Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-98-172

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Mr. Colon C. Settle, Q.C.** **Mr. F. Les Cox**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Joan McKelvey.**
HEARING DATE:	**October 5, 2000**
ISSUES:	**1. Entitlement to Permanent Impairment Benefits;** **2. Whether reduction of IRI benefits was justified.**
RELEVANT SECTIONS:	**Sections 107, 110(1)(d), 115, 138 and 160 of the MPIC Act, and Schedule C of Manitoba Regulation No. 39/94 (copies of which are annexed hereto).**

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:

On May 5, 1994, the Appellant, [text deleted], was operating his [text deleted] motorcycle eastbound on [text deleted], when a [text deleted], also proceeding eastbound on [text deleted], changed lanes from the curb lane into the median lane occupied by [the Appellant], thereby cutting him off. In an effort to avoid a collision with the [text deleted], [the Appellant] lay down

his motorcycle and fell onto his left side. The motorcycle fell on top of him. [The Appellant] sustained a fracture of the left tibial plateau and a fracture dislocation of the left shoulder.

At the time of the accident, the Appellant was employed as a heavy equipment operator, earning in excess of $60,000/year. After the accident, it was determined that the Appellant could no longer manage the demands of a heavy equipment operator. He had limited mobility, including walking and stair climbing and inability to lift and carry heavy objects. He experienced increased left knee discomfort during standing and with use, which restricted his participation in many activities.

A Functional Capacity Evaluation was carried out by [rehab clinic #1] on December 11 and 12, 1995, to determine the Appellant's work strengths and limitations and to facilitate further vocational planning. [The Appellant] demonstrated work limitations related to extended standing, walking and stair climbing, and difficulties with carrying, pushing, pulling and lifting. The evaluation concluded that the Appellant's functional abilities corresponded to a light to medium level of work.

Alternative employments were explored for the Appellant with the assistance of a vocational rehabilitation consultant. A retraining opportunity was identified in the area of small engine repair and accordingly the Appellant was enrolled in the [text deleted] program at [text deleted] in September, 1996. [The Appellant] completed the program and obtained his certificate in the [text deleted] program on December 2, 1997. After some failed attempts at employment, [the Appellant] was able to secure permanent part-time employment with [text deleted] working three-hour shifts per day from 9:00 a.m. to 12:00 noon. He was unable to work additional hours due to increased fatigue after working three-hour shifts on a daily basis.

Effective December 2, 1997, [the Appellant's] adjuster at MPIC, [text deleted], advised [the Appellant] that MPIC had determined an employment for him in accordance with Section 107 of The Manitoba Public Insurance Corporation Act (the 'Act'). Based upon [the Appellant] having obtained his certificate in the [text deleted] course, MPIC determined his employment as "a motorcycle and other related mechanic". [Appellant's MPIC adjuster] confirmed that the Income Replacement Indemnity ('IRI') that [the Appellant] had been receiving prior to the determination of employment under s. 107 would continue for a further year, to December 2, 1998. However, as required by s. 116 of the Act, should he obtain employment within the year, his IRI would be reduced by 75% of his net earnings from that employment. Further, after December 2, 1998, s. 110(1)(d) would apply to terminate his entitlement to the IRI that he had been receiving, but he would continue to be entitled to an IRI calculated in accordance with s. 115 of the Act. In the Appellant's case it was determined that his IRI would be reduced by $19,010 (gross), being the entry level salary for a motor vehicle mechanic and repairer identified in Schedule C of Regulation 39/94 of the Act.

On January 17, 1998, [the Appellant] filed an Application for Review of MPIC's decision to reduce his IRI effective December 2, 1998. [The Appellant] submitted that MPIC's decision was premised on his being capable of working full-time at small engine repair work in order to earn an annual salary of $19,010. [The Appellant] advised the Internal Review Officer that he lacked the endurance to work a full day and had no expectation of ever being able to do so. In a decision dated May 12, 1998, the Internal Review Officer determined that there was little evidence on the file supporting the view that [the Appellant] could work a full day and that the decision to reduce his IRI effective December 2, 1998 was premature. The Internal Review Officer overturned the adjuster's decision and decided that [the Appellant's] functional capacity

should be reassessed closer to the material date, December 2, 1998, and that a new claims decision regarding the continuation of his benefits should be based on the evidence provided by that reassessment.

As a result of the Internal Review Officer's decision, an occupational therapist, [text deleted], was hired by MPIC in order to conduct a workplace and mobility assessment to assist [the Appellant] with achieving a longer, less fatiguing and less pain-inducing workday. [Appellant's occupational therapist] conducted a work-site assessment of [the Appellant's] workplace on June 24, 1998, and August 5, 1998. Her assessment recommended that [the Appellant] consult [Appellant's doctor] with respect to his sleep disturbance; that [the Appellant] try to stay awake when he returns home after working three hours per day to increase his tolerance; that [the Appellant] increase his work hours on a gradual basis until he could return to work at full hours; and lastly, should he be unable to return to work on a full-time basis at [text deleted], an alternate employment should be considered where heavy lifting was not a job requirement.

[Appellant's occupational therapist] continued to review the Appellant's status by phone over the following months. In a report dated January 6, 1999, she concluded that the only limiting factor for an effective return to work for [the Appellant] was his subjective complaints of increased fatigue over the course of the work day. She advised that a graduated return to work option was discussed with [the Appellant] whereby he could increase his hours gradually over a period of several weeks to allow development of work tolerance over time. According to her report, [the Appellant] refused on several occasions, stating that he had tried a gradual return to work before and failed due to his fatigue levels. Nevertheless, she recommended a gradual return to work program of six to eight weeks to allow gradual improvement in his work tolerance until he was able to manage eight hours per day.

In a medical report dated December 3, 1998, from [Appellant's doctor] to MPIC, [Appellant's doctor] advised MPIC that the Appellant's issues with insomnia had been resolved. The case manager then discussed the file with [MPIC's doctor] of MPIC's Health Care Services Team. [MPIC's doctor] provided the opinion that the Appellant was now capable of resuming full-time employment within the field for which he had been retrained.

In a letter dated January 12, 1999, [Appellant's MPIC adjuster] advised the Appellant that, based on the medical evidence, MPIC had concluded that the Appellant was now capable of full-time employment. Effective January 25, 1999, he would be afforded eight weeks to gradually increase his hours of work. Effective March 15, 1999, his IRI would be reduced by $19,010 (gross).

[The Appellant] sought an internal review from that decision. In his decision dated November 5, 1999, the Internal Review Officer determined that the claims decision dated January 12, 1999, did not correctly apply s. 115 of the Act to [the Appellant's] situation. He concluded that since the Appellant was not in fact working full-time as of March 15, 1999, his actual income was not such as to bring s. 115 into play. However, the Internal Review Officer went on to determine that the adjuster was not in fact applying s. 115 in his claims decision of January 12, 1999, but rather, was suspending part of the Appellant's benefits under s. 160 of the Act. He then based his decision on whether the claims decision could be supported under s. 160 of the Act. In reviewing the steps leading to the claims decision, the Internal Review Officer accepted the evidence of the occupational therapist, [text deleted], that the Appellant had refused to participate in a graduated return to work program. The Internal Review Officer concluded that this failure to cooperate activated subsections 160(f) and (g) of the Act. Accordingly he upheld

the claims decision of January 12, 1999 as a reduction or suspension of benefits pursuant to s. 160 of the Act.

It is from this latter decision that [the Appellant] now appeals.

Issues:

Counsel for the Appellant submitted that there were two issues to be dealt with at the hearing of this matter, as follows:

1. whether the Appellant should receive permanent impairment benefits for the loss of strength in his left arm and his recurring migraine headaches; and
2. whether the Appellant's IRI should have been reduced by $19,010 on March 15, 1999.

Discussion:

With respect to the first issue, the Commission determined at the outset of the hearing that it did not have jurisdiction to deal with the issue of permanent impairment benefits relating specifically to loss of strength in the left arm and recurring migraine headaches as there had not been an Internal Review decision dealing with those specific matters. Accordingly this matter is remitted back to MPIC's adjuster for a determination.

With regard to the reduction of IRI, counsel for the Appellant submitted that there were various errors committed by MPIC in their decisions. Firstly, [Appellant's representative] argued that the classification used by MPIC to determine [the Appellant's] entry-level salary was arbitrary, as it was not directly comparable to the occupation performed by [the Appellant]. The classification utilized by MPIC of a motor vehicle mechanic and repairer identified in Schedule C of Regulation 39/94 of the Act differed greatly from that of small engine repair work. The entry-level salary described in Schedule C was $9.14/hour which was much higher than the

$6.50/hour earned by [the Appellant]. Even if [the Appellant] were able to work a full day, it would be almost impossible for him to reach the $9.14/hour in order to earn the $19,010 which MPIC expected him to, argued [Appellant's representative].

[Appellant's representative] also submitted that MPIC had determined an incorrect employment for [the Appellant] in that he could not hold the employment which had been determined for him on a full-time basis. Referring to a brochure from [text deleted] which describes the [text deleted] course and states that an applicant should have good physical health, should have no physical handicaps, should be able to lift 50 pounds on a regular basis and lift 100 pounds occasionally, [Appellant's representative] argued that this occupation did not fall within the light to medium level of work which had been classified for the Appellant. Furthermore, the Appellant himself testified that he was not able to perform many of the requirements of the job that his co-workers undertook and he often relied on his co-workers for help with any heavy lifting. Therefore, it was submitted that neither s. 110(1)(d) nor s. 115 of the Act applied to [the Appellant].

Lastly, [Appellant's representative] argued that the decision of the Internal Review Officer must fail because there had been no documented warnings, either verbal or written, given before the termination of benefits pursuant to ss. 160(f) and (g). The Internal Review Officer assumed that [the Appellant] refused to participate in a gradual return to work program, yet there was no evidence that [the Appellant] had ever refused such a program.

Counsel for MPIC submitted that the employment determined for [the Appellant] was indeed appropriate. She reviewed the fact that the retraining had been arranged for [the Appellant] with his full cooperation and input taking his interests into account. Furthermore, according to the

vocational rehabilitation consultant working with [the Appellant], the course was suitable for [the Appellant] and the work was deemed to be medium with respect to work tolerance. Moreover, there had never been an expectation that he could accommodate the lifting requirements without assistance from co-workers and ergonomic assistance. Lastly, based on a review of the medical information on file, there was no medical information to indicate that [the Appellant] could not work full-time hours. Counsel for MPIC referred to the work site assessment completed by [Appellant's occupational therapist] which noted that the Appellant was capable of managing his job duties and which advised that the only limiting factor was his fatigue levels. Based on her recommendation of a gradual return to work program, and the Appellant's apparent refusal to participate in such a program as relayed by [Appellant's occupational therapist], counsel for MPIC argued that the Corporation was indeed justified in suspending [the Appellant's] benefits based on his lack of cooperation.

Counsel for MPIC also submitted that [the Appellant] was aware that the Corporation could terminate his benefits pursuant to s. 160. This was based on a previous warning which had been given to him by the Corporation on June 20, 1997, in relation to his completion of the [text deleted] program at [text deleted].

There is no question that MPIC's case manager and other personnel have worked very hard in their attempts to rehabilitate [the Appellant] and reintegrate him into the workforce. While we agree with the Internal Review Officer's decision that s. 115 of the Act cannot apply to [the Appellant's] situation, we cannot agree with his application of subsections 160(f) and (g) of the Act to reduce [the Appellant's] entitlement to IRI as of March 15, 1999. It is plainly evident that there were no documented warnings, either oral or written, given by MPIC to [the Appellant] to

advise him of the possible reduction of benefits if he failed to participate in a gradual return to work program.

The Internal Review Officer sought to rely upon [Appellant's occupational therapist's] evidence that [the Appellant] refused to participate in a gradual return to work program in her discussions with him. The *viva voce* evidence which was given at the hearing of this matter has caused us concern with the reports submitted by [Appellant's occupational therapist]. The inconsistencies between the evidence of the witnesses and the observations made by [Appellant's occupational therapist] certainly cast a shadow of doubt upon her assessments. [The Appellant's] evidence was that a gradual return to work program was discussed, as was a reconditioning program at the [rehab clinic #2], but neither was followed up on by [Appellant's occupational therapist]. Further, [the Appellant] testified that he received no notice or warnings that his benefits would be cut off, and he never refused to participate in a gradual return to work program.

This Commission finds that there is insufficient evidence that [the Appellant] refused to participate in a gradual return to work program. Even if that were so, without a clear warning or notice given by MPIC to [the Appellant], that his benefits would be in jeopardy if he failed to cooperate, we find insufficient grounds upon which to reduce [the Appellant's] IRI on the basis of subsections 160(f) and (g) of the Act.

We are also mindful that [the Appellant] has not yet been able to return to a position on a full-time basis. [MPIC's doctor] in his report of September 20, 2000, expresses his concern that,

> "…there were significant limitations in the medical information on file and while the information indicated that he was capable of performing some of the tasks needed in his employment, his tolerance was not demonstrated. I agreed with the opinion of the occupational therapist that a trial of graduated return to work would be reasonable. The recently submitted information does not change that opinion. The radiographic changes

> noted on x-ray do not necessarily correlate with function and do not absolutely indicate that he is capable of the work-related activities nor do they indicate that he is precluded from those activities."

The Appellant testified that he would be willing to attempt a gradual return to work program as part of his rehabilitation. Therefore, this matter will be remitted back to MPIC's case manager who, working in conjunction with a new occupational therapist, will arrange for a gradual return to work program for [the Appellant] in order to increase his tolerance. If necessary, a conditioning and work-hardening program shall also be arranged for [the Appellant] in order to allow him the greatest opportunity to succeed with the transition to full-time duties.

If, after the conditioning and work-hardening program and the gradual return to work program, [the Appellant] is genuinely unable to achieve a transition to full-time duties at his determined occupation, we find that a Functional Capacity Evaluation should be carried out in order to reassess [the Appellant] and facilitate further vocational planning, including a change in careers should that be required.

Disposition:

1. The claim of [the Appellant] is referred back to MPIC for a determination of permanent impairment benefits relating specifically to loss of strength in the left arm and recurring migraine headaches;
2. [The Appellant's] Income Replacement Indemnity shall be reinstated as of March 15, 1999. Interest shall be added to the amount due and owing to [the Appellant];
3. MPIC shall arrange for a graduated return to work for [the Appellant], together with such conditioning and work-hardening programs as may be necessary;

4. if, following bona fide efforts to that end, [the Appellant] is unable to regain the physical fitness to perform the work of a small engine mechanic, he shall be reassessed for further vocational planning as noted above, pursuant to the provisions of Section 138 of the Act;

5. any failure by [the Appellant] to cooperate in the completion of any reasonable program arranged by MPIC pursuant to this decision shall entitle MPIC to invoke the provisions of Section 160 of the Act.

Dated at Winnipeg this 28th day of November, 2000.

YVONNE TAVARES

COLON C. SETTLE, Q.C.

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