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Indexed as:

J.L. (Re)

IN THE MATTER OF an appeal by J.L.

AICAC File No.: AC-95-16

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[1995] M.A.I.C.A.C.D. No. 10

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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: November 9, 1995.

Decision: November 21, 1995.

(7 pp.)

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Issue(s):

To qualify for Income Replacement Indemnity under Section 85(1)(a) of the M.P.I.C. Act, does the Applicant have to have a firm offer of employment made and accepted prior to the date of the accident?

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.

36, s. 85(1)(a).

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Appearances:

Manitoba Public Insurance Corporation ('M.P.I.C.')
represented by Joan McKelvey.

J.L., the appellant, appeared in person.

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MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

REASONS FOR DECISION

THE FACTS:

[para1] J.L. sustained a number of injuries when the automobile he was driving, was struck by another vehicle, on November 20th, 1994. The injuries were primarily to the right side of his neck and his right shoulder and his physician, Dr Fajen Ramgoolam, described J.L. as having "suffered a moderate

to severe whiplash type of injury, a cervical spine strain". In Dr. Ramgoolam's report of April 10th, 1995 he stated that J.L. had made "significant improvement" and was probably left with a 25 % residual disability. He hoped that J.L. would continue to improve and he should be fairly well recovered in the next six months.

[para2] At the time of the accident J.L. was unemployed and receiving no income as he had exhausted his Unemployment Insurance Benefits. J.L. had last been employed as a clerk with the federal government making approximately \$25,000.00 per year. At the time of the accident he was looking for work, had made a number of job applications but did not have a contract of employment.

[para3] On or about December 14th, 1994 J.L. saw an adjuster with Manitoba Public Insurance Corporation ('M.P.I.C.') and filed an application for compensation, short form, for out-of-pocket expenses arising out of the accident. J.L. was advised at that time he was not eligible for Income Replacement Indemnity ('I.R.I'). as he was unemployed and had no contract of employment. A few days later the adjuster called J.L. and advised him that he (the adjuster) might perhaps have been in error. He qualified his earlier advice by adding that, if J.L. were able to secure a job or a firm job offer within six months after the accident and could not take or hold that job because of his injuries resulting from the accident, then it was just possible that he might qualify for I.R.I. based on the salary of that new job or job offer.

[para4] In response to this new information J.L., in late December 1994, after seeing an advertisement in a newspaper seeking people to teach English to children in Korea, called the advertiser, [text deleted], USA. J.L. was faxed a letter, dated December 27th, 1994 and an unsigned form of employment agreement. The teaching position was to start on February 1st, 1995 and paid \$1,300.00 (U.S.) per month with medical coverage, furnished accommodations and a round-trip air fare with a bonus of \$1,300.00 (U.S.) for completion of one year of work. J.L. signed the form and faxed it back to [text deleted]. The document, of which a copy was filed by J.L. at his hearing, did not contain a signature on behalf of or by the Employer. In a subsequent telephone call to a representative of the company, J.L. was advised that [text deleted] was merely an agency and that the Employer had to approve J.L.s' application before he would be hired for the job. The representative stated he would advise J.L. if he had the job prior to the start up date of February 1st.

[para5] By the end of the third week in January 1995 J.L. had not heard back from [text deleted]. It follows, therefore, that while J.L. had offered his services by signing the form sent to him by [text deleted], his offer had never been accepted and he therefore had no firm employment

available. In any event, J.L. decided to contact [text deleted] on January 21st, to advise them that because he had been injured in an auto accident he would not be taking the job. When asked at the hearing why he had declined the job he advised that he would have been lonely in Korea and that all of his family and friends live in Manitoba. He also added that he had become somewhat confused and felt that he 'would get into hot water' if he accepted an offer of employment and then declined it. J.L. made one more call to [text deleted] in preparation for the hearing before this Commission. He was told, he said, that it (i.e. the paper he had signed) 'was a job offer, not a job hire'. We agree, with the qualification that the offer emanated from J.L..

[para6] On January 31st, 1995 J.L. worked at a telemarketing job making telephone calls for a few hours; he was offered a job but he testified that he just didn't show up for work the next day. He did not give the employer any reason for not returning to the position, although he did give evidence to the effect that he could not comfortably sit in a chair all day in a job where he could not stand or leave the telephone.

[para7] J.L. advises that he receives free rent from his landlord in return for doing odd jobs and yard work. He also stated that he is now capable of carrying a canoe and portaging with one, indicating a substantial degree of recovery. This was in keeping with the apparent candour which clothed J.L.s' evidence.

THE LAW:

[para8] J.L. was not employed or earning an income from any source at the time of the accident; to qualify for Income Replacement Indemnity he would have to qualify as a "non-earner" under Section 85(1)(a) of the M.P.I.C. Act, which reads as follows:

"Entitlement to I.R.I. for first 180 days

85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

(a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;"

[para9] M.P.I.C.'s Internal Review Officer has interpreted this section to mean that a successful Applicant must have an existing job offer, made and accepted, prior to the time of the accident in order to qualify for Income Replacement Indemnity. We do not agree.

[para10] We hold that this section clearly qualifies for I.R.I. any Applicant who, within 180 days after his/her accident, either obtains employment or obtains a firm, bona fide offer of employment and is not able to accept or continue in the job as a result of an injury caused by the accident. The I.R.I. commences from the date the job would have started during this 180-day period; the amount received would be based on the salary that the individual would have earned at the job. The I.R.I. continues only to the end of the 180-day period for the purposes of this section.

[para11] This section does not apply when the Applicant has simply filed a job application or filed a personal resume with a potential employer. To qualify for I.R.I. during the 180 days after the accident the Applicant must have received a bona fide job offer. The Applicant must provide proof of the validity of the job offer and proof that he could not accept the job, or could not continue with it having once started, because of problems arising from the accident.

[para12] Does this interpretation then allow J.L. to qualify for I.R.I.? We are of the opinion that the mailing of an Employment Agreement For Instructor to J.L. by [text deleted] was merely what is known in law as an invitation to treat, that J.L.s' signature on December 28th, 1994 amounted to an application for employment and that the document never became a contract of employment. J.L. was told by the representative of [text deleted] that he would have to have his client, [text deleted], accept his application before he would be offered the job. What J.L. did with his call to [text deleted] in late January 1995, when he had had no response to his application, was to remove that application from consideration by the employer. This was not a valid contract of employment as there was neither the offer of a job by the employer nor an acceptance by that employer of J.L.s' application. As noted above, it is doubtful, in any event, whether a firm offer of employment would have been forthcoming at that late date.

[para13] The telemarketing job that J.L. was offered in January, 1995 does not appear to qualify him for I.R.I. since, although he did not return to work, he gave no reason to the employer for his disappearance and we are not satisfied that his accident caused him to discontinue that brief employment. If pain or discomfort arising from the accident that had occurred two months earlier had obliged him to quit work after so short a time, it would have been logical for him to have said as much to the employer.

[para14] To qualify for I.R.I. J.L. had to provide proof of a valid job offer that existed prior to the date of the accident or during the 180-day period thereafter, and of his inability to hold that employment due to the accident. J.L.s'

own evidence is that he applied for several jobs but neither received and accepted a valid job offer nor felt obliged to refuse one by reason of his injury. Therefore, under the clear wording of the Act, we must find that he does not qualify for I.R.I.

DISPOSITION:

[para15] We dismiss J.L.s' appeal and confirm the decision of M.P.I.C., not for the Corporation's stated reasons but, rather, for those stated above.

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