

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-69**

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

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC') represented
by
Ms Joan McKelvey;
[Text deleted], the Appellant, appeared on his own behalf.

HEARING DATE: February 19th, 1998.

ISSUE(S): Whether Appellant entitled to continuance of Income
Replacement

RELEVANT SECTIONS: Sections 83(1) and 84(1) of the MPIC Act ('the Act') and Section
6 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 Appellant, [text deleted], was riding his bicycle near the intersection of [text
deleted] and [text deleted] in [text deleted] on June 7th, 1996, when he was struck by a car
approaching him from behind. He was thrown over the handlebars of his bicycle onto the
sidewalk, taking most of the impact with his hands but nevertheless hitting his head which,
fortunately, was cushioned to some extent by his hands. He sustained injuries to his hands and

wrists, cervical spine, upper extremity, thoracic and lumbar regions as well as injury to his right knee.

[the Appellant] was treated by his family doctor, [text deleted], who saw him on the day of the accident and arranged for both of [the Appellant's] forearms and wrists to be placed in casts; [the Appellant] remained that way until June 17th, 1996, when the casts were removed, but even then his hands remained in tensor bandages and he was barely able to move his fingers. He received nursing assistance from the [text deleted] and domestic help from a volunteer friend.

[Appellant's doctor's] initial health care report noted that [the Appellant] had sustained significant limitation in function, and was unable to fend for himself in the ordinary course of daily living, such as food preparation, dressing himself, washing and so on. [Appellant's doctor] felt, at that point, that physiotherapy would probably be required, with a possible referral to a specialist, depending upon his rate of recovery.

[Appellant's doctor] did, in fact, refer [the Appellant] to physiotherapy at the [text deleted], where the Appellant was treated by [Appellant's physiotherapist #1] for an initial period of four weeks, commencing on October 1st of 1996.

In response to a request from MPIC for an up-to-date report, [Appellant's doctor], on October 24th of 1996, reported that he had re-examined the Appellant regarding his bi-lateral hand/wrist injuries as well as lower and mid-back complaints resulting from his accident. [Appellant's doctor] reported that [the Appellant] continued to exhibit functional diminished range

of motion and of strength in both hands and wrists; while [the Appellant] had normal extension, flexion was painful, grip strength was 2/5 bilaterally. An examination of the Appellant's upper and mid-back areas revealed slight, generalized, diminished functional range of motion, especially motion involving flexion and extension, with evidence of paravertebral and paracervical muscle spasm and tension. [Appellant's doctor] reported that he continued to treat the Appellant with combinations of analgesics, non-steroid anti-inflammatory drugs and muscle relaxants with good responses. [Appellant's doctor] also felt that the Appellant's physiotherapy sessions, aimed at improving active range of motion, strength, mobility and muscular endurance, should be continued for at least a further month, pending further review. [Appellant's doctor] adds "He is able to continue attendance re: education, but is at the limit of what he can achieve in terms of hourly attendance; however he is not yet deemed fully recovered from his past injuries as to be employable".

A further physiotherapy report from [Appellant's physiotherapist #1], dated November 12th of 1996, says that [the Appellant] is still complaining of cervical, lumbar, upper limb and lower limb pains (the latter in his right knee), multi zones of pain above and below the waist, sleep disturbance two to three times every night and pain at the back of his head. Nonetheless, after eight physiotherapy sessions in October and two in November, [Appellant's physiotherapist #1] proposed discharging [the Appellant] from physiotherapy on November 15th at which date, she felt, he should be able to return to graded work activities.

On November 26th of 1996, in reliance largely upon the physiotherapy report, [the Appellant's] case manager at MPIC wrote to him to advise that income replacement indemnity

would cease as of November 15th since, in the view of the Corporation, [the Appellant] had "regained the capacity to return to your duties prior to the motor vehicle accident".

At the time of his accident, [the Appellant] was employed on a full-time basis by [text deleted], as a flooring installer. Earlier, he had been enrolled as a full-time student at [text deleted], but had dropped out of his [text deleted] courses in February of 1996 because he had been promised full-time work by [text deleted] and needed the money for completion of his courses. He was also receiving social assistance, and had reported all of his earned income to the appropriate authority. He had registered for three or four full courses at the [text deleted], to commence in the fall of 1996, but was working full-time in flooring installation during the summer and, part-time, during the previous academic term. He had actually enrolled for two summer courses during the 1996 year as well, to be taken twice a week in the evenings, but dropped out of those by voluntary withdrawal following his accident. [The Appellant's] declared objective was to continue working full time for [text deleted] until the fall of 1997, probably taking a couple of evening, summer courses, and enrolling back at [text deleted] on a full-time basis for September of 1997. Being prevented by his accident from earning during the period from June 7th, 1996, through June 30th, 1997, he in fact registered for the minimum requirement of six courses - three in the first term and three in the second - during the 1996/97 academic year, passing four of them, failing one, and passing the last one by way of a deferred examination in September of 1997. During his spare time, he worked as a volunteer at the [text deleted] for mentally handicapped youngsters.

[Appellant's doctor] had referred [the Appellant] to [text deleted], a specialist in neurology, shortly after [the Appellant's] accident in 1996. [Appellant's neurologist] saw the Appellant again on January 10th, 1997. [Appellant's neurologist's] report of January 13th indicates that, while [the Appellant] was much better than he had been six months previously, he continued to complain of low back pain radiating up to his neck and shoulders, as well as occipital frontal headaches; the pains were continuous. [The Appellant's] major complaint was of continuing difficulty with concentration, which was having an adverse impact upon his studies at the [text deleted], to which he had returned. [The Appellant] advised [Appellant's neurologist] that he had felt much better while receiving physiotherapy and that his symptoms had worsened once the physiotherapy had been terminated. [Appellant's neurologist's] neurologic examination of [the Appellant] disclosed no abnormalities nor any evidence of raised intra-cranial pressure. However, [Appellant's neurologist] expressed the opinion that [the Appellant] was still suffering from post-traumatic syndrome, although noticeably better than before. [Appellant's neurologist] adds that "Personally, I would support further physiotherapy as this is obviously the way to improve his condition in the long run". [Appellant's neurologist] then referred [the Appellant] to [physiotherapy clinic], where he was seen on or about the 12th of February 1997 by [text deleted], a qualified physiotherapist. [Appellant's physiotherapist #2's] report of February 12th, after relating in some detail the subjective complaints voiced by [the Appellant], concludes by saying, in part:

"[The Appellant's] injuries have not been totally resolved and he is left with some serious disfunction and residual discomfort that continues to require attention. At the present time he would be unable to return to work as his functional level is 65/70% with marked restrictions in his ability to lift and carry on prolonged activity. It is my impression, and

over the course of the five treatments he has received, that [the Appellant] will benefit from a course of therapy.....program course for resolution is predicted to be approximately six to eight weeks with expected functional level to rise to 90 to 95%. Treatment is planned for two times per week with an educational component encouraging home exercise....."

A letter to MPIC from [Appellant's doctor] of January 22nd, 1997, after noting that the Appellant had been examined by [Appellant's doctor] and [Appellant's neurologist] latterly, says that "...he has not as yet fully recovered from these injuries although improvement has been noted; he would still benefit from physiotherapy services and it is hoped these will be reinstated. **He is not however deemed to be held currently employable.**"

Despite the foregoing, and with no further explanation on the part of MPIC, [the Appellant's] case manager wrote to him under date of January 22nd, 1997 to the effect that all matters related to the Appellant's claim appeared now to have been concluded and the Corporation would be closing its file.

A further physiotherapy report from [physiotherapy clinic], dated February 21st, 1997, indicates that the Appellant continued to suffer the residual effects of his motor vehicle accident, both by way of soft tissue injury and joint restriction. Clinical treatments of from six to eight weeks were anticipated at that juncture.

[The Appellant] applied for a review of the Corporation's decision to discontinue both his income replacement and his physiotherapy. The internal review officer, upon the recommendation of [text deleted], MPIC's medical director of its Claims Administration Department, agreed that the Appellant did require some further strengthening and was entitled to a further seven to eleven physiotherapy treatments, over and above those already received as of February 12th, 1997. However, upon the basis of the opinion of [Appellant's physiotherapist #1] that [the Appellant] was ready to return to work, resumption of income replacement indemnity was denied him. The internal review officer found that the Appellant was "capable of performing modified duties" and that there were no objective findings in the medical reports that would prevent him from returning to work. It is from this latter pair of decisions that [the Appellant] now appeals.

From the time of the Appellant's accident, the combination of medication, imbalance and pain precluded his driving, using ladders and lifting anything of consequence; as a result, he was unable to earn money. He testified that the first time he had been able to work, post accident, was at the beginning of July of 1997; he had tried to find work during the first half of 1997 but could not find any physical work of which he was capable (due to his injuries) nor anyone who would hire him for office work. He had finally been able to find occasional landscaping and other odd jobs during the summer of 1997, but could not go back to work for [text deleted] because, as he put it, "I couldn't give them 100%, since I couldn't put much weight on my knee, lift heavy loads and things like that".

This is largely borne out by a further letter from [Appellant's physiotherapist #2] of June 30th, 1997, who reports that [the Appellant] had continued his home exercise program following conclusion of physiotherapy treatments on April 21st of 1997, and that this had been of major benefit. The Appellant's knee remained ' a problem which may require further investigation, either by orthopaedic consult or an MRI to determine if a meniscal problem is present.' [Appellant's physiotherapist #2] goes on to say that, in his opinion, [the Appellant's] functional level and physical status were about 80 to 90% and that, 'although prolonged efforts produce some discomfort it would appear that he could return to his former job as a carpenter with the only detriment being his right knee'. [Appellant's physiotherapist #2] recommended continuance of [the Appellant's] home exercise program and, potentially, further investigation of the right knee.

[Appellant's physiotherapist #2's] recommendation and opinion are supported by [Appellant's doctor] who, on October 16th of 1997, gives a precis of [the Appellant's] medical history since his accident, and makes mention of a referral to [text deleted] (an orthopaedic specialist) on July 4th and an MRI scheduled for November 7th of 1997. [Appellant's doctor] then concludes by saying

"We support and concur with the notion that the above named certainly would have been available for his return to the work force as of July 1st, 1997, however, he certainly would not have been in a position to do so prior to this as evidenced by his need for additional physiotherapy treatments and general rehabilitation/conditioning throughout the first half of 1997. If he had continued with his physiotherapy from November 1st, 1996 without disruption in all likelihood he would have been rehabilitated at a much earlier date".

We may say that we were not made privy to the results of the magnetic resonance imaging referred to above if it was in fact, ever carried out, nor do we have the benefit of any report from [Appellant's orthopedic specialist].

[Appellant's neurologist] and [Appellant's doctor] both express the view that [the Appellant] has been suffering from post-traumatic syndrome, and the principal symptoms of which [the Appellant] complains, including severe headaches, impairment in attention and concentration, poor memory, sleep disturbance and fatigue, along with continued pain in his lower back and neck, all seem to be in accord with the literature on the subject. Indeed, one of the standard problems associated with post-traumatic symptom is the very lack of objective findings to which MPIC's medical team make reference; it is that fact which makes it difficult for the professional physician, let alone the lay person, to determine whether the complaints of a claimant alleging post-traumatic syndrome are genuine or creatively self-induced. It becomes necessary, then, to look at as many external factors as are available, including the claimant's work history, industriousness (or lack of it), over-all achievements, attitude and desire, along with the views and apparent objectivity of the physicians and other, personal caregivers who have dealt with the claimant on a week-by-week basis.

We find, on a reasonable balance of probabilities and, in particular, in reliance upon the evidence of [Appellant's doctor] and [Appellant's neurologist] supported, at least in part, by that of [Appellant's physiotherapist #2], that [the Appellant] was not able to return to his former employment nor, indeed, to any useful, gainful employment until July 1st of 1997.

We may say that we found [the Appellant's] evidence to be straight-forward and credible, including his testimony that he had been following faithfully the program of home exercises prescribed for him by [Appellant's physiotherapist #1]. Most of his earlier physiotherapy, he noted, had been directed towards the restoration of strength and mobility to his hands, wrists and forearms; his home exercises had been primarily for the benefit of his neck and back.

THE LAW:

By virtue of **Section 6 of Regulation 37/94**, [the Appellant] was, at the time of his accident, a temporary earner, in that he

'held the employment for less than one year before the day of the accident,had been employed for not less than 28 hours per week, not including overtimeand was not covered by clause 4(b),' (which relates to one of the definitions of full-time employment.)

Section 83(1) of the Act provides that a temporary earner is entitled to an income replacement indemnity ('IRI') for any time, during the first 180 days after an accident, that he is unable to continue the employment or to hold an employment that he would have held during that period if the accident had not occurred.

Section 84(1) of the Act makes provision for recalculation of a temporary earner's IRI after the first 180 days, based upon a hypothetical employment for which the claimant is

deemed, by the insurer, to have been suited. However, the resultant, bi-weekly IRI after the 180th day must not, in any event, be less than that awarded the claimant during the first 180 days. Hence, in [the Appellant's] case, no change is called for after the 180th day following his accident.

DISPOSITION:

We find the Appellant, [text deleted], a temporary earner within the meaning of the Act and Regulations, to have been entitled to the continuance of his income replacement indemnity from November 15th, 1996, through June 30th of 1997, and the decision of MPIC's internal review officer of April 14th, 1997 is, therefore, rescinded and the foregoing award substituted for it.

Dated at Winnipeg this 9th day of March 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED