Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-95-24

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], the Appellant, appeared in person**
HEARING DATE:	**January 26th and January 30th, 1996**
ISSUE:	**Extent of disability; ability to return to work; right of M.P.I.C. to terminate benefits for non-cooperation; quantum of I.R.I.**
RELEVANT SECTIONS:	**Sections 74(1), 83(1)(a), 83(2) and certain definitions.**

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 26th, 1995, the Appellant, [text deleted], was a healthy, [text deleted] -year-old man on vacation in [text deleted], Minnesota. His claim is that he was rollerblading, without a helmet or other protective gear, in a southerly direction along a main street in

[Minnesota] at about 1:30 A.M. when, swerving out to avoid a parked car after making an appropriate hand signal, he either hit, or was hit by, a bus on the left side of his body. As a result of that incident, he claims, he suffered spasms in his back muscles, pain in his left hip and buttocks, blurred vision, headaches and occasional nausea. The result, says [the Appellant], was to render him incapable of carrying on with his normal employment and, therefore, eligible for income replacement indemnity under Section 83 of the Manitoba Public Insurance Corporation Act ('the Act').

[The Appellant] was, in fact, awarded income replacement of $390.69 on a bi-weekly basis, commencing seven days after the incident described above, but M.P.I.C. terminated those payments with an effective date of October 27th, 1995, upon the twin bases that the Corporation was not satisfied that an ' accident' within the statutory definition had occurred as alleged by [the Appellant], and that he had refused to cooperate with the rehabilitation plan that M.P.I.C. had developed for him. A copy of the relevant sections of the Act referred to in these Reasons is annexed hereto.

Five issues arise in connection with [the Appellant's] appeal, namely:

(a) was there an accident and, if so, did it occur in the manner described by [the Appellant] - that is to say, was he in collision with a bus or, indeed, with any vehicle?

(b) did injury result from that accident and, if so, to what extent?

(c) if injury did result, was it sufficient to preclude his return to work and, if so, for how long?

(d) if, upon the basis of the facts as alleged by [the Appellant], he became entitled to I.R.I., was the amount of it properly calculated by the insurer? and

(e) was the I.R.I., whether properly calculated or not, legitimately terminated for non-cooperation?

THE ACCIDENT:

The event that appears to have taken place at about 1:30 in the morning on May 26th in [Minnesota] is clouded with some measure of uncertainty.

[The Appellant] told the [Minnesota] police that he remembers nothing whatsoever after swerving out to avoid a parked car, yet later purported to recall being hit by a bus that he never saw, being unconscious for a period of between ten and fifteen minutes (although how he could know this in the absence of some discussion with an eye witness is, at least, questionable), says that he was not up and about immediately following the accident and yet recalls regaining consciousness in a [text deleted's] parking lot, near its entrance onto the street, at a point between twenty and thirty feet away from the alleged point of impact.

[The Appellant] recalls seeing a man emerging from a local pizza parlour near the [text deleted's] parking lot, and says he asked that man to call 911, although he later testified that he thought an anonymous woman had called 911. It is possible that both calls were made, although no witness has been identified. In any event, someone must have made such a call because, in due course, an ambulance arrived at the parking lot and [the Appellant] was transported to a nearby hospital, [text deleted].

[The Appellant] appears to have told the ambulance attendants that the accident was his fault. However, [the Appellant] also purports to remember being interviewed at the hospital by an off-duty policeman who, he says, had witnessed the accident and had told him, in effect, not to worry because "they had caught the person who had committed the crime". We are given no evidence about the "crime" to which the police officer might have referred, in light of [the Appellant's] statement that he, himself, had been responsible for the accident. In the event, it transpires that the police officer in question, [text deleted], had neither witnessed the accident nor been off duty. Rather, he was on duty and had come to the hospital to take a statement from [the Appellant] as a result of the 911 call.

The [text deleted] says that it caused a careful inspection to be made of the only bus that was in the vicinity at or about the time and place when this incident is alleged to have occurred, that the bus was sufficiently dirty that any such impact would have left noticeable marks on the outside of the bus, that no such marks were found and that the driver of the bus has no recollection of any sight or sound that might have indicated collision of any kind with a rollerblading passerby. That, perhaps, is a natural stance for the Transit Authority to adopt, since to do otherwise would be to invite an instant lawsuit from [the Appellant]. We therefore content ourselves with noting that the Transit Operations Department of the [text deleted] denies any liability in this regard.

We have decided to assume, although not with some hesitancy, that [the Appellant] was involved in an accident of some sort in the early hours of the morning on May 26th of 1995 in Minnesota]. We have also assumed for the purposes of these reasons, but without being

persuaded of the fact, that [the Appellant's] accident involved some form of physical contact between [the Appellant] and a motor vehicle.

THE INJURY:

Following his arrival at the hospital, [the Appellant] appears to have been thoroughly examined by the medical staff there, since he had complained of pain on the left side of his body, weakness and blurry vision. His medical examinations had included x-rays. The emergency service record, generated at the time of that examination, states very clearly that no evidence was found of any trauma, that although the patient complained of weakness on the left side of his body he showed excellent strength when pushed, was able to stand on his left foot and on his toes without difficulty, that he was able to walk around the Emergency Department without difficulty or apparent pain and, perhaps most significantly, that there were no signs of any abrasions or contusions anywhere on his body. That record became noteworthy when [the Appellant] told us that he had numerous scrapes and bruises as a result of his accident. He had arrived at the hospital at 2:09 A.M. and was discharged at about 7 o'clock in the morning with a prescription for Ibuprofen, a moderate analgesic.

Four days after the incident, and following his return to [Manitoba], [the Appellant] attended upon [Appellant's doctor]. He appears to have told [Appellant's doctor] that his main occupation was that of an assembly line worker which, while not completely false ([the Appellant] did work in a kind of a disassembly line when required to scrape dishes at the hospital) may be described as stringently economical with the truth. [Appellant's doctor], while of course

accepting her patient's description of his accident, was told by [the Appellant] that he had only been able to read the top two lines of the Snellen's eye chart in [Minnesota] and still complained of blurred vision. She reports that, when she tested his eye sight, he had 20/30 vision with both eyes and 20/40 with each eye separately. Other than a slight tenderness in one of the muscles used in lifting his left shoulder blade, [Appellant's doctor] was unable to determine any other objective indications of recent trauma but, since [the Appellant] continued to complain of blurred vision, she referred him to [text deleted], a specialist in neurology.

[The Appellant] appears to have described his occupation to [Appellant's neurologist] as a 'nutritionist', and to have complained of headaches, occasional nausea, difficulty in doing anything requiring mental and visual concentration, and soreness in the left side of his neck and hip. [The Appellant] did not complain of double vision. [Appellant's neurologist's] report states, in part:

> "On examination he claimed decreased vision in both eyes. On my assessment he claimed only 20/140 in both eyes while it was 20/80 in the left and 20/100 in the right eye. He insisted that vision was worse with both eyes open. There was no evidence of disconjugation of eye movement on red glass testing...Fundi showed spontaneous venous pulses. Vision fields and eye movements were full. There was no tenderness in the neck muscles. The remaining exam was unremarkable."

[Appellant's neurologist] added that he could find no evidence of any underlying neurologic problem, that [the Appellant] had a normal electroencephalogram but was being referred to [text

deleted] (an Opthamologist) for a more in-depth assessment of his vision function. [Appellant's neurologist] expressed the belief that any decreased acuity on [the Appellant's] part was not due to organic causes "as his acuity appeared to be the same at half the distance from the eye chart as it was at full distance".

[Appellant's ophthalmologist] examined [the Appellant] on July 26th of 1995 and again in September. At his first examination by [Appellant's ophthalmologist], it appears that, even with corrective lenses forming part of the testing equipment, [the Appellant] claimed that he was only able to see 20/200 with his right eye and 20/100 with his left eye. The apparent, sudden improvement in [the Appellant's] eye sight between his hospital examination on May 26th and his examination by [Appellant's doctor] on May 30th, followed by a remarkable deterioration between May 30th and June 28th (the [Appellant's doctor] exam) and the further, equally dramatic deterioration between June 28th and July 26th (the first [Appellant's ophthalmologist] exam) are difficult to explain, other than by the fact that the medical examiner is, to a large extent at least, obliged to rely upon what the patient says about his ability to see letters of diminishing size upon a chart. [Appellant's ophthalmologist] was sufficiently concerned about [the Appellant's] claim of blurred vision resulting from the [Minnesota] incident that, having advised [the Appellant] to return for a follow-up examination in one month's time, he was finally able to get [the Appellant] to attend for that second examination in September which produced results of corrected vision of 20/80 in the right eye and 20/100 in the left one (exactly the reverse of what [the Appellant] had told [Appellant's neurologist]). [Appellant's ophthalmologist] also referred [the Appellant] to the [hospital #2] for a Visual Evoked Response test of optic nerve function, which was reported on September 26th, 1995, as normal.

In his final report to this Commission, [Appellant's ophthalmologist] says, in part:

> "...my examination only revealed reduced acuities and abnormal fields. There was no sign of ocular or optic nerve damage. The small refractive error is not enough to reduce vision to the level he ([the Appellant]) claims to be only able to see.
>
> I have to modify my (July) opinion about the possible occipital contusion because no central defect shows up on the second set of fields and there would have to be in order to have reduced central acuity.
>
> It is most unlikely that he would develop loss of vision some time after the accident. The effects of trauma are usually more immediate."

We are satisfied that, at least upon a strong balance of probabilities if not as a near certainty, if [the Appellant] does suffer from any blurred vision, dizziness or occasional nausea - all of which claims are, in our unanimous view, of dubious authenticity - none of those symptoms was "caused by an automobile" within the meaning of the Act.

DID INJURY, EVEN IF GENUINE AND CAUSED BY A MOTOR VEHICLE, PRECLUDE RETURN TO WORK?

Prior to May 26th of 1995 [the Appellant] had been employed in two areas of work:

(a) he had, for some years, been a permanent, part-time employee at the [text deleted], as a Diet Aide. The Director of Dietary Services ([text deleted]) testified, and [the Appellant]

agreed, that his primary tasks were to strip and clean trays, carts, hot food wagons, steam tables and pots, clean off dishes and feed those dishes into the dishwashing machinery, and occasionally deliver food trays to different wards at the facility. Most of his work there was performed on weekends, when he would work during four-hour or six-hour shifts. [Director of Dietary Services] testified that the visual problem of which [the Appellant] complains would not have impaired his ability to perform his tasks. We agree. [Director of Dietary Services] also testified that, in any event, since [the Appellant] had ceased providing medical evidence of continuing disability, his employment there was terminated in December of 1995 but with an effective date some time in September, the last date to which his medical certification was valid.

(b) [The Appellant] was also employed by [text deleted] as a part-time commissioned sales person, selling cellular telephones, pagers and [text deleted] airtime products by way of telephone solicitations. He was paid on the basis of 40% of the gross sales that he produced. A statement from his employer indicates that, between the commencement of his employment there in early February of 1995 until the 11th of April 1995 he earned total commissions of $320.00 - a figure that [the Appellant] disputes as being substantially under estimated. By [the Appellant's] computation, he earned approximately $800.00, most of which, he says, was earned during the last five or six weeks of his employment. The employer's evidence, with which [the Appellant] appears to agree, is that [the Appellant] has made no sales since April 11th of 1995. [The Appellant] explains this by saying that he started his holiday in May and has not felt able to return to work since the alleged accident. The employer says that [the Appellant] is no longer an authorized sales person of [text deleted] and is no longer on the payroll. [The Appellant] says that this is

news to him and that, indeed, when he attended at the offices of that corporation a couple of months ago he was greeted warmly by his employer who asked him, in effect, when he would be coming back to work. [The Appellant] agrees, however, that he had not been providing this employer with any medical evidence of his inability to work and had not been showing up for work at all. [The Appellant], when explaining his alleged blurred vision, testified that he could concentrate on his reading for periods of approximately fifteen minutes, after which he found it difficult to continue doing so; he would need to take a break before returning to reading. In the context of his telephone sales, it is apparent that he was already fully familiar with the forms of contract used by his employer, so that constant and detailed reading of them was quite unnecessary; he was able to explain them to any potential customer without having to concentrate for extended periods upon the printed page. Occasional, and apparently infrequent, need to fill in the blank spaces on forms of contract would not have required either visual or mental concentration for more than a few minutes at a time. We are satisfied that, had [the Appellant] wished to return to work for this employer and had the employer been willing to accept him, he was suffering from no disability that would have prevented his so doing.

WAS [THE APPELLANT'S] I.R.I. PROPERLY CALCULATED?

Because of our other findings in this decision, it is unnecessary for us to answer this question in any detail. It is sufficient, in our view, to note that if M.P.I.C.'s calculations of [the Appellant's] maximum gross yearly employment income erred at all, they erred on the generous side.

WAS I.R.I. PROPERLY TERMINATED FOR NON-COOPERATION?

M.P.I.C. appears to have gone to considerable lengths in its attempts to weave [the Appellant] back into the work force. Not only was the insurer accepting at its face value, at least initially, [the Appellant's] description of the accident in [Minnsota] and his resultant injuries, but it retained the services of an outside, rehabilitation consultant to assist [the Appellant] in working with his medical advisors and with his employers. Despite that, the entire history of [the Appellant's] dealings with the insurer and with the rehabilitation consultant, [text deleted], is studded with [the Appellant's] failures to keep appointments, sometimes with no rational excuse and sometimes with excuses removed some distance from the truth. By way of examples only, we note:

(a) appointments not kept because, as [the Appellant] put it "He ([Appellant's rehab consultant]) kept making morning appointments for me and I am not a morning person; I like to sleep in...";

(b) an appointment not kept because [the Appellant] was at home, watching the O. J. Simpson trial on television, "...the outcome of that trial was very important to me, [text deleted]...";

(c) statements by [the Appellant] that he could not keep an appointment because he was attending classes when, in fact, he only went to night classes and spent a large part of his daytime hours working out at the YMCA and watching his favourite television shows;

(d) [The Appellant's] continued insistence upon his alleged inability to read or concentrate, while during the same period he passed one complete course in criminal justice or corrections (he seemed unsure of the name of the course and could not remember the name of his teacher) in which, he testified, he obtained an A rating in his final examination. He testified that he read nothing connected with that course which he took at night, took no

notes, never had to read the printed handouts given to the class by the teacher because, as he put it, "We discussed all that stuff in class", and wrote a multiple choice examination at the end of the term in twenty minutes. We can only say that this description of a course offered by [text deleted] that requires no reading whatsoever strains credulity;

(e) the recurrence of missed appointments and lack of cooperation, even after a meeting that [Appellant's rehab consultant] arranged for himself, [the Appellant] and representatives of the employer and M.P.I.C., when it was made clear to [the Appellant] that his I.R.I. would cease if his apparent attitude prevailed.

There are other aspects of [the Appellant's] apparent failure to cooperate including, but not limited to, his failure to reattend at either of his places of work following suggestions that he might reasonably have done so on an initially limited basis in order to see how he could get along, and his misplaced conviction that meetings with [Appellant's rehab consultant] were a waste of time.

We are of the view that the insurer had ample grounds, on the basis of Subsections (c) and (g) of Section 160 of the Act, to terminate the benefits, if any, to which [the Appellant] might otherwise have been entitled,

DISPOSITION:

For the foregoing reasons, the decisions of the Internal Review Officer are confirmed and [the Appellant's] appeals are dismissed.

Dated at Winnipeg this 2nd day of February 1996.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED