

# **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an appeal by [the Appellant]  
AICAC File No.: AC-96-70**

**PANEL:** Mr. J. F. Reeh Taylor, Q.C. (Chairperson)  
Mr. Charles T. Birt, Q.C.  
Mrs. Lila Goodspeed

**APPEARANCES:** Manitoba Public Insurance Corporation ('MPIC') represented  
by Mr. Tom Strutt  
[Text deleted], the Appellant, was represented by [Appellant's  
representative]

**HEARING DATE:** February 25th, 1997

**ISSUE(S):** Whether apparent back injuries were caused by MVA and,  
therefore, qualify Appellant for I.R.I.

**RELEVANT SECTIONS:** Sections 71(1) and 85(1) of the MPIC 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 a motor vehicle accident ('MVA') in Winnipeg on January 19th, 1995. He was then [text deleted] years of age and, just a few days prior to his accident, had been laid off from his employment as a sheet metal worker. In the course of that employment, his principal work consisted of assisting sheet metal journeymen in erecting

structural steel, insulation and exterior steel sheeting. In the latter context, he would help in hoisting the sheets of metal up to the appropriate level on the building where he was working, and then affixing them to the structural girders. The sheets of metal weigh a minimum of about 20 pounds and, occasionally, up to 100 pounds.

Two days after his accident, on January 21st, 1995, he consulted [Appellant's doctor #1] at the [text deleted] Medical Centre. [Appellant's doctor #1] says that his patient reported 'acute pains in his right knee, elbow, upper back, neck and lower back'. [Appellant's doctor #1] reports that, on examination, [the Appellant] demonstrated normal range of motions for all neck, shoulder and lower back parameters, although some muscle spasm was evident. He diagnosed musculoskeletal soft tissue injuries secondary to MVA and advised [the Appellant] to apply ice/heat and to perform stretches. [Appellant's doctor #1] prescribed a muscle relaxant to be taken for five days and advised [the Appellant] to return for re-examination at the end of that time. [Appellant's doctor #1] did not see [the Appellant] again.

On February 23rd, 1995 [the Appellant] filed an application for income replacement, based upon his apparent inability to work as a result of his MVA. That application for income replacement makes no mention of a sore back, but only of injuries to [the Appellant's] shoulder and knee. He claimed an inability to use his right arm in lifting heavy materials. [The Appellant] explains the absence of any mention of the sore back by saying that he certainly told his adjuster about his back problem, but that she must have inadvertently omitted to include it. However, that omission does assume somewhat greater significance when taken in conjunction with the fact that [Appellant's doctor #1], also, was not told of any lower back problem.

[The Appellant] does not seem to have sought any further medical or quasi-medical attention thereafter, until May 23rd, 1995 when he attended at the [text deleted] Chiropractic Clinic, where he was seen either by [Appellant's chiropractor #1] or by [Appellant's chiropractor #2]. The report from that Centre does, indeed, indicate that [the Appellant] complained of low back pain when he first sought chiropractic treatment, and that he had stated that his low back pain was aggravated by working, lifting, stooping and sitting. However, the subsequent report from [Appellant's chiropractor #2], dated June 18th of 1996, says that "Due to the type and extent of injuries and based on the history he provided, his condition was considered to preclude him from work between May 23rd, 1995 and June 5th, 1995.....[Appellant's doctor #1] continued his care on a regular basis from May 23rd, 1995 to June 6th, 1995, at which time he was considered no longer work disabled. After that date he attended for care on July 12th, August 4th and September 25th, 1995, on an as needed basis. At no time during those few visits did his condition appear work disabling".

And again, later in that same report, we find the statements: "At the time of his final visit on September 25th, 1995, his condition did not warrant any disability rating. No functional limitation or deficit existed that would have precluded him from his employment".

[The Appellant] had apparently attended at the Chiropractic Clinic for about twelve to fourteen treatments.

[The Appellant] was called back to work by his original employer, [text deleted], in June of 1995. When that job finished, he found work of a similar kind in [text deleted], Manitoba, starting on September 11th, 1995. He worked for two full weeks from September 11th to

September 24th, inclusive; for the week of October 1st, 1995 he worked for three days (it was never made clear to us why the other two days were missed); for the week ending October 8th, 1995 he worked full-time. During the following two weeks, [the Appellant] apparently advised his supervisor that he had to see his doctor with respect to an insurance claim, but he returned to work on October 23rd and worked for the whole of the week ending October 29th.

[The Appellant] then worked a further three full weeks up to November 17th, 1995. At that point, he advised his supervisor that, due to some back problems, he needed time off. He was told that, if he did so, the job would be over by the time he came back to work and that, therefore, the company would be laying him off. He was issued a separation slip as at November 17th, 1995.

The next occasion upon which [the Appellant] appears to have sought medical assistance was on the 2nd of October 1995 when he attended upon [Appellant's doctor #2]. Her report covering that visit notes that "Patient has been seeing chiropractor. First seen by myself today. Pain in back persisting. Still working, does heavy lifting as steel worker. Spasm in lower back with S1 joint instability". For treatment, [Appellant's doctor #2] referred [the Appellant] for physiotherapy and, in the portion of her report where she was asked to list occupational or domestic limitation, she wrote "Patient has been working through the period since accident".

Subsequently, toward the end of 1995 on a date which seems obscure (her report, which purports to be dated November 28th, speaks of an examination having taken place on December 21st, and her narrative report of December 19th says that the last examination was on

December 13th!) [Appellant's doctor #2] indicates that [the Appellant] was capable of resuming his main occupation, says that his disability ended on December 1st of 1995 but, in the same report, lists his occupational or domestic limitations as "heavy lifting, prolonged sitting". [Appellant's doctor #2's] narrative report of December 19th notes that [the Appellant] "Works at a steel plant and is required to do a lot of lifting while on the job" which, again, is difficult to reconcile with the rest of her report. [Appellant's doctor #2's] narrative also speaks, in quotation marks, of her patient's recent "relapse" which, she says, "appears to be a result of his motor vehicle accident of January 19th, 1995". We have to assume that, since [Appellant's doctor #2] first saw [the Appellant] on October 10th, her conclusion about the cause of [the Appellant's] discomfort can only stem from [the Appellant] himself, since there appear to have been no objective, medical findings of cause and effect at that juncture.

The next narrative report from [Appellant's doctor #2] bears date January 18th in which she reiterates that [the Appellant] had remained working during the period between the date of his MVA and October 2nd of 1995; she confirms that she had referred him to physiotherapy for low back muscle spasm and S1 joint instability. She goes on to add that [the Appellant] was recently seen on December 28th, 1995, complaining of recent relapse one week prior with mild exertion and sneezing. [Appellant's doctor #2] then referred [the Appellant] to an orthopaedic specialist, [text deleted], who does not appear to have seen [the Appellant], and to a specialist in rehabilitation medicine, [text deleted], who did see him. [Appellant's doctor #2's] last report of January 18th, summarizing her December 28th examination of [the Appellant], concludes that [the Appellant] "Is unable to return to heavy lifting and physical labour which is most of his previous occupation as a steel worker entailed (sic). Functionally, the patient is limited by pain secondary

to muscle spasm and decreased range of motion in his lower back, and will need further improvement in back musculature".

[The Appellant] was seen on several occasions by [Appellant's rehab medicine specialist], to whom he had been referred by [Appellant's doctor #2]. We have had the benefit of reading several careful, thorough reports prepared by [Appellant's rehab medicine specialist] - specifically: a report of March 18th, 1996 respecting his first examination of [the Appellant]; a report of July 8th, 1996 dealing with his examinations of [the Appellant] on April 1st and about July 1st; a report of October 30th covering an examination of that same date; a report of November 6th, 1996 outlining, briefly, [Appellant's rehab medicine specialist's] overall observation of [the Appellant] and an assessment that [the Appellant] was then unable to return to employment and, in particular, incapable of pursuing his pre-injury job and, finally, a report of February 10th whereby [Appellant's rehab medicine specialist] responds to some comments of [text deleted], a physician in the employ of MPIC. [The Appellant] apparently told [Appellant's rehab medicine specialist] that he had struck the windshield of his car in the course of his accident; he had told [Appellant's chiropractor #2] that he had hit the steering wheel; [Appellant's rehab medicine specialist's] report speaks of feelings of numbness in the right anterior thigh and chronic lumbosacral strain on the right side; [Appellant's chiropractor #2] notes that [the Appellant] complained of left leg pain. [Appellant's rehab medicine specialist's] report mentions that "The impact of collision caused injury to the low back", although [the Appellant] did tell us that this had not become apparent until some time after the accident itself. [Appellant's rehab medicine specialist's] report of July 8th indicates that [the Appellant] appeared to have been doing very well with his physiotherapy and reconditioning exercise program, that [the Appellant's] back now showed a very good range of motion, albeit with a little tenderness to the right of the lumbosacral junction, but that there did not

appear to be any remaining articular muscular or neurological deficit. [The Appellant] had apparently declared his intent of seeking other work and abandoning his work as a sheet metal worker.

The subsequent report of [Appellant's rehab medicine specialist], of October 30th, tells us that [the Appellant] had attended at [Appellant's rehab medicine specialist's] clinic at the [hospital] that morning, complaining of low back pain that had recurred about two months previously "to the point that he was unable to keep up with his self-employed work". [The Appellant] testified that the "self-employed work" to which [Appellant's rehab medicine specialist] refers was, merely, "helping out a few friends with auto repairs - making suggestions for them - and there wasn't really enough of that to make it worth while". It is difficult to understand why low back pain would have precluded [the Appellant] from keeping up with that "self-employed work". In any event, at the October 30th examination [the Appellant] appears to have been suffering from pain in his lower back and right leg, rather than from the left leg of which he complained when attending upon his chiropractor.

It seems clear from the reports of [Appellant's rehab medicine specialist], a specialist of high qualification and expertise, that at the times of [Appellant's rehab medicine specialist's] examinations of [the Appellant] the Appellant was, indeed, exhibiting symptoms of low back pain. What is not so clear is the cause of that pain and other discomforts from which [the Appellant] may well have been suffering. As is not infrequently the case, this Commission is faced with the difficult task of determining, upon a reasonable balance of probabilities, which of two streams of medical opinion should be given the greater weight. In the present case, and based primarily upon the following facts:

- (a) the physician who saw [the Appellant] two days after his accident reports that [the Appellant] was quite capable of returning to work on a full-time basis,
- (b) his chiropractor, [Appellant's chiropractor #2], provides essentially the same opinion,
- (c) his physiotherapist arrived at the same conclusion, as of June 6th, 1995,
- (d) [the Appellant], by his own testimony, returned to work on a full-time basis for his original employer, [text deleted], in June, and thereafter worked at a much more demanding job in [text deleted], long before his first contact with [Appellant's rehab medicine specialist],

we find that the stronger likelihood is that any injury from which [the Appellant] was suffering when he first saw [Appellant's doctor #2] and [Appellant's rehab medicine specialist] had been caused, not by his motor vehicle accident of January 1995 but, rather, from some excess exertion connected with the demands of his work at [text deleted]. We are satisfied that his earlier symptoms had resolved and that he had been left with no material restrictions upon his ability to resume his former occupation by about the 1st of June of 1995.

Our task would have been more difficult had [the Appellant] been receiving regular medical or chiropractic treatment throughout the entire period, and had that treatment disclosed no substantial improvement. That was not the case, however, and we have great difficulty in concluding, as [the Appellant's] counsel invites us to do, that the deterioration in [the Appellant's] condition from about mid-1996 was directly related to a motor vehicle accident that had occurred in January of 1995.

While, granted, it is not possible for us to say with any certainty just what the cause might be of [the Appellant's] present discomforts, we can only arrive at our decision upon the

basis of that cause which seems to us to be the most likely one. We do not find that [the Appellant's] automobile accident falls into the latter category.

One further point should, perhaps, be made: [text deleted], counsel for [the Appellant], indicated that his client was seeking income replacement indemnity from January 26th, 1995 to date and, indeed, thereafter, on a monitored basis, until it could be established that [the Appellant] was able to return to work. Having in mind that [the Appellant] had, unfortunately, been laid off only a few days prior to his accident, he would in any event be classified as a non-earner within the meaning of the MPIC Act and, therefore, would not in any event qualify for income replacement until 180 days after the accident unless he had been able to establish that there was other employment which, but for his accident, he would have been able to obtain. There was a suggestion - but no more than that - that other employment might have been available, but we were given no real evidence upon which to base an affirmative finding. Before the expiry of the first 180 days after his accident, as we have found, [the Appellant] had been restored to pre-accident status. He had, in fact, been paid income replacement for two weeks in October of 1995 and for three weeks in 1996, but it is our view that MPIC had erred on the side of benevolence in making those payments and cannot now be estopped from denying [the Appellant's] continued entitlement.

**DISPOSITION:**

For the reasons noted above, we are therefore obliged to dismiss [the Appellant's] appeal and to confirm the decision of MPIC's Internal Review Officer bearing date December 4th, 1996.

MPIC will be responsible for the cost of all medical and para-medical reports filed in support of [the Appellant's] claim, if that has not already been taken care of.

Dated at Winnipeg this 13th day of March 1997.