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Indexed as:
D.A. (Re)

IN THE MATTER OF an appeal by D.A.
AICAC File No.: AC-98-87

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[1998] M.A.I.C.A.C.D. No. 29

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, and
L. Goodspeed
Heard: August 20, 1998.
Decision: October 5, 1998.
(17 paras.)

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Issues(s):

Re-instatement of Income Replacement Indemnity ('IRI')
from November 24th, 1997 to January 26, 1998.

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Relevant Sections:

Section 81(1) of the MPIC Act ('the Act').

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Appearances:

Manitoba Public Insurance Corporation ('MPIC') represented by
Keith Addison.

Appellant represented by David J. Keith.

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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] The Appellant was driving a pickup truck east on
Hespler Avenue in Winnipeg, Manitoba, when he was struck from
behind twice by the same vehicle on September 7th, 1997. He
was thrown back and forth and at one point hit his head on the
back window. As a result of this accident he developed
headaches and pains in his chest, back and neck.

[para2] Shortly after the accident he consulted Dr. Raj

Mahay who referred him for physiotherapy at Rebound Physiotherapy, arranged for X-rays of his head to determine the source of his headaches and prescribed medication. D.A. was employed in the construction/maintenance Division of the [text deleted] as a labourer at the time of the accident; Dr. Mahay advised him not to return to work for the time being and gave him a medical certificate to this effect.

[para3] The X-Rays, taken on September 15th, 1997, did not reveal any evidence of a skull fracture or any increase in intercranial pressure. The headaches persisted and Dr. Mahay referred D.A. to Dr. Anthony Auty, a neurologist, for an examination on October 3rd, 1997. Dr. Auty concluded that there was nothing neurologically wrong with him and recommended that D.A. remain active and get back to his usual activities as soon as possible.

[para4] In late October Dr. Mahay felt that the Appellant could return to work but only on a graduated return to work basis, starting at four hours per day and gradually increasing the work by one hour per week until he was able to work full time. Unfortunately this type of program was not available with his employer.

[para5] The Appellant had qualified for IRI as he was not able to return to work due to the accident. The Adjuster handling this case talked to Mr. Tom Berzish, the physiotherapist treating D.A., on November 4th, 1997, to determine if the Appellant was able to return to work. Mr. Berzish advised that D.A. was not capable of working on a full-time basis at that time. He was of the opinion that a work hardening program was not needed and that by November 24th, 1997, the Appellant would be able to return to his full time work duties. The Adjuster advised Mr. Berzish that if the Appellant did not return to his full-time work duties by November 24th, 1997, he would terminate the physiotherapy treatments and place him in a work hardening program at another facility.

[para6] On November 21st Rebound Physiotherapy advised the Adjuster that they had discharged D.A. as he had reached 80% of his pre-accident status but they could do nothing further for him as his continuing headaches and dizziness were preventing further improvement in his recovery program.

[para7] The Adjuster talked to Dr. Mahay on November 24th, 1997 about D.A.'s ability to return to full-time work. Dr. Mahay is reported as having advised the Adjuster that he was capable of returning to work. Based on this medical and physiotherapy information MPIC were of the opinion that the Appellant had reached his pre-accident status and more importantly was capable of returning to his full-time work at the [text deleted]. D.A. was advised of this decision by

telephone on November 24th and that his IRI benefits were terminated effective November 23rd, 1997.

[para8] However in a report to MPIC dated November 26th, 1997, Dr. Mahay states that the Appellant should try modified work that did not involve heavy lifting and repeated bending. He advised that the Appellant felt he could not handle even this type of work and even if he could, this type of work was not available with his employer.

[para9] D.A. continued to experience headaches and dizziness and Dr. Mahay sent him to see Dr. Auty again who confirmed there was nothing neurologically wrong with him. D.A. was sent for a CT Brain Scan on December 29th, 1997 and it proved normal and these findings were conveyed to Dr. Mahay on January 8th, 1998.

[para10] D.A. saw Dr. Mahay several times during January, 1998, and was finally told he could return to his full-time work at the [text deleted] on January 26th, 1998. He did return to work on that date.

ISSUE:

[para11] D.A.'s position on this appeal is that he was cleared to do only light duties or work on November 24th and not given medical clearance to return to full-time work until January 26th, 1998. He was not able to get this type of work at the [text deleted] and because he could not work full-time due to the accident he was entitled to receive IRI benefits for this period.

[para12] Information provided by the [text deleted] indicates that MPIC advised them on November 24th, 1997, that D.A. has fully recovered from his automobile injuries. The [text deleted] contacted D.A. on December 1st, 1997, and advised him that if he could not return to work they need a medical certificate excusing him from work. This request was apparently made again on December 2nd and 17th of 1997. On December 22nd the [text deleted] notes that D.A. failed to provide the required medical certificate as per their Collective Agreement and Departmental policy however he did provide a medical certificate stating he would be off sick for December 22nd, 23rd and 24th of 1997. The [text deleted] continued to request this medical certificate throughout January and by the 21st was provided with one stating he could return to work on January 26th, 1998 and he did.

[para13] In a report dated April 24th, 1998, Dr. Mahay advises that he saw D.A. on January 2nd, 1998, and told him to call Dr. Auty to get the results of the December 29th CT Scan; if they were normal he was to return to regular work. Dr. Auty then reports that D.A.'s next visits in January were primarily

for fever and respiratory tract infection and that his absence from work after the first week in January, 1998, was mainly due to fever. There is no mention by Dr. Mahay that he gave a medical certificate to D.A. to excuse him from work for the period of December 22nd to 24th, 1997.

[para14] After considering all of the evidence we are of the opinion that D.A. could have returned to work on December 22nd, 1997, but for reasons not related to the accident he did not. It is likely that he was suffering from the aforementioned fever and respiratory tract infection which are not accident-related. We are also of the view that the Adjuster, when he was informed on November 26th, 1997, that the Appellant could only do light or restricted work, should have enrolled him in a work hardening program that he contemplated doing in early November, 1997. MPIC would have paid IRI to D.A. during his attendance at this type of program.

[para15] D.A. should have been offered a work hardening program and therefore would have been entitled received IRI benefits but only up to December 21st, 1997.

[para16] D.A. is to receive IRI for the period of November 24th to December 21st 1997 plus interest on this outstanding balance from December 21st, 1997 to the date of actual payment at the rate prescribed by statute, which is the prejudgment rate of interest determined under Section 79 of the Court of Queen's Bench Act.

DISPOSITION:

[para17] For the reasons set out above, the Acting Review Officer's decision of May 12th, 1998 is rescinded and the foregoing substituted for it.

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