

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-124**

PANEL: Mr. J. F. Reeh Taylor, Q.C., Chairman
Mrs. Lila Goodspeed
Mr. F. Les Cox

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC')
represented by Mr. Keith Addison;
the Appellant, [text deleted], appeared on his own
behalf

HEARING DATE: July 5th, 1999

ISSUE(S): Entitlement to income replacement indemnity

RELEVANT SECTIONS: Sections 83(1), 110(1)(a) and 160(a) 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 Appellant, [text deleted], was involved in a motor vehicle accident on September 15th, 1994. His testimony at the hearing of his appeal, with respect to the accident itself, may be summarized thus:

I was riding my bicycle north bound, on the sidewalk at the intersection of [text deleted] and [text deleted] in Winnipeg; I saw a car approaching along [text deleted] on my left, which appeared to be moving at about 5 miles per hour. I did not stop and the car hit the frame of my bicycle, shearing off the left pedal and bending the perpendicular front tube of my bike so as to put a bow in it. The impact pushed me towards some oncoming traffic which I managed to avoid, but the seat of my bicycle was turned sideways and the spring under that seat was

compressed by my body weight to such a point that it would not resume its former shape. I was not knocked off my bicycle and, indeed, I continued riding it downtown to the premises of [text deleted], where I was working on an uncompleted contract to provide some handmade goods.

[The Appellant] applied for and received income replacement indemnity in the aggregate amount of \$3,326.28, to cover the period from October 3rd, 1994 to April 24th, 1995. Effective on the latter date, MPIC terminated his income replacement payments upon the ground that he had knowingly provided false or inaccurate information to the Corporation.

It should be noted that [the Appellant] had apparently sustained two prior injuries that had been the subject of Workers' Compensation claims, the one on June 13th, 1991, and the other on February 5th, 1992. The Workers' Compensation Board had accepted the first of those claims and had paid him benefits for the period from June 13th to July 15th, 1991; his appeal for an extension of those benefits was denied. His claim arising out of his February 5th, 1992 incident was denied and that denial was upheld by the Workers' Compensation Appeal Commission.

At the hearing of [the Appellant's] appeal before this Commission, a great deal of contradictory evidence was submitted. Some of that evidence strains credulity. We were provided with a large number of videotapes, prepared by investigators retained by MPIC, depicting a variety of activities on [the Appellant's] part. Those tapes were accompanied by narrative reports, purporting to describe or summarize the actives depicted on the videotapes. [The Appellant] takes strong exception to many of the comments made in those narrative reports. Rather than have our decision tainted by any suggestion of the unfairness or inaccuracies that [the Appellant] alleges are contained in those narratives,

we have relied solely upon the videotapes themselves, whenever there appears to be any discrepancy between the film and the written word.

[The Appellant's] Pre-accident Occupation

In his application for compensation, [the Appellant] gave a work history as a truck driver from April to July, 1991, as a part-time relief butcher from September, 1987, until September, 1992, as a meat cutter from December, 1992, through February of 1993 and, thereafter, as a self-employed leather craftsman, doing fine leather work by hand. [the Appellant] testified that, in the months leading up to his accident, he was able to work between 4 and 5 hours a day. His working hours had been limited due to an industrial accident for which he had been receiving Workers' Compensation.

[The Appellant's] Post-accident Occupation

[The Appellant] agreed with counsel for MPIC that, within about 3 months after his accident, he was able to work at least 3 to 4 hours per day, although he had told his adjuster in January of 1995 that he could only work 2 hours per day. [The Appellant] appears to have done some portion of his work at his own home and, as well, spent time working at the premises of [text deleted]. [The Appellant] explained this latter location by saying he was not working for [text deleted] but, rather, was receiving instruction there in the art of [text deleted] beadworking while, at the same time, giving instruction to an employee of that firm in the making of leather clothing. He told one of MPIC's investigators, who had inquired about the possible purchase of some custom made clothing, that when he was doing beadwork on the finished product, he had an assistant

who would help him and they would normally work a 10-hour day. (In this context, [the Appellant] was obviously referring to his post-accident working hours.) On February 15th, 1995 the appellant's wife is reported by MPIC's investigator to have said that [the Appellant] was then "working out of a company known as [text deleted]. Similarly, on March the 8th, 1995, when one of MPIC's investigators attended at [text deleted], posing as a customer, she was told that [the Appellant] was not there but would return the following day and "was almost always there between the hours of 10 A.M. and 6 P.M. Indeed, [the Appellant] himself told [text deleted], an investigator on the staff of MPIC, that he was "there every day from 10 A.M. to 6 P.M.", except every second Wednesday when he goes for therapy". Other surveillance reports seem to indicate that, while [the Appellant] was at the store on [text deleted] until close to 6 o'clock on some occasions, he would more frequently leave somewhat earlier. Despite the foregoing, on April 19th, 1995, [the Appellant] told his adjuster at MPIC that he had been totally disabled from his job of working 4 hours a day as a leather craftsman and was now only working 2 hours a day. He apparently agreed that, prior to his accident, he'd only been working halftime due to his prior industrial injury.

Issues of Credibility

[The Appellant], in filing his claim for compensation and, in subsequent discussions with his adjuster, said that the motor vehicle had "grazed" the pedal on the left side of his bicycle. When testifying before this Commission, he swore that the impact had sheared off his pedal although, by some excellent feat of balance, he had managed to lift his leg above the level of the fender of the car so that his leg was uninjured. Despite the force of that impact, he said, he had not been knocked off his bicycle but had continued to ride it

all the way downtown and, later, home, using only the right pedal with a distorted frame and a practically unusable seat. We have to say that this evidence makes little sense. MPIC's adjuster attended at [the Appellant's] garage on October the 3rd, 1994, did not find the left-hand pedal to be missing and, although noting that the seat of the bicycle was "off center quite a bit at an angle to the right" commented that it would have been easy to realign that seat. It would, in our view, have been a strange cyclist who would not have paused to straighten out the seat of his bicycle before continuing his ride downtown and homeward, and only someone wedded to his bicycle would ride it all the way from the scene of the accident to his workplace downtown and then, later in the day, ride it home, using only one pedal - a practical impossibility! We find that both the description of the accident given by [the Appellant] to MPIC and the evidence that he gave to this Commission, touching upon the mechanics of his accident, difficult, if not impossible, to believe.

Every person in the employ of MPIC who has dealt with [the Appellant] describes him, in one way or another, as walking with difficulty, exhibiting extreme discomfort getting into and out of a chair with apparent pain and, in general, presenting himself as someone with at least moderately, if not seriously, limited mobility. The fact is, however, that wherever he is shown on videotape, he is able to move confidently, swiftly, with total mobility and no apparent discomfort of any kind. He has been described as running for buses, walking fast, mounting stairs two at a time and, in general, exhibiting no outward signs of discomfort at all.

When, during the course of his appeal, this discrepancy was put to [the Appellant], he said that he had never claimed to be unable to walk; rather, he said, it was the sitting that

gave him problems. In any event, he said, it was understandable that he would be showing signs of discomfort when he showed up for an interview with his adjuster, since he always walked from his home in [text deleted] to MPIC's offices at [text deleted]. This latter statement is simply not believable. While surveillance tapes, and reports made independent of those tapes, do indicate that [the Appellant] did a certain amount of walking in the downtown area, he has never been observed walking the kinds of distances of which he speaks. It is, also, noteworthy that in his application for compensation, in response to the question "What injuries resulting from the accident prevent the victim from carrying out any of these activities?" [The Appellant] shows vacuuming, **walking**, and cycling as things he could no longer do.

We quote, here, from a decision of [text deleted] who, in acquitting [the Appellant] of a charge of defrauding MPIC and knowingly making a false statement, made the following comments:

With respect to exhibit 5, the videotape, it for the most part displays [the Appellant] on occasion walking down the street, the front street of his residence, to a bus stop.

It shows [the Appellant] walking downtown in [text deleted] in the vicinity of a business establishment where he did some work, and on two occasions it shows [the Appellant] doing something which might be seen to be somewhat, not necessarily unusual, but perhaps strange, for an individual who has suffered a back injury, and I refer specially to the occasion when [the Appellant] is seen to be shoveling the walk in front of the business establishment on [text deleted] and on another occasion when he appears to be sweeping the sidewalk in front of that establishment. Those are specific incidents or episodes which (the Crown) points to as being indicative of the overall effort on the part of [the Appellant] to defraud the MPIC by claiming to have an injury which has resulted in the further reduction of his workday when indeed there was no such thing.

[Text deleted] acquitted [the Appellant] because, as he rightly pointed out, "While one's suspicions may be aroused in respect of this particular matter ...suspicion

does not amount to proof beyond a reasonable doubt...". In a hearing before this Commission, it is only necessary for one of the parties to establish his or it's case upon a reasonable balance of probabilities. To adopt the language of [text deleted], it is not only strange for an individual who has suffered a back injury to be shoveling the walk and sweeping the sidewalk in front of a business establishment; it is also strange for someone to be doing that if, as he testified, he was not even working there. (This is not to suggest that [the Appellant] denied having a presence at that store; rather, his allegation is that he was simply trading some of his expertise for that of an employee of the store.) [The Appellant] does not deny that he was in [text deleted] for at least 6 hours on most working days, but he suggests that he was only able to work for 2 of those hours. Understandably, perhaps, he was not able to tell us how he was engaged during the other 4 hours of his presence at that store.

Although [the Appellant] told us that it was sitting, and not walking, that caused him difficulty, he signed his Statutory Declaration on April the 10th 1995 which says, in part "In my day to day activities I find I have great trouble walking. The pain extends down to my left leg. As a result, I sometimes have to throw my leg forward by rotating my hip. It eases the pain." That statement is materially at odds with [the Appellant's] testimony to this Commission that he walked from his home in [text deleted] to MPIC's offices downtown, and that it was this walking that caused him to exhibit such stiffness and pain when meeting with his adjuster. His Statutory Declaration is, for the same reason, graphically contradicted by the videotapes, which show no such discomfort or difficulty.

The file contains numerous other items of evidence establishing quite clearly that [the Appellant] was well able to work and did, in fact, work for far more hours per diem than

his evidence would lead us to believe. His evidence included, in that same Statutory Declaration, a reiteration by [the Appellant] that he was only able to work 2 hours a day by reason of the injuries sustained in his September 15th, 1994 accident, that he did his work at home and that, due to those same injuries, was having trouble getting around to the point that he might require a cane. We cannot ascribe any credibility to any of those statements.

Medical Evidence

The medical evidence supporting [the Appellant's] claim is minimal in the extreme.

True, his family physician, [text deleted], does express the view that:

This gentleman was injured at work many years ago. He was left with a chronic back strain and it was thought to be facet joint damage at L5-S1...He was getting injections into this joint, approximately every 3 months. In September 15th 1994 he was involved in a car accident with increased pain in the same area of the back. This pain has persisted at an increased rate in the same area since this motor vehicle accident. X-rays and CT scans of the back have really not furthered the fact that there was apparent damage to the joint. There is no sign of any disks or any permanent nerve damage having been done. ...I think that he is going to have persistent back pain for the rest of his life ...I would feel that he is severely limited with restrictions on his back, no heavy lifting, bending or repetitive bending with even light lifting, in any job that he could do.

A careful reading of this, and of [Appellant's doctor's] earlier report to MPIC, discloses no objective, medical evidence that might indicate any material injury sustained by [the Appellant] in the accident in question. In a report of December 29th, 1994 to MPIC, [Appellant's doctor] says:

I believe at the present time he is still working on about 3 to 4 hour basis depending upon how severe the back pain is. It is very hard to tell in this case how much is due to a new accident and how much due to his prior injury that he had. Certainly there is no doubt in my mind that he has had a severe aggravation of the prior injury and the question of percentage due to each injury at this time is

very hard to determine.

An earlier report from [Appellant's doctor] of some date in October, 1994, is illegible and does not indicate a likely date when the disability might end.

[Appellant's doctor] referred [the Appellant] for further assessment to [text deleted], a specialist in orthopedic surgery, who arranged for a myelogram, which was normal, and a CT scan which showed a small, right lateral disk herniation and right lateral endplate degenerative spur. The CT scan report contains the comment; "It is not causing any significant problem and does not correspond with his symptoms. I believe his condition is that of mechanical low back pain of discogenic origin, the L4 disk is obviously not entirely normal. It is degenerate." (The foregoing comments from [Appellant's orthopedic surgeon] are dated January 14th, 1995.) [Text deleted], the radiologist who performed the post-myelogram CT scan of [the Appellant's] lumbo-sacral spine, also noted that there was no evidence of disk herniation, spinal stenosis or nerve root compression at the L5-S1 level.

[Appellant's orthopedic surgeon] also makes the statement that [the Appellant's] original injury was in 1991 and that he had never been symptom-free since that time.

The only other person medically qualified to comment on [the Appellant's] file is [text deleted], medical director of MPIC's Claims Administration Department. While [MPIC's doctor], of course, has never had an opportunity to examine [the Appellant] in person, he did review all of the videotapes and makes note of the following, salient facts (amongst others):

1. This patient has a normal gait on dry pavement and can walk at a relatively

brisk pace.

2. The patient does not appear to limp, either on good pavement or on ice, in my opinion.
3. The patient can bend asymmetrically into right side lumbar flexion, both carrying some bulky material, as well as without carrying material. He can demonstrate 30 degree of forward flexion for a sustained amount of time, 40 degree of forward flexion for a sustained amount of time, as well; he can occasionally get to approximately 90 degree of lumbar forward flexion while performing activities such as shoveling snow.
4. He can get in and out of a car without relative difficulty.
5. He can carry material in the left arm, and walk briskly.
6. He can lift a young child and perform some lumbar extension, with some mild side-to-side rocking without apparent pain or difficulty.
7. He can sweep in prolonged forward flexion at 30/40 and up to 60-degree forward flexion. He can utilize some lumbar side flexion with this movement also.
8. He can place his hands over head without any apparent pain behavior, while reaching to touch objects in front of his face.
9. He can scrape snow with force, utilizing almost 90-degree lumbar forward flexion. He can make sharp rotational movements while flinging snow off the shovel.

[MPIC's doctor] also comments that "the diagnosis of a "bad back" is one that I frankly do not understand. [The Appellant] demonstrates excellent function for brisk walking, lumbar forward flexion, minimal lumbar extension and repetitive activities such as shoveling and sweeping. He does not demonstrate an antalgic gait, nor any pain behavior during these activities. I am not able to specifically comment on a lack of function, but he clearly does not have significant impairment, based on the videotapes".

It is also clear that, as [MPIC's doctor] puts it, "The physical examination documented by [Appellant's orthopedic surgeon] fails to document any significant spinal impairment".

Conclusion

For all of the reasons noted above, we find that MPIC was justified in terminating [the Appellant's] benefits as of April 24th 1995 on the ground that he had knowingly provided false or inaccurate information to the Corporation.

We find, further, that in any event the accident described by [the Appellant] as having occurred on September 15th, 1994 did not render him unable to hold, or to continue to hold, any employment that he would otherwise have held after April 24th, 1995.

[The Appellant's] appeal must, therefore, be dismissed and the decision of MPIC's internal review officer confirmed.

Dated at Winnipeg this 5th day of August, 1999.

