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Indexed as:
O.S.(Re)

IN THE MATTER OF an Appeal by O.S.
AICAC File No.: AC-00-93

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[2001] M.A.I.C.A.C.D. No. 27

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Manitoba Automobile Injury Compensation Appeal Commission
Heard: July 11, 2001.
Decision: August 13, 2001.
(61 paras.)

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Issues(s):

Re-instatement of Income Replacement Indemnity Benefits

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Relevant Sections:

Sections 110(1)(a) and 81(1)(a) of the Manitoba Public
Insurance Corporation Act

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Appearances:

The Appellant, O.S., was represented by Harvey Slobodzian.
Manitoba Public Insurance Corporation ('MPIC') was represented
by Keith Addison.

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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 O.S. is appealing an Internal Review
Decision of MPIC dated May 11, 2000, wherein MPIC had denied
the entitlement to O.S. of Income Replacement Indemnity
benefits (hereinafter referred to as IRI benefits) effective
September 15, 1999, pursuant to Section 110(1)(a) of the
Manitoba Public Insurance Corporation Act (hereinafter
referred to as the Act).

[para2] Section 110(1)(a) of the Act states as follows:

A victim ceases to be entitled to an income replacement
indemnity when any of the following occurs:

- (a) The victim is able to hold the employment that he or she held at the time of the accident;...

[para3] On June 14, 1998, O.S. was stopped in traffic when the vehicle he was operating was rear-ended and pushed into the vehicle in front of him. As a result of the accident, O.S. suffered trauma to his neck, shoulder and jawbone together with an injury to his left ankle and was entitled to the receipt of IRI Benefits pursuant to section 81(a) of the Act which states:

A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment;...

[para4] At the time of the accident, O.S. (who is [text deleted] years of age) had been working on a full-time basis for the [text deleted] (hereinafter referred to as the [text deleted]) in the dual capacities of a [text deleted] bus driver (4 1/4 hours per day) and storekeeper (3 3/4 hours per day).

[para5] On August 17, 1998, O.S. returned to the storekeeper position. He has never returned to the [text deleted] bus driver's position. In late 1998 and early 1999 concerted efforts were made by Manitoba Public Insurance Corporation (hereinafter referred to as MPIC) to facilitate O.S.'s return to the position of [text deleted] bus driver. This included:

- (a) the Case Manager approving the purchase of an ankle brace;
- (b) when O.S. suggested he would not be able to operate a standard transmission bus because of his left ankle, the Case Manager confirmed to him and to his employer that MPIC would fully fund the conversion of one of the [text deleted] buses to an automatic transmission at the cost of approximately \$12,000.00.
- (c) when the [text deleted] inquired as to what would happen if the converted bus was inoperable on any given day, the Case Manager immediately confirmed that MPIC would pay O.S.'s IRI benefits for any such days (provided he was still disabled - due to his injuries - from driving a bus with a standard transmission.)

[para6] On August 17, 1999, O.S. indicated that he would

be prepared to return to his duties as a bus driver effective August 31, 1999.

[para7] As a result of receiving that information, the Case Manager contacted S.O. (the director of the transportation department of the [text deleted]) for the purpose of arranging for O.S.'s return to work. She informed the Case Manager that in order for O.S. to be returned to work they would require a medical certificate clearly indicating that he was capable of returning back to his duties as a [text deleted] bus driver. The Case Manager indicated that he would contact O.S. and advise him to obtain the necessary medical certificate.

[para8] On August 23, 1999, V.M., the secretary-treasurer of the [text deleted], wrote to the Case Manager subsequent to a telephone discussion between the two of them, to outline his understanding of the agreement between the school division and MPIC regarding O.S.'s return to his employment as a [text deleted] bus driver. Paragraph one of his letter states:

The [text deleted] will receive full medical documentation that O.S. is medically fit, ... to return on a regular, recurring basis to his duties as a [text deleted] bus driver with our division.

[para9] V.M.'s letter further stated that:

[O.S.] will be required to successfully complete the necessary in-vehicle training road tests to ensure that he is completely fit to return to work on a regular, recurring basis. These tests are conducted under the direction of the Director of Transportation and will be the determining factor as to [O.S.'s] ability to operate a [text deleted] bus in a safe manner.

We wish to emphasize that the safety of the [text deleted] is paramount. The [text deleted] will cooperate in order to accommodate [O.S.'s] return, however, if in our opinion, the students' safety is put at risk, we will seek to terminate this agreement. (underlining added)

[para10] MPIC had retained Dr. Nance as a medical consultant in this matter. Dr. Nance is a member of the Section of Physical Medicine and Rehabilitation, which is connected with the University of Manitoba Department of Medicine and the Health Science Centre. On July 5, 1999, Dr. Nance provided the Case Manager with a report indicating that O.S. was capable of driving an extended cab truck without any obvious limitations or safety considerations.

[para11] On August 18, 1999, Dr. Intrater, a doctor employed with the St. Boniface Pain Clinic who had been consulted by O.S.'s personal physician, Dr. Harvey Lee, provided a medical opinion to MPIC with respect to O.S.'s left

foot pain. In this letter, Dr. Intrater indicated that in his view the installation of an automatic transmission into a [text deleted] bus would assist O.S. with the problems he was having using his left foot with a manual transmission.

[para12] However, Dr. Intrater further stated in his letter dated August 18, 1999:

It is my opinion that the combination of [O.S.'s] physical limitations along with his doubts and concerns regarding his ability to safely operate a [text deleted] bus should raise some concern regarding this appropriateness of allowing [O.S.] to return to work as a [text deleted] bus driver. In light of these considerations I do not feel that it would be in the best interest of [O.S.], his [text deleted] bus passengers, other motorists, or pedestrians to allow [O.S.] to return to work as a [text deleted] bus driver.

[para13] On August 27, 1999, Dr. Lee wrote to S.O. confirming that O.S. was capable of returning to work in order to operate a school bus with an automatic transmission. In doing this he provided the medical clearance that S.O. had earlier required as a condition to allow O.S. to resume his duties as a [text deleted] bus driver.

[para14] On August 31, 1999, the Case Manager wrote to V.M. enclosing a copy of Dr. Lee's medical report of August 27, 1999, and Dr. Intrater's report of May 11, 1999, and noted that Dr. Lee had indicated in his medical report of August 27, 1999, that O.S. was capable of returning to work operating a [text deleted] bus.

[para15] The Case Manager requested further medical reports from Dr. Intrater and Dr. John Wiens, an orthopedic surgeon.

- (a) On August 31, 1999, the Case Manager wrote to Dr. Intrater providing him with a copy of Dr. Nance's report of July 5, 1999, along with the reports of a private investigation firm dated April 29 and May 14, 1999, and a condensed videotape. The Case Manager requested Dr. Intrater to provide a medical report in respect of [O.S.'s] capacity to resume his occupation as a [text deleted] bus driver having regard to this information. (In reply, Dr. Intrater provided a medical report on October 13, 1999, which will be referred to later in these reasons in paragraph 43 herein.)
- (b) On September 13, 1999, the Case Manager also wrote to Dr. Wiens, and indicated that [O.S.] had advised that he had seen Dr. Wiens on August 30, 1999. The Case Manager requested that Dr. Wiens

advise him as to whether or not there were any functional or restrictions or limitations that he would place on [O.S.] that would affect his ability to return to work as a [text deleted] bus driver. In reply, Dr. Wiens provided a medical report on October 13, 1999, which will be referred to later in these reasons in paragraph 42 herein.)

[para16] O.S. did not return to work on August 31, 1999. Negotiations were taking place between V.M. and the Case Manager in respect to a number of matters relating to O.S.'s return to work. These matters included MPIC agreeing to pay the cost of the conversion of a [text deleted] bus from a standard transmission to an automatic transmission, the payment by MPIC to O.S. of IRI benefits when the bus with automatic transmission was not available for him to use, and the requirement of O.S. to undergo an in-vehicle training road test to insure he was completely fit to return to work on a regularly re-occurring basis.

[para17] On September 3, 1999, S.O., (at the request of J.T., a staff officer with [text deleted] and a consultant to the [text deleted]), wrote to J.T., providing him with a list of some of the physical demands that persons must be capable of performing in their duties as a [text deleted] bus driver. On this list was the following requirement:

"Drivers must be medically and physically fit to assist [text deleted] out of the bus in an emergency" (underline added)

[para18] In order to deal with the issues raised in S.O.'s letter to J.T., relating to O.S.'s return to work, a meeting took place between J.T., S.O., O.S. and the Case Manager on September 13, 1999.

[para19] A description of what took place at this meeting is set out in the handwritten notes of J.T., a copy of which was subsequently provided to Mr. Slobodzian (O.S.'s solicitor), S.O. and the Case Manager. J.T. in his notes indicates that:

1. It appeared that there was a consensus among the persons present at the meeting that [O.S.] was fit and able to return to [text deleted] bus driving if the bus was converted to an automatic transmission;
2. However there was one major outstanding issue related to the safety of [O.S.] driving a [text deleted] bus. J.T. referred to Dr. Intrater's letter dated August 18, 1999, and to [O.S.'s] comments concerning his capability in the area of safety in the operation of a [text deleted] bus.

These issues J.T. stated raised a concern with the [text deleted];

3. J.T. noted that he had earlier requested S.O. to prepare a list of the duties and responsibilities which had been provided to J.T. by S.O. in a letter dated September 3, 1999; and

4. J.T. requested [O.S.] to review carefully S.O.'s written description of the physical demands bus drivers must be capable of performing in carrying out their duties as a bus driver. J.T. requested [O.S.] to advise him whether [O.S.] felt he was capable of safely performing these duties as a [text deleted] bus driver. In response [O.S.] replied that he definitely had concerns with his ability to safely perform his duties as a bus driver.

[para20] After the meeting of September 13, 1999, S.O. wrote to the Case Manager on September 14, 1999, and stated as follows:

This letter is to outline the results of our meeting on September 13, 1999, with [O.S.], J.T. and S.O.

1. [J.T.] asked [O.S.] to review carefully [S.O.'s] written job description of the physical demands bus drivers must be capable of performing;
2. [J.T.] then asked [O.S.] if he felt he was capable of safely performing his duties as a [text deleted] bus driver.
3. [O.S.] replied that he definitely had concerns with his ability to safely perform his duties as a [text deleted] bus driver.

Based on concerns expressed by [O.S.] regarding his ability to safely perform his duties as a [text deleted] bus driver, the [text deleted] is not prepared, at this time, to have [O.S.] return to his position as a [text deleted] bus driver.

[para21] The [text deleted] has an obvious and fundamental duty to ensure that the children transported in [text deleted] buses are safe. If the [text deleted] had any concern as to O.S.'s capacity to carry out the physical demands of his job as a bus driver in an emergency situation, then it was absolutely justified in refusing to permit him to continue to work as a bus driver. O.S. was required, as a responsible employee, to respond candidly and honestly to the questions

put to him in respect to safety by J.T. Safety was not only an issue of concern to the [text deleted], but it was also of concern to O.S. as well.

TERMINATION OF IRI BENEFITS BY CASE MANAGER

[para22] On September 14, 1999, the Case Manager contacted O.S. and abruptly terminated his IRI benefits effective September 15, 1999.

[para23] O.S. testified under oath at the Appeal Commission hearing and stated that on September 14, 1999, the Case Manager contacted him by phone and criticized O.S. for informing the representatives of the [text deleted] that he did not feel that he was 100% fit to return to his employment.

[para24] The same complaint is contained in a letter dated October 4, 1999, from Mr. Slobodzian to the Case Manager. In this letter, Mr. Slobodzian stated:

I was deeply concerned to hear about your comments to [O.S.] in your telephone conversation of September 14, 1999, where you indicated to [O.S.] that you expected him to advise his employer that he was 100% fit to return to his employment. As a representative of a Public Insurance Corporation you have a duty to promote the safety of everyone using our highways particularly the safety of [text deleted]. It is quite evident that you have completely neglected, in assessing [O.S.'s] situation, any of those safety concerns which directly impact upon their welfare.

[para25] At the Appeal Commission hearing, the legal counsel for MPIC did not challenge either O.S.'s testimony on this issue nor Mr. Slobodzian's above mentioned comments in his letter dated October 4, 1999.

[para26] On October 1, 1999, the Case Manager wrote to O.S. setting out the reasons for terminating the IRI benefits. In this letter, the Case Manager referred to the September 13 meeting and stated:

Based on the safety concerns you expressed to your employer, they are not prepared to accept your return back to work as a [text deleted] bus driver. Your employer confirmed that as long as you continued to express any concerns whatsoever about safety issues they are not prepared to accept your return back to work as a [text deleted] Bus driver. You were aware that the medical information stated that you were capable of returning safely, yet you chose to state otherwise.
(underlining added)

. . .

In accordance with Section 160, we have identified the following:

1. The activities you display outside the medical setting are not in keeping with what you have displayed in the medical setting.
2. Medical information supports that you are functionally capable of resuming your occupation as a [text deleted] bus driver safely. You continue to indicate to the contrary knowing full well that your employer would not be prepared to allow your return back to work as a [text deleted] bus driver as long as you continue to voice any concern regarding safety issues. (underlining added)

Given all of the above, you have demonstrated an unwillingness to comply and work with Manitoba Public Insurance towards your rehabilitation. You have been advised previously of the importance of your involvement in this program yet you have chosen not to comply with the statutory requirements as outlined under Section 160. Accordingly, there is no further entitlement to Income Replacement Indemnity and other benefits in accordance with Section 160 effective September 15, 1999.

[para27] The Case Manager's letter asserts that O.S. failed to comply with Section 160(g) of the Act by failing to follow or participate in a rehabilitation program made available by MPIC. The Case Manager also stated in his letter:

Medical information supports that you are functionally capable of resuming your occupation as a [text deleted] bus driver safely. You continue to indicate to the contrary knowing full well that your employer would not be prepared to allow your return back to work as a [text deleted] bus driver as long as you continue to voice any concern regarding safety issues.

[para28] The Case Manager concluded that despite medical evidence available to O.S. which demonstrated that he was functionally capable of safely resuming his occupation as a [text deleted] bus driver, he intentionally prevented his return to work by voicing concerns about safety. This persuaded the [text deleted] to refuse to continue to employ him as a [text deleted] bus driver.

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[para29] There was no evidence before the Case Manager to support these serious allegations. An examination of J.T.'s

notes referred to in paragraph 19 herein clearly indicates that it was at his request that S.O. prepared a list of physical demands in respect of the duties of a bus driver. It was J.T. who raised the concern at the September 13, 1999 meeting as to the physical capacity of O.S. to carry out emergency duties. O.S. was required to respond as candidly and honestly as he could to the question put to him by J.T. O.S. did not unjustifiably raise concerns about safety in order to persuade the [text deleted] not to permit him to return to work.

[para30] The medical information referred to by the Case Manager in order to justify his criticism of O.S. and on which the Case Manager relied to terminate the IRI benefits of O.S., were the medical reports of Dr. Nance dated July 5, 1999, and Dr. Lee dated August 27, 1999. In both reports, the doctors indicated that O.S. was capable of operating a bus in a safe manner.

[para31] However, both reports were incomplete as they did not take into account the following:

- (a) The information in the letter S.O. had written to J.T. outlining the physical demands of a bus driver in an emergency situation;
- (b) the information contained in the discussions between J.T. and O.S. at the meeting of September 13, 1999;
- (c) the decision of the [text deleted] not to permit O.S. to return to his duties as a bus driver in view of the safety concerns.

[para32] As a result, neither Dr. Lee nor Dr. Nance had the opportunity to address the critical safety issue arising out of the physical and medical capacity of O.S. to act effectively as a bus driver in an emergency situation. This safety issue was the primary reason why the [text deleted] made its decision not to permit O.S. to return to his duties as a bus driver.

[para33] After the meeting of September 13, 1999, the Case Manager should have provided Drs. Lee and Nance with the information he obtained at that meeting and asked them to comment on the physical and medical capacity of O.S. to operate effectively as a bus driver in an emergency situation. Unfortunately, the Case Manager did not do so, but instead made a decision based on the obviously incomplete medical information available at that point, and terminated the IRI benefits.

[para34] It therefore appears to the Commission that on September 14, 1999 there was insufficient medical information

available to the Case Manager to abruptly terminate the IRI benefits, pursuant to Section 110(1)(a) of the Act.

[para35] The Case Manager had the opportunity shortly after terminating the IRI benefits to reconsider his decision and he failed to do so.

[para36] Four days after the IRI benefits were terminated, O.S.'s lawyer, Mr. Harvey Slobodzian, wrote to the Case Manager by letter dated October 4, 1999, and stated:

I have also reviewed the medical report of Dr. Nance dated July 5, 1999 dealing with [O.S.'s] capabilities of resuming his occupation. It is clearly evident that the full extent of [O.S.'s] duties and the safety concerns that are raised regarding the discharge of those duties, given the fact that he would be in charge of anywhere up to 66 [text deleted] at any one time, were not addressed nor considered.

These issues were, however, considered at the meeting among yourself and representatives of [O.S.'s] employer.

I note that [S.O.'s] letter is unequivocally clear that "[text deleted] is not prepared, at this time, to have [O.S.] return to his position as a [text deleted] bus driver". I am advised that notwithstanding the definitive position of [O.S.'s] employer that you have proceeded to terminate his wage indemnity benefits, which in my opinion is outrageous in the circumstances.

[para37] The Commission agrees with Mr. Slobodzian's comments in respect of weight to be given to Dr. Nance's report dated July 5, 1999. The same criticism could be applied in respect to the weight which could be attributed to Dr. Lee's report dated August 27, 1999.

[para38] In the light of Mr. Slobodzian's letter to the Case Manager dated October 4, 1999, the Case Manager should have:

- (a) rescinded his previous decision to terminate the IRI benefits;
- (b) conducted an investigation as set out in paragraph 33 herein.

If the Case Manager had conducted the appropriate investigation he would have had available to him objective medical information, which would have permitted him to determine whether or not O.S.'s concerns were correct, and whether or not O.S. was physically and medically

capable of safely operating a bus in an emergency situation.

[para39] Notwithstanding that there was new information available to the Case Manager arising out of the meeting of September 13, 1999, which could have materially affected the medical reports of Dr. Lee and Dr. Nance, and despite comments in Mr. Slobodzian's letter to the Case Manager referred to in paragraph 36 herein, the Case Manager ignored the new information and Mr. Slobodzian's comments.

[para40] The Case Manager rejected O.S.'s concerns, and concluded that having regard to the incomplete medical reports of Dr. Nance and Dr. Lee that O.S. was functionally capable of returning to work.

[para41] It should also be noted that the Case Manager did not provide the new information available through the meeting of September 13, 1999 to Dr. Wiens or Dr. Intrater.

[para42] Dr. Wiens' report dated October 13, 1999, was provided by Dr. Wiens to the Case Manager in response to a letter from the Case Manager dated September 13, 1999 (referred to paragraph 15(b) herein). In this letter, Dr. Wiens indicated that in his opinion as far as the ankle injury was concerned O.S. should be able to return to his former job as a school bus driver. Unfortunately, Dr. Wiens was not provided with the new information arising out of the meeting of September 13, 1999, and was not given an opportunity to address the safety issue which caused the school division to refuse to permit O.S. to return to work as a bus driver.

[para43] Dr. Intrater's report dated October 13, 1999, was in reply to a request by the Case Manager for a report on August 31, 1999 (referred to paragraph 15(a) herein). This request obviously occurred prior to the meeting of September 13, 1999, and so the Case Manager could not have at that time have provided Dr. Intrater with any information arising out of the September 13, 1999, meeting. However, this information obviously was relevant and when it became available it should have been provided to Dr. Intrater.

[para44] It should also be noted that when Dr. Lee subsequently became aware of the safety issue, he revised his medical opinion and wrote a letter dated December 13, 1999, which Mr. Slobodzian provided to MPIC by letter dated January 31, 2000. In this letter, Dr. Lee stated:

Would [O.S.], due to his dysfunction, be able to evacuate a bus if a supervisory role did occur?

Therefore, the issue is, "Is he physically fit to assist [text deleted] out of a bus in an emergency situation?". He and I both believe that he may not be capable of handling this duty. There are two problems: range of

motion of his neck as well as ambulation with the left ankle. Due to these factors, he would not be capable of handling a crisis.

Another issue is performing a complete pre-trip inspection. He would not be able to examine the exhaust pipes, to assess whether they are leaking or hanging.

In addition, he would have a difficult time carrying bigger [text deleted] off the bus if there were an emergency problem.

There is also a four-foot drop at the back of the bus and he does not believe he could land on his ankle easily.

On the basis of the above, and certain concerns that I have I believe he is not fit to carry on with his duties. (underlining added)

[para45] When the Case Manager received a copy of Dr. Lee's letter from Mr. Slobodzian shortly after January 31, 2000, the Case Manager had a second opportunity to reconsider his decision to terminate the IRI benefits, and he chose not to do so. Upon receiving Dr. Lee's letter, the Case Manager should have communicated with Drs. Nance, Intrater and Wiens, and at that time provided them with Dr. Lee's report dated December 13, 1999, all the relevant information with respect to the meeting of September 13, 1999, and requested their medical opinion as to whether or not O.S. had the physical and medical capacity to act safely in dealing with children in an emergency situation when he was performing his duties as a bus driver. Unfortunately, the Case Manager did not obtain these medical opinions.

[para46] It is reasonable to assume if Dr. Lee changed his opinion as to whether or not O.S. could operate a bus safely in an emergency situation, that Drs. Wiens, Intrater and Nance may have come to the same conclusion and changed their medical opinions in this respect. However, none of the doctors were given the opportunity to reconsider their medical opinions.

APPLICATION FOR REVIEW

[para47] The Appellant, O.S., applied to review the claim in an application dated November 17, 1999, which stated as follows:

1. MPI's adjudication neglected to account for a variety of safety issues associated with the operation of a [text deleted] bus with responsibility for approx. 60 young children which safety duties were discussed in detail with MPI adjuster and employer for the first time on Sept. 13, 1999;

2. Claimant remains unable to perform evacuation procedures required of a school bus driver and his employer is not prepared to permit claimant to operate a school bus.

[para48] The review took place on April 13, 2000 and the review decision was issued on May 11, 2000. The Internal Review Officer accepted the decision of the Case Manager and confirmed the termination of the IRI Benefits. However, he found that the termination of these benefits was justified under Section 110(1)(a) of the Act and not under section 160 of the Act, as determined by the Case Manager.

[para49] In this decision, the Review Officer indicated that he was troubled by the fact that on September 13, 1999, on the very eve of the expected return to work, another barrier suddenly appeared. This barrier was O.S.'s statement that he did not feel he was physically capable of dealing with small children in an emergency situation when driving the bus.

[para50] The Review Officer, like the Case Manager, was extremely skeptical of O.S.'s position in this regard. The Review Officer, like the Case Manager, accepted incomplete medical reports to conclude that there was no justification for O.S.'s raising concerns about his physical and medical capacity to return to work as a bus driver.

[para51] The criticism by the Internal Review Officer of O.S. was not justified. O.S., when questioned by J.T. was entitled to raise concerns about his physical capacity to drive a [text deleted] bus in an emergency situation. The [text deleted] accepted O.S.'s concerns as legitimate and refused to have him returned to work as a bus driver. It was open to the [text deleted], if they believed that O.S. had been unjustifiably refusing to return to work, to take disciplinary action against O.S., but they did not do so at that time.

[para52] As it turned out, O.S.'s concerns have been corroborated by Dr. Lee's medical report dated December 13, 1999. In addition, O.S.'s concerns were confirmed by Dr. Intrater's letter to Mr. Broadhurst dated August 18, 1999, which is referred to in paragraph 12 herein.

[para53] Unfortunately, the Internal Review Officer, like the Case Manager, in concluding that the IRI benefits should be terminated effective September 14, 1999, failed to give any weight to the following evidence:

- 1) The information arising out of the September 13, 1999 meeting, the correspondence between the various parties, and the hand-written notes of J.T. (referred to in paragraphs 17-20, herein).

- 2) Mr. Slobodzian's letter to the Case Manager, dated October 4, 1999, wherein he criticizes the manner in which the Case Manager had spoken to O.S. on September 14, 1999, and Dr. Nance's medical report which had not taken into account the safety issue. (referred to in paragraph 36 herein).
- 3) The revised medical report of September 13, 1999, wherein Dr. Lee determined that O.S. was not capable of operating a school bus in an emergency situation. (referred to in paragraph 44 herein). Dr. Lee was the only medical doctor who had the opportunity in regard to O.S.'s ankle injury to determine whether or not O.S. was capable of operating a bus safely in an emergency situation.

[para54] In the Commission's view, this evidence was of sufficient weight to have caused the Internal Review Officer to rescind the Case Manager's decision to terminate the IRI benefits and refer the matter back to the Case Manager to conduct a proper investigation into this matter.

[para55] In addition to ignoring this material evidence, the Internal Review Officer, like the Case Manager accepted the incomplete medical reports of Dr. Wiens, Dr. Intrater, Dr. Nance and Dr. MacKay. As indicated earlier in these reasons, none of these reports addressed the central issue of the physical and medical capacity of O.S. to effectively operate a bus safely in an emergency situation.

[para56] It should be noted that when arriving at his decision, the Review Officer accepted Dr. Lee's medical report dated August 27, 1999 but rejected Dr. Lee's revised medical report dated December 13, 1999. As indicated earlier, Dr. Lee was the only medical doctor who addressed the issue as to whether or not O.S. had the medical and physical capacity to operate a bus safely in an emergency situation, in his report dated December 13, 1999.

[para57] In justifying his decision to reject Dr. Lee's medical report of December 13, 1999, the Review Officer asserted that since Dr. Lee's opinion was at variance with Dr. Nance as it related to the ranges of motion of the neck and that Dr. Lee's opinion relating to the problems of the left ankle was at odds with Dr. Wien's medical opinion, he could not give much weight to Dr. Lee's report. However, in drawing this conclusion, the Review Officer ignored the comments of Dr. Intrater, who in his reports of August 18, 1999 and October 13, 1999, supported Dr. Lee's concerns as to the limited range of O.S.'s neck movements. Although Dr. Wien's medical opinion is at variance with Mr. Lee's medical opinion, Dr. Wien's medical opinion does not address the fundamental issue of safety in an emergency situation.

[para58] As a result, the Review Officer should not have given any weight to Dr. Wien's medical report when rejecting Dr. Lee's medical report of December 13, 1999. The Review Officer, in rejecting Dr. Lee's medical report dated December 13, 1999, asserted that Dr. Lee's opinion was a theory only and had never been tested. The same criticism can be made in respect to the medical reports of Dr. Nance, Dr. MacKay, Dr. Intrater and Dr. Wiens, yet the Review Officer had no problem accepting these reports.

[para59] O.S. testified under oath at the hearing that he was not physically capable of carrying on his duties as a bus driver in an emergency situation. He further testified that the back of the bus that he is required to operate has a four foot drop. In an emergency situation, he may be required to physically carry small children from the bus by jumping off the back of the bus. O.S. testified that he was unable, having regard to the condition of his ankle, to land on his ankle easily if he jumped. O.S. testified in a candid and direct manner, and the Commission accepts his testimony that he was not physically capable of carrying out the duties of a bus driver in a safe manner in an emergency situation.

DECISION

[para60] In summary, the Commission determines that the Internal Review Officer erred:

1. in concluding that there was sufficient evidence for the Case Manager to have abruptly terminated the entitlement of O.S. to IRI benefits, pursuant to 110(1)(a) of the Act;
2. in failing to rescind the decision of the Case Manager and refer the matter back to the Case Manager;
3. by accepting the medical reports of Dr. Nance, Dr. MacKay and Dr. Wiens in respect to O.S.'s left ankle injury;
4. in failing to give appropriate weight to the medical report of Dr. Lee dated December 13, 1999;
5. in failing to give appropriate weight to the relevant portions of Dr. Intrater's medical reports dated August 18, 1999 and October 13, 1999 in respect of the range O.S.'s neck movements;
6. in failing to give appropriate weight to O.S.'s testimony that the injury he suffered to his ankle as a result of the accident prevented him from safely fulfilling all aspects of his job as a

school bus driver including any physical activity required to respond to an emergency situation.

[para61] The Commission:

1. accepting the medical opinions of Dr. Lee dated December 13, 1999 and the relevant portions, as set out in Dr. Intrater's medical reports dated August 18, 1999 and October 13, 1999, in respect to the range of O.S.'s neck movements; and
2. accepting the sworn testimony of O.S. that the accident of June 14, 1998, contributed to his continuing ankle problems and prevented him from having the physical and medical capacity on September 14, 1999 to operate a school bus safely in an emergency situation;
3. determines that pursuant to section 81(1)(a) of the Act, O.S. has established on the balance of probabilities that on September 14, 1999, he was unable to continue his employment as a bus driver because of the injury he sustained in the accident which occurred on June 14, 1998; and
4. further determines that O.S.'s entitlement to Income Replacement Indemnity benefits should be reinstated effective September 15, 1999, and interest to the date of payment at the prescribed rate shall be added to the amount due and owing to him; and
5. the Commission retains jurisdiction in this matter and if the parties are unable to agree as to the amount of the Income Replacement Indemnity benefits, then either party may refer this dispute back to this Commission for final determination; and
6. the decision of the MPIC's Internal Review Officer dated May 11, 2000 is therefore rescinded.

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