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Indexed as:  
T.D.S. (Re)

IN THE MATTER OF an appeal by T.D.S.  
AICAC File No.: AC-98-145

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[1999] M.A.I.C.A.C.D. No. 8

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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: January 21, 1999.  
Decision: April 6, 1999.  
(18 paras.)

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Issue(s) :

Whether Appellant entitled to reinstatement of income  
replacement indemnity ('IRI');  
Whether Appellant entitled to further chiropractic  
treatments.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993,  
c. 36, ss. 81, 136(1)(a) and 138.  
Regulation 40/94, s. 5.

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Appearances:

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

The appellant, T.D.S., appeared in person.

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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] The Appellant, T.D.S., was the victim of a motor  
vehicle accident on November 21st, 1996. He sustained a  
fracture at C5-C6 in his neck, with some injury to the  
existing nerves at that level but without spinal cord damage.  
X-ray investigation revealed that the fracture was relatively  
stable and could be managed in an external supporting device

which was utilized. He had significant neck pain and arm pain initially, primarily on the right side.

[para2] In the months immediately preceding his accident, T.D.S. had been engaged in two, seasonal occupations. During the summer months, he operated a hot dog stand; during the remainder of the year he had been working as a restaurant manager at the [text deleted] in Winnipeg, but had also been self-employed in the woodworking industry, making custom-built hope chests and signboards since 1993. At the time of his accident he had just finished his hot dog season.

[para3] He was admitted under the care of Dr. Derek Fewer, neurosurgeon, immediately following his accident. Dr. Fewer saw him again on December 2nd, 1996, when X-rays revealed that the fracture had not changed in position; T.D.S. was experiencing pain in the two nerve pathways in his right arm, although without significant weakness. A further examination on January 20th, 1997 showed good fusion of the fractured site with no evidence of instability, although T.D.S. was still experiencing much paraspinal pain and restriction of motion. Dr. Fewer referred him for physiotherapy to help him recover his range of motion.

[para4] By July 9th, 1997, Dr. Fewer was reporting improvement in T.D.S.'s range of motion of his neck, reduction in his pinched nerve symptoms and the absence of arm pain. Dr. Fewer reported that T.D.S. was still on physiotherapy as his ability to tolerate extended periods of upward neck motion was still limited. Dr. Fewer indicated that he had approved T.D.S.'s return to work in the middle of April, 1997, but without any heavy labour. "He will in theory at least recover over a period of at least one year."

[para5] T.D.S. was involved in a second motor vehicle accident on July 30th, 1997, following which he was treated by Dr. Angela Bharadwaj, a family physician, and also by Dr. Michael de Jong, chiropractor. Dr. Bharadwaj referred him to Dr. Arneja, physiatrist and specialist in rehabilitation medicine. By November 12th, 1997, Dr. Bharadwaj expressed the view that T.D.S. could return to work on a limited basis of two hours per day "with modified duties/light work that does not involve repetitive right arm movements".

[para6] Meanwhile, MPIC had referred T.D.S. to PAR Health Services for an assessment, with a view to his participation in a functional restoration program that was to include physiotherapy and occupational therapy. Some behavioural problems arose, giving rise to the need for psychological counseling and a broader multi-disciplinary approach to his rehabilitation. Even that was not totally successful, and on July 10th, 1998 T.D.S.'s adjuster wrote to him, after numerous earlier warnings, terminating his benefits under the Personal

Injury Protection Plan contained in Part 2 of the Manitoba Public Insurance Corporation Act, upon the grounds set out in Subsections (d), (e), (f) and (g) of Section 160 of the Act.

[para7] T.D.S. appealed from that decision to MPIC's Internal Review Officer, whose decision reads, in part, as follows:

At your internal review hearing of September 8th, 1998 you advised me that, due to the fact that you had a drinking problem and problems with your family as well as running a business and you were in the process of buying and selling a house, you were not able to comply completely with the rehabilitation work hardening program. You had also advised me at the internal review hearing that, in fact, you are no longer drinking and all of these other problems will not interfere with further rehabilitation. You stated at your hearing that you are willing to go back to work hardening at any time, therefore it is my decision that you will be provided with one more month of work hardening paid for by the Manitoba Public Insurance Corporation....As a result of this decision you will be paid income replacement indemnity benefits only for the month that you are attending the work hardening program.

[para8] In a second, separate decision bearing date January 7th, 1999, the Internal Review Officer decided that a request made by T.D.S. for continued chiropractic treatment should be denied.

[para9] It is from these two decisions of the Internal Review Officer that T.D.S. now appeals to this Commission.

[para10] Following the hearing of T.D.S.'s appeal, we advised the parties that, in the absence of some further evidence, the only facet of T.D.S.'s appeal upon which we felt competent to make a decision related to his claim for income replacement indemnity from the period between October 2nd, 1998 and November 4th, 1998. October 2nd was the date upon which MPIC's Internal Review Officer decided that T.D.S. should be given one further and final opportunity to enter a work hardening program; November 4th was the date when he actually commenced that program, which he completed satisfactorily on December 4th, 1998. We concluded that, since T.D.S. appeared to have commenced his work hardening program at the earliest practicable date after receiving the Internal Review Officer's decision, he should be entitled to his income replacement indemnity from the date of that decision until he commenced the program, and we so advised the parties. We therefore confirm his entitlement to IRI from October 2nd to November 3rd, 1998, both inclusive.

[para11] Concurrently with the latter decision, we wrote to Dr. Conrad Hoy a physiatrist and specialist in physical medicine and rehabilitation, who had been supervising T.D.S.'s work hardening program, to Ms Stephanie Roberecki, physiotherapist, to whom T.D.S. had been referred to be educated regarding a reconditioning program, and to Dr. S. Soni, Jr., a physician with Lakewood Medical Centre where T.D.S. had been treated by Dr. Soni and a number of the latter's colleagues.

[para12] Ms Roberecki reported, in essence, that after a daily reconditioning program, combining active reconditioning and passive soft tissue massage and stretching, T.D.S. had noted significant relief from pain. He had been referred to Dr. Hoy for trigger point injections and, although these produced increased pain immediately post injection, they seemed to aid in overall improvement. She expressed the view that, if T.D.S. were to continue with his exercise program on a daily basis, further improvement would be realized. The implication is that T.D.S. had not achieved full rehabilitation by the time of Ms Roberecki's last report.

[para13] Dr. Hoy, in an earlier report to MPIC of December 14th, 1998, appeared to feel that further trigger point injections would be useful, but that T.D.S. should have been able to return to his previous job as hot dog vendor by early June of 1998. Dr. Hoy based that opinion upon a report from PAR Health Services of June 8th. However, an analysis of that report from PAR Health Services gives rise to certain concerns. Firstly, that report contains the comment that a discharge assessment could not be completed because T.D.S. did not attend his final assessment and, for the same reason, ongoing reassessments were not available. Secondly, it contains the rather contradictory conclusion that T.D.S. should be able to return to his previous job as a hot dog vendor on a full-time basis, but was unable to deal with the heavier aspects of setting up and taking down his equipment. Thirdly, he was only assessed as to his ability to operate his hot dog stand and no attention seems to have been paid to the fact that, for at least six months of the year, he was a woodworker.

[para14] Dr. Hoy's most recent report pointed out that the most effective long term treatment of myofascial pain is a regular strengthening regime. He did not feel that trigger point injections were completely necessary, although they might be helpful to T.D.S. Dr. Hoy expressed a willingness to reassess the Appellant in the event of a significant increase in symptoms and a decrease in function.

[para15] Dr. Robin Sen of the Lakewood Medical Centre responded to the letter we had addressed to Dr. Soni. Dr. Sen had been treating T.D.S. since September 8th, 1998, but had

available to him T.D.S.'s medical records at that clinic from May of 1996 to date. He noted that T.D.S. had been referred to Dr. Shelton, neurologist, who had seen him on January 7th, 1999. Dr. Shelton had found a mild impairment of vibration sensation in the Appellant's fifth fingers bilaterally as well as a subjective decrease in pinprick sensation in the right hand and forearm. Dr. Shelton concluded there was evidence of minimal residual neurologic dysfunction and suggested continuing with physiotherapy and anti-inflammatory medications. A CT Scan arranged by Dr. Sen had revealed nothing of significance. Dr. Sen reports that T.D.S. continues to have positive objective signs, such as tenderness of his left low back with mildly restricted extension of his lumbosacral spine, tenderness of his right neck and shoulder muscles with some restriction of neck movement, especially right lateral bending, and mild impairment of vibration sensation in the fifth fingers of both hands. He did not feel that there was any evidence of serious neurological dysfunction. Dr. Sen concludes his opinion of February 2nd, 1999 with the comment that

In my opinion [T.D.S.'s] persistent neck and shoulder signs, his low back pain and the minor neurological signs in his hands are a result of the original motor vehicle accident of November 1996 and were all aggravated by the motor vehicle accident of July 1997.

Despite his persistent symptoms, I feel that he should be able to return to some of his work duties. It may very well be that he is unable to do all of his previous work activities because of aggravation of his pain. In that case, alternate lighter work or retraining would be indicated. I think he should continue his exercises and remain as active as possible. He may very well benefit from further trigger point injections.

[para16] T.D.S. testified that he was initially receiving chiropractic treatments at a frequency of three times per week, then twice weekly and, thereafter, sporadically on an 'as needed' basis. Following the discontinuance of chiropractic treatments at MPIC's expense, T.D.S. attended upon Dr. de Jong another twelve times at the expense of Manitoba Health Services Commission, but had only seen Dr. de Jong a couple of times since then. There is really no evidence before us upon which we might base an order for continued chiropractic treatments. Indeed, if any further physical treatments are required they would probably take the form of a few more trigger point injections, together with strengthening and stretching exercises in a controlled situation, as opposed to reliance upon T.D.S.'s ability to complete his home exercise program.

[para17] T.D.S. testified, and we accept as fact, that he

was able to recommence his woodworking career on at least a part-time basis on January 7th, 1999. We therefore find that he is also entitled to continuance of his income replacement indemnity from December 5th, 1998 (the day following completion of his work-hardening program) until the day before his return to work, namely January 6th, 1999, both inclusive.

[para18] We also find that, since none of his caregivers has found, in any definitive way, that T.D.S. has, in fact, been restored to his pre-accident status, he should be referred back to his Adjuster in order to arrange for a new functional capacity evaluation. If the recommendation flowing from that evaluation is for a further, time-limited course of physiotherapy or work hardening in order to restore his ability to perform both his woodworking tasks and those of hot dog vendor, then that is what he should receive; if, as a result of that evaluation, he is found to be unable to perform all of his previous work activities, then he will be entitled to such retraining as may be found appropriate. He will be entitled to payment of income replacement indemnity while undergoing functional capacity evaluation and, if deemed necessary as result of that evaluation, while undergoing further work hardening, physiotherapy or retraining.

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