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Indexed as:
D.B. (Re)

IN THE MATTER OF an appeal by D.B.
AICAC File No. AC-96-26

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[1996] M.A.I.C.A.C.D. No. 18

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), L. Goodspeed
and F.L. Cox
Heard: July 22, 1996.
Decision: July 23, 1996.
(7 pp.)

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Issue:

- (a) No work available of which appellant was deprived - whether right to I.R.I. exists;
- (b) injuries healed within 4-5 months - whether claim for I.R.I. after 180 days valid.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, ss. 85(1) and 86(1).
Regulation 37/94, s. 8.

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Appearances:

Manitoba Public Insurance Corporation ('M.P.I.C.')
represented by Joan McKelvey.
D.B., 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] D.B., the Appellant, was injured on September 26, 1995 when, as he was approaching a parked vehicle on his bicycle, the door of the vehicle opened suddenly, leaving him no opportunity to avoid colliding with it.

[para2] Initially, he attended at the Health Sciences Centre where he was examined and had his hand x-rayed. He was advised to take pain medication.

[para3] On October 2, 1995 he was seen by his family physician, Dr. S. Steinberg, who found a 2.5 cm. superficial scratch on the upper arm, fairly heavy bruising on the right elbow, an abrasion on the side of the elbow and tenderness in the hollow portion of the arm immediately in front of the elbow. At that first examination by Dr. Steinberg, D.B.'s grip appeared to be weak. Dr. Steinberg prescribed an anti-inflammatory medication and some exercises, expressing the opinion that there were no pre-existing or unrelated conditions that might delay recovery or be responsible for ongoing symptoms. Dr. Steinberg saw D.B. twice more, on October 12th and December the 18th of 1995, when D.B. continued to complain of a sore right arm and pain when gripping anything with his right hand.

[para4] On February 23, 1996, at the request of M.P.I.C., D.B. was examined by Dr. F.K. Shariff, a specialist in orthopaedic medicine, of whose detailed report we were given a copy. In summary, the considered opinion of Dr. Shariff was that D.B. had, indeed, sustained a laceration to his right upper arm, an abrasion to the back side of his elbow and bruising to his right hand and right shoulder regions as a direct result of the accident noted above. By the time of Dr. Shariff's examination, the laceration and the abrasion had both healed, and the bruising had subsided.

[para5] The only possible after-effect of the accident that still prevailed was a certain amount of inflammation in the right elbow, which did not appear to be bad enough to warrant any specific treatment and was likely to subside with time. Any other symptoms of which D.B. complained were, in Dr. Shariff's view, most unlikely to have resulted from the accident described above - an opinion reinforced by the fact that no mention had been made of those additional symptoms in the course of D.B.'s earlier examinations by Dr. Steinberg.

[para6] At the time of the accident, D.B. was unemployed. He had worked for one week only, in the employ of {text deleted}, between January of 1993 and the date of the accident in September of 1995.

[para7] D.B. testified that, shortly after his accident, he had made application for work with a number of different companies in the field of general construction, although he could not remember the name of any one of those companies. He added that, although he had put in a number of written applications, he had had no response from any of those potential employers. He agreed that the lack of response might well have been due to the fact the applications went in

toward the end of the construction season. He had also applied to the {text deleted} for work as a general labourer without success and had, as well, been seeking work as a dishwasher or general labourer in the restaurant field, with equal lack of success.

THE ISSUES:

[para8] We have to deal firstly, with a claim for Income Replacement Indemnity, ('I.R.I.') made by D.B., covering the first 180 days immediately following his accident, since he says that the accident has made it, for all practical purposes, impossible for him to hold down a job that entails the use of his right arm. We are also asked to deal with the possibility that D.B. might be entitled to I.R.I. for the period from the 180th day after his accident to date since, he claims, he is still unable to work as a result of that accident.

THE LAW:

[para9] At the time of his accident, D.B. was undoubtedly a "non-earner" within the meaning of the M.P.I.C. Act, in that he was capable of working but was not then gainfully employed.

[para10] Section 85(1) of the Act 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;

(b) he or she is deprived of a benefit under the Unemployment Insurance Act (Canada) or the National Training Act (Canada) to which he or she was entitled at the time of the accident.

[para11] The question, then, is whether D.B. was unable to hold an employment that he would have held during that first 180 days if the accident had not occurred. We have expressed view in at least one earlier appeal that an Appellant in D.B.'s position must establish upon a reasonably strong balance of probabilities that, but for the accident, he would have been employed in an occupation for which, at the time when the employment would have become available, he was qualified. The onus is upon the claimant to establish that employment would have been available for which he was qualified.

[para12] D.B. indicated that he had been employed in the construction trades as a general labourer some years earlier, had then operated a rooming house for six or seven years until the City of Winnipeg's fire regulations had forced him to discontinue that occupation and, since then, had been unemployed. The very fact that all of his efforts to obtain employment, through the Canada Employment Centre and otherwise, unfortunately came to naught tells us that the balance of probabilities is weighted against his claim. That is to say, we are not persuaded that, even in the absence of his accident, any employment was available for which he was qualified, during the first 180 days following his accident or, indeed, thereafter.

[para13] D.B. has not found it necessary to see Dr. Steinberg since December 18, 1995, has not required nor sought any physiotherapy, and does not appear to have followed the course of exercises suggested to him by Dr. Steinberg and by Dr. Shariff.

[para14] A claim by a non-earner for I.R.I. after the first 180 days following an accident is governed by Section 86(1), which reads as follows:

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

For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section 106, and the non-earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident."

[para15] The phrase "unable to hold employment" is further defined in Section 8 of Regulation 37/94, which reads as follows:

"Meaning of unable to hold employment

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."

[para16] We are not able to find that his accident had rendered D.B. entirely or substantially unable to perform the essential duties of any employment that he would have

performed but for the accident. The fact that his own efforts to find employment were, unfortunately, quite unsuccessful indicates that he undoubtedly would have remained unemployed, with or without the accident, and that the accident therefore was not a cause of his continuing unemployment.

[para17] That situation seems to have prevailed even up to the time of the hearing of his appeal but, in any event, we are satisfied that any physical damage that was directly caused by the accident was sufficiently healed by the 180th day so that, had employment been available for which he was qualified, he could have accepted it and performed his duties quite well.

[para18] For the foregoing reasons, we have no option but to deny D.B.'s appeal and to confirm the decision of the Internal Review Officer of M.P.I.C. dated June 11, 1996.

[para19] One other, small matter arose during the course of submissions from D.B. and counsel for M.P.I.C. We refer to the fact that the costs of medication prescribed for D.B. by his physicians, as a result of the accident, appear to have been paid by the City of Winnipeg Welfare Department as well as by M.P.I.C. D.B. explains that by saying that he assumed that the monies paid out by the City would be deducted from his welfare cheque but that, of course, did not happen. There is no doubt that M.P.I.C. has the right to seek recovery of those monies but, since we have not been asked to make any formal ruling on the matter, we merely note that the decision, whether or not to seek that recovery, is in the discretion of M.P.I.C.

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