

AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-97-135**

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 Ms Joan McKelvey;
Appellant represented by [Appellant's representative]

HEARING DATE: January 11th, 1999

ISSUE: Did the Appellant have a valid reason for not attending a
program of modified work duties?

RELEVANT SECTIONS: Section 160 of the Manitoba Public Insurance Corporation
Act ('the 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 driving his family [text deleted] Van on September 14th 1996 when he had to come to a full stop behind a vehicle stopped for a pedestrian corridor on [text deleted]. Another car

rear-ended his vehicle causing it considerable damage; the force of the accident broke the driver's seat. Following the accident [the Appellant] consulted his family physician, [Appellant's doctor #1] of the [text deleted] Clinic who, in a report dated September 23rd, 1996, stated that [the Appellant] had suffered cervical myalgia and a back strain. [Appellant's doctor #1] described his injury as a Type 2 Whiplash Associated Disorder (WAD 2).

At the time of the accident [the Appellant] was employed with [text deleted] as a mail courier driving a truck and working 5.5 hours per day for a total of 27.5 hours per week. [Appellant's doctor #1] told him to stay off work and arranged for him to attend a physiotherapy program.

[Appellant's doctor #1] sent an Occupational Fitness Assessment to the Appellant's employer dated October 29th advising that he could not attend work due to problems with his neck and lower back. There was a space in the report to indicate if the Appellant was suffering from any shoulder problems but that area was left blank.

In a report to MPIC dated September 30th, 1997 [Appellant's doctor #1] advised the Appellant had been in two previous auto accidents which caused recurring problems to his neck, shoulder and back and that he had received extensive physiotherapy, attended the [text deleted] Clinic and been seen by rehabilitation specialists for these problems. He also advised that he had seen the Appellant on July 12th, 1996 because he had exacerbated his right shoulder while throwing a light ball the previous weekend. He felt [the Appellant] had developed a possible rotator cuff tendinitis or tear and prescribed Naproxyn. [Appellant's doctor #1] again saw [the Appellant] on August 20th because of

persistent irritation in the right shoulder; he diagnosed rotator cuff tendinitis in his right shoulder and sent [the Appellant] to the [text deleted] Clinic for treatment. There on August 28th, 1996 he saw [Appellant's doctor #2] on August 28th, 1996 who advised [the Appellant] that he was suffering from a chronic cervical strain with some secondary muscle imbalance. [Appellant's doctor #2] recommended that he get into a reconditioning program in order to get a set of exercises for his shoulder and neck muscles.

[Appellant's doctor #1] referred the Appellant to the [text deleted] Physiotherapy Clinic where he was evaluated by [Appellant's physiotherapist]. She reported on November 7th, 1996 that he has problems with the lumbar and cervical areas of his spine and had a right rotator cuff muscle strain. She developed a treatment program that she felt would resolve [the Appellant's] problems within about eight weeks of treatment. [The Appellant] immediately started working with [Appellant's physiotherapist] on her exercise program.

In a report dated November 27th, 1996 to MPIC [Appellant's doctor #1] stated that [the Appellant's] "specific diagnosis is cervical and lumbar myalgia secondary to MVA" but there is no reference to his suffering from any right shoulder problems. He went on to state that [the Appellant] was unable to work at his current job and that he would be reassessed for modified duties in early January 1997.

In late January 1997 the Adjuster handling [the Appellant's] case contacted his employer, [text deleted], and learned that they have a light work program and would be willing to place [the Appellant] in it with the hope that it would help him return to his full time job. An outline of this

program was sent to [Appellant's physiotherapist] on January 29th, 1997 asking for her comments. On February 7th she responded to the Adjuster stating she believed [the Appellant] could handle the modified work program but he would have to avoid heavy lifting, overhead activities and excessive repetition.

The job description was also faxed to [Appellant's doctor #1] on February 6th, 1997 asking for his comments.

On February 10th, 1997 after several attempts the Adjuster was able to get in touch with [the Appellant] and outline to him the modified work program he had arranged for him at [text deleted]. [The Appellant] told the Adjuster that he had been through these modified duties before and the repetitive movements would aggravate his shoulder. The Adjuster advised [the Appellant] that his physiotherapist had agreed that he could do this type of work with the aforementioned restrictions. [The Appellant] responded that [Appellant's physiotherapist] seemed to be telling the Adjuster one thing and him another. To check on this statement the Adjuster called [Appellant's physiotherapist] later that day and she reiterated her position that the Appellant could return to work doing the modified duties. She advised she would put something in writing to [Appellant's doctor #1].

[Appellant's physiotherapist] sent a fax to [Appellant's doctor #1] on February 13th, 1997 which read:

MPI adjuster contacted me recently re: RTW - I expressed concerns about overhead work, lifting & excess repetition. He told me that [text deleted] would work around restrictions &

had modified duties for [the Appellant]. Subsequently I've learned that [the Appellant] has done this previously & ltd success.

Your input appreciated. We will continue to focus on posture & strengthening,..... Do you think another ortho consult would be beneficial?

On February 13th, 1997 the Adjuster delivered a letter to [the Appellant] confirming their conversation of February 10th and in it he outlined when and where the Appellant was to start work. He was also warned that if he failed to attend the job without valid reasons his benefits could be terminated. The Adjuster contacted [the Appellant] later that day to discuss his letter and was told by [the Appellant] that he had seen [Appellant's doctor #1] that day and the doctor told him not to return to work. He also told the Adjuster that [Appellant's physiotherapist] told him not to do repetitive activity. He then told the Adjuster he would not attend the modified work program.

The Adjuster then spoke with [Appellant's physiotherapist] on February 17th, 1997 to see what she had told the Appellant and she assured him that she had not told [the Appellant] to stay away from the program but just the opposite - i.e. that he could do the modified duties and how would he know he could not do them until he tried them. The Adjuster attempted to reach of [Appellant's doctor #1] several times but without any success and, on February 24th, 1997, wrote to the Appellant advising him that MPIC was terminating his benefits because he did not have any valid reasons for not attending the modified work program at [text deleted].

Neither the Adjuster nor the physiotherapist heard from [Appellant's doctor #1] until March 5th, 1997. He returned [Appellant's physiotherapist's] original fax to her with the following note on the

bottom "March 5/97 [Appellant's physiotherapist] please continue physio for 1 month further if not improved - will attempt consult [Appellant's orthopedic specialist]".

In a handwritten note dated March 5th [Appellant's doctor #1] states "Have attempted to contact [text deleted] (ans. Machine x 3) re above patient. Should continue to be covered by autopac benefits". There is no reference in either of these communications about the question he had been asked, namely, whether [the Appellant] could handle the modified return to work program.

THE ISSUE:

The question we have to answer is whether or not [the Appellant] had a valid reason for not attending the modified work program arranged for by MPIC at [text deleted].

[The Appellant] believes that he had valid reason based on the belief that [Appellant's doctor #1] and [Appellant's physiotherapist] told him not to take the job at the [text deleted]. Unfortunately the evidence does not support [the Appellant's] contention. All of Ms [Appellant's physiotherapist's] written and oral information to the Adjuster states that [the Appellant] could and should try the modified work program.

[Appellant's doctor #1's] evidence does not support [the Appellant's] contention either. [Appellant's doctor #1] did say in his report of September 25th, 1997 that on November 27th, 1996 he felt [the Appellant's] return to work at that time was premature. In all other correspondence with MPIC,

[Appellant's doctor #1] fails to say that he advised [the Appellant] not to start or try the modified work program at [text deleted]. In fact he is silent in all of his communications on this issue that goes to the heart of this Appeal.

[The Appellant] may have felt he was not ready to return to the modified work program in February 1997 but we do not find this a valid reason. Had [the Appellant] attended the job and found he could not do it then he would have had a valid reason for not continuing. His belief that he could not do it without some supporting medical or other evidence does not constitute a valid reason. It follows that [the Appellant] did not have a valid reason for refusing to attend the modified work program and therefore his appeal must fail.

DISPOSITION:

The Acting Review Officer's decision of October 20th, 1997 is therefore confirmed.

Dated at Winnipeg this 31st day of March, 1999.

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

CHARLES T. BIRT, Q.C.

LILA GOODSPEED