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Indexed as:
N.L. (Re)

IN THE MATTER OF an appeal by N.L.
AICAC File No.: AC-95-13

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[1995] M.A.I.C.A.C.D. No. 13

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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: October 3 and December 12, 1995.
Decision: December 13, 1995.
(6 pp.)

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Issues:

- (i) Right of non-earner Appellant to receive I.R.I. when potential employer in lay-off mode.
- (ii) Right of non-earner Appellant to receive I.R.I. when capable of holding employment reasonably determined by M.P.I.C.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, ss. 106(1) and (2), 107, 109, and 110(1)(c).
Regulation 37/94, s. 7(c) .

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Appearances:

Manitoba Public Insurance Corporation ('M.P.I.C.')
represented by James Shaw.
N.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] N.L. suffered some soft tissue injuries as a
result of a motor vehicle accident on May 22nd, 1994. At the

time of the accident, N.L. had a firm offer of employment with [text deleted], which was to have commenced on May 24th, 1994, but he advised that employer that he had been involved in an accident and was unavailable for work until May 30th. [text deleted] required someone immediately and the position was therefore offered to another individual. Manitoba Public Insurance Corporation ('M.P.I.C.') paid him income replacement indemnity ('I.R.I.') as well as his costs of chiropractic treatment and travel expenses up to the 28th of January 1995.

[para2] While his chiropractic fees and travel expenses appear to have been paid beyond January 28th, 1995, his I.R.I. was discontinued as of that date. The reason given to N.L. by M.P.I.C. for that termination was twofold:

- (a) [text deleted] was then in a layoff status from mid-January to the end of March and, for a disabled non-earner to continue receiving I.R.I. during a layoff, he must be able to demonstrate that he would have held alternate employment during the layoff (see Sections 106(1) and (2), and 110(1)(c) of the M.P.I.C. Act, and to Section 7(1) of Regulation 37/94 of the M.P.I.C. Act, of which copies are annexed hereto); and
- (b) pursuant to the foregoing Sections of the Act and the Regulations, M.P.I.C. had determined that the employment for which N.L. was best suited was that of a sewing machine operator in a garment factory. The corporation had determined that N.L. was not disabled from that employment.

M.P.I.C.'s decision that N.L. was best suited for work as a 'sewing machine operator' was not, strictly speaking, accurate, since the machines that he was trained to use would not normally be classified as 'sewing machines' although used in the process of garment assembly. We find, however, that by the end of January 1995 he was no longer disabled by the accident to the point of being unable to do the work for which he was best qualified.

[para3] N.L. now appeals from M.P.I.C.'s decision, although he was unable to tell us how much longer he felt entitled to I.R.I. beyond January 28th, 1995.

[para4] The sole issue that we need to decide, therefore, is whether N.L. has established his right to receive I.R.I. past the termination date of January 28th, 1995.

[para5] This Commission sat, initially, on October 3rd to hear N.L.'s appeal, and adjourned the matter in order that more complete medical evidence might be obtained. The hearing was continued on December 12th, 1995.

THE LAW AND THE EVIDENCE

[para6] In cases of this kind, the onus is upon the Appellant to establish, upon a balance of probabilities, that his claim has validity. Much of N.L.'s testimony does not seem to be supported by extraneous evidence. For example:

- (a) N.L. testified that he had worked for [text deleted] from April 17th to July 28th, 1995, that he was often unable to complete an eight-hour shift due to his back injuries and that he had been let go because, he was told, he was not suited to the job. However, I.R., President of that company, says that N.L.'s hours of work were from 7:30 A.M. until 4:00 P.M., Monday through Friday, and that his employment was terminated due to a shortage of work. I.R., in a general outline of N.L.'s duties, did indicate that "On occasion he may have had to lift over twenty pounds. He was never forced to lift anything that was too heavy. He was allowed to refuse and help was provided if needed. He had some absenteeism but it was a normal acceptable level."
- (b) N.L. testified that he worked for [text deleted] from August 28th, 1995 to October 6th, 1995, on a part-time basis, on call, as a pant turner. He says that he was working four to four and a half hours per shift but was often unable even to complete those shifts because of pain from his motor vehicle injury. However, B.A., the laundry manager at [text deleted], tells us that N.L.'s hours of work were from 4:00 P.M. until 12:00 A.M., Monday through Friday, with an occasional weekend shift, that the reason for N.L.'s termination was a shortage of work and that his duties included loading and unloading jeans from a washing machine, adding chemicals and turning pants. B.A. adds that "Occasionally he may have had to lift over twenty pounds, but certainly not on a regular basis. He was considered to be an average employee with normal absenteeism."
- (c) N.L.'s initial evidence was that he had been seeing Dr. Leslie an average of three times a week since May 25th of 1994 up to and including the dates of both hearings. He agreed that his visits to Dr. Leslie, his chiropractor, had been at his own initiative rather than at that of Dr. Leslie. However, the frequency of those visits is not borne out by the evidence of Dr. Leslie, who said, in his letter of October 13th, 1995 to this Commission, that "The frequency of treatment is approximately one to two times a week with occasional periods

where he will receive increased treatment depending on the increased symptomatology as a result of activities he has participated in or the result of acute exacerbations (sic)." We note, in passing, that this is not the first occasion when N.L. has given unreliable evidence as to the frequency of his visits to his chiropractor: early in 1995, he had claimed travel expenses for visits to Dr. Leslie for January 18th, nine separate occasions in February and one further visit in March, none of which proved to be truthful.

[para7] Following the October 3rd hearing, N.L. was referred by this Commission to Dr. R. K. Maccoomb, a specialist in orthopaedic medicine and surgery at the Winnipeg Clinic. Further evidence was also sought and obtained from Dr. Leslie. The essence of their separate and complete reports is that:

- (a) as of early February of 1995 N.L. was able to return to full-time duties, of the kind that he had been able to perform before the accident, provided that he was not called upon to lift more than twenty pounds at a time and that no postural nor other physical factors existed to aggravate his condition (per Dr. Leslie);
- (b) Dr. Maccoomb's very thorough examination and report, while admittedly made ten months after the termination of N.L.'s I.R.I., strongly supports the view of Dr. Leslie that N.L. would have recovered sufficiently, by November 9th of 1994, to have been capable of resuming at least a modified work activity to the extent noted in the preceding paragraph and persuades us that, by the beginning of February of 1995, N.L. should normally have been capable of resuming all pre-accident levels of activity.

Dr. Maccoomb's further opinion was that although, as noted above, N.L. is apparently still attending at the office of Dr. Leslie with some frequency, there is no measurable degree of musculoskeletal impairment that would make such visits necessary, nor any indication for any ongoing, protracted therapy, including chiropractic. This appears to have been the situation since late January or early February of 1995.

[para8] In the absence of any other evidence adduced by or on behalf of N.L. to support his claim that the motor vehicle accident rendered him unable to return to work as of the end of January 1995, we find that he has failed to meet the onus of proof and are therefore obliged to dismiss his appeal.

DISPOSITION:

[para9] The decision of M.P.I.C.'s Internal Review Officer
is therefore confirmed.

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