Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-99-21

PANEL:	**Mr. J. F. Reeh Taylor Q.C. Chairperson** **Mr. Charles T. Birt, Q.C.** **Mr. F. Les Cox**
APPEARANCES:	**The appellant, [text deleted], appeared on his own behalf;** **Manitoba Public Insurance Corporation ('MPIC') represented by Ms Joan McKelvey**
HEARING DATE:	**June 1, 1999**
ISSUE:	**Suspension of Income Replacement Indemnity ('IRI') – whether justified.**
RELEVANT SECTIONS:	**Sections 160 (e), (f), and (g) 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') on February 19, 1998 at 11:30 P.M. He was a passenger in a car involved in a two-vehicle accident and received fairly serious injuries. He had to be removed from the vehicle with the so-called "Jaws of Life" and was immediately transported by ambulance to [hospital #1] and thence to the [hospital #2] where he remained for 5 days. He was treated there for fractures to his lower

right ribs, #11 and #12, and for head lacerations. He was also examined and monitored by the Department of Thoracic Surgery for sub-pulmonic effusion, but no significant effusion was noted.

[The Appellant] was discharged from The [hospital #2] on February 25th , 1998 and was given a prescription for Tylenol #3. Arrangements were made for him to be examined by [Appellant's doctor #1], of the [text deleted] Medical Clinic, one week later.

[Appellant's doctor #1] had been [the Appellant's] personal physician for some ten years prior to the MVA. In his report of March 31st, 1998, [Appellant's doctor #1] gave his opinion that [the Appellant's] injuries should heal within six to eight weeks, but that the healing process might be delayed because of an underlying arthritic condition. [Appellant's doctor #1] had been treating the arthritis with medication at the time of the MVA. He also expressed the view that the pain from [the Appellant's] injuries might prevent him from returning to work as a self-employed general contractor for at least 6-8 weeks.

In May, 1998, [the Appellant] began receiving chiropractic treatments from [Appellant's chiropractor] for the injuries he had received in his MVA. [Appellant's chiropractor] had treated [the Appellant] over a period of some 10 to 12 years for disc problems and sciatica, prior to the MVA.

In late May, MPIC retained the services of [Appellant's rehab coordinator] of [vocational rehab consulting company] to organize a return-to-work program for [the Appellant].

[Appellant's rehab coordinator] referred the appellant to the [text deleted] Physiotherapy Clinic for an initial assessment and treatments.

[Appellant's rehab coordinator], after discussion with the appellant's chiropractor and physiotherapist, referred [the Appellant] to the [rehab clinic] at [hospital #1] for a work-hardening program, where he presented with lower back pain . The [rehab clinic] describes that as "mostly right-sided lumbrosacral radiating into his right leg".

On April 8th, 1998, [the Appellant's] adjuster at MPIC [text deleted], after discussion with [Appellant's doctor #1], told [the Appellant] he could return to light duties at work. The appellant responded that there were no light duties in construction work. [Appellant's MPIC adjuster] apparently cautioned [the Appellant] orally that doing things to interfere with or delay his recovery "may cause us to reduce or cancel your benefits".

On June 9, 1998, [Appellant's MPIC adjuster] wrote to the appellant advising that he apparently had not attended at [text deleted] Physiotherapy Clinic on June 4, 1998 for an assessment and repeating the earlier warning that withholding information, refusing treatment, or doing things to interfere with or delay recovery could reduce or cancel the appellant's MPI benefits.

[The Appellant] responded that he had never received the message of June 2nd, setting up the June 4th appointment, and he immediately agreed to a new appointment on June 11th , 1998. Mr. [Appellant's physiotherapist #1] of the [text deleted] Clinic began seeing [the

Appellant] regularly in June and felt that the appellant was, at that point, ready to start a work-hardening program. This conclusion was also supported by [Appellant's rehab coordinator] of [vocational rehab consulting company], who was concurrently advising [Appellant's MPIC adjuster] with respect to the management of [the Appellant's] case.

[The Appellant] was given a psychological assessment by [Appellant's psychologist] of [rehab clinic], preparatory to commencing the work-hardening program. [Appellant's psychologist's] undated report noted sleep disturbance, discouragement and frustration, but no past-traumatic stress syndrome, nor any anxiety disorders nor depression. The appellant did report weight loss from loss of appetite since the MVA, but appeared to be a good candidate for work-hardening. [Appellant's psychologist] added that he ([Appellant's psychologist]) was to be consulted during the process of work-hardening, by way of reinforcement, and to determine if [the Appellant] needed counseling assistance during the continuance on that program. [Appellant's psychologist] noted "[the Appellant] himself appears very motivated to begin work on his physical rehabilitation".

After [Appellant's psychologist]'s psychological assessment, [rehab clinic] agreed to administer a work-hardening program for the appellant. [The Appellant] attended there for a functional capacity assessment on July 21st, 1998 and an assessment report was completed on July 24th by [text deleted], physiotherapist. The recommendation of that report, based on findings from extensive tests, was

> [The Appellant] is an appropriate candidate for participation in a 6-8 week work-hardening program. This program would be designed to provide [the Appellant] with a general conditioning program, with some specific emphasis on lumbar stabilization, abdominal and hip girdle strengthening. Given his past medical history of many joint

> injuries and fractures, this may hinder his capacity to regain full flexibility and strength. Given his past history of chiropractic treatment for low back pain, [the Appellant] may have had some lumbar instability and weakness prior to the MVA, which was subsequently exacerbated by the MVA.
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> Barring any unforeseen complications during this program it should be possible for [the Appellant] to resume his pre-accident employment as a general contractor. I am uncertain as to whether a graduated return-to-work would be possible for him, given that he was self-employed at the time of the accident.

[Rehab clinic] planned to start the work-hardening program on August 4th, 1998. Prior to arranging that start, [Appellant's MPIC adjuster] wrote to the appellant on July 31st, 1998, to say that:

> We have been advised by the [vocational rehab consulting company] that you have cancelled the following appointments:
>
> 1. On June 25, 1998 due to a family emergency.
> 2. On July 7, 1998 you had an appointment with [text deleted] Physiotherapy. You arrived to this appointment 10 minutes early and then left for no apparent reason.
> 3. On July 9, 1998 this appointment was cancelled based on a phone call from a woman who said you were not feeling well: This woman was requested to advise you that you had an appointment with [vocational rehab consulting company] on July 10, 1998.
> 4. On July 10, 1998, you did not phone or attend at [vocational rehab consulting company].
>
> Further, we have been advised by [text deleted], Chiropractor, that you have discharged yourself from chiropractic care.
> You were advised on June 9, 1998, that by withholding information, refusing treatment, doing things to interfere with or delay your recovery, or failing to co-operate with rehabilitation or reasonable requests for medical examination, may cause the Manitoba Public Insurance Corporation to suspend or cancel your benefits.
>
> Please note this is the second and last warning letter that you will receive. Any further non-compliance by yourself will result in suspension of benefits.

[The Appellant] agreed to attend the work-hardening program at [rehab clinic], starting August 4th. Prior to that session, he was asked to attend on July 30th to have the [rehab clinic's] social worker educate him and other participants in the program, offering them

ongoing counseling during that program. On July 30th, 1998 the appellant 'phoned [rehab clinic] and cancelled his appointment, stating untruthfully that he had a social worker's degree himself and did not think he needed to meet with the [rehab clinic's] social worker. [Rehab clinic], not being in agreement, re-scheduled [the Appellant's] appointment for August 4th, the same day upon which his work-hardening program was to start.

On August 4, 1998, [the Appellant] did attend at [rehab clinic] for his appointment. He was to have continued that program August 5th, but failed to attend. Instead, a lady purporting to be his sister telephoned the [rehab clinic] to advise he had been in another car accident on August 4th and was at [hospital #3].

Subsequent inquiries led to the admission by the appellant that he had not attended the hospital on August 4th and sought no medical attention until seeing [Appellant's doctor #1] on August 13th. [Appellant's doctor #1's] brief report indicates that the appellant had presented on August 13th with a history of being involved in a hit-and-run accident August 4th, resulting in bruising on his left knee and ankle.

All rehabilitation for the appellant at [rehab clinic] ceased until he could be re-assessed by the [hospital #1] staff at a meeting scheduled for August 20th, 1998 at 10:00 A.M. Present at that meeting were the appellant, [Appellant's rehab coordinator], [Appellant's physiotherapist #2] and [Appellant's MPIC adjuster]. The discussion focused upon [the Appellant's] alleged non-compliance and the alleged second motor vehicle accident of August 4th, 1998.

[The Appellant] is reported as saying that he did not agree with the July 31, 1998, letter quoted above. Firstly, he said, he had not cancelled the appointment with [Appellant's physiotherapist #1] because of any family emergency of his own; it had been [Appellant's physiotherapist #1] who had the family emergency. Secondly, he had waited one half-hour for his appointment with [Appellant's physiotherapist #1] on the second occasion, but had had been obliged to leave to be on time for another appointment with [Appellant's MPIC adjuster] at MPIC. [The Appellant] reported that his third cancellation was because he was "really sore", that he had tried to reach [Appellant's rehab coordinator] on July 17th, 1998 but that [Appellant's rehab coordinator] had been on vacation. (We may say that we find it puzzling that [the Appellant] would wait until July 17th before attempting to explain his July 9th absence to [Appellant's rehab coordinator].) With respect to the alleged motor vehicle accident of August 4th, 1998, [the Appellant] agreed that he had made no report of that incident to the police and had received no medical attention until August 13th. [Appellant's doctor #1's] report described the bruising as being 10x13 cm on one knee. [Appellant's physiotherapist #2], who saw the bruise the next day - August 14th - reports a tiny cut and much smaller bruising.

When asked why he did not try to communicate his situation to [rehab clinic], [the Appellant] replied that he had lost the compliance sheets that he had been given.

[The Appellant] agreed to continue for six weeks the work-hardening program that he had now recommenced. The agreed plan was that, upon finishing the work-hardening program, [the Appellant] would either follow a home exercise program or obtain a gym membership

at [rehab clinic]. At the time of the meeting described above, the appellant had completed some two hours of his work-hardening program and reported some discomfort from this, his first day. The question of alcohol was discussed and [the Appellant] acknowledges having received three oral warnings from the both [Appellant's MPIC adjuster] and [Appellant's physiotherapist #2]. [Appellant's physiotherapist #2] added that if he again attended the program after consuming alcohol he would be sent home.

On August 21st, 1998 the appellant advised [Appellant's MPIC adjuster] that he was too sore and could hardly move; there was no way, he said, that he could attend the work-hardening program. He received bus fare from MPIC to enable him to attend the program. However, he claimed to be unable to take the bus. [Appellant's rehab coordinator] and [Appellant's physiotherapist #2] felt they should assess [the Appellant's] medical condition. They therefore offered to send a taxi to have him attend [rehab clinic] but he refused that offer. Since [the Appellant] had offered no medical evidence that he was unable to continue, and since he appeared unwilling to cooperate with MPI and his caregivers, MPIC decided to suspend his IRI benefits until he complied with his caregivers' recommendations.

A letter bearing date August 26th, 1998 was sent to [the Appellant], terminating his IRI benefits under Section 160 of the MPIC Act which reads, in part, as follows:

> Section 160: The corporation may refuse to pay compensation. To a person or may reduce the amount of an indemnity or suspend or terminate that indemnity, where the person

(e) without valid reason, refuses, does not follow, or is not available for, medical treatment recommended a medical practitioner and the Corporation.
(f) without valid reason, prevents or delays recovery by his or her activities.
(g) without valid reason, does not follow or participate in a rehabilitation program made available by the Corpora`tion.

The August 26th letter also noted that [the Appellant] had missed appointments on August 24th and August 25th without notifying his caregivers nor MPIC that he would be missing them, nor why.

On August 27th, 1998, [the Appellant] sent a memorandum to [Appellant's MPIC adjuster], to the affect that he had returned to [Appellant's doctor #1] who had suggested that [the Appellant] see a back specialist and refuse the work-hardening program if he were unable to exercise. However, a note from [Appellant's doctor #1] dated August 26th says that he saw the appellant and told him that he should return to physiotherapy on August 27th. No mention is made by [Appellant's doctor #1] of any back specialist nor of any advice to refuse the exercise program.

On September 3rd, 1998, [Appellant's rehab coordinator] wrote [Appellant's doctor #1] to confirm a telephone conversation of that date. [Appellant's doctor #1] is reported, in that letter, to have told his patient to return to physiotherapy on August 27th, and if exercises were too difficult, to ask the physiotherapist to try a different approach. [Appellant's doctor #1] also arranged for the appellant to see [Appellant's doctor #2] on October 26th, 1998.

[the Appellant] did not, in fact, return to physiotherapy to see if any modified exercise would improve his condition. On October 14th, 1998, [Appellant's doctor #1] reported that the appellant had back pain and was on medication, but that report did not indicate whether the pain related to the MVA of February 1998 or to the pre-existing problems or to [the Appellant's] alleged August 4th accident.

When [Appellant's doctor #2] saw the appellant in October 1998, his impression was that the appellant suffered from mechanical back pain. [Appellant's doctor #2's] report of October 27th, is brief and does not say whether he was aware of the appellant's lengthy, pre-accident, medical history trauma nor does he indicate whether, in his opinion, the pain of which [the Appellant] was complaining in October was related to the February motor vehicle accident. [Appellant's doctor #2] said that he "would like to refer the appellant to physiotherapy if his treatments will be funded by MPI", but does not elaborate on the kind or duration of treatments. [The Appellant] was to re-contact [Appellant's doctor #2] after speaking to [Appellant's MPIC adjuster].

Meanwhile, [the Appellant] had appealed, to MPIC's Internal Review Officer, from the corporation's decision to terminate his benefits as of August 26th, 1998. The decision of [text deleted], the Review Officer, dated December 3rd, 1998 varies the decision letter of August 26th by merely suspending the appellant's benefits until such time as the appellant resumed participation in another program to be arranged by his adjuster.

Subsequently, [the Appellant] did resume a renewed, revised work-hardening program designed and administered by [rehab clinic] from about mid-December, 1998 until February 22nd, 1999. His Income Replacement Indemnity was also reinstated for that same period and then terminated. It has not been reinstated since.

A contract was signed by the appellant and his caregivers on December 15th, 1998, and reads in part as follows:

> Termination from the program will occur if:
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> 1) You do not comply with the program components;
> 2) You are absent from the program for two days without proper validation;
> 3) You attend the program and there is any evidence of substance abuse.

On February 1st, 1999 MPIC wrote the appellant, advising him that the insurer was aware he had missed 4 days of the program on January 8th, 13th, 15th, and 22nd, 1999. He had called in sick on two occasions but on the other two occasions had neither attended nor called. However, surprisingly (sic) enough, this was a warning letter only and did not result in the termination of [the Appellant's] benefits.

[The Appellant's] work-hardening program was modified again after February 9th, 1999, due to a wrist injury that he had sustained on that date when slipping on ice. His IRI continued from mid-December 1998 until February 22nd, 1999, when [rehab clinic] advised MPIC that he was "capable of completing a medium level of work based on the assessment completed on January 25, 1999". [The Appellant] appears to have been discharged from

the work-hardening program as of February 22nd, and his IRI benefits terminated accordingly.

At the hearing of his appeal, [the Appellant] emphasized his view that the work-hardening program of August 1998 was, as he put it, "a mistake". He complained particularly that one machine at [rehab clinic], intended to strengthen his hamstring muscles, caused him great pain in his low back that kept him from attending the following day. He says he asked for that machine to be modified and claims that [rehab clinic] refused that request. The appellant added that he had been told by [rehab clinic] that stress would improve his condition and lessen his pain, but he objected to that concept and feels that it is wrong. He considered a structured work-hardening program to be stressful. He felt that, since the insurer was still apparently reimbursing him for pain-killing drugs, it was thereby acknowledging the presence of pain and should have continued to pay him IRI throughout 1998. He does, however, acknowledge, that after finally submitting to the work-hardening program in its modified state, he is "okay now – almost".

DISPOSITION:

The only issue before us is whether MPIC was justified in suspending [the Appellant's] Income Replacement Indemnity benefits from August 26th, 1998, until the re-commencement of his work-hardening program. After a careful review of all the evidence, we can find no reason to disagree with the decision of the Internal Review Officer, which is therefore confirmed.

Dated at Winnipeg this 21st day of July, 1999.

J.F.R.TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

F. LESLIE COX, Esq.