it exists, we find that it was not caused by W.V.C.'s motor vehicle accident. Despite that, W.V.C. has been told by Dr. Hoy that, if he ever has an acute flare-up of swelling of his right knee, he should come to the Clinic at the Rehabilitation Hospital where either Dr. Hoy or Dr. Lau would aspirate his knee joint or any other joint that is swollen. Dr. Hoy expressed the view that the small amount of swelling in W.V.C.'s right knee may well be due to the synovial reaction to his arthroscopy and that the incision sites for the scopes were still a little aggravated and producing more synovial fluid than is normal. Dr. Hoy emphasized, however, that even in the presence of a diagnosis of gout, W.V.C.'s knee should be able to undertake the full range of normal human activities, including heavy activities that a workplace might demand of him.

[para56] The multiplicity of complaints voiced by W.V.C. from time to time amount, in almost every case, to symptom magnification and, as Dr. Hoy puts it, "appear to be out of proportion to the actual somatic aberrations". Despite his greatly improved functional capacity, W.V.C. seems determined to believe that his body is seriously impaired and is beyond rehabilitation. Even as late as September 10th, 1997, he reported to Dr. Hoy that he was encountering severe pains in his neck, shoulder, low back, coccyx, knee and arm pains throughout the entirety of both arms. He is reported to have described headaches that felt "as if his eyeballs were coming out of his head" - and this, three years and three months after an accident in which, it must be remembered, his attending physician describes his injuries merely as "neck and back strain and contusion and strain to right knee".

[para57] The point was raised on behalf of W.V.C. that he had lost his job by reason of his accident. There are two responses to that submission: firstly, we find that W.V.C.'s position was a temporary one, on a six-month term, of which he had served four months; there were only two months of that employment term remaining at the time of his accident, and that period had expired long before he was ready to return to work; secondly, it is only a full-time earner or a part-time earner who is entitled to any additional income replacement benefits as a result of having lost his or her employment

because of a motor vehicle accident, and W.V.C. would not, therefore, qualify for those additional benefits in any event.

Section 6 of Manitoba Regulation No. 37/94 defines temporary employment this way:

6. A person holds a regular employment on a temporary basis where the person

(a) has held the employment for less than one year before the day of the accident;

(b) during the course of the employment, has been employed for not less than 28 hours per week, not including overtime hours;.....

[para58] Section 8 of the same regulation defines the phrase "unable to hold employment" as follows:

8. A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Ongoing Benefits

[para59] While we have found that MPIC was fully justified in terminating W.V.C.'s personal care assistance benefits and income replacement indemnity when it did, it should be noted that the Corporation has offered vocational placement assistance to W.V.C. although, to the best of our knowledge, he has not yet taken advantage of that offer. We presume that offer still stands as part of the Corporation's obligations under Section 138 of the Act. Similarly, and despite our finding that his ongoing problems with his right knee were almost undoubtedly not caused by his motor vehicle accident, Dr. Hoy has invited W.V.C. to re-attend at the Clinic at the Rehabilitation Hospital if he encounters any further swelling, in order that the knee may be aspirated to at least establish or disprove the presence of any crystalline matter that might indicate gout. That examination would presumably be covered by Manitoba Health Services. Despite W.V.C.'s numerous complaints of his ill-treatment at the hands of MPIC, PAR Health Services and many of his other caregivers, we find it hard to imagine any steps that MPIC could possibly have taken towards his rehabilitation, to lessen any disabilities resulting from his motor vehicle accident and to facilitate his return to a normal life, in addition to those which it has taken or offered to take. He remains eligible for vocational placement assistance - at a team meeting of W.V.C.'s caregivers on July 23rd, 1997 the decision was made that Ms

Lafreniere would complete a Transferable Skills Analysis to identify suitable employment for W.V.C., but, so far as we can tell, that does not ever appear to have been done.

[para60] W.V.C. also remains eligible for psychological counselling so that he will become less pain focused and able to get on with his life.

[para61] Although it might well be argued that, given W.V.C.'s pattern of conduct in the past and this Commission's findings reflected above, he is entitled to no more assistance from MPIC, we are of the view that one more effort should be made to reintegrate him into the workforce. W.V.C. should, firstly, be referred for a new Functional Capacity Evaluation; secondly, since W.V.C. has undoubtedly become deconditioned since last attending at PAR Health Services, the results of that evaluation should be used as a guide for a time-limited functional restoration program combined with the psychological counselling referred to above. Needless to say, if W.V.C. again proves to be uncooperative or fails in any way to give that restoration program his own, best efforts, MPIC will be justified in terminating the program and any further benefits. During the time when W.V.C. is genuinely and actively participating in the foregoing program, he will be entitled to receive income replacement indemnity at the rate which prevailed on October 19th, 1997. That entitlement will continue until the completion of the foregoing time-limited functional restoration program or until the insurer has validly terminated that entitlement under Section 160 of the Act, whichever first occurs.

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