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Indexed as:
J.H. (Re)

IN THE MATTER OF an appeal by J.H.
AICAC File No.: AC-99-112

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[2000] M.A.I.C.A.C.D. No. 7

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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: January 25, 2000.
Decision: March 1, 2000.
(24 paras.)

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Issues(s):

Whether Appellant able to hold pre-accident employment as
of August 26th, 1999, when MPIC terminated his IRI
benefits.

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Relevant Sections:

Section 70(1), 83(1), 85(1) & (3), 86(1), 106, 107, 109 &
110(1) of the Manitoba Public Insurance Corporation
Act ('the Act').

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Appearances:

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

The appellant appeared on his own behalf, accompanied by I.G.

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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] On October 10th, 1996, the Appellant's vehicle was
rear-ended while stopped for a red light. The force of the
impact broke his seat and threw him into the back of the
automobile. He noted pain in his lower back and attended at
the Emergency Department of Grace General Hospital. The pain

continued in his low back as well as down his right leg; that interfered with his walking ability. X-rays taken of his lower spine on October 23rd, 1996, showed degenerative changes in the lumbar spine with moderately severe narrowing of the L4-5 disc and mild narrowing of the L5-6 disc. There were arthritic changes noted in all of the lumbar vertebral bodies. Dr. Mosher, J.H.'s family doctor, reported that these degenerative changes preceded the accident but that they did not prevent him from carrying out his normal work duties prior to the rear-end collision. J.H. was provided with a five-month physiotherapy course, including a program of exercises and pain control, which helped his condition improve.

[para2] J.H. was a crane operator by trade. He had operated his own crane business for about twenty years and sold it in 1991 or 1992. He did not work regularly thereafter but did occasional jobs for others up to the time of his accident. Shortly after the accident, MPIC inquired about his past work experience to determine what, if any, income replacement indemnity ('IRI') he was entitled to receive. J.H. provided the Corporation with a letter dated February 16th, 1996 addressed to himself and signed by J.M.C., a general contractor, reading as follows:

This is a personal employment contract for the period March 1/96 to April 30/96 for assistance in my consulting activities, duties to include estimating, construction costing and construction supervision.

It is expected that further employment will be offered for the period Sept 15/96 to Dec 20 on site as a crane operator and materials clerk.

I will pay on invoice at the rate of \$[text deleted]/per mo.

[para3] J.H. worked for the months of March and April, 1996, as set out in J.M.C.'s letter and did receive the stipulated payment of \$[text deleted]. He testified that he never returned to work for J.M.C., nor for anyone else, after April, 1996. In answer to the question on his Application for Compensation form, J.H. described his job title while working for J.M.C. as "Construction Supervisor".

[para4] MPIC asked for and received written permission from J.H. to obtain copies of his personal income tax returns for the five years preceding the accident. Revenue Canada sent them copies of his 1990, 1991, 1992 and 1993 tax returns but advised MPIC that they did not have J.H.'s 1994, 1995, 1996 and 1997 tax returns on file - the evidence seems to indicate that he did not file any. This is borne out by J.H.'s own acknowledgement that, in the years after the sale

of his business, he "...worked off and on as a crane operator for different companies - not steadily but occasionally - always on a cash basis 'under the table'".

[para5] Upon reviewing this information MPIC concluded that J.H. was a self-employed, full-time earner as defined in Section 81(2)(ii) of the Act at the time of his accident. They determined that his gross yearly income was \$[text deleted] by annualizing the two, \$[text deleted] monthly payments he had received from J.M.C. Section 8 and Schedule C of Regulation 39/94 required the Corporation to determine a job classification and salary for J.H. at the time of his accident in order to determine the amount of IRI he would be entitled to receive. MPIC placed him in the job classification of "Management Occupation, Construction Operations" with a presumed salary of \$[text deleted] because of more than ten years experience in this field.

[para6] The Act sets \$55,000.00, indexed upon the basis of the Consumer Price Index for Manitoba, as the maximum amount that can be used to calculate insurable earnings. By the date of J.H.'s accident that maximum had risen to \$56,500.00. Once all of the statutory deductions were taken off, MPIC paid J.H. IRI of \$[text deleted] bi-weekly, starting October 18th, 1996 and ending August 26th, 1999.

[para7] Unfortunately, J.H. was involved in a second automobile accident on September 19th, 1997. Another vehicle struck his driver's side door, causing his left shoulder and head to strike the door. He fractured two ribs and required the assistance of the Fire Department to extract him from his automobile.

[para8] J.H. was provided with another six-month physiotherapy program to help him recover from the second accident. In December of 1999, MPIC referred J.H. to Dr. Conrad Hoy, a specialist in physical medicine and rehabilitation. In an extensive report dated January 11th, 1999, Dr. Hoy concludes that the Appellant's main difficulties were a myofascial pain syndrome in his shoulder girdle and sleep disorder. J.H. had advised Dr. Hoy that, amongst other problems, he had fairly constant low back pain that varied in intensity and pains in his right leg. On these latter two points Dr. Hoy reports:

There is no indication of low back pain, neurological deficits or findings typical of spinal stenosis (i.e. increased back pain with spinal extension, no lower extremity symptoms with exertion, no need to flex spine with increased low back symptoms, and 'pain' described as 'low back pressure' that is consistent with muscle tension from physical exertion). There is no evidence of neurogenic claudication.

[para9] MPIC, based on Dr. Hoy's report and a review by its Medical Services Unit, advised J.H. on July 26th, 1999, that no physical impairment of function arising from his motor vehicle accident had been identified that would prevent him from safely returning to his occupation of a self-employed crane operator, construction site supervisor, manager, consultant or other related position such as costing and estimating. His IRI benefits were terminated effective August 26th, 1999.

THE ISSUE(S) :

- (i) Was J.H. self-employed, a part-time earner or a non-earner at the date of his accidents?
- (ii) Was J.H. physically capable of returning to his pre-accident employment when MPIC terminated his IRI benefits on August 26th, 1999?

[para10] The Commission, after reviewing the evidence available to MPIC, is of the view that the insurer was wrong in determining that J.H. was a self-employed full-time earner at the time of his first accident. He had been self-employed, working as an independent contractor for J.M.C. for \$[text deleted] per month for March and April, 1996, but the letter from J.M.C. dated February 16th, 1996 to J.H. states merely that he expects to offer him further employment from September 15th to December 20th, 1996. There is no evidence to indicate that he had started work on September 15th nor that he was working for anyone at the time of the accident - indeed, his own evidence is to the contrary. J.H. was clearly a non-earner at the time of the accident and was not entitled to receive IRI benefits for the first 180 days thereafter.

[para11] J.M.C. testified at the hearing that, two weeks prior to Thanksgiving in the fall of 1996, he had hired another individual, Mr. C., to do the work formerly done by J.H. Mr. C. moved to the construction site in northern Manitoba four days after Thanksgiving. Thanksgiving fell on October 15th that year, which means that J.M.C. must have hired Mr. C. on or about October 1st, 1996. J.H. was available at that time as his accident did not occur until October 10th, 1996. J.M.C.'s evidence confirms that J.H. was not working for him at the time of that first accident, and J.H.'s own evidence confirms that he had not re-entered the work force by the date of his second accident on September 19th, 1997; he was still receiving IRI from the insurer.

[para12] J.H. did not have a job to go to with J.M.C. on or after his first accident, as the position they had discussed back in February had already been filled by Mr. C. Therefore Section 85(1)(a) of the Act does not apply.

[para13] We were provided with a letter dated December 2nd, 1996, purportedly addressed by J.M.C. to J.H., which reads as follows:

This is a renewal of my existing personal contract (employment) with John Hatch dated Feb 16/96 as crane operator and materials clerk.

The same terms and conditions to apply. This contract covers the period Dec 20/96 - June 30/97.

We have to say that this letter lacks any credibility, since by that date Mr. C. had been hired and J.H. was, to the knowledge of J.M.C. and by the testimony of them both, incapable of doing the work. Not only that, but J.M.C. testified that "if the contract between me and [J.H.] had resumed in the Fall, he would have been laid off after December 22nd for at least a couple of months". We can only assume that this letter of December 2nd, 1996, was produced in order to persuade this Commission that, but for his accident, J.H. would have been employed at \$[text deleted] per month from December through June of 1996/7.

[para14] We are of the view that MPIC also erred in determining that J.H.'s job classification fell within the "Management Occupations, Construction Operations" category and that he was entitled to the maximum presumed salary. The evidence to determine the correct job classification can be found in the adjuster's Report of Investigation/Discussion dated 16/12/96. A breakdown of J.H.'s duties for the work performed for J.M.C. were as follows:

Crane Operator	25 %
Office Duties	25 %
Foreman	25 %
Other	25 %
Total	100 %

When only 25 % of the job function involves supervision, one can hardly classify the job description as being one that fits into the category of "Managerial Occupation-Construction Operations". At that time there was no evidence for the five-year period prior to the accident that J.H. was employed in any capacity.

[para15] J.H. was entitled to receive IRI upon the 181st day after his accident, as he was not able to work at his chosen occupation due to his injuries. Section 86(1) gives

J.H. this benefit and stipulates that his employment shall be determined by Section 106 of the Act. The factors MPIC shall consider in determining J.H.'s employment are the Regulations, and his education, training, work experience and physical and intellectual abilities immediately before the accident.

[para16] J.M.C.'s evidence confirmed that J.H.'s primary job during March and April, 1996, was that of a crane operator and that J.H. had helped J.M.C. prepare the estimates for the next phase of the job. J.H. confirmed J.M.C.'s evidence. We find that J.H.'s proper classification was that of a crane operator, with supplemental skills as a construction foreman and as an assistant cost estimator. MPIC should have classified J.H.'s job category as coming within the Construction Trades Occupation group contained in Schedule C of Regulation 39/94. There is no specific job description that fits J.H.'s background exactly, and we therefore apply the category in the Regulation that most closely approaches that of J.H., namely "Excavating, Grading and Related Occupations". Due to his length of experience, J.H. would qualify at a Level 3, giving him a deemed income level of \$41,396.00. The indexing factor provided by Section 165 of the Act raises that deemed annual income to \$42,638.00. There is no evidence to support J.H.'s contention that he was earning upwards of \$[text deleted] per annum; if he was, he was certainly not reporting it to Revenue Canada.

[para17] MPIC has, in our unanimous view, paid J.H. more IRI benefits than those to which he was entitled, but in light of Section 190 of the Act we do not give any direction in that regard.

[para18] J.H. testified that at the time his IRI benefits were cut off, and at the time of the hearing, he still had low back pain and pains down his right leg. These problems, he says, especially in his leg pains, prevent him from walking even short distances or climbing stairs. At times he had no control over his right leg. He did not believe he could operate a crane safely because of the loss of control with his right leg. This evidence is at odds with that of Dr. Ian Sutton of the Pain Clinic, who speaks of "low back pain....which radiates into his left leg.

[para19] Dr. Mosher, in a report dated November 5th, 1999 advised that J.H. was attending a Pain Clinic for treatments of his back. Dr. Mosher, relying in part upon his own observations and in part upon a report from Dr. Sutton, the expert at the Pain Clinic, expresses the view that J.H. had an ongoing disability that would prevent him from returning to his normal work as a crane operator without significant risk to himself and his fellow employees.

[para20] Section 107 of the Act requires MPIC to determine

an employment for a victim after the second anniversary of the accident, if the victim can still not return to work. In making that determination, the insurer is required to consider the insured's education, training, work experience and physical and intellectual abilities at the time of the determination. We do not find enough objective evidence to enable us to decide whether J.H. was capable of returning to his former occupation by the time his IRI benefits were terminated on August 26th, 1999, or even at the time of the hearing of his appeal.

[para21] MPIC shall do a two-year determination on J.H. and that time shall run from the date of the second accident on September 19th, 1997. In fairness to J.H., the second accident may have been the one that set him back the most, since the medical evidence after first accident indicated that he had been making some recovery. In making the two-year determination MPIC shall obtain new medical evidence and, if deemed appropriate, evidence from a qualified physiotherapist or occupational therapist, or both, to determine objectively J.H.'s current physical abilities as of September 19th, 1999. We recognize the difficulty of completing a retroactive functional capacity evaluation or medical examination but, fortunately, not too many months have elapsed since September of last year and, in the meantime, J.H. has been examined by Dr. Mosher and Dr. Sutton. In sum, a new Functional Capacity Evaluation is required in order to enable the insurer to decide whether J.H. is, or is not, entitled to further benefits and, if he is found definitively to be unable to return to his former occupations, to decide upon a proper classification for him.

[para22] MPIC shall give J.H. the names of two independent practitioners, from whom J.H. shall then select the one by whom he wishes to be examined and assessed in the context of the preceding paragraph.

[para23] This Commission will remain seized of the matter until the foregoing decisions have been made by MPIC and accepted by J.H., so that any further dispute arising from the foregoing may be referred back to this Commission for a further decision at the request of either party.

DISPOSITION:

[para24] The Acting Review Officer's decision of September 24th, 1999 is hereby rescinded and the foregoing substituted therefor.

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