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Indexed as:
P.S. (Re)

IN THE MATTER OF an appeal by P.S.
AICAC File No.: AC-97-06

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[1997] M.A.I.C.A.C.D. No. 24

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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: April 18 and June 9, 1997.
Decision: June 27, 1997.
(7 pp.)

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Issue(s):

- (i) Claim for payment of Income Replacement Indemnity ('IRI') from date of dismissal from employment;
- (ii) which of two m.v.a.'s was cause of appellant's condition resulting, in whole or in part, in termination of employment.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, s. 81.

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Appearances:

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

The appellant represented by Richard Henderson.

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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

[para1] This hearing commenced on April 18th, 1997 but, at the request of both counsel, it was adjourned sine die and heard on June 8th, 1997.

[para2] This was a complex case as it had three major

issues intertwined:

1. the Appellant was involved in an automobile accident on September 13th, 1993 and suffered injuries for which he has a claim still pending. This accident predates the existing Act and falls under the previous tort litigation system;
2. the Appellant was injured in an automobile accident on June 19th, 1995, to which the current Act applies; and
3. the Appellant's employment was terminated in October 1995, either as a result of the accident on June 19th, 1995 (which would entitle him to IRI from the date of his termination) or for 'just cause' or poor performance, in which latter event no claim for IRI would arise resulting from his loss of employment.

[para3] The Appellant gave evidence and was cross-examined and we were provided with medical reports from the following doctors on his behalf: Dr. Terence M. Michalyshyn (Chiropractor), Dr. R. J. Hayward (Family Physician), Dr. Dubo (Rehabilitation Medicine), Dr. Ian Altman (Clinical Psychologist) and Dr. David Cantor (Psychiatry).

[para4] In 1993 the Appellant was operating his own business as a manufacturer's agent for a number of surgical equipment companies. His territory, which he covered by automobile, was from the Alberta/Saskatchewan border to Thunder Bay. One of the companies the Appellant had represented when he operated his own company was [text deleted] and in February 1994 he started working for them on a full-time basis. He sold only their products and his territory remained unchanged.

[para5] The Appellant's first accident occurred on September 13th, 1993 and is summarized in Dr. Michalyshyn's report of January 25th, 1996:

"...while driving on the highway, his vehicle collided with a large truck. He was aware of the impending collision and braced himself for it. He was wearing his seat-shoulder harness at the time of the accident. He struck the left side of his head against the car window and developed a mild contusion. He did not sustain any other bruises or cuts. He remained conscious through the entire incident and was able to leave his vehicle unassisted. He stated he was in a mild state of shock. Immediately following the collision, [P.S.] began to experience mild neck, left shoulder and lower back pain which became progressively worse.

[P.S.] was examined by his M.D., Dr. R. Hayward, several days after the accident. He was prescribed analgesics and muscle relaxants.

[P.S.] experienced mild discomfort in his neck, upper back and lower back immediately after the accident. The pain became progressively worse and he was especially stiff and sore on waking the following morning. All neck movements were painful especially flexion and rotation. He felt a grinding sensation in his neck whenever he turned his head. He occasionally experienced headaches which originated at the base of his skull and would sometimes radiate to his forehead. He complained of tinnitus (ringing in the ears) and a "fuzzy-headed" feeling. [P.S.] experienced pain in his left shoulder which was aggravated by raising his left arm. This made lifting very difficult. He found that his trunk mobility was quite limited by the pain in his lower back. This pain sometimes radiated to his buttocks and hamstrings. Heavy and awkward lifting, prolonged sitting, standing and driving aggravated his lower back pain as well as his neck and upper back pain.

He had some difficulty sleeping because the pain and stiffness would tend to wake him. He found that he generally felt very stiff in the morning on waking and would gradually loosen up as he became more mobile. He found that he fatigued more easily and that he did not have the same stamina he had before the accident."

[para6] In the Prognosis part of the same report Dr. Michalyshyn states:

"[P.S.'s] condition had improved to some degree prior to his second accident on June 19th, 1995. His recovery had been hampered because he continued to work in a very demanding occupation. His job required that he lift and move heavy pieces of equipment and stand for hours at a time. He travelled frequently which meant that he would have to lift and carry his luggage and equipment as well as drive or sit for many hours at a time. His employer was notified on his injuries but would not acknowledge this situation. [P.S.] feared that if he took time off he would lose his position. This caused significant psychological distress."

[para7] Dr. Michalyshyn was the Appellant's primary care giver for his two auto accidents. Dr. Hayward was his family physician and had looked after him since July 1988. The Appellant did consult Dr. Hayward occasionally about his September 13th, 1993 accident. In his report dated January 12th, 1996 Dr. Hayward makes the following observations: "Oct 13/93 - Neck - Neck stiffens; Jul 13/94 Neck - Shoulder/neck

pain. Loss of energy; July 14/94 - Back/neck - Bothering him more; Apr/95 - Poor sleep - Neck/back pain. Some mental deterioration with depression and anxiety; May 30/95 - Back-Flare of pain in lower back. Paraspinal spasm and facet tenderness."

[para8] On May 24th, 1995 the Appellant suffered a lower back injury when he lifted a TV monitor out of the back seat of his car that he intended to take into a hospital for a trial and evaluation. A notice of injury was filed by his employer with the Ontario Workers Compensation Board. He did not take any time off nor receive any compensation for this incident.

[para9] The Appellant testified that as time progressed from the September 13th, 1993 his health, both physical and mental, deteriorated to the point that he could not function at his normal life style level and it was having a dramatic impact, both upon his ability to do his job and upon his daily life. He testified that he had kept his employer, [text deleted], informed of his deteriorating condition and had requested time off to help him recover. On June 5th, 1995 he sent two separate faxes to his employer and one contained the following statement "I am in so much pain I don't know how much longer I can keep going without my medication and work. I'm fully booked." The medication prescribed for him made him drowsy and incoherent sometimes and he made the decision not to take it. He faxed a copy of the druggist's warning concerning his medication to his employer and added the note "Dear [text deleted] & [text deleted]. I cannot take this while I am in surgery" - meaning, he explained, that he knew it to be unwise to take his medication while working with a surgical team in the operating room, due to the side effects noted above. On the other hand, without his medication he was in too much distress to do his job effectively.

[para10] The second fax to his employer on this date contained the following plea: "Please I need a few weeks off to try and get better. Please try to find a replacement for me for approx. 6 weeks if I am needed on a emergency level I will refrain from medication and do my best."

[para11] On June 19th, 1995 the Appellant was in his automobile and stopped at a stop sign on Clifton Street at Portage Avenue in Winnipeg. A car on Portage Avenue was involved in an accident and flipped through the air and landed on the front of his car. The impact knocked the front end and the engine to the ground. The Appellant was shaken up, he did not suffer any new injuries but his existing injuries were exacerbated.

[para12] After this second accident, the Appellant continued to receive chiropractic treatments from Dr.

Michalyshyn and was still receiving them by the date when his appeal was heard on June 9th, 1997. Dr Hayward continued to be consulted on an infrequent basis, and he referred [P.S.] to Dr. Dubo, Head of Rehabilitation Medicine at the Health Sciences Centre who, in turn, referred him to Dr. Ian Altman, a Clinical Psychologist.

[para13] We were provided with evidence from [text deleted] that, after a reasonably good start, the quality of the Appellant's work had not been very satisfactory and that he had been placed on probation on September 8th, 1994. According to the Company, his performance had not improved but had deteriorated and, on October 18th, 1995, they terminated his employment.

[para14] The Appellant alleges that his poor work performance was as a result of the injuries suffered on June 19th, 1995 and that this led to his dismissal. His position is that his injuries caused him to lose his job and that he is therefore entitled to receive IRI from the date of dismissal until he is able to return to full-time employment at his pre-accident level. The Appellant continued to work for and receive full salary from his employer from the June 19th, 1995 accident until he was terminated.

[para15] When we review the medical reports of the two Doctors who treated the Appellant before and after the June 19th, 1995 accident, we cannot find any new symptoms or injuries that were caused by this accident. While it is true that the medical reports all express the view that the Appellant's condition in late 1995 and 1996 was largely attributable to the 1995 auto accident, that view appears to have been based largely upon subjective comment made to them by the Appellant, and the best evidence on this point is the Appellant's own testimony. He stated that just prior to the June 19th accident he had degenerated both physically and emotionally to the point that he was in serious need of time off and rest to help him recover. His evidence is that he steadily deteriorated from the time of the first accident to the point at which he could no longer function at his normal level, whether work-related or in the context of his personal life style. The medical evidence supports this position. The physical and mental condition of the Appellant was the same just before June 19th as it was when he was terminated by his employer in October 1995.

[para16] Upon reviewing all of the evidence we are of the opinion that the 1993 accident is the primary cause and materially contributed to the Appellant's medical and emotional position in June 1995 and thereafter. It necessarily follows that the Appellant is not entitled to IRI from the date of the termination of his employment, since we can not find that his loss of employment was a result of the 1995

accident.

[para17] A great deal of time was spent and evidenced was tendered by both parties on the reason for the termination of the Appellant's employment and whether that termination amounted to unjust dismissal. In our view, we do not need to make a finding with respect to this issue, since our decision does not stand or fall upon the point. That matter will have its final determination in another forum.

DISPOSITION:

[para18] We therefore dismiss the appeal and confirm the Review Officer's decision dated October 28th and November 28th, 1997.

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