

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by J.J.T.

AICAC File No.: AC-97-96

PANEL: Mr. J. F. Reeh Taylor, Q.C. (Chairperson)
Mr. Charles T. Birt, Q.C. Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC') represented by
Ms Joan McKelvey
the Appellant, J.J.T., appeared in person, accompanied by his
wife, S.T.

HEARING DATE: April 30th and June 18th, 1998

ISSUE: Whether MPIC justified in terminating Appellant's benefits for
non-compliance.

RELEVANT SECTION: Section 160(1) of the MPIC Act

**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 Appellant, J.J.T., a [text deleted]-year-old truck driver in the employ of [text deleted] at the time, was involved in a motor vehicle accident on December 28th, 1995 in the City of Winnipeg. He was driving his 1977 Mercedes Benz car when it was struck on the left side by a moving van. Although J.J.T. was wearing his seatbelt and shoulder strap, with the head rest raised, his forehead apparently struck the windshield of his vehicle, causing small glass cuts to his forehead and breaking his eyeglasses. He complained of pain at the top and posterior of his head, the posterior of his neck and both shoulders, right and left jaws, low back, left knee and left leg, and of a cut to the right index finger. He was taken by ambulance to the Health Sciences Centre in Winnipeg where X-rays were taken and J.J.T. was given a soft neck collar; his vehicle was apparently written off. J.J.T. was

initially examined on December 29th, 1995 by his family physician, Dr. John Mayba, who diagnosed soft tissue injuries to neck, shoulders, chest wall, lumbosacral sacral spine and the left knee. Dr. Mayba prescribed the application of heat, rest, 292 tablets, muscle relaxants and physiotherapy.

J.J.T. was next seen by Dr. I. I. Mayba , a specialist in orthopaedic surgery who, after examining J.J.T. and analyzing the X-ray results, found no fractures nor any dislocations, no bone nor joint abnormality in any of the left knee, the cervical spine, the thoracic spine or the lumbosacral spine. Dr. I. I. Mayba advised J.J.T. to remove the cervical collar several times each day, to continue applying heat to the soft tissue at points of discomfort, and to restrict some of his activities during physiotherapy. At the time of a second examination by Dr. I. I. Mayba on February 2nd, 1996, J.J.T. stated that he had fallen on stairs at his home on February 1st and had injured his left hand. X-rays showed a fracture at the base of the middle phalanx of the left fifth finger, and Dr. I. I. Mayba therefore taped J.J.T.'s left fourth and fifth fingers together and advised him to remain off work for this latter reason.

J.J.T. was seen for the third time by Dr. I. I. Mayba on March 4th, where X-rays were again taken of J.J.T.'s right knee. Dr. Mayba's report of that examination indicated that progress had been satisfactory; prognosis was good; no permanent impairment nor any sequelae to the patient's musculoskeletal system were anticipated and J.J.T. required no further physiotherapy. Dr. Mayba added that, in his opinion, J.J.T. should be fit and able to return to his usual activities and work by April 1st of 1996.

However, despite that opinion from the orthopedic consultant, J.J.T. continued to attend upon his

regular practitioner, Mr. John Mayba, who had already seen him on January 24th, February 2nd, February 15th and March 4th, and who examined him again on April 4th, April 29th, May 30th and June 27th of 1996. During all or part of that time, J.J.T. was also attending for physiotherapy and, finding that those sessions were too painful and vigorous for him, sought and received acupuncture and other more passive treatments instead. As well, he was using an Obus Forme seat, wrist tensor support, a lumbar corset, a body pillow, a McKenzie cervical roll, a 65 centimeter therapeutic exercise ball, a digiflexor hand and finger exerciser, a high back Obus Forme support with extra roll, and right knee bolster with right knee support. All of those orthotic aids seem to have combined, along with his acupuncture and medication, to give J.J.T. a slow, moderate improvement in his overall condition. Throughout this period, J.J.T. received income replacement indemnity from MPIC, which also paid for his treatments, medication and travel expenses.

J.J.T. was sent by MPIC for an independent examination on August 28th, 1996 by Mr. Wayne Singer, a physiotherapy consultant, whose recommendations, in his report of September 12th, 1996 may be summarized this way:

1. although J.J.T., in completing certain questionnaires, appeared to consider himself to be crippled, his perceived functional limitations were not in proportion to objective findings. His neurological exam had been normal and he had a reasonably full, functional range of motion - albeit with complaints of discomfort;
2. although still taking Amitriptyline, J.J.T. complained of waking every two hours and it might be appropriate for his physician to review the then current dosage;
3. any damage to J.J.T.'s right knee would have been the result of the fall down his stairs and

- was unrelated to his motor vehicle accident;
4. since J.J.T. had switched from a physiotherapy program focusing on strengthening to one of a mainly passive nature, treatment at a frequency of six times per week for acupuncture with heat and stretching every other day was, in Mr. Singer's opinion, excessive. At this stage of his rehabilitation (more than eight months after his injury) an aggressive strengthening and stretching program was essential. Similarly, the home exercise program was lacking in several respects and full restoration was not likely to be accomplished with the then current program;
 5. in Mr. Singer's view, J.J.T.'s past history had major significance since, following a 1988 work-related accident, J.J.T. had not rejoined the workforce until 1993, at which point J.J.T. himself felt that he had recovered to less than 50% of his pre-accident status;
 6. J.J.T. would best benefit from a work-hardening program within a multi-disciplinary centre where he would be closely supervised during the performance of flexibility, strengthening and job-related tasks as well as being counselled with respect to pain issues. The difference between hurt and harm must be emphasized, said Mr. Singer;
 7. a time frame of six to eight weeks would be appropriate for the work-hardening program, to be followed by a return to work.

On November 13th, 1996, MPIC wrote to J.J.T., terminating his benefits on the ground that he had "knowingly provided false and inaccurate information to the Corporation". It transpires that this boiled down to an excessive claim for travel expenses in the total sum of \$29.78, for which MPIC was claiming reimbursement. In addition, MPIC had apparently determined that, by November 13th

of 1996, J.J.T. was, in any event, again capable of holding the employment that he had held at the time of his accident, and this formed the second ground for the Corporation's termination of his benefits.

J.J.T. and S.T. had consulted Mr. Donald Bjornson, their solicitor, who sent a lengthy letter of November 13th to the President of MPIC, giving a detailed background of his client's situation and seeking an immediate review of the Corporation's decision. As a result, a meeting was held between Mr. Bjornson and three senior members of MPIC's Personal Injuries Claims team - Messrs. Bruce Buchanan, Lewis Egan and Mr. Ray Morin. J.J.T. had apparently been invited to join that meeting but had elected to leave matters in the hands of his solicitor, simply holding himself ready to join the meeting if requested.

At that meeting, MPIC agreed to reinstate J.J.T.'s income replacement upon the following conditions, which were confirmed by way of a letter from Mr. Bjornson to MPIC of December 19th, 1996:

1. that J.J.T. would furnish MPIC with his Workers Compensation Board claim file within a reasonable time;
2. that J.J.T. would attend for a reassessment by Mr. Wayne Singer;
3. that J.J.T. would provide full disclosure to Mr. Singer and would participate and cooperate fully with Mr. Singer;
4. that MPIC, having received reports from Mr. Singer and Dr. John Mayba, would submit those reports to its medical services team for a further assessment of J.J.T.'s claim.

Mr. Bjornson's letter went on to say that J.J.T. was in full agreement with the providing of his Workers Compensation claim file to MPIC; J.J.T. had, himself, a file that he would be happy to turn over to the Corporation, but MPIC would have to obtain any additional material directly from the Workers Compensation Board. Mr. Bjornson purported to add a further condition to the foregoing points of agreement, that J.J.T.'s cheque would be processed immediately and would make that cheque available for J.J.T. by noon of the following day, to include income replacement from the date of his last cheque. Mr. Bjornson also added that his client insisted that the Corporation process J.J.T.'s claim for a lost watch and ring. These two conditions had not been raised nor agreed upon at the December 13th meeting and had no binding effect on the parties.

Mr. Bjornson's letter went on to reaffirm J.J.T.'s willingness to cooperate and his anxiety to return to work. "He has previously agreed, and agrees now, to attend to whatever program of rehabilitation is recommended to him provided that same meets with the approval of his medical advisors."

J.J.T. did, in fact, receive a cheque to cover his income replacement indemnity up to the date agreed upon at the December 13th meeting and received income continuing thereafter up to the 13th of January 1997.

On January 17th, 1997, Mr. Singer wrote to Mr. Bruce Buchanan at MPIC, to report that, while J.J.T. had attended at Mr. Singer's clinic January 14th, accompanied by his wife, J.J.T. had informed Mr. Singer that he chose not to be reassessed. J.J.T. apparently advanced reasons for this refusal that predated the December 13th meeting and the undertakings given on his behalf by Mr. Bjornson.

During his evidence before this Commission, J.J.T. emphasized his view that agreements made on his behalf by his lawyer were not binding upon him; these, in his view, were Mr. Bjornson's agreements but not those of J.J.T. himself. The law, however, is clear that all such reasonable undertakings as those given by Mr. Bjornson on J.J.T.'s behalf are, indeed, binding upon the client.

The reasons for the need for J.J.T.'s reassessment by Mr. Singer, and for the production of the Workers Compensation Board file, had been made very clear to Mr. Bjornson and, we have to assume, communicated by Mr. Bjornson to his client.

In light of Mr. Singer's report of January 17th and the fact that nothing had been produced by J.J.T. or his counsel in the form of a Workers Compensation Board file (other than a copy of a letter of January 4th, 1990 from W.C.B. addressed to J.J.T., terminating his temporary total disability benefits as of December 31st, 1989) MPIC wrote to J.J.T. on January 23rd, 1997 advising him that his income replacement benefits were being terminated.

Mr. Bjornson, on J.J.T.'s behalf, applied for an internal review of that decision. That review was conducted by Mr. T. B. Kumka on May 6th, 1997, and resulted in the earlier decision of MPIC being confirmed. It is from the decision of Mr. Kumka that J.J.T. now appeals.

In the course of his evidence, J.J.T. testified that he had not felt it necessary to produce any Workers Compensation Board material because, in discussions with Mr. Kevin McCulloch, MPIC's Senior Counsel and Corporate Secretary, he had learned that Mr. McCulloch already had the Workers

Compensation Board file in his possession. If we understood J.J.T. correctly, he was also alleging that Mr. Wayne Singer had been provided with his Workers Compensation Board file. These allegations were so much at odds with the material provided to us by MPIC that we felt it necessary to adjourn the initial hearing of J.J.T.'s appeal to the first date when Mr. McCulloch and Mr. Singer could be available to give their own, oral testimony and submit to cross-examination by J.J.T. J.J.T. also indicated an intention to call Mr. Don Bjornson to give testimony on his behalf. However, although the hearing was reconvened on June 18th, and although the sworn testimony of Mr. McCulloch and Mr. Singer flatly contradicted the earlier evidence of J.J.T., J.J.T. declined the opportunity to ask any questions of either of them, and also declined the opportunity to make any further submissions. He said, simply, "I'm happy with the answers I got".

What, then, are the relevant facts with which we are faced? They may be summarized as follows:

1. despite the undertaking given on behalf of J.J.T. at the meeting of December 13th, 1996, neither J.J.T. nor his counsel provided any portion of the Workers Compensation Board file respecting his earlier, industrial accident, save only for the letter of January 4th, 1990 which had apparently been provided by J.J.T.'s counsel in the early stages of the claim and long before December 13th, 1996. Suggestions by J.J.T. that MPIC personnel had, in some fashion, improperly obtained material from that file are totally without foundation - a fact supported by a report from the Workers Compensation Board itself of which J.J.T. was fully aware;
2. despite the undertaking given on his behalf by Mr. Bjornson and, so far as we can tell, also explained to J.J.T. by Mr. Singer at their meeting of January 14th, 1997, J.J.T. refused to

- participate in a functional reassessment by Mr. Singer and gave, as his reasons for that refusal, grounds that, in the respectful view of this Commission, are quite without merit;
3. prior to that refusal, J.J.T. had in fact received a cheque for \$[text deleted], representing the income replacement indemnity covering the period from the date of his previous cheque up to and including December 19th, 1996. He cashed that cheque but did nothing to live up to his end of the bargain;
 4. his own physician, Dr. John Mayba, had reported that J.J.T. had made a satisfactory recovery from all injuries sustained in his December 28th, 1995 motor vehicle accident, except for some soft tissue strain to his lumbosacral spine which, in the view of Dr. John Mayba, would undergo a complete recovery following successful completion by J.J.T. of a work hardening program of six to eight weeks duration. By that point, said Dr. John Mayba, J.J.T. would have returned to his pre-accident status. With that full knowledge, J.J.T. appears to have taken no steps towards undergoing a reassessment, followed by the work hardening program that Dr. John Mayba and Mr. Singer had so strongly recommended.

The only section of the MPIC Act that is relevant to this appeal is Section 160, of which a copy is annexed to and intended to form part of these Reasons. In the view of this Commission, J.J.T.'s acts and omissions fully justify the termination of his benefits by MPIC under Subsections (d), (e), (f) and (g) of Section 160(1). He refused to undergo an examination by Mr. Singer; he did not make himself available for treatment recommended by both Mr. Singer and Dr. John Mayba; for that same reason, and also by exaggerating the nature and extent of his injuries and discomfort, and by insisting upon passive forms of therapy rather than the more active and aggressive forms that were clearly called

for, he prevented or delayed his own recovery and, by refusing his cooperation with Mr. Singer, he also failed to participate in the rehabilitation program that would have been made available to him at the cost of MPIC.

There were suggestions in MPIC's file of fraud on J.J.T.'s part, but the evidence in that regard was minimal and we have paid no heed to it at all.

It must be added that the relationship between J.J.T. and S.T., on the one hand, and various representatives of MPIC, on the other, appear to have proceeded from a poor start: we heard allegations from J.J.T. and S.T. of unjustifiable delays and cavalier treatment; we read allegations by MPIC that suggest dishonesty on the part of the claimants. It is not necessary for us to decide those aspects of this claim, despite the existence of evidence tending to support both sets of allegations. Our role is necessarily limited to determining whether or not MPIC was justified in terminating J.J.T.'s income replacement indemnity and other benefits when it did so by way of Mr. Buchanan's letter to J.J.T. of January 23rd, 1997. We have no hesitation in finding that the termination was justified for the reasons outlined above. The decision of MPIC's Internal Review Officer of May 27th, 1997 is therefore, confirmed.

Dated at Winnipeg this 24th day of June 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED