Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-35

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** **[Appellant's representative] represented the Appellant, [text deleted]**
HEARING DATE:	**January 31st, 1997**
ISSUE(S): **benefits**	**Was M.P.I.C. correct in terminating the Appellant's I.R.I. on December 10th, 1995?**
RELEVANT SECTIONS:	**Sections 81(1) & 110 of the M.P.I.C. Act ('the Act')**

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 was involved in an automobile accident on January 29th, 1995 when his [text deleted] truck hit a car that was backing out of a driveway. He suffered injuries mainly to his lower back. At the time of the accident the Appellant was off work as a result of a re-aggravation of a back problem but he was scheduled to return to work on a full-time basis on January 30th, 1995.

The Appellant had worked at [text deleted] from June, 1992 to April, 1994 doing light duties on the evening shift. In April he was assigned to a heavy labour job that involved twisting, bending and lifting heavy material and was repetitive in nature. In June 1994 he sustained an injury to his lower back and was placed on Workers Compensation until July 1994 when he returned to light work. In the fall of 1994 he was bumped to a heavier work area where he re-injured his lower back. He was again placed on Workers Compensation and in mid-January, was cleared by [text deleted], his family doctor, to return to work at his heavy labour job on January 30th, 1995. The Appellant advised that he probably would have been put on light work for the first couple of weeks but then he would return to his former job that involved heavy lifting , twisting and bending on a continual and repetitive basis.

As a result of the automobile accident [Appellant's doctor] placed the Appellant on a physiotherapy program three times a week. A short time later the Appellant started his own workout regime that included weight lifting. It never exceeded an hour at any one time and followed a very careful and controlled work out plan.

The Appellant attended [text deleted] each morning after his night shift, where he was enrolled in the [text deleted], taking 24 hours of instruction per week. He continued taking courses right up to the end of December 1995. He could not continue his studies after this date as his I.R.I. benefits were terminated on December 10th, 1995, he was not able to return to his job and he had no other means of financial support to enable him to continue with his studies. While attending school after the accident the Appellant found sitting in class very painful and often had to leave the classroom to exercise his back.

The Appellant in his Notice of Appeal asked M.P.I.C. to pay for his

re-education/re-training but at the hearing he abandoned this part of his claim.

Manitoba Pubic Insurance Corporation paid the Appellant Income Replacement Indemnity (I.R.I) up to December 10th, 1995. M.P.I.C. advised the Appellant by letter dated December 29th, 1995 that, based on [Appellant's orthopaedic surgeon's] report that said he was capable of returning to work they were terminating his I.R.I benefits as of December 10th, 1995.

As an aside we find this method of informing someone after the fact that their benefits have been cut off very discourteous and unprofessional. This does not allow the claimant any time to make adjustments or plan decisions that could affect living arrangements. Where possible the claimant should be told in advance of the insurer's intent to discontinue benefits, thus allowing the claimant to either appeal his decision on a timely basis and/or make alternative plans. The officer responsible for making that decision would, in each case, do well to place himself or herself in the shoes of the claimant, and to imagine the apparent unfairness perceived by the victim who learns, after the event, that benefits had already been discontinued.

THE LAW:

M.P.I.C. terminated the Appellant's I.R.I.based on [Appellant's orthopaedic surgeon's] report and on Section 110(1) of the Act which states in part:'

> "110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (c) The victim is able to hold the employment that he or she held at the time of the accident;"

The Act places the onus on M.P.I.C. to show that the Appellant was at the time of termination of his benefits, able to hold the employment that he held before the accident - in this case a heavy labour job.

[Appellant's doctor] advises, in a report dated July 12th, 1995, that the Appellant "is gradually improving and has recently been referred to [vocational rehab consulting company] for therapy and reassessment". The Appellant was then sent to the [rehab clinic #1], for a Functional Capacity Evaluation and they report on September 2nd, 1995 that "It is my assessment that [the Appellant's] current physical abilities do not match the very heavy physical demands of his job as a foundry worker, and that he is at risk for re-injury if he returns to the same work. It is recommended that he return to work at a job which requires light to medium level strength capacity."

The Appellant continued with his physiotherapy program twice a week and his gym programme five days per week. On October 26th, 1995 [Appellant's doctor] reports to M.P.I.C. that the Appellant's "recovery has been static for several months". [Vocational rehab consulting company], hired by M.P.I.C. to co-ordinate the recovery program of the Appellant, sent the Appellant to [rehab clinic #2] for a work hardening assessment; and they recommended a two-week work hardening trial focusing on the repetitive aspect of a job as a labourer. The Appellant completed this trial during the period of November 14th to 24th, 1995 and [rehab clinic #2] report on December 22nd, 1995 that:

"1. [The Appellant's] should continue his personal exercise program including the components of stretching, strengthening(weight-training) and cardiovascular activity.

2. [The Appellant's] physical and functional abilities do not match his current job demands, especially those tasks requiring repetitive lifting at a heavy level, and tasks requiring

sustained trunk position in forward flexion.

3. No further rehabilitation is recommended with regards to preparing [the Appellant] to return to his pre-injury job (ie: work hardening) as he has plateaued physically.

4. It may be appropriate to consider further intervention for the myofascial pain - specifically involvement of a rehabilitation medicine specialist to perform trigger point injections. [the Appellant] has been advised to discuss this with his general practitioner."

Just prior to this work hardening trial [Appellant's doctor] had sent the Appellant to see [text deleted], an Orthopaedic Surgeon, for an examination. [Appellant's orthopaedic surgeon's] report of December 6th, 1995 states that "I would allow the patient to return to his previous employment if it is still available and if the patient has the desire to do so". While this report does reflect a great deal of discussion with the Appellant, some medical tests and examinations, as well as a finding that [the Appellant] suffered a sprain to his spine and had pain and discomfort when [Appellant's orthopaedic surgeon] touched his lower back area, the conclusion is that [Appellant's orthopaedic surgeon] is giving a qualified statement about the Appellant's ability to return to work that it is dependent on the availability of the work and the patient's wish to return to work. It is clear from the other evidence before us, however, that [the Appellant] could not return to his job on December 10th, 1995 because he was not physically fit to do it.

[Vocational rehab consulting company] referred the Appellant to [Appellant's pain management specialist] of the [text deleted] on January 4th, 1996. After examining the Appellant and all of his medical reports he finds that the Appellant has:

1. Myofascial pain in the right quadratus lumborum and query (sic) deep paraspinal muscles in the region of L4-L5;

2. Associated muscular pain of the thoracic paraspinal muscles.

[Appellant's pain management specialist] recommended a course of acupuncture to try and alleviate the Appellant's problem but we do not know if this program ever took place. On June 3rd, 1996 [Appellant's doctor] confirms that the Appellant "is not fit to perform the heavy level of work he would be required to perform in his job at [text deleted] ".

When we look at all of the medical evidence from all of the participants in the Appellant's treatment program we are of the opinion that the Appellant had not returned to his pre-accident functional level when his I.R.I. payments were terminated on December 10th, 1996. [Appellant's doctor], who treated him throughout the two Workers' Compensation injuries and recommended he was fit to return to work on January 30th, 1995, best sums the situation up in his June 3rd, 1996 letter "I would not recommend that [the Appellant's] return to his labouring job at Canada Metal".

We are of the opinion that M.P.I.C. did not meet the onus the Act places on it when it terminated the I.R.I. benefits. We therefore instruct M.P.I.C. to reinstate the Appellant's I.R.I. payments from December 10th, 1996 up to and including August 31st 1996. On September 1st the Appellant obtained a full time job that paid the same income that he had received at [text deleted] prior to the accident. The Appellant received U.I. Benefits for a number of weeks in the spring of 1996 and this sum should be credited towards the amount of I.R.I. owing to the Appellant. For the period of the U.I. payments M.P.I.C. only has to pay the difference between the U.I. amount and what [the Appellant] would have received as an I.R.I. payment. Should there be any disputes as to the amount the Appellant should receive then we shall remained seized of this matter and it can be referred to us for adjudication.

Pursuant to Section 163 of the Act the Appellant is entitled to interest at the prejudgement rate to be determined under Section 79 of the Court of Queen's Bench Act computed from December 10th, 1995 until payment is made to him.

DISPOSITION:

We therefore rescind the Review Officer's decision dated July 30th, 1996 and substitute the above noted decision.

Dated at Winnipeg this 5th day of February 1997.