Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-73

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 Mr. Tom Strutt** **[Text deleted], the Appellant, appeared in person**
HEARING DATE:	**February 27th, 1997**
ISSUE(S):	**1. Allegation of permanent injury;** **2. Calculation of income replacement indemnity ('I.R.I.');** **3. Whether Appellant entitled to I.R.I. from June 5th to August 5th, 1995;** **4. Whether Appellant was prevented by M.V.A. injury from accepting other employment; and** **5. Claim for loss of business income.**
RELEVANT SECTIONS:	**Sections 110(1)(a) and 116(1) of the M.P.I.C. Act, Section 4 of Regulation 37/94**

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, [text deleted], sustained certain minor injuries as a result of a motor vehicle accident on December 1st, 1994. He was, at the time, employed by the [text deleted] as a

Psychiatric Nursing Assistant in two separate and distinct capacities: part of the time he was deployed in the [text deleted], helping to provide night supervision to residents of group homes, and working there on approximately a half time basis, forty hours bi-weekly; he was, in addition, picking up casual shifts in a standard psychiatric nursing role on various wards at the [text deleted]. It might be noted here, since the physical demands of each job become relevant later on, that [the Appellant's] work in the group homes entailed very little, if any, heavy lifting, bending or twisting involving the use of his back. Work on the wards at the Centre itself placed potentially heavier demands upon his musculoskeletal system.

It is common ground between [the Appellant] and Manitoba Public Insurance Corporation ('M.P.I.C.') that he was a casual worker, with no guaranteed number of hours in any given time frame, but that since he had apparently been employed for about fifty-six hours bi-weekly on a consistent basis for two or three years prior to his accident, he was properly classified as a full-time employee within the meaning of Section 4 of Regulation 37/94.

(A copy of each relevant section of the Act or Regulations referred to in these Reasons will be annexed hereto as a Schedule.)

[The Appellant] was examined by four separate medical practitioners. He was seen initially by [Appellant's doctor #1]; at [the Appellant's] request, [Appellant's doctor #1] referred him to [text deleted], an orthopaedic specialist with the [text deleted] Clinic; thereafter, [the Appellant] sought the advice of [text deleted], a general practitioner with the [text deleted] Clinic who saw him on several occasions, and, finally, he was examined by [text deleted], also an orthopaedic specialist, on April 27th, 1995. [Appellant's doctor #1] reported that [the Appellant]

was advised to go back to work, both at the [text deleted] and to his avocation of promoting and playing the drums in various musical events, as of February 21st, 1995. [Appellant's orthopaedic specialist #1], who had examined [the Appellant] on January 17th of 1995, told [the Appellant] that he did not require any further therapy but should be able to return to his work at the [text deleted]; he simply needed to be careful when doing excessive bending and heavy lifting. [Appellant's doctor #2] appears to have advised [the Appellant], on February 22nd, and again, on April 3rd of 1995, that he should return to light duties, doing his best to avoid any heavy lifting for the time being, while continuing with a home exercise program in order to maintain mobility and to strengthen the musculature of the back and improve [the Appellant's] endurance and capabilities. In this latter context, we have reference to [Appellant's doctor #2's] letter to M.P.I.C. of April 21st, 1995. [Appellant's orthopaedic specialist #2], in his medical report bearing date May 2nd, 1995, after detailing the facts as narrated to him by [the Appellant] and after outlining [Appellant's orthopaedic specialist #2's] own examinations and findings, says, in part,

> "...on examination there was no positive physical finding except for slight discomfort, more like tightness on the opposite side on lateral flexion and rotation of his dorsolumbar spine. Such tightness should improve with continued exercises on his part. At the time I saw him, I found no reason to think that the car accident should result in any permanent impairment to his lumbar spine or dorsal spine.
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> He told me that for a couple of weeks he has not been doing much exercises of his neck or back. It was suggested to him to resume exercises of his neck and back. With continued exercises, the remaining symptoms of tightness should improve. It was felt that in the course of another three to four weeks the symptoms in his lower back and mid-back should improve enough for him to return to the type of work that he has been doing at [text deleted]."

In the meantime, [the Appellant] had, in fact, returned to work at [text deleted] on March 7th, 1995, restricting his duties initially to those in the group home and not returning to work on any of the wards [text deleted] until August 5th of 1995.

M.P.I.C. paid [the Appellant] income replacement indemnity ('I.R.I.') for the period commencing seven days after the date of his injury and continuing until March 7th, when [the Appellant] had returned to work on light duties. From that point until June 5th of 1995, [the Appellant's] I.R.I. was reduced by 75% of his net income from employment following his return to light duties, pursuant to Section 116(1) of the Act. His I.R.I. was terminated altogether as of June 5th, 1995.

We turn, now, to the nature of [the Appellant's] various claims against M.P.I.C., under the following heads:

Permanent Injury

In the letter accompanying his Notice of Appeal, [the Appellant] speaks of having "sustained a permanent injury which will bother me for the rest of my life." Since no evidence of any permanent injury was presented to us and since, indeed, [Appellant's orthopaedic specialist #2's] report clearly indicates that such a permanent disability is highly unlikely, this facet of [the Appellant's] claim appears to have been abandoned from the outset of the hearing of his appeal.

Calculation of I.R.I.

It is possible that the most recent information received from [text deleted], provided to this Commission by the employer since the date of the Internal Review Officer's decision, might give rise to a slight readjustment in the quantum of [the Appellant's] I.R.I. That being so, Mr. Tom Strutt, counsel for the insurer, has undertaken to refer that aspect of the matter back to the appropriate department of M.P.I.C. for a recalculation and, for greater certainty, we shall embody that in our final decision. In all other respects, we find that M.P.I.C.'s calculation of [the Appellant's] I.R.I., based upon the information then before them, appears to have been accurate.

Claim for Continuance of I.R.I. from June 5th to August 5th, 1995

[the Appellant] alleges that he was not allowed to resume his full duties by working on the wards as well as at the group home at [text deleted] until August 5th of 1995. He says that this was because his employer insisted upon receiving some form of undertaking from M.P.I.C., to the effect that, should he re-injure himself in the course of his employment, M.P.I.C. would resume payment of his I.R.I. We do not find that evidence to be credible. We find, as a fact, that [the Appellant] was perfectly capable of returning to his full duties by June 1st, at the very latest (and probably a lot sooner than that) and that it was he, not his employer, who was attempting to insist upon the receipt of such a letter from M.P.I.C. [Text deleted], the Director of Personnel at [text deleted], had merely advised [the Appellant] that he was welcome to return to his full duties if he wished, but noted that, in the event of a re-injury to [the Appellant's] back, it would be incumbent upon the employer to advise the Workers Compensation Board of [the Appellant's] prior, automobile injury, leaving it up to that Board and M.P.I.C. to determine, between them, whether

that new injury was a 'relapse' for which the insurer would be responsible or whether it would qualify for Workers Compensation. That, in fact, is sensible advice that was subsequently confirmed by M.P.I.C. in a letter from [the Appellant's] Adjuster to [Director of Personnel] at [text deleted], bearing date July 25th, 1995. We find, therefore, that it was [the Appellant's] own decision, not that of his employer nor that of M.P.I.C., that precluded his return to full duties until August 5th. Had he wished, he could have done so on or before June 5th, and his claim in this context, must also fail.

Did [the Appellant's] M.V.A. prevent him from accepting other employment?

[The Appellant] had applied for part-time work at the [text deleted]. There is some direct conflict of evidence between [the Appellant] and the Director of Community Residential Services for [text deleted], as to who initiated contact between [the Appellant] and [text deleted] and when. There also appears to have been some misunderstanding between them as to why [the Appellant] felt that he had to disqualify himself, at least temporarily, from accepting any employment there that might be offered to him. However, those differences are not of major importance, and are only mentioned here because they, amongst many other factors, go to the overall credibility of [the Appellant's] testimony. Of greater importance are these facts: there is an indication in a letter of July 24th, 1996 from [text deleted] that [the Appellant] was offered employment there on March 7th, 1995; [the Appellant] himself, in a letter of August 12th, 1996 addressed to M.P.I.C.'s Internal Review Officer, also alleges that he was offered employment at [text deleted] although, as he tells it, the offer was given him on December 3rd of 1994; both [the Appellant] and [text deleted] agree that he apparently felt obliged to turn down that employment offer - although each of them advances a different reason for that refusal. However, during the

course of his sworn, oral testimony before this Commission, [the Appellant] steadfastly and repeatedly denied that he had received any firm offer of employment and, since this testimony was contrary to his own interests and was reaffirmed despite our invitation to him to revisit that portion of his testimony, we must conclude that, upon this point at least, his evidence under oath has to be accepted. He was, therefore, not prevented by his injury from accepting employment at [text deleted].

Claim for Loss of Business Income

[The Appellant] also claims entitlement to compensation for loss of income allegedly suffered by [text deleted]., a corporation apparently wholly owned by [the Appellant] and used by him in the promotion of musical and other events [text deleted], in Manitoba. This aspect of his claim must also fail, for three reasons:

(a) no evidence was offered to us to support [the Appellant's] contention that the comparatively minor injuries to his back somehow prevented him from continuing to operate his corporation which, so far as we could tell, entailed little, if any, physical activity;

(b) [text deleted] is a corporation, and therefore a separate entity from [the Appellant]; the company was neither the 'victim' nor the person insured at the time of the accident and, therefore, does not qualify for any form of compensation;

(c) in any event, by [the Appellant's] own testimony, that corporation has never shown a profit in any fiscal year of its corporate existence; he claims to have been able to use its annual losses to offset his income from other sources. We confess that we have difficulty in understanding how that would ever be allowed by Revenue Canada but, in any event, the

company's history of continued losses make it difficult to justify a claim by [the Appellant] for loss of income.

DISPOSITION:

For the reasons outlined above, we find that [the Appellant's] claims must fail and that, subject to the undertaking of counsel for M.P.I.C. to have the quantum of I.R.I. reviewed and, if appropriate, readjusted, the decision of the Corporation's Internal Review Officer must be confirmed.

Dated at Winnipeg this 3rd day of March 1997.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED