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Indexed as:
K.M. (Re)

IN THE MATTER OF an appeal by K.M.
AICAC File No.: AC-99-21

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[1999] M.A.I.C.A.C.D. No. 26

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C., and
F.L. Cox

Heard: June 1, 1999.
Decision: July 21, 1999.
(34 paras.)

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Issue:

Suspension of Income Replacement Indemnity ('IRI')
- whether justified.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993,
c. 36, ss. 160 (e), (f), and (g).

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Appearances:

The appellant, K.M., appeared on his own behalf.
Manitoba Public Insurance Corporation ('MPIC') represented by
Joan McKelvey.

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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 involved in a motor vehicle
accident ('MVA') on February 19, 1998 at 11:30 P.M. He was a
passenger in a car involved in a two-vehicle accident and
received fairly serious injuries. He had to be removed from
the vehicle with the so-called "Jaws of Life" and was
immediately transported by ambulance to [Text deleted] and
thence to the [Text deleted] where he remained for 5 days. He
was treated there for fractures to his lower right ribs, #11

and #12, and for head lacerations. He was also examined and monitored by the Department of Thoracic Surgery for sub-pulmonic effusion, but no significant effusion was noted.

[para2] K.M. was discharged from [Text deleted] on February 25th, 1998 and was given a prescription for Tylenol #3. Arrangements were made for him to be examined by Dr. Chan, of the Balmoral Medical Clinic, one week later.

[para3] Dr. Chan had been K.M.'s personal physician for some ten years prior to the MVA. In his report of March 31st, 1998, Dr. Chan gave his opinion that K.M.'s injuries should heal within six to eight weeks, but that the healing process might be delayed because of an underlying arthritic condition. Dr. Chan had been treating the arthritis with medication at the time of the MVA. He also expressed the view that the pain from K.M.'s injuries might prevent him from returning to work as a self-employed general contractor for at least 6-8 weeks.

[para4] In May, 1998, K.M. began receiving chiropractic treatments from Dr. Rothman for the injuries he had received in his MVA. Dr. Rothman had treated K.M. over a period of some 10 to 12 years for disc problems and sciatica, prior to the MVA.

[para5] In late May, MPIC retained the services of Mr. Dan Chafe of Occupational Rehabilitation Group ('ORG') to organize a return-to-work program for K.M. Mr. Chafe referred the appellant to the D'Arcy Bain Physiotherapy Clinic for an initial assessment and treatments.

[para6] Mr. Chafe, after discussion with the appellant's chiropractor and physiotherapist, referred K.M. to the Wellness Institute at Seven Oaks Hospital for a work-hardening program, where he presented with lower back pain. The Institute describes that as "mostly right-sided lumbrosacral radiating into his right leg".

[para7] On April 8th, 1998, K.M.'s adjuster at MPIC (Ms. Barbara Bandura), after discussion with Dr. Chan, told K.M. he could return to light duties at work. The appellant responded that there were no light duties in construction work. Ms. Bandura apparently cautioned K.M. orally that doing things to interfere with or delay his recovery "may cause us to reduce or cancel your benefits".

[para8] On June 9, 1998, Ms. Bandura wrote to the appellant advising that he apparently had not attended at D'Arcy Bain Physiotherapy Clinic on June 4, 1998 for an assessment and repeating the earlier warning that withholding information, refusing treatment, or doing things to interfere with or delay recovery could reduce or cancel the appellant's MPI benefits.

[para9] K.M. responded that he had never received the message of June 2nd, setting up the June 4th appointment, and he immediately agreed to a new appointment on June 11th, 1998. Mr. Wayne Singer of the D'Arcy Bain Clinic began seeing K.M. regularly in June and felt that the appellant was, at that point, ready to start a work-hardening program. This conclusion was also supported by Mr. Dan Chafe of ORG, who was concurrently advising Ms. Bandura with respect to the management of K.M.'s case.

[para10] K.M. was given a psychological assessment by Dr. Moore of The Wellness Institute, preparatory to commencing the work-hardening program. Dr. Moore's undated report noted sleep disturbance, discouragement and frustration, but no past-traumatic stress syndrome, nor any anxiety disorders nor depression. The appellant did report weight loss from loss of appetite since the MVA, but appeared to be a good candidate for work-hardening. Dr. Moore added that he (Dr. Moore) was to be consulted during the process of work-hardening, by way of reinforcement, and to determine if K.M. needed counseling assistance during the continuance on that program. Dr. Moore noted "[K.M.] himself appears very motivated to begin work on his physical rehabilitation".

[para11] After Dr. A. Moore's psychological assessment, The Wellness Institute agreed to administer a work-hardening program for the appellant. K.M. attended there for a functional capacity assessment on July 21st, 1998 and an assessment report was completed on July 24th by Ms. Leslie Milne, physiotherapist. The recommendation of that report, based on findings from extensive tests, was

[K.M.] is an appropriate candidate for participation in a 6-8 week work-hardening program. This program would be designed to provide [K.M.] with a general conditioning program, with some specific emphasis on lumbar stabilization, abdominal and hip girdle strengthening. Given his past medical history of many joint injuries and fractures, this may hinder his capacity to regain full flexibility and strength. Given his past history of chiropractic treatment for low back pain, [K.M.] may have had some lumbar instability and weakness prior to the MVA, which was subsequently exacerbated by the MVA.

Barring any unforeseen complications during this program it should be possible for [K.M.] to resume his pre-accident employment as a general contractor. I am uncertain as to whether a graduated return-to-work would be possible for him, given that he was self-employed at the time of the accident.

[para12] The Wellness Institute planned to start the work-hardening program on August 4th, 1998. Prior to

arranging that start, Ms. Bandura wrote to the appellant on July 31st, 1998, to say that:

We have been advised by the Occupational Rehabilitation Group that you have cancelled the following appointments:

1. On June 25, 1998 due to a family emergency.
2. On July 7, 1998 you had an appointment with D'Arcy Bain Physiotherapy. You arrived to this appointment 10 minutes early and then left for no apparent reason.
3. On July 9, 1998 this appointment was cancelled based on a phone call from a woman who said you were not feeling well: This woman was requested to advise you that you had an appointment with Occupational Rehabilitation Group on July 10, 1998.
4. On July 10, 1998, you did not phone or attend at Occupational Rehabilitation Group.

Further, we have been advised by Dr. W. Rothman, Chiropractor, that you have discharged yourself from chiropractic care.

You were advised on June 9, 1998, that by withholding information, refusing treatment, doing things to interfere with or delay your recovery, or failing to co-operate with rehabilitation or reasonable requests for medical examination, may cause the Manitoba Public Insurance Corporation to suspend or cancel your benefits.

Please note this is the second and last warning letter that you will receive. Any further non-compliance by yourself will result in suspension of benefits.

[para13] K.M. agreed to attend the work-hardening program at the Wellness Institute, starting August 4th. Prior to that session, he was asked to attend on July 30th to have the Institute's social worker educate him and other participants in the program, offering them ongoing counseling during that program. On July 30th, 1998 the appellant 'phoned the Wellness Institute and cancelled his appointment, stating untruthfully that he had a social worker's degree himself and did not think he needed to meet with the Institute's social worker.

[para14] The Wellness Institute, not being in agreement, re-scheduled K.M.'s appointment for August 4th, the same day upon which his work-hardening program was to start.

[para15] On August 4, 1998, K.M. did attend at the Wellness Institute for his appointment. He was to have

continued that program August 5th, but failed to attend. Instead, a lady purporting to be his sister telephoned the Institute to advise he had been in another car accident on August 4th and was at [Text deleted] Hospital.

[para16] Subsequent inquiries led to the admission by the appellant that he had not attended the hospital on August 4th and sought no medical attention until seeing Dr. Chan on August 13th. Dr. Chan's brief report indicates that the appellant had presented on August 13th with a history of being involved in a hit-and-run accident August 4th, resulting in bruising on his left knee and ankle.

[para17] All rehabilitation for the appellant at The Wellness Institute ceased until he could be re-assessed by the Seven Oaks Hospital staff at a meeting scheduled for August 20th, 1998 at 10:00 A.M. Present at that meeting were the appellant, Mr. Chafe, Ms. Leslie Milne and Ms. Bandura. The discussion focused upon K.M.'s alleged non-compliance and the alleged second motor vehicle accident of August 4th, 1998.

[para18] K.M. is reported as saying that he did not agree with the July 31, 1998, letter quoted above. Firstly, he said, he had not cancelled the appointment with Wayne Singer because of any family emergency of his own; it had been Mr. Singer who had the family emergency. Secondly, he had waited one half-hour for his appointment with Mr. Singer on the second occasion, but had had been obliged to leave to be on time for another appointment with Ms. Bandura at MPIC. K.M. reported that his third cancellation was because he was "really sore", that he had tried to reach Mr. Dan Chafe on July 17th, 1998 but that Mr. Chafe had been on vacation. (We may say that we find it puzzling that K.M. would wait until July 17th before attempting to explain his July 9th absence to Mr. Chafe.) With respect to the alleged motor vehicle accident of August 4th, 1998, K.M. agreed that he had made no report of that incident to the police and had received no medical attention until August 13th. Dr. Chan's report described the bruising as being 10x13 cm on one knee. Ms. Milne, who saw the bruise the next day - August 14th - reports a tiny cut and much smaller bruising.

[para19] When asked why he did not try to communicate his situation to the Wellness Institute, K.M. replied that he had lost the compliance sheets that he had been given.

[para20] K.M. agreed to continue for six weeks the work-hardening program that he had now recommenced. The agreed plan was that, upon finishing the work-hardening program, K.M. would either follow a home exercise program or obtain a gym membership at The Wellness Institute. At the time of the meeting described above, the appellant had completed some two hours of his work-hardening program and reported some discomfort from this, his first day. The question of alcohol

was discussed and K.M. acknowledges having received three oral warnings from the both Ms. Bandura and Ms. Milne. Ms. Milne added that if he again attended the program after consuming alcohol he would be sent home.

[para21] On August 21st, 1998 the appellant advised Ms. Bandura that he was too sore and could hardly move; there was no way, he said, that he could attend the work-hardening program. He received bus fare from MPIC to enable him to attend the program. However, he claimed to be unable to take the bus. Mr. Chafe and Ms. Milne felt they should assess K.M.'s medical condition. They therefore offered to send a taxi to have him attend The Wellness Institute but he refused that offer. Since K.M. had offered no medical evidence that he was unable to continue, and since he appeared unwilling to cooperate with MPI and his caregivers, MPIC decided to suspend his IRI benefits until he complied with his caregivers' recommendations.

[para22] A letter bearing date August 26th, 1998 was sent to K.M., terminating his IRI benefits under Section 160 of the MPIC Act which reads, in part, as follows:

Section 160: The corporation may refuse to pay compensation. To a person or may reduce the amount of an indemnity or suspend or terminate that indemnity, where the person

- (e) without valid reason, refuses, does not follow, or is not available for, medical treatment recommended a medical practitioner and the Corporation.
- (f) without valid reason, prevents or delays recovery by his or her activities.
- (g) without valid reason, does not follow or participate in a rehabilitation program made available by the Corporation.

[para23] The August 26th letter also noted that K.M. had missed appointments on August 24th and August 25th without notifying his caregivers nor MPIC that he would be missing them, nor why.

[para24] On August 27th, 1998, K.M. sent a memorandum to Ms. Bandura, to the affect that he had returned to Dr. Chan who had suggested that K.M. see a back specialist and refuse the work-hardening program if he were unable to exercise. However, a note from Dr. Chan dated August 26th says that he saw the appellant and told him that he should return to physiotherapy on August 27th. No mention is made by Dr. Chan of any back specialist nor of any advice to refuse the exercise program.

[para25] On September 3rd, 1998, Mr. Chafe wrote Dr. Chan to confirm a telephone conversation of that date. Dr. Chan is reported, in that letter, to have told his patient to return to physiotherapy on August 27th, and if exercises were too difficult, to ask the physiotherapist to try a different approach. Dr. Chan also arranged for the appellant to see Dr. Hillel Sommer on October 26th, 1998.

[para26] K.M. did not, in fact, return to physiotherapy to see if any modified exercise would improve his condition. On October 14th, 1998, Dr. Chan reported that the appellant had back pain and was on medication, but that report did not indicate whether the pain related to the MVA of February 1998 or to the pre-existing problems or to K.M.'s alleged August 4th accident.

[para27] When Dr. Sommer saw the appellant in October 1998, his impression was that the appellant suffered from mechanical back pain. Dr. Sommer's report of October 27th, is brief and does not say whether he was aware of the appellant's lengthy, pre-accident, medical history trauma nor does he indicate whether, in his opinion, the pain of which K.M. was complaining in October was related to the February motor vehicle accident. Dr. Sommer said that he "would like to refer the appellant to physiotherapy if his treatments will be funded by MPI", but does not elaborate on the kind or duration of treatments. K.M. was to re-contact Dr. Sommer after speaking to Ms. Bandura.

[para28] Meanwhile, K.M. had appealed, to MPIC's Internal Review Officer, from the corporation's decision to terminate his benefits as of August 26th, 1998. The decision of Mr. Kumka, the Review Officer, dated December 3rd, 1998 varies the decision letter of August 26th by merely suspending the appellant's benefits until such time as the appellant resumed participation in another program to be arranged by his adjuster.

[para29] Subsequently, K.M. did resume a renewed, revised work-hardening program designed and administered by The Wellness Institute from about mid-December, 1998 until February 22nd, 1999. His Income Replacement Indemnity was also reinstated for that same period and then terminated. It has not been reinstated since.

[para30] A contract was signed by the appellant and his caregivers on December 15th, 1998, and reads in part as follows:

Termination from the program will occur if:

- 1) You do not comply with the program components;
- 2) You are absent from the program for two days without

proper validation;

- 3) You attend the program and there is any evidence of substance abuse.

[para31] On February 1st, 1999 MPIC wrote the appellant, advising him that the insurer was aware he had missed 4 days of the program on January 8th, 13th, 15th, and 22nd, 1999. He had called in sick on two occasions but on the other two occasions had neither attended nor called. However, surprisingly enough, this was a warning letter only and did not result in the termination of K.M.'s benefits.

[para32] K.M.'s work-hardening program was modified again after February 9th, 1999, due to a wrist injury that he had sustained on that date when slipping on ice. His IRI continued from mid-December 1998 until February 22nd, 1999, when The Wellness Institute advised MPIC that he was "capable of completing a medium level of work based on the assessment completed on January 25, 1999". K.M. appears to have been discharged from the work-hardening program as of February 22nd, and his IRI benefits terminated accordingly.

[para33] At the hearing of his appeal, K.M. emphasized his view that the work-hardening program of August 1998 was, as he put it, "a mistake". He complained particularly that one machine at The Wellness Institute, intended to strengthen his hamstring muscles, caused him great pain in his low back that kept him from attending the following day. He says he asked for that machine to be modified and claims that The Wellness Institute refused that request. The appellant added that he had been told by The Wellness Institute that stress would improve his condition and lessen his pain, but he objected to that concept and feels that it is wrong. He considered a structured work-hardening program to be stressful. He felt that, since the insurer was still apparently reimbursing him for pain-killing drugs, it was thereby acknowledging the presence of pain and should have continued to pay him IRI throughout 1998. He does, however, acknowledge, that after finally submitting to the work-hardening program in its modified state, he is "okay now - almost".

DISPOSITION:

[para34] The only issue before us is whether MPIC was justified in suspending K.M.'s Income Replacement Indemnity benefits from August 26th, 1998, until the re-commencement of his work-hardening program. After a careful review of all the evidence, we can find no reason to disagree with the decision of the Internal Review Officer, which is therefore confirmed.

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