

@B00000088,MAIC  
@1  
@Z19971010  
@2

Indexed as:  
H.G. Re)

IN THE MATTER OF an appeal by H.G.  
AICAC File No.: AC-97-19

@3

[1997] M.A.I.C.A.C.D. No. 36

@4

Manitoba Automobile Injury Compensation Appeal Commission  
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C.,  
and L. Goodspeed  
Heard: September 30, 1997.  
Decision: October 10, 1997.  
(5 pp.)

@6

Issue(s):

Whether the income replacement indemnity (IRI) was  
correctly terminated?

@5

Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.  
36, s. 83(1)(a).

@8

Appearances:

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

Terri Mestdagh represented the appellant, H.G.

@7

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] The Appellant was involved in an automobile  
accident on August 4th, 1996, which resulted in an injury to  
his neck and back. A subsequent accident occurred on September  
20th, 1996 when the claimant rolled his vehicle and sustained  
a compression fracture to one of the lumbar vertebrae.

[para2] M.P.I.C. decided that the claimant's medical

treatment and his IRI benefits would continue as established after the first accident and not be subject to the required 7 day waiting period.

[para3] At the time of his accident, H.G. was a temporary earner. A temporary earner is defined by the Act as a victim who at the time of the accident, holds a regular employment on a temporary basis.

[para4] He commenced his work with [text deleted] on May 1st, 1995 and continued there until October 18th, 1995, the usual lay off period at the end of the season. He was rehired for seasonal work on March 25th, 1996.

[para5] On August 5th, the day after his accident, he was unable to complete a shift of work and in fact, never has returned to work for [text deleted] despite being able to perform light duties by November 13th. By that later date, there was no available employment at [text deleted].

[para6] In that there is no dispute regarding H.G.'s injuries, impairment award or his ongoing chiropractic treatment, the only question before us is whether or not his IRI benefits were correctly terminated.

[para7] In light of his injuries and inability to work at any job, M.P.I.C. determined H.G. to be a temporary earner and paid him IRI benefits from August 12th, 1996 until October 27th, 1996, by which date he had been laid off.

[para8] His income benefits were discontinued because, relying upon section 83(2) of the Manitoba Public Insurance Act, M.P.I.C. decided that he was only entitled to income replacement indemnity during that period in which he would have held employment. H.G. was under the impression that he would have had full time employment throughout the winter and, thus, would be eligible for continued IRI benefits.

[para9] Mr. J., the Storage Supervisor at [text deleted], provided the Appellant's employment records and testimony regarding the nature of the work at [text deleted]. He stated that most employees are hired on a seasonal basis for the planting, harvesting and storage of their products and that most of them are laid off on the usual layoff dates of October of each year. Only those few employees who were exceptional workers were retained to work throughout the winter.

[para10] H.G. was employed by [text deleted] as a temporary earner for seasonal work during 1995. His termination report stated that his quality of work was unsatisfactory as he was slow to catch on to assignments and required extra supervision. There was a check beside the word rehire. He was rehired in the spring of 1996 and worked until

his accident on August 4th, 1996. Mr. J. stated that H.G. had never been promised permanent work and in fact he had been told repeatedly by the personnel manager, Mr. H., and by his supervisor, J.W., that his work was unsatisfactory and that he would not be rehired. Mr. J. testified that it was decided in July 1996 that H.G. would not be offered further employment because of his unsatisfactory performance and he was not recommended to be rehired because he "has no desire or ambition to work". His termination of employment was determined as of October 25th, 1996, which was one of the dates when the seasonal labourers are laid off.

[para11] There was some debate over the interpretation of a letter, dated, October 30th, 1996 and signed by A.H., the personnel manager. The letter confirmed that many employees are laid off during October but that the storage crew has work throughout the winter. The troubling sentence was, "If [H.G.] had been able to do the job we had available in a satisfactory manner he would probably have had work throughout the year". Because there was some question raised about the interpretation of that particular sentence, the adjuster Mr. Polischuk asked for clarification. Mr. H. wrote another memo dated November 6th making it very clear that H.G.'s work had not been at all satisfactory and that J.W. and D.J. were not interested in rehiring the Appellant. A form signed on October 21st, 1996 by A.H. sent to [text deleted] indicated very clearly that Henry would be terminated as of October 25th, 1996. The decision to terminate H.G.'s employment had been clearly documented as of October 21st and, in the view of the Commission, the letter of October 30th could not be construed as meaning that continued employment would have been offered to H.G. if he had been able to work. Rather it meant that continued employment would only have been offered if the employer believed that the work would have been undertaken in a satisfactory manner.

[para12] In addressing the issue of whether or not the IRI received by H.G. was correctly terminated, it is necessary to examine the events that ended entitlement to IRI. M.P.I.C. terminated the Appellant's IRI based on Section 110(1) of the Act which states in part:

"110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(f) the expiration of a time that is fixed under Subsection 1 (sections 81 to 105);"

As a temporary earner H.G.'s entitlement is fixed by the time frame outlined in Section 83. Section 83(2) reads in part, as follows:

"83(2) The corporation shall determine the income

replacement indemnity for a temporary or part-time earner on the following basis:

"(a) under clause (1)(a) , if at the time of the accident

(1) the temporary earner or part-time earner holds or would have held employment as a salaried worker, the gross income that he or she earned or would have earned from the employment,"

[para13] In the case of temporary earners, IRI ends when the employment is scheduled to end. H.G.'s job would have been terminated in October 1996. H.G. was paid IRI up to the time his job terminated.

DISPOSITION:

[para14] In conclusion the commissioners are of the view that the IRI payments were correctly terminated. We therefore dismiss the appeal and confirm the decision of the Internal Review Officer dated January 20th, 1997.

@1

@XQL @XUpdate: 20000627  
qp/d/dcb  
@H  
MVRT  
@1<QLDATE C=19971010 U=20000919>