Automobile Injury Compensation Appeal Commission

IN THE MATTER OF the appeals by [the Appellants]
AICAC File No.: AC-95-20

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Ms Joan McKelvey** **[Text deleted], counsel for the Appellants**
HEARING DATE:	**May 7th, 1996**
ISSUE(S):	**Meaning of 'disabled' for purposes of lump sum indemnity when applied (a) to widow, injured in fatal accident, and (b) to injured,** **dependent, infant child of deceased.**
RELEVANT SECTIONS:	**119(1), 120(1), 120(2) and 121(2) of M.P.I.C.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 basic facts of this pair of appeals, which were heard together and dealt with as one, are set out in the first two and one half pages of the Brief filed with this Commission by counsel for the Appellants and, since those facts are not in dispute, they are reproduced here, verbatim:

"On July 1, 1994, the appellant [text deleted], her husband [text deleted], and their four children were riding in their van on the highway outside of [text deleted], Manitoba, when a vehicle swerved onto their side of the highway and struck the van being driven by [the Deceased] head on, causing his death and seriously injuring his wife and their four year old son, the appellant [text deleted]. [Appellant #1] and her four children were taken to Emergency at [hospital].

[Appellant #1], age [text deleted], sustained multiple fractures of the ribs and pneumothorax, a ruptured spleen, which had to be removed, fractures of both bones of the right forearm, which required the insertion of two rods and a pin, and the humerus of the left arm, which required the insertion of a steel plate, as well as a collapsed lung, and a severe contusion to the cervical and lumbar spine. When examined by an orthopaedic specialist on August 22, 1994, supination (lateral rotation) of her right forearm remained very poor, while the opposite elbow had a 30 degree lack of full extension. On October 4, 1994, the specialist determined that the fractures in the left and right arms were not healing properly and she would probably require bone grafting to the sites of the fractures. She was advised to exercise extreme caution in her activities due to the injuries to her upper extremities.

In the same accident [Appellant #2] sustained a trauma to the head, depressed skull fracture, a large scalp laceration, and pain in the right knee. A few days later [Appellant #2] developed problems with balance and limping on the right leg, and subsequently developed an extreme sensitivity to touch and temperature. An enhanced CT scan performed on January 25, 1995, revealed primary cerebral lesions, which had not immediately shown in the initial scan of

July 1, 1994. A neurologist concluded that he had probably suffered permanent impairment of motor coordination in his right lower limb.

Both [the Deceased] and [Appellant #1] were working at the time of the accident. [The Deceased] worked as welder's helper, earning an income from his employment in 1993, based on his income tax assessment for 1993 of $10,572.00. [Appellant #1] worked as a waitress and cook, earning an average of $440.00 bi-weekly prior to the accident.

In a letter dated September 19, 1994, [text deleted], adjuster for the Manitoba Public Insurance Corporation (hereinafter the "Corporation"), informed the appellants' solicitor that [Appellant #1] was entitled only to the minimum lump sum death benefit of $40,000.00, pursuant to s. 120(2) of the Manitoba Public Insurance Corporation Act (hereinafter the "Act") and that her son [Appellant #2] was entitled only to a lump sum benefit under Schedule 3, pursuant to s. 121(2(a). [Appellant #1's] claim for a lump sum benefit under s. 120(1), under Schedule 2, due to her being disabled on the day of the accident, was denied, as was [Appellant #2's] claim for an additional lump sum benefit under s. 121(2)(b) due to his being disabled on the day of the accident.)

The appellants applied for a review of the Corporation's decision. The hearing was held May 26, 1995 before review officer [text deleted] and his decision rendered on October 26, 1995. [MPIC's Internal Review Officer] concluded that neither of the appellants qualified for the benefits each claimed under the Act."

In addition to the foregoing facts, we were provided with copies of numerous medical reports and, with respect to [Appellant #1], those reports included a detailed letter from [text deleted], a highly qualified orthopaedic surgeon, and a letter of January 2nd, 1995 from who was the attending surgeon at the time of [Appellant #1's] injury. [Appellant #1's attending surgeon], after setting out a very brief description of [Appellant #1]'s injuries, makes the comment that "I would certainly agree that she was completely disabled the day of her accident and for an indefinite period of time." He adds that he is not in a position to know what her subsequent recovery had been nor how long she remained disabled. [Appellant #1's orthopaedic surgeon], who was reporting upon his detailed examination of [Appellant #1] that had taken place on August 22nd, 1994, found (in addition to those observations referred to in counsel's brief) that " [Appellant #1] was found to be tender on deep palpation of heads of Rush pin, namely around the radial styloid process as well as olecranon process of her right forearm. The x-rays of [Appellant #1]'s left humerus, while revealing a good alignment of fracture fragments with the presence of compression plate and six screws, nevertheless showed that the fracture site appeared to be slightly wider than usual with very little evidence of new bone formation." In other words, the fracture was not healing properly. Similarly, x-rays of the right forearm showed good alignment of the fractures with the presence of Rush nails, but very little evidence of new bone formation around the fracture site. [Appellant #1] was therefore advised to exercise extreme caution for her upper limbs injury and to continue with gentle range of motion exercises for her stiffened elbows and forearm.

On further examination on October 3rd of 1994, radiological examination showed evidence of slow healing of the left humeral shaft fracture and of the right radial and ulnar shaft

fracture; [Appellant #1's orthopaedic surgeon] expressed the view that she was suffering from delayed union of those three fracture sites. Again, on November 14th, further x-rays revealed very little change, with similar results in December of 1994. [Appellant #1's orthopaedic surgeon] advised [Appellant #1] of the probability of the need for further surgical intervention, in the form of bone grafting to the site of her previous fracture "in order to alleviate her delayed union and non-union of left humeral shaft and right ulnar and radial shaft fractures." [Appellant #1's orthopaedic surgeon]'s report goes on to say that [Appellant #1] had a further appointment to see him in 1995 "when more clinical and radiological assessment would be done for her. I am afraid she is considered still disabled for her work as a waitress/cook until further notice. The degree of her permanent impairment of right and left upper limbs remains to be evaluated in the future. She may require to have further surgical intervention such as bone grafting done. Her prognosis I would consider to be guarded."

[Appellant #1's orthopaedic surgeon's] report concludes, in part, by stating that [Appellant #1] "is considered completely disabled for her work until further notice due to presence of delayed union of her left humeral and right ulnar and radial shaft fractures...her permanent impairment would have to wait for a while before it can be fully assessed. Particularly as she is showing evidence of delayed union and non-union of her fractures which may require further surgical intervention and bone grafting...in view of her multiple injuries...she is unable to continue with her previous employment therefore was rendered disabled until her fractures heal."

We were advised by counsel for [Appellant #1] that, although his client had attempted to return to her earlier work on a part-time basis, she had found it impossible to continue

those efforts and had not, in fact, been gainfully employed for more than a few days since the date of her accident.

For reasons that appear below, we do not feel it necessary to deal in such detail with the injuries suffered by [Appellant #2], [Appellant #1's] [text deleted] -year-old infant son.

THE LAW:

The sections of the Manitoba Public Insurance Corporation Act with which we are here concerned are these:

> 119(1) In this division "**Disabled"** means unable to hold any substantially gainful employment because of a physical or mental disability that is likely to be of indefinite duration or result in death.
>
> 120(1) The spouse of a deceased victim is entitled to a lump sum indemnity equal to the product obtained by multiplying the gross income that would have been used as the basis for computing the income replacement indemnity to which the victim would have been entitled if, on the day of his or her death, the victim had survived but had been unable to hold employment because of the accident, by the factor appearing opposite the victim's age in Schedule 1 or, where the spouse is disabled on that day, Schedule 2. (Emphasis added)

120(2) The lump sum indemnity payable under Subsection 1 shall not be less than $40,000.00, whether or not the deceased victim would have been entitled to an income replacement indemnity had he or she survived.

121(2) A dependent, other than the spouse, of a deceased victim is entitled to

(a) a lump sum indemnity in the amount opposite the age of the dependent in Schedule 3; and

(b) if the dependent is disabled on the day the deceased victim dies, an additional lump sum indemnity of $17,500.00.

Since [the Deceased's] gross income had been $10,572.00, a calculation of [Appellant #1's] lump sum indemnity under Section 120(1), using Schedule 1, would only have been $16,915.20, but that amount is over-ridden by the provisions of Section 120(2), entitling her to the $40,000.00 minimum which she has, in fact, received. However, if Schedule 2 becomes applicable, her late husband's income becomes multiplied by a factor of 5, for a total of $52,860.00, and it is that difference of $12,860.00 that [Appellant #1] now seeks. In [Appellant #2's] case, the calculation is even more straight forward: the Corporation has already paid the sum of $31,000.00 pursuant to Section 121(2)(a); the additional lump sum indemnity of $17,500.00 referred to in subparagraph (b) of that subsection is now sought.

Each of these appeals must stand or fall upon the true meaning of the word "disabled", as defined in Section 119(1) and, in particular, the meaning of the phrase *" a physical or mental disability likely to be of indefinite duration".*

Patently, the meaning of that phrase must fall somewhere between two extremes: on the one hand it could, we suppose, be argued, although somewhat speciously, that when a patient is told by his or her physician that a condition will be cured ‘within a few weeks’, that is indefinite; on the other hand, the statute does not imply that the disability of the spouse or dependent child must be permanent before they can qualify for the additional benefits under Section 120(1) or 121(2)(b). We are of the view that, to enable a claimant to qualify for those additional benefits, his or her medical advisors must be able to say that:

(a) as at the date of the accident, the claimant was suffering from a physical or mental disability, using those words in the normal, clinical sense;

(b) it would not have been practicable to forecast with any reasonable accuracy the duration of the recovery time, meaning the length of time that it would take to restore the patient at least to a point at which he or she could hold substantially gainful employment, whether or not that employment was the same as that held by the patient prior to the accident; and

(c) that the estimated recovery period, while not determinable at the time of the accident, would probably extend for the foreseeable future. We use the word *foreseeable* in the sense of the future that lies sufficiently close to allow forecasting. Obviously, if the future course of the injury and the duration of its healing can be forecast, the patient's condition is removed from the purview of the phrase “indefinite duration”; on the other hand, if the attending physician or surgeon cannot, with reasonable confidence, forecast that duration, then in our view the patient's disability falls within the definition contained in Section 119(1).

It is significant that, in a memorandum of March 30th, 1995, nine months after the accident, [text deleted], Medical Director of the Claims Administration Department of M.P.I.C., in a memorandum to [text deleted], a Director in that same Department, after reviewing [Appellant #1's orthopaedic surgeon's] report of December 30th, 1994, says in part:

> "In my opinion, [Appellant #1's orthopaedic surgeon's] opinion on this file appears to be cogent and reasonable. Based on a delayed union of the left humeral fracture and delayed union of the right ulnar and radial shaft fractures, it would not be unreasonable to consider this patient disabled from performing her pre-accident occupation of a cook/waitress. At this point, it is also not unreasonable to consider this disability to be indefinite. However, such injuries with subsequent bone grafting and further time to heal usually allow the patient to return to some type of occupational and recreational activity. There may be some limitation in function, but I do not suspect that she will be unable to hold any gainful employment because of this physical or mental disability. Therefore, in the future, I do not think that this patient will meet the appropriate qualifications for being "disabled" that the Manitoba Public Insurance Corporation manual refers to. I would think that within the next six months we might see some significant improvement in this case, but as [Appellant #1's orthopaedic surgeon] says, at this point one cannot make definitive statements regarding any permanent impairment that might develop secondary to the motor vehicle accident in question..."

It is clear, from the last portion of the above quoted memorandum, that [MPIC's doctor], having initially taken the proper approach, then starts to confuse "indefinite" with "permanent". The point, of course, is that both [Appellant #1's orthopaedic surgeon] and

[MPIC's doctor] were of the view, even six months after the accident, that [Appellant #1] was, indeed, disabled and that her disability was of indefinite duration.

While the indefinite nature of the disability must be gleaned, to the extent possible, from the medical opinions that prevailed at the time of the accident or as soon thereafter as the patient could be subjected to detailed examination, we are of the view that it is not only permissible, but sometimes necessary, to examine their views at intervals thereafter, if only to determine whether the original diagnosis of indeterminate disability was well-founded. We find, without hesitation, that in [Appellant #1's] case the disability that she suffered at the date of her husband's death was of indefinite duration, that it certainly prevented her from holding substantially gainful employment, and that she was therefore disabled within the meaning of Section 119(1) and is entitled to the additional benefit provided by Schedule 2.

Turning, now, to the claim for additional benefits advanced on behalf of [Appellant #1's] infant son, [Appellant #2]. [Text deleted], counsel for the Appellants, argues forcefully that it would be patently absurd to apply, to a [text deleted] -year-old child, the criterion that he must be "unable to hold any substantially gainful employment" because of a physical or mental disability likely to be of indefinite duration. He suggests that this might simply be an oversight on the part of the legislaturers, of the sort that finds its way into new legislation, but submits that, in any event, the reasonable approach is to apply the criterion in a way that is appropriate to the age of the dependent Appellant. He cites, for example, a young child with behavioural difficulties or deficiencies in motor skills development as being analogous to an adult's inability to hold substantially gainful employment. Proceeding from there to deal with an expert opinion

presented to us from [text deleted], a specialist in pediatrics and neurology, to the effect that [Appellant #2] has been suffering from serious neurological deficits since the day of the accident, which are disabling at least to the extent of affecting his coordination and have been causing behavioural difficulties as well, [Appellants' counsel] emphasizes [Appellant #2's pediatric neurologist's] belief that these disabilities may, perhaps, be permanent and that, as of April 5th, 1995, the likely duration of [Appellant #2's] disability was still indefinite. Therefore, says [Appellants' counsel], [Appellant #2] should be dealt with upon the same basis as if he were an adult but disabled, dependent child, unable to work because of his disability.

In other words, we are asked to find that [Appellant #2's] minority is, of itself, a 'disablity', or at least sufficiently analagous to a disability to bring him within the meaning of Section 121(2)(b).

While these arguments may have much appeal to the emotions, we are obliged to interpret the statute by giving it its plain and obvious meaning; it is not open to us to read some legislative intent into language that is not, on its face, ambiguous or capable of two or more different interpretations. It is our view that the Legislature, when enacting Section 119(1) clearly meant the word "disabled" to be directly related to some determinable economic loss that would be suffered by the surviving dependent. We are told that [Appellant #2] will shortly be subjected to some further neuro-psychological tests. If the results of those tests indicate that he has suffered a permanent anatomicophysiological deficit or other form of permanent impairment, then of course a claim can be made for him under Division 4 of the Act, but that will be a different kind of compensation from the death benefits contemplated under Division 3. Meanwhile, the unavoidable fact is that, although [Appellant #2] was certainly unable to hold substantially gainful

employment at the time of this father's death, that situation did not result from a physical or mental disability, nor did it result in any economic loss of the kind for which, in our view, the statute was intended to compensate. [Appellant #2's] inability to hold employment was due to his minority, which does fall within the generally accepted meaning of 'disability'. If we were to accept the submission on this point advanced by counsel on behalf of [Appellant #2], the reference to gainful employment in Section 119(1) would be rendered unnecessary in the context of claims advanced on behalf of minors, since every juvenile dependent, whether gainfully employed or not at the time of a fatal accident involving a parent, would, if under some physical or mental disability at the time, automatically qualify for the additional $17,500.00. We do not believe that this was the intent of the Legislature, since that intent could have been more clearly and simply expressed without the need on our part to read something into the statute that is not there on its face.

DISPOSITION:

We therefore find that [Appellant #1] was a disabled spouse on the date of her late husband's death and was therefore entitled to be paid a lump sum indemnity of $ 52,860.00.
However, we find that her son, [Appellant #2], does not qualify as a disabled dependent within the meaning of Sections 119(1) and 121(2 , and the appeal filed on his behalf must, therefore, fail.

Dated at Winnipeg this 8th day of May 1996.

CHARLES T. BIRT, Q.C. **J.F.REEH TAYLOR, Q.C.** **LILA GOODSPEED**