Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-46

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Ms Joan McKelvey** **the Appellant, [text deleted], represented by [Appellant's counsel]**
HEARING DATE:	**November 8th and December 11th, 1996**
ISSUE(S):	**Whether victim had achieved pre-accident status when I.R.I. terminated.**
RELEVANT SECTIONS:	**Sections 81(1) and 110 of the M.P.I.C. Act; Section 8 of Regulation 37/94**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

REASONS FOR DECISION

THE FACTS:

[The Appellant] is self-employed, as the owner of a [text deleted] delivery franchise from [text deleted]. He sustained a compression fracture of his third lumbar vertebra in an accident that occurred on the 11th of July 1994 when the truck that he was driving fell into an unbarricaded sink hole on [text deleted]. [The Appellant] was hospitalized for eleven days

immediately following the accident, returning to work in a reduced capacity, primarily as a supervisor on or about August 31st of 1994.

In light of his injury and his resultant, reduced ability to perform the full demands of his work, Manitoba Public Insurance Corporation ('M.P.I.C.') paid him income replacement indemnity in the amount of $600.00 bi-weekly (just enough to cover his out-of-pocket expenses in hiring his brother as a helper), from the seventh day following his accident up to the end of June 1995. His income benefits were discontinued as of June 30th, 1995 because, relying upon certain occupational therapy reports, M.P.I.C. felt that he would have attained his pre-accident status by that date and no longer qualified for those benefits.

There is no suggestion, here, that [the Appellant] has been anything less than straightforward. Indeed, his Adjuster makes the comment that [the Appellant] has been "open and cooperative on this claim in the past and he is being honest and forthright in his dealings with us to date". It is quite clear, from a review of M.P.I.C.'s entire file, that [the Appellant] is not one to lie back on his oars but, rather, has been anxious to accelerate his return to work on a full-time basis. In that context, it is noteworthy that [the Appellant's] Adjuster felt that "He could have received the full I.R.I. entitlement from day one but he chose to work in the reduced capacity from the onset of his claim, so the payment reflected this".

By the same token, all of the professional, medical reports that are relevant to this appeal support [the Appellant's] belief that he needed an assistant to help him with the loading and unloading of his vehicle and the completion of his deliveries, at least until the 31st of January 1996.

The difficulty that has arisen here, as we see it, lies in certain communications between M.P.I.C. and [the Appellant's] Occupational Therapist at [rehab clinic], which may be summarized this way:

(i) a memorandum of June 7th, 1995 from the Senior Adjuster, [text deleted], reflects a discussion with [text deleted], the Occupational Therapist at [rehab clinic], advising that [the Appellant] had increased his hours to five hours a day "And it looks like by the end of June he should be capable of working the amount of hours he was working prior to the accident". It should be emphasized, here, that any references in this and other discussions and correspondence to a given number of hours per day only refers to hours spent delivering [text deleted]; one must add to that the time and effort spent in loading and unloading the truck at the [text deleted];

(ii) a further memorandum of June 14th reflects a discussion between [MPIC's senior adjuster] and [Appellant's occupational therapist #1], whereby she advised that "A tentative return to full-time duties (six and one-half hours) is for July 1st, 1995;

(iii) a letter from [MPIC's senior adjuster] to [the Appellant] of June 14th, confirming [Appellant's occupational therapist #1's] advice that "As of July 1st, 1995 you should be capable of working as many hours, without assistance, as you were doing prior to the motor vehicle accident". (This may or may not be an accurate reflection of [Appellant's occupational therapist #1's] advice, since neither of the two, earlier memoranda make reference to the phrase "without assistance".)

(iv) a reporting letter of July 12th, 1995 from [text deleted], an Occupational Therapist at [rehab clinic]. After giving a complete history of [the Appellant's] work-hardening program and the demands of his work, after noting that [the Appellant] was "pleasant and cooperative during his work-hardening program" and quite receptive to suggestions for

modifying tasks, this report details [the Appellant's] functional capacities at discharge and concludes that he was then currently capable of working at a MEDIUM level according to the Canadian Classification and Dictionary of Occupations Physical Activities Strength Factors. The report goes on to say:

> "The client's work capabilities would appear to match the critical physical demands of identified vocation goal, to return to his regular duties as a [text deleted] delivery person. *He presently is not capable of doing this full-time.* (Italics added.)
>
> *RECOMMENDATIONS*
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> As previously mentioned, [the Appellant] should begin a graduated return to his pre-injury full-time duties...he should begin the deliveries for two hours per day and be gradually increased on a regular basis until he reaches his pre-injury status of 6.5 hours...."

(v) memorandum of July 17th, 1995 from [Appellant's occupational therapist #1] to [MPIC's senior adjuster] indicating, in part, that "[the Appellant] has plateaued at 5 hours consecutive delivery...as he has now plateaued for six weeks, I feel that we have little more to offer in terms of OT intervention."

(vi) a full report from [Appellant's occupational therapist #1] to [MPIC's senior adjuster], dated July 18th, 1995 which, after giving a full history of his work-hardening program, of the work schedules that [the Appellant] had been attempting to maintain, and of other, relevant information concludes (inter alia):

> "[The Appellant] is advised to continue to upgrade his hours on a gradual basis as tolerated in the next few months ahead. The main limiting factor preventing an increase in the client's hours at present are reported subjective levels of lower back pain."

It is quite apparent that, although [rehab clinic] may well have expected that [the Appellant] would have been fully restored to pre-accident status by July 1st of 1995, the subsequent reports from [rehab clinic] itself, as well as from [the Appellant's] medical advisors, strongly support his contention that he was not, in fact, able to attain that status. One only needs to note that, starting normally at about 4:30 in the morning, [the Appellant] would have to report to the [text deleted] and load about 80 cases of [text deleted] each day, each case weighing about forty pounds. At the loading dock of the [text deleted], pallets are stacked six cases high, and the franchise operator has to load them from the dock onto his truck. In the course of his subsequent deliveries, many customers take more than one case at a time - schools, for example, will normally take four cases at a time - and the person making deliveries will normally carry one case of forty pounds in each hand. These weights are substantially in excess of the maximum amount recommended by [the Appellant's] physicians and therapists, for him to carry.

As a result, while [the Appellant] did most, if not all, of the driving of his vehicle during the period now under review, he unquestionably needed assistance in loading the truck and in making deliveries.

Much has been made of the fact that, in or about April of 1995, he bought a second, smaller [text deleted] delivery route from his brother, who was also his paid helper. M.P.I.C. has taken the view that it was the addition of this extra route that made the hiring of [the Appellant's] brother so necessary. We take a different view. [The Appellant] contends that he bought that extra route, resulting in what he calls "a run and a half" as a form of insurance, since he knew that the injury suffered in his accident might well give rise to a permanent impairment and he wanted to

be sure that, with help, he would always be able to maintain approximately the same standard of income that he had enjoyed before. In fact, he says, the money that he has been paying his brother is approximately equal to the net profits from the second run, leaving him roughly the original amount of net income from his original run.

From the July 26th memorandum of [text deleted], [the Appellant's] present Physician, it appeared that [the Appellant] was only likely to need a helper until the end of January of 1996. We have no further evidence of continuing disability making the hiring of a helper essential and, since [the Appellant's] counsel advised us, at the beginning of the hearing of this appeal, that [the Appellant] was seeking continuance of his I.R.I. of $600.00 bi-weekly from July 1st, 1995 to January 31st, 1996, we content ourselves with allowing the appeal to that extent.

Dated this 13th day of December 1996.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED