

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-138**

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;
the Appellant, [text deleted], was represented by
[Appellant's representative]

HEARING DATE: May 14th, 1999

ISSUE(S): (i) Causation - whether renewed disability after return to
work was caused by MVA;
(ii) Whether Appellant entitled to further physical therapy.

RELEVANT SECTIONS: Section 81(1) and 136(1) of the MPIC 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

At the time of his motor vehicle accident on November 13th, 1996, the Appellant, [text deleted], was [text deleted] years of age and employed as a shipper, receiver and delivery person by [text deleted]. His duties included picking up and loading into a vehicle some ten or twelve automotive transmissions every week and shuttling them between [text deleted] and [text deleted], moving 40 gallon oil drums, receiving and stocking automotive tires and, in general, shipping, receiving and transporting a wide variety of automotive parts and equipment.

He was travelling easterly at a fairly high speed - he estimates 60 to 70 kilometers per hour - approaching an intersection, when a woman driving another vehicle and heading north left a stop sign before it was safe to do so and, realizing too late that [the Appellant's] vehicle was approaching, stopped in the middle of the intersection giving him no chance to avoid a major collision between the front of his vehicle and roughly the center of the driver's side of her car. [the Appellant's] vehicle was written off. He believes, although he is not sure, that he hit his head on the windshield of his car (the windshield was apparently shattered but probably not by any impact with his head) and, amongst other damage, the lower part of the dashboard on his car was broken from impact with his left knee. The evidence is that [the Appellant] lost consciousness for a short spell and was then driven by a friendly bystander to the hospital in [text deleted] where he was given a neck brace. He had also injured his left wrist and left ankle, sustained a Grade 2 Whiplash Associated Disorder and soft tissue injuries to his lower back. He left the hospital on crutches which he used for some three or four months; he also wore his neck brace for approximately three months.

[the Appellant] had been referred by his family physician for physiotherapy at [text deleted] Physiotherapy and Sports Injury Clinic, where he received approximately 40 treatments from [Appellant's physiotherapist].

After the statutory seven-day hiatus, [the Appellant] received income replacement indemnity ('IRI') in the amount of \$439.86 bi-weekly until the 26th of April 1997. In the interim, he had attempted to return to work, performing the normal duties of his job, but had found it impossible

to do this due to his injuries. Towards the end of March, 1997, he started a gradual return to work, doing light duties for two to three hours per day until by the beginning of May of that year, he was back to work on a full-time basis and no longer receiving IRI. At or about the same time, [Appellant's physiotherapist] apparently felt that his patient had plateaued and physiotherapy was discontinued.

In late August or early September [the Appellant] was promoted by [text deleted] and was placed in charge of the parts counter. It is not often that one can view a promotion as a disadvantage but that, in fact, is what happened to [the Appellant]. Until that promotion he had managed reasonably well, although his evidence is that he had not had a pain-free day since his motor vehicle accident. It is, perhaps, appropriate to note here that we found [the Appellant] to be a sincere and credible young man whose work history, supported by the views of his physicians, negates any suggestion of malingering.

[The Appellant's] evidence is that his promotion entailed a different and much less mobile kind of work, although with quite a lot of bending and lifting. As he puts it, his neck and back "started to get tighter and tighter". He continued to do the exercises laid out for him by [Appellant's physiotherapist] but found it necessary to take two or three hot showers every day, along with analgesics, to relieve his pain.

In light of his worsening condition, [the Appellant] attended at [text deleted] Medical Centre where [Appellant's doctor #1] assessed him and diagnosed cervical, thoracic and lumbar strains/sprains, prescribed the discontinuance of physiotherapy, noted that [the Appellant] was

capable of less than full function due to symptoms or functional deficits, and referred him to the [text deleted]. There he was examined on or about November 26th, 1997 by [Appellant's doctor #2], who diagnosed chronic muscoligamentous dysfunction which, in [Appellant's doctor #2's] view, was related to [the Appellant's] deceleration injury of November 1996. He recommended a six-week reconditioning program and prescribed Elavil (10 mg) to be taken at bedtime to improve the quality of [the Appellant's] sleep. [Appellant's doctor #2] also recommended that activity was the most important factor in improving [the Appellant's] back pain, and encouraged him to continue to work and to be as active as possible in his daily activities.

[The Appellant's] Adjuster at MPIC advised [the Appellant] that the Corporation would not be in a position to pay for any reconditioning program until it had received a further report from [Appellant's doctor #2] and had submitted that report to its medical team for advice.

MPIC received a report from [Appellant's doctor #2] dated December 16th, 1997 and a report from [text deleted] (a chiropractor in [text deleted] whom [the Appellant] had consulted on December 22nd, 1997); [Appellant's chiropractor's] initial health care report was dated January 9th, 1998 and was followed by a further, narrative report dated January 20th, 1998.

A note on the file, written by [text deleted], one of MPIC's chiropractic consultants, reads this way:

February 3rd/98 [the Appellant's] c-spine is now, by all reports, in worse condition than at any time in the course of his recovery. He was discharged from therapy in November 1997 with mild symptoms, full range of motion with end-range pain and able to self

manage with home program. He had been back at work without restrictions for some time. Given his apparent virtually full recovery the relationship of his current condition to the MVA in question is difficult to understand.

[Appellant's chiropractor] wrote to [Appellant's doctor #2] on February 8th, 1998, to advise him, in part:

[The Appellant] first presented on December 22nd, 1997 with generalized pain located about the cervical and thoracic spinal regions. The patient stated that, following his MVA, he had never fully recovered, however was sufficiently well to return to his work and continued with therapy. He also stated that he found work at times to be a source of pain due to his varied duties, which involved computer work and some lifting. On January 12th, 1998, [the Appellant] presented in severe pain.....located about the cervical paraspinal and suboccipital regions, left/right trapezius (upper fibres) and mid-thoracic region with pain felt at times into the lower lumbar region as well.

.....no positive neurological findings were noted. Lumbar orthopaedic examination was essentially unremarkable.

[The Appellant] tells me that he saw you as well before Christmas 1997 and that you suggested a six week intensive therapeutic rehab program. I believe this to be the way to go and.....have tried to convince MPIC of this. Hopefully by the time you read this letter things will have been approved.

Unfortunately, neither I nor [the Appellant] can explain the sudden downturn in his condition....

On February 11th, 1998, [the Appellant's] Adjuster at MPIC wrote to both him and [Appellant's chiropractor] to tell them, primarily upon the basis of an opinion written by [text deleted], Medical Director of MPIC's Claims Services Department, that [the Appellant's] ongoing complaints were not related to the motor vehicle accident and, therefore, no further benefits would be provided. In the meantime, several things had transpired:

1. [The Appellant] had gone on a skiing trip with his girlfriend to [text deleted], British

Columbia, for a two-day skiing vacation over the Christmas holidays, returning to [Manitoba] by New Year's Eve. Much has been made of that skiing trip, and of the suggestion that, if [the Appellant's] need to quit work can be laid at the door of anything, it was probably that ski vacation. We do not accept that suggestion. Firstly, [the Appellant's] evidence was that, although he was somewhat stiff and uncomfortable following his return to [Manitoba], the stiffness soon passed and the measure of his pain was no greater immediately post-vacation than it had been before his trip; it was not until about mid-January that the pains he had been experiencing before Christmas became even more severe. Secondly, this is a young man who had been skiing for many years prior to his accident; he had no injuries nor any spills in the course of his skiing; thirdly, he had consulted [Appellant's doctor #2] prior to going on his vacation, specifically to ask whether it would be an acceptable activity for him, and had been told that it would do him good; fourthly, [Appellant's doctor #2] and [Appellant's chiropractor] had both been recommending a six-weeks reconditioning program in November of 1997 but even then, over a month before [the Appellant's] ski trip, MPIC refused to authorize it.

2. Following his vacation, [the Appellant] returned to work until January 12th, although continuing to experience the same kinds and degree of pain that he had experienced before Christmas. He testified that, having hardly known what a headache was prior to his MVA, he had experienced headaches on an almost daily basis ever since that accident. Those headaches, which were directly related to the pain and tightness at the base of his neck and the muscles of his shoulder, had been getting increasingly severe since his promotion to the parts counter in late summer or early fall of 1997. By January 12th, 1998, [the Appellant] was unable to return to work because of his pains. He

attempted to go back to work on January 25th and continued at his job until February 2nd, 1998, at which point he gave up entirely. He testified that, even though he learned on or about February 10th that MPIC was not prepared to extend any further benefits to him, "I did not return to work because I just could not stand the constant headaches.

3. [The Appellant] concentrated on getting his back into full working order and ridding himself of the debilitating headaches by attending upon [Appellant's chiropractor] until some time in March of 1998; he also joined a local gymnasium.

At or about the end of April 1998, [the Appellant] was able to find a new job for himself at [text deleted]. where his work enables him to be more physically active and mobile without frequent, heavy lifting. He testified that he had only had to leave work early on a couple of occasions, due to the recurrence of his headaches and muscular pain which, he felt, were steadily improving.

MPIC's decision not to resume any benefits for [the Appellant] appears to be based almost entirely upon the conclusion that, by the time [the Appellant] returned to full-time work in May of 1997, he had recovered fully from the effects of his motor vehicle accident. On the other hand, [Appellant's doctor #3], another member of the [text deleted] Medical Centre, who had been caring for [the Appellant] since November 22nd, 1996, in a letter addressed to MPIC on August 10th, 1998, says in part:

.....It was I who had encouraged ([the Appellant]) to get back to work after a long period of physiotherapy. He and I both knew that he was not fully recovered, but I felt that he needed to get back into the actual work situation and work hardening rather than linger any longer at the physiotherapist's. It was with this in mind that I had encouraged him to actually get back to work hardening before too much more time had elapsed.

[Appellant's doctor #2], in a letter of June 3rd, 1998 addressed to MPIC's Internal Review Officer, makes note of [MPIC's doctor's] interpretation of a report from [Appellant's physiotherapist] dated September 23rd, 1997, wherein [Appellant's physiotherapist] says that "This patient had full range of motion in all levels of the spine with some pain with over pressure inflexion" (sic). [MPIC's doctor] inferred from that, and from the fact that [the Appellant] was reported to have regained normal muscle strength with no neurologic signs, that the Appellant was fully recovered from his MVA injuries. However, [Appellant's doctor #2] felt that [Appellant's physiotherapist's] report suggests that, even then, there was some persisting dysfunction in [the Appellant's] spine. As he put it:

I think we all agree that this was a soft tissue injury that [the Appellant] experienced from his motor vehicle accident. I would suggest that this injury creates some intrinsic, albeit complex and difficult objectively to quantify, subtle musculoligamentous dysfunction. I will give the example of an ankle sprain which creates ligamentous instability. The patient can return to a full range of motion strength and neurologic status but remains susceptible (sic) to recurrent injury. Complexity of the back makes it very difficult to assess subtle instability and dysfunction.

I always stress an active return to function with these patients but some patients will relapse but the majority will do fine. Those that do relapse I feel generally require a more structured exercise routine to ensure to maximize the body's own ability to cope with these injuries.....To the best of my recollection I had approved his ski trip. I feel [the Appellant's] attempt to return to his normal function, that being specifically his skiing trip in the holidays, is a positive attempt to return him back to his normal life. Unfortunately he did have an exacerbation in his back pain which in most likelihood is related to the dysfunction he experienced as a result of his motor vehicle accident of November of 1996.

[Appellant's doctor #1] is also supportive of [the Appellant's] current appeal. In a letter to MPIC of February 13th, 1998, [Appellant's doctor #1] says that

Although his back pain has certainly been going on a long time since his motor vehicle accident in November 1996, this certainly is the most likely cause of his ongoing pain. He had seen [Appellant's doctor #2] from the [text deleted] in November 1997. He ([Appellant's doctor #2]) felt that his back pain was in fact due to the motor vehicle

accident and that he would benefit from a reconditioning program at the [text deleted] Clinic. [The Appellant] certainly seems determined to rehabilitate his back and, therefore, I think that this reconditioning program would be of benefit to him.

[Appellant's chiropractor's] concurrence in the recommendations of [Appellant's doctor #2] has already been noted.

[MPIC's doctor], in a memorandum of July 10th, 1998 to MPIC's Internal Review Officer, while again emphasizing that, in his view, it was improbable that [the Appellant's] current complaints had any direct cause/effect relationship with his motor vehicle accident, did note that "It is possible that an injury can cause recurring symptomatology, and recidivism with spinal complaints is well known".

We cannot find anywhere in [the Appellant's] medical history following his accident an opinion voiced by anyone, whether physician, chiropractor or physiotherapist, to the effect that [the Appellant] had fully recovered from his injuries. Given the serious nature of the original collision, the supporting views of his caregivers and, above all, the evidence of [the Appellant] himself, we find that the disabling pain that caused his absence from the workplace through parts of January, through February and March of 1998 were most probably caused in whole or in part by his motor vehicle accident. It may well be that, if [Appellant's doctor #2's] original recommendation of a six week reconditioning program had not been rejected by MPIC, the Appellant's problems would have been laid to rest a great deal sooner at substantially less cost to the insurer. While respectful of the views of [MPIC's doctor] and [MPIC's chiropractor], and mindful of the fact that there is very little objective, clinical evidence offered by [Appellant's

doctor #3], [Appellant's doctor #1] and [Appellant's doctor #2] to prove the validity of their opinions, we also have in mind that each of them has personally examined the Appellant, each of them has independently expressed the same view and their opinions mesh very well with the credible testimony of the Appellant himself. [The Appellant] is therefore entitled to be paid the amount owing to [Appellant's chiropractor], in the total amount of \$721.01, to reimbursement for any travel expenses incurred in his attendances upon [Appellant's doctor #2] (we have taken it that he incurred no travel expense in visiting his [text deleted] caregivers but, if he did, he is entitled to be paid for that as well) and income replacement indemnity from January 12th to January 24th and from February 3rd to April 30th, 1998, both dates being inclusive in each case. He will also be entitled to interest on the IRI and travel monies calculated from April 30th, 1998 to the date when the appropriate funds are actually remitted to him.

Dated at Winnipeg this 18th day of May, 1999.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED