

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-145**

PANEL: Mr. J. F. Reeh Taylor, Q.C., Chairman
Mr. Charles T. Birt, Q.C.
Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC')
represented by Mr. Keith Addison
the Appellant, [text deleted], appeared in person

HEARING DATE: January 21st, 1999

ISSUE(S): Whether Appellant entitled to reinstatement of income
replacement indemnity ('IRI');
Whether Appellant entitled to further chiropractic
treatments.

RELEVANT SECTIONS: Sections 81, 136(1)(a) and 138 of the MPIC Act, and Section
5 of Manitoba Regulation No. 40/94.

**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 the victim of a motor vehicle accident on November 21st, 1996. He sustained a fracture at C5-C6 in his neck, with some injury to the existing nerves at that level but without spinal cord damage. X-ray investigation revealed that the fracture was

relatively stable and could be managed in an external supporting device which was utilized. He had significant neck pain and arm pain initially, primarily on the right side.

In the months immediately preceding his accident, [the Appellant] had been engaged in two, seasonal occupations. During the summer months, he operated a hot dog stand; during the remainder of the year he had been working as a restaurant manager at the [text deleted] in [text deleted], but had also been self-employed in the woodworking industry, making custom-built hope chests and signboards since 1993. At the time of his accident he had just finished his hot dog season.

He was admitted under the care of [text deleted], neurosurgeon, immediately following his accident. [Appellant's neurosurgeon] saw him again on December 2nd, 1996, when X-rays revealed that the fracture had not changed in position; [the Appellant] was experiencing pain in the two nerve pathways in his right arm, although without significant weakness. A further examination on January 20th, 1997 showed good fusion of the fractured site with no evidence of instability, although [the Appellant] was still experiencing much paraspinous pain and restriction of motion. [Appellant's neurosurgeon] referred him for physiotherapy to help him recover his range of motion.

By July 9th, 1997, [Appellant's neurosurgeon] was reporting improvement in [the Appellant's] range of motion of his neck, reduction in his pinched nerve symptoms and the absence of arm pain. [Appellant's neurosurgeon] reported that [the Appellant] was still on physiotherapy as his ability to tolerate extended periods of upward neck motion was still limited. [Appellant's

neurosurgeon] indicated that he had approved [the Appellant's] return to work in the middle of April, 1997, but without any heavy labour. "He will in theory at least recover over a period of at least one year."

[The Appellant] was involved in a second motor vehicle accident on July 30th, 1997, following which he was treated by [text deleted], a family physician, and also by [text deleted], chiropractor. [Appellant's doctor #1] referred him to [text deleted], physiatrist and specialist in rehabilitation medicine. By November 12th, 1997, [Appellant's doctor #1] expressed the view that [the Appellant] could return to work on a limited basis of two hours per day "with modified duties/light work that does not involve repetitive right arm movements".

Meanwhile, MPIC had referred [the Appellant] to [rehab clinic] for an assessment, with a view to his participation in a functional restoration program that was to include physiotherapy and occupational therapy. Some behavioural problems arose, giving rise to the need for psychological counseling and a broader multi-disciplinary approach to his rehabilitation. Even that was not totally successful, and on July 10th, 1998 [the Appellant's] adjuster wrote to him, after numerous earlier warnings, terminating his benefits under the Personal Injury Protection Plan contained in Part 2 of the Manitoba Public Insurance Corporation Act, upon the grounds set out in Subsections (d), (e), (f) and (g) of Section 160 of the Act.

[The Appellant] appealed from that decision to MPIC's Internal Review Officer, whose decision reads, in part, as follows:

At your internal review hearing of September 8th, 1998 you advised me that, due to the fact that you had a drinking problem and problems with your family as well as running a

business and you were in the process of buying and selling a house, you were not able to comply completely with the rehabilitation work hardening program. You had also advised me at the internal review hearing that, in fact, you are no longer drinking and all of these other problems will not interfere with further rehabilitation. You stated at your hearing that you are willing to go back to work hardening at any time, therefore it is my decision that you will be provided with one more month of work hardening paid for by the Manitoba Public Insurance Corporation....As a result of this decision you will be paid income replacement indemnity benefits only for the month that you are attending the work hardening program.

In a second, separate decision bearing date January 7th, 1999, the Internal Review Officer decided that a request made by [the Appellant] for continued chiropractic treatment should be denied.

It is from these two decisions of the Internal Review Officer that [the Appellant] now appeals to this Commission.

Following the hearing of [the Appellant's] appeal, we advised the parties that, in the absence of some further evidence, the only facet of [the Appellant's] appeal upon which we felt competent to make a decision related to his claim for income replacement indemnity from the period between October 2nd, 1998 and November 4th, 1998. October 2nd was the date upon which MPIC's Internal Review Officer decided that [the Appellant] should be given one further and final opportunity to enter a work hardening program; November 4th was the date when he actually commenced that program, which he completed satisfactorily on December 4th, 1998. We concluded that, since [the Appellant] appeared to have commenced his work hardening program at the earliest practicable date after receiving the Internal Review Officer's decision, he should be entitled to his income replacement indemnity from the date of that decision until he

commenced the program, and we so advised the parties. We therefore confirm his entitlement to IRI from October 2nd to November 3rd, 1998, both inclusive.

Concurrently with the latter decision, we wrote to [text deleted] a physiatrist and specialist in physical medicine and rehabilitation, who had been supervising [the Appellant's] work hardening program, to [text deleted], physiotherapist, to whom [the Appellant] had been referred to be educated regarding a reconditioning program, and to [Appellant's doctor #2], a physician with [text deleted] where [the Appellant] had been treated by [Appellant's doctor #2] and a number of the latter's colleagues.

[Appellant's physiotherapist] reported, in essence, that after a daily reconditioning program, combining active reconditioning and passive soft tissue massage and stretching, [the Appellant] had noted significant relief from pain. He had been referred to [Appellant's physiatrist #2] for trigger point injections and, although these produced increased pain immediately post injection, they seemed to aid in overall improvement. She expressed the view that, if [the Appellant] were to continue with his exercise program on a daily basis, further improvement would be realized. The implication is that [the Appellant] had not achieved full rehabilitation by the time of [Appellant's physiotherapist's] last report.

[Appellant's physiatrist #2], in an earlier report to MPIC of December 14th, 1998, appeared to feel that further trigger point injections would be useful, but that [the Appellant] should have been able to return to his previous job as hot dog vendor by early June of 1998. [Appellant's physiatrist #2] based that opinion upon a report from [rehab clinic] of June 8th. However, an

analysis of that report from [rehab clinic] gives rise to certain concerns. Firstly, that report contains the comment that a discharge assessment could not be completed because [the Appellant] did not attend his final assessment and, for the same reason, ongoing reassessments were not available. Secondly, it contains the rather contradictory conclusion that [the Appellant] should be able to return to his previous job as a hot dog vendor on a full-time basis, but was unable to deal with the heavier aspects of setting up and taking down his equipment. Thirdly, he was only assessed as to his ability to operate his hot dog stand and no attention seems to have been paid to the fact that, for at least six months of the year, he was a woodworker.

[Appellant's physiatrist #2]'s most recent report pointed out that the most effective long term treatment of myofascial pain is a regular strengthening regime. He did not feel that trigger point injections were completely necessary, although they might be helpful to [the Appellant]. [Appellant's physiatrist #2] expressed a willingness to reassess the Appellant in the event of a significant increase in symptoms and a decrease in function.

[Appellant's doctor #3] of the [text deleted] Medical Centre responded to the letter we had addressed to [Appellant's doctor #2]. [Appellant's doctor #3] had been treating [the Appellant] since September 8th, 1998, but had available to him [the Appellant's] medical records at that clinic from May of 1996 to date. He noted that [the Appellant] had been referred to [text deleted], neurologist, who had seen him on January 7th, 1999. [Appellant's neurologist] had found a mild impairment of vibration sensation in the Appellant's fifth fingers bilaterally as well as a subjective decrease in pinprick sensation in the right hand and forearm. [Appellant's neurologist] concluded there was evidence of minimal residual neurologic dysfunction and suggested continuing with physiotherapy and anti-inflammatory medications. A CT Scan

arranged by [Appellant's doctor #3] had revealed nothing of significance. [Appellant's doctor #3] reports that [the Appellant] continues to have positive objective signs, such as tenderness of his left low back with mildly restricted extension of his lumbosacral spine, tenderness of his right neck and shoulder muscles with some restriction of neck movement, especially right lateral bending, and mild impairment of vibration sensation in the fifth fingers of both hands. He did not feel that there was any evidence of serious neurological dysfunction. [Appellant's doctor #3] concludes his opinion of February 2nd, 1999 with the comment that

In my opinion [the Appellant's] persistent neck and shoulder signs, his low back pain and the minor neurological signs in his hands are a result of the original motor vehicle accident of November 1996 and were all aggravated by the motor vehicle accident of July 1997.

Despite his persistent symptoms, I feel that he should be able to return to some of his work duties. It may very well be that he is unable to do all of his previous work activities because of aggravation of his pain. In that case, alternate lighter work or retraining would be indicated. I think he should continue his exercises and remain as active as possible. He may very well benefit from further trigger point injections.

[The Appellant] testified that he was initially receiving chiropractic treatments at a frequency of three times per week, then twice weekly and, thereafter, sporadically on an 'as needed' basis. Following the discontinuance of chiropractic treatments at MPIC's expense, [the Appellant] attended upon [Appellant's chiropractor] another twelve times at the expense of Manitoba Health Services Commission, but had only seen [Appellant's chiropractor] a couple of times since then. There is really no evidence before us upon which we might base an order for continued chiropractic treatments. Indeed, if any further physical treatments are required they would probably take the form of a few more trigger point injections, together with strengthening and

stretching exercises in a controlled situation, as opposed to reliance upon [the Appellant's] ability to complete his home exercise program.

[The Appellant] testified, and we accept as fact, that he was able to recommence his woodworking career on at least a part-time basis on January 7th, 1999. We therefore find that he is also entitled to continuance of his income replacement indemnity from December 5th, 1998 (the day following completion of his work-hardening program) until the day before his return to work, namely January 6th, 1999, both inclusive.

We also find that, since none of his caregivers has found, in any definitive way, that [the Appellant] has, in fact, been restored to his pre-accident status, he should be referred back to his Adjuster in order to arrange for a new functional capacity evaluation. If the recommendation flowing from that evaluation is for a further, time-limited course of physiotherapy or work hardening in order to restore his ability to perform both his woodworking tasks and those of hot dog vendor, then that is what he should receive; if, as a result of that evaluation, he is found to be unable to perform all of his previous work activities, then he will be entitled to such retraining as may be found appropriate. He will be entitled to payment of income replacement indemnity while undergoing functional capacity evaluation and, if deemed necessary as result of that evaluation, while undergoing further work hardening, physiotherapy or retraining.

Dated at Winnipeg this 6th day of April, 1999.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED