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Indexed as:
R.J.B. (Re)

IN THE MATTER OF an appeal by R.J.B.
AICAC File No.: AC-96-70

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[1997] 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: February 25, 1997.
Decision: March 13, 1997.
(9 pp.)

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Issue(s):

Whether apparent back injuries were caused by MVA and,
therefore, qualify Appellant for I.R.I.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, ss. 71(1) and 85(1).

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Appearances:

Manitoba Public Insurance Corporation ('MPIC') represented by
Tom Strutt.

Brian Kress represented the appellant, R.J.B.

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REASONS FOR DECISION

THE FACTS:

[para1] R.J.B. was involved in a motor vehicle accident ('MVA') in Winnipeg on January 19th, 1995. He was then [text deleted] years of age and, just a few days prior to his accident, had been laid off from his employment as a sheet metal worker. In the course of that employment, his principal work consisted of assisting sheet metal journeymen in erecting structural steel, insulation and exterior steel sheeting. In the latter context, he would help in hoisting the sheets of metal up to the appropriate level on the building where he was working, and then affixing them to the structural girders. The

sheets of metal weigh a minimum of about 20 pounds and, occasionally, up to 100 pounds.

[para2] Two days after his accident, on January 21st, 1995, he consulted Dr. R. Bilos at the Norwood Medical Centre. Dr. Bilos says that his patient reported 'acute pains in his right knee, elbow, upper back, neck and lower back'. Dr. Bilos reports that, on examination, R.J.B. demonstrated normal range of motions for all neck, shoulder and lower back parameters, although some muscle spasm was evident. He diagnosed musculoskeletal soft tissue injuries secondary to MVA and advised R.J.B. to apply ice/heat and to perform stretches. Dr. Bilos prescribed a muscle relaxant to be taken for five days and advised R.J.B. to return for re-examination at the end of that time. Dr. Bilos did not see R.J.B. again.

[para3] On February 23rd, 1995 R.J.B. filed an application for income replacement, based upon his apparent inability to work as a result of his MVA. That application for income replacement makes no mention of a sore back, but only of injuries to R.J.B.'s shoulder and knee. He claimed an inability to use his right arm in lifting heavy materials. R.J.B. explains the absence of any mention of the sore back by saying that he certainly told his adjuster about his back problem, but that she must have inadvertently omitted to include it. However, that omission does assume somewhat greater significance when taken in conjunction with the fact that Dr. Bilos, also, was not told of any lower back problem.

[para4] R.J.B. does not seem to have sought any further medical or quasi-medical attention thereafter, until May 23rd, 1995 when he attended at the River Park South Chiropractic Clinic, where he was seen either by Dr. Steven Lambos or by Dr. John Toth. The report from that Centre does, indeed, indicate that R.J.B. complained of low back pain when he first sought chiropractic treatment, and that he had stated that his low back pain was aggravated by working, lifting, stooping and sitting. However, the subsequent report from Dr. Toth, dated June 18th of 1996, says that "Due to the type and extent of injuries and based on the history he provided, his condition was considered to preclude him from work between May 23rd, 1995 and June 5th, 1995 [R.J.B.] continued his care on a regular basis from May 23rd, 1995 to June 6th, 1995, at which time he was considered no longer work disabled. After that date he attended for care on July 12th, August 4th and September 25th, 1995, on an as needed basis. At no time during those few visits did his condition appear work disabling".

[para5] And again, later in that same report, we find the statements: "At the time of his final visit on September 25th, 1995, his condition did not warrant any disability rating. No functional limitation or deficit existed that would have

precluded him from his employment".

[para6] R.J.B. had apparently attended at the Chiropractic Clinic for about twelve to fourteen treatments.

[para7] R.J.B. was called back to work by his original employer, [text deleted], in June of 1995. When that job finished, he found work of a similar kind in Brandon, Manitoba, starting on September 11th, 1995. He worked for two full weeks from September 11th to September 24th, inclusive; for the week of October 1st, 1995 he worked for three days (it was never made clear to us why the other two days were missed); for the week ending October 8th, 1995 he worked full-time. During the following two weeks, R.J.B. apparently advised his supervisor that he had to see his doctor with respect to an insurance claim, but he returned to work on October 23rd and worked for the whole of the week ending October 29th.

[para8] R.J.B. then worked a further three full weeks up to November 17th, 1995. At that point, he advised his supervisor that, due to some back problems, he needed time off. He was told that, if he did so, the job would be over by the time he came back to work and that, therefore, the company would be laying him off. He was issued a separation slip as at November 17th, 1995.

[para9] The next occasion upon which R.J.B. appears to have sought medical assistance was on the 2nd of October 1995 when he attended upon Dr. Clarissa Koh. Her report covering that visit notes that "Patient has been seeing chiropractor. First seen by myself today. Pain in back persisting. Still working, does heavy lifting as steel worker. Spasm in lower back with S1 joint instability". For treatment, Dr. Koh referred R.J.B. for physiotherapy and, in the portion of her report where she was asked to list occupational or domestic limitation, she wrote "Patient has been working through the period since accident".

[para10] Subsequently, toward the end of 1995 on a date which seems obscure (her report, which purports to be dated November 28th, speaks of an examination having taken place on December 21st, and her narrative report of December 19th says that the last examination was on December 13th!) Dr. Koh indicates that R.J.B. was capable of resuming his main occupation, says that his disability ended on December 1st of 1995 but, in the same report, lists his occupational or domestic limitations as "heavy lifting, prolonged sitting". Dr. Koh's narrative report of December 19th notes that R.J.B. "Works at a steel plant and is required to do a lot of lifting while on the job" which, again, is difficult to reconcile with the rest of her report. Dr. Koh's narrative also speaks, in quotation marks, of her patient's recent "relapse" which, she

says, "appears to be a result of his motor vehicle accident of January 19th, 1995". We have to assume that, since Dr. Koh first saw R.J.B. on October 10th, her conclusion about the cause of R.J.B.'s discomfort can only stem from R.J.B. himself, since there appear to have been no objective, medical findings of cause and effect at that juncture.

[para11] The next narrative report from Dr. Koh bears date January 18th in which she reiterates that R.J.B. had remained working during the period between the date of his MVA and October 2nd of 1995; she confirms that she had referred him to physiotherapy for low back muscle spasm and S1 joint instability. She goes on to add that R.J.B. was recently seen on December 28th, 1995, complaining of recent relapse one week prior with mild exertion and sneezing. Dr. Koh then referred R.J.B. to an orthopaedic specialist, Dr. Balageorge, who does not appear to have seen R.J.B., and to a specialist in rehabilitation medicine, Dr. Bowie, who did see him. Dr. Koh's last report of January 18th, summarizing her December 28th examination of R.J.B., concludes that R.J.B. "Is unable to return to heavy lifting and physical labour which is most of his previous occupation as a steel worker entailed (sic). Functionally, the patient is limited by pain secondary to muscle spasm and decreased range of motion in his lower back, and will need further improvement in back musculature".

[para12] R.J.B. was seen on several occasions by Dr. Ron Bowie, to whom he had been referred by Dr. Koh. We have had the benefit of reading several careful, thorough reports prepared by Dr. Bowie - specifically: a report of March 18th, 1996 respecting his first examination of R.J.B.; a report of July 8th, 1996 dealing with his examinations of R.J.B. on April 1st and about July 1st; a report of October 30th covering an examination of that same date; a report of November 6th, 1996 outlining, briefly, Dr. Bowie's overall observation of R.J.B. and an assessment that R.J.B. was then unable to return to employment and, in particular, incapable of pursuing his pre-injury job and, finally, a report of February 10th whereby Dr. Bowie responds to some comments of Dr. Neil Craton, a physician in the employ of MPIC. R.J.B. apparently told Dr. Bowie that he had struck the windshield of his car in the course of his accident; he had told Dr. Toth that he had hit the steering wheel; Dr. Bowie's report speaks of feelings of numbness in the right anterior thigh and chronic lumbosacral strain on the right side; Dr. Toth notes that R.J.B. complained of left leg pain. Dr. Bowie's report mentions that "The impact of collision caused injury to the low back", although R.J.B. did tell us that this had not become apparent until some time after the accident itself. Dr. Bowie's report of July 8th indicates that R.J.B. appeared to have been doing very well with his physiotherapy and reconditioning exercise program, that R.J.B.'s back now showed a very good range of motion, albeit with a little tenderness

to the right of the lumbosacral junction, but that there did not appear to be any remaining articular muscular or neurological deficit. R.J.B. had apparently declared his intent of seeking other work and abandoning his work as a sheet metal worker.

[para13] The subsequent report of Dr. Bowie, of October 30th, tells us that R.J.B. had attended at Dr. Bowie's clinic at the Rehabilitation Hospital that morning, complaining of low back pain that had recurred about two months previously "to the point that he was unable to keep up with his self-employed work". R.J.B. testified that the "self-employed work" to which Dr. Bowie refers was, merely, "helping out a few friends with auto repairs - making suggestions for them - and there wasn't really enough of that to make it worth while". It is difficult to understand why low back pain would have precluded R.J.B. from keeping up with that "self-employed work". In any event, at the October 30th examination R.J.B. appears to have been suffering from pain in his lower back and right leg, rather than from the left leg of which he complained when attending upon his chiropractor.

[para14] It seems clear from the reports of Dr. Bowie, a specialist of high qualification and expertise, that at the times of Dr. Bowie's examinations of R.J.B. the Appellant was, indeed, exhibiting symptoms of low back pain. What is not so clear is the cause of that pain and other discomforts from which R.J.B. may well have been suffering. As is not infrequently the case, this Commission is faced with the difficult task of determining, upon a reasonable balance of probabilities, which of two streams of medical opinion should be given the greater weight. In the present case, and based primarily upon the following facts:

- (a) the physician who saw R.J.B. two days after his accident reports that R.J.B. was quite capable of returning to work on a full-time basis,
- (b) his chiropractor, Dr. Toth, provides essentially the same opinion,
- (c) his physiotherapist arrived at the same conclusion, as of June 6th, 1995,
- (d) R.J.B., by his own testimony, returned to work on a full-time basis for his original employer, [text deleted], in June, and thereafter worked at a much more demanding job in Brandon, long before his first contact with Dr. Bowie,

we find that the stronger likelihood is that any injury from which R.J.B. was suffering when he first saw Drs. Koh and Bowie had been caused, not by his motor vehicle accident of

January 1995 but, rather, from some excess exertion connected with the demands of his work at Brandon. We are satisfied that his earlier symptoms had resolved and that he had been left with no material restrictions upon his ability to resume his former occupation by about the 1st of June of 1995.

[para15] Our task would have been more difficult had R.J.B. been receiving regular medical or chiropractic treatment throughout the entire period, and had that treatment disclosed no substantial improvement. That was not the case, however, and we have great difficulty in concluding, as R.J.B.'s counsel invites us to do, that the deterioration in R.J.B.'s condition from about mid-1996 was directly related to a motor vehicle accident that had occurred in January of 1995.

[para16] While, granted, it is not possible for us to say with any certainty just what the cause might be of R.J.B.'s present discomforts, we can only arrive at our decision upon the basis of that cause which seems to us to be the most likely one. We do not find that R.J.B.'s automobile accident falls into the latter category.

[para17] One further point should, perhaps, be made: Mr. Kress, counsel for R.J.B., indicated that his client was seeking income replacement indemnity from January 26th, 1995 to date and, indeed, thereafter, on a monitored basis, until it could be established that R.J.B. was able to return to work. Having in mind that R.J.B. had, unfortunately, been laid off only a few days prior to his accident, he would in any event be classified as a non-earner within the meaning of the MPIC Act and, therefore, would not in any event qualify for income replacement until 180 days after the accident unless he had been able to establish that there was other employment which, but for his accident, he would have been able to obtain. There was a suggestion - but no more than that - that other employment might have been available, but we were given no real evidence upon which to base an affirmative finding. Before the expiry of the first 180 days after his accident, as we have found, R.J.B. had been restored to pre-accident status. He had, in fact, been paid income replacement for two weeks in October of 1995 and for three weeks in 1996, but it is our view that MPIC had erred on the side of benevolence in making those payments and cannot now be estopped from denying R.J.B.'s continued entitlement.

DISPOSITION:

[para18] For the reasons noted above, we are therefore obliged to dismiss R.J.B.'s appeal and to confirm the decision of MPIC's Internal Review Officer bearing date December 4th, 1996. MPIC will be responsible for the cost of all medical and para-medical reports filed in support of R.J.B.'s claim, if that has not already been taken care of.

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