AUTOMOBILE INJURY COMPENSATION COMMISSION

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-28

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Keith Addison;** **Appellant represented by [Appellant's representative]**
HEARING DATE:	**September 18, 1997**
ISSUE(S):	**1. whether I.R.I. properly terminated;** **2. whether victim entitled to I.R.I. at increased rate by virtue of Section 82(1) of the Act;** **3. whether victim lost employment due to motor vehicle accident; and** **4. whether victim entitled to re-training.**
RELEVANT SECTIONS:	**Sections 70(1), 81, 82(1), 107, 110(2) and 138 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

THE FACTS:

The Appellant was involved in a motor vehicle accident ('the accident') on September 28, 1994 and suffered injuries to his neck and lower back; he experienced headaches and pain between his shoulders. For the purposes of this appeal it is necessary to touch upon the Appellant's medical

history and upon the nature of his work immediately prior to the accident.

The Appellant was employed with [text deleted] for a number of years, initially as a sheet metal worker; subsequently, for reasons that were never made clear to us, his classification changed to that of a steam cleaner although, as will appear later in these reasons, that does not seem to have been the job that he was actually doing when last actively employed by [text deleted]. On March31st, 1993, the Appellant was emptying garbage cans and, as he bent over to empty a can, he felt an immediate sharp pain in his lower back. The pain, which became progressively worse, made walking difficult and was aggravated by bending, sitting and lifting. He was placed on Workers Compensation.

(It might be noted, here, that prior to his March 31st 1993 claim the Appellant had made six Workers Compensation claims while working for [text deleted], five involving his lower back and one for his upper back, and that one such claim, at least, involved a lengthy period of disability of about two years.)

[Text deleted], then the Appellant's chiropractor, provided a series of progress reports to the Workers Compensation Board from April,1993, through to February, 1994. In April of 1993 he reported that the Appellant was capable of light work but must avoid repetitive bending and not lift more than 60 pounds. By July of 1993 he was 'capable of doing medium type of work but must avoid repetitive bending and not lift more than 40 pounds' - something of an anomaly or, at least, a regression, since [Appellant's chiropractor #1] had allowed the Appellant to lift up to 60 lbs. when restricted to 'light work'. In a report dated November 25, 1993 [Appellant's chiropractor #1] advised that the Appellant could start his " regular duties" at the end of November.He suggested a work harding programe whereby the Appellant would start working for

two hours on November 29th for the first week, increasing the amount of work time by two hours every two weeks until, by January 3, 1994,he would be able to work a full eight-hour day. This programe was concurred in by the [text deleted] medical team and the Workers Compensation Board.

In a report to the Appellant's Solicitor dated June 10th, 1997, [Appellant's chiropractor #1] indicated that the Appellant, at the time of his last examination on January 28, 1994, had returned to 90 % of the condition that he had enjoyed immediately prior to the March 31st, 1993, incident, and was capable of modified light duties, although with some limitation. From the evidence, which is slightly confusing at this juncture, we conclude that [the Appellant] did return to work in pursuance of the work hardening program referred to above, but only for a brief period, since by February 8th, 1994, he had developed chronic irritable bowel syndrome (later diagnosed as diverticulitis) and a recurrence or, perhaps more accurately, continuance of a chronic anxiety state to which he had been subject for many years. The diverticulitis proved to be sufficiently disabling as to keep him off work from February 8th, 1994, until the date of his accident and beyond.

[The Appellant] says that, by the date of his accident, he had started to feel well enough that he was seriously contemplating a return to work - a step which, his physician, [text deleted], agrees should have been possible by about November 21st of that year. We find, therefore, on a strong balance of probabilities that at the time of the accident [the Appellant] had reached about 90% of his March 30th, 1993, capacity in the context of his ability to perform the duties that had then been expected of him; he needed only about another two months of therapy in order to return to work.

The Appellant consulted another chiropractor, [text deleted], for the treatment of his injuries arising out of the auto accident. MPIC paid for this treatment and paid IRI to him for the period from the 7th day following the accident (October 5th, 1994) until September 23rd, 1996.

In a report dated August 6, 1996, [Appellant's chiropractor #2] wrote to MPIC stating that the Appellant:

> " is functionally capable of going to a modified light duty janitorial position as of this date, but not the [text deleted] steamcleaner position at which he was working at the time of the accident. .....[the Appellant] could work 6 ½ hours per day, five days a week, increasing one hour each week over the next three weeks until he reaches eight hours per day as a light duty janitor. This does not bring him back to his pre-MVA capabilities of [text deleted] steamcleaner for handling 80 lbs bearings. He would be able to return for steam wand cleaning of cars at the schedule suggested but with the restriction on no lifting greater than 20lbs or twisting of a repetitive nature."

[Appellant's chiropractor #2] sent a similar letter to [text deleted] on September 16, 1997

What were the Appellant's "regular duties" prior to the March 31st injury? The Appellant, himself, says that his duties included lifting and carrying various items, including bearings weighing 80lbs, although he later agreed that those bearings actually consisted of four or five separate pieces having an aggregate weight of 80 lbs. and that the heaviest of them would not exceed about 25 to 30 lbs. He was never required to lift an entire bearing, unless by use of a crane. He stated that he also was required to use a power washer - i.e. a wand through which water would pass under pressure - and a scraper with which to clean [text deleted], and that his other duties encompassed sweeping, mopping, shovelling and operating a fork-lift.

In June of 1996, representatives of MPIC met with [text deleted], Senior Manager Supply & Equipment Services at the Appellant's place of employment, and with [text deleted], Senior Supervisor in the area where the Appellant would have been working as a labourer/steam cleaner. These [text deleted] representatives outlined the job demands of a labourer/steam cleaner and

advised that the Appellant, while apparently classified and paid as a steam cleaner, was only qualified to perform certain parts of the work covered by that job description; they stated that he would not have been qualified to do all of the work of a steam cleaner (particularly those aspects of the job that required dismantling and scraping [text deleted]). They added that any heavy lifting would be done by use of an overhead crane, and that even the use of the power washing wand to spray underneath an [text deleted] would be achieved by walking down a couple of steps to bring the operator to the proper level and, thus, avoid much bending. It does seem clear from their statements that the Appellant, when last at work prior to the accident, worked in a janitorial labour capacity. He was cleaning washrooms and sweeping the floors and that was the extent of his actual work, notwithstanding his classification and pay scale.

The other principal, material fact is this: whether or not [the Appellant] had been able to return to work on or before September 23rd, 1996, there was no job awaiting him. That job had, in fact, been eliminated by a major reorganization of the workplace during the period of [the Appellant's] disability. The evidence does not make clear the date when his job disappeared, but it was certainly well known by February of 1995 that, if [the Appellant] had been able to return to work then, he would have been confronted with a lay-off notice. The only reason that he was not given that notice was that, by virtue of his union's collective agreement, the employer could not lay him off during any period of legitimate sick leave.

MPIC wrote to the Appellant on September 13, 1996 advising him of the contents of [Appellant's chiropractor #2's] letter of August 6th and that, based on that professional opinion, the insurer

intended to terminate his I.R.I. as of September23, 1996. It is from this decision that [the Appellant] now appeals.

THE LAW;

The relevant sections of the Act will be annexed to, and are intended to form part of, these Reasons.

There was no oral nor any new evidence produced at the hearing, other than [the Appellant's] responses to several questions directed by members of the Commission to his counsel; the parties relied on material from the Appellant's Workers Compensation and MPIC files.

[The Appellant], through his counsel, makes four basic submissions:

a) that his I.R.I. was terminated prematurely, since he had not, in fact, reached pre-accident status by the date of termination;

b) that he is entitled not only to the re-instatement of his I.R.I. but, as well, to an increase in the amount of it since the job for which he was called back to work (and which he was unable to accept due to the employer's requirement of full-time participation) carried a higher pay rate than that which was applicable at the date of the accident;

c) that he is entitled to continued I.R.I. for 180 days following the first two years after the accident in any event, by virtue of Section 110(2) of the Act; and that

d) he is entitled to re-training under Section 107 of the Act.

The primary obligation of MPIC under the Act is to use its best endeavours to return the Appellant to his pre-accident status and to pay him the appropriate amount of I.R.I. until he reaches that level. Much of the dispute between M.P.I.C. on the one hand, and [the Appellant] and his chiropractor, [text deleted], on the other, arises from their divergent views of the nature of the Appellant's actual work when he was last gainfully employed. [Appellant's chiropractor #2], in his letter of August

6th, 1996, upon which M.P.I.C. relied when terminating the Appellant's I.R.I., disagrees with the suggestion that the Appellant had reached his pre-September 28th, 1994 functional capabilities, but he bases that opinion upon what, in our respectful view, is an erroneous belief that [the Appellant's] duties were much more demanding and his capabilities much greater before the accident than was, in fact, the case. As we have noted above, we find that [the Appellant], when last actively employed, was primarily engaged in the work of a janitorial labourer; he had reached a functional level of about 90% of total ability to perform those tasks by the time of his accident. Now, what does [Appellant's chiropractor #2] say of the Appellant's condition as of August 6th, 1996? He says this:

> "His (the Appellant's) pre-MVA restrictions were to avoid bending and twisting, no lifting greater than 20 lbs., avoid mopping and allow for breaks at work up to the date of June 2, 1994.....He is functionally capable of going to a modified light duty janitorial position as of this date, but not the [text deleted] steamcleaner position at which he was working at the time of the motor vehicle accident."

But that comment is based upon a statement made by [Appellant's chiropractor #1], to the effect that [the Appellant]'s "janitorial duties started in February of 1994 and ceased as of June 2, 1994. At this time he returned for 8-hour days to a steamcleaner/classified labourer position that required twisting to the right side carrying 80 lbs bearings (5 pieces) at approximately 200 bearings per night and the steam wand cleaning of [text deleted] care." The evidence before us is that [the Appellant] did not, in fact, return to work in June of 1994, nor at all, after the onset of his gastro-intestinal problem in February of 1994. Similarly, the evidence of the [text deleted] supervisory personnel makes it clear that, despite [the Appellant's] classification, the job that he was actually performing did not entail much of the work called for by the job description of a steam cleaner. We may say that we accept the statements of the [text deleted] personnel, who have

no axe to grind, rather than those of the Appellant in this context which seem to have consistently exaggerated the demands of his work in discussions with his medical advisers. Again, by [the Appellant's] own evidence, he was never called upon to lift 80 lbs. bearings.

We find that those same light duty janitorial functions of which [Appellant's chiropractor #2] found him capable in August of 1996 were the functions that he was capable of performing just prior to the accident. He still had some physical limitations at the time when his I.R.I. was terminated, but they were no greater, in our view, than those existing on September 27th, 1994. We therefore find that the insurer was justified in terminating the Appellant's I.R.I. as of September 23rd, 1996.

(b) The Appellant was called back to work at a position in the sheet metal department of [text deleted] but he could not accept it because the employer insisted that he must be able to start putting in a full day's work at the outset, rather than starting on a graduated basis as had been recommended. This position would have paid a higher salary than that of a steam cleaner and the Appellant wanted his I.R.I. increased to reflect this new, potential, increased income level. The evidence seems to indicate that the call-back came after the Appellant's IRI had been terminated and, as indicated, we are of the opinion that his IRI benefit was properly terminated. Under those circumstances, that facet of [the Appellant's] claim must also fail. If there is evidence that the call-back came during the period of [the Appellant's] entitlement to I.R.I., then we would be prepared to re-visit this portion of his claim at the request of either party. That statement should not, however, be taken as a decision of any kind upon that particular point: we have, simply, not considered it.

(c) The Appellant argued that he was, in any event, entitled to I.R.I. for an additional 180 days, by virtue of Section 110(2) of the Act, of which the text is annexed. A reading of that Section

makes clear that it applies only when the motor vehicle accident has caused the loss of employment. The loss of [the Appellant's] job did not result from the accident but, rather, from his employer's decision to reorganize the workplace. The Appellant's claim under this head therefore falls outside the purview of Section 110(2) and must fail.

(d) Re-training under Section 107 is only available to a victim who, two years immediately after a motor vehicle accident, is unable because of that accident to hold either the original, full-time, regular employment that he/she held at the time of the accident or a more remunerative employment.

But that benefit is not available to a victim who, by the end of that second year, has already been restored to pre-accident status - a status which, we find, [the Appellant] had, in fact, achieved.

An additional argument that was advanced during the hearing was that M.P.I.C. has an obligation to find the Appellant a job similar to the one that he could have held prior to the accident. That position might be sustainable, at least within certain limits, had [the Appellant] lost his job by reason of the accident. But, as noted above, his job had been eliminated for reasons unrelated to the accident; it was a job that he would have lost even if working there full-time and its loss cannot, therefore, become a basis for compensation from M.P.I.C.

DISPOSITION:

The Appeal is dismissed and the decisions of the Review Officer dated January 20, 1997 is confirmed.

Dated at Winnipeg this 3rd day of November 1997.

J.F.Reeh Taylor, Q.C.

Charles R. Birt, Q.C.

Lila Goodspeed