# AUTOMOBILE INJURY COMPENSATION COMMISSION

**IN THE MATTER OF an appeal by [the Appellant]**
**AICAC File No.: AC-97-101**

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| **PANEL:** | **Mr. J. F. Reeh Taylor, Q.C. (Chairperson)**<br>**Mr. Charles T. Birt, Q.C.**<br>**Mrs. Lila Goodspeed** |
| **APPEARANCES:** | **Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Tom Strutt;**<br>**the Appellant was represented by [Appellant's representative]** |
| **HEARING DATE:** | **December 4th, 1997** |
| **ISSUE(S):** | **1. Re-instatement of IRI;**<br>**2. Re-instatement of Rehabilitation Programs.** |
| **RELEVANT SECTIONS:** | **Section 160 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:

On January 4th, 1996 the Appellant was in the driver's seat of his motor vehicle with his seat belt on and parked in a parking lot when his vehicle was struck in the rear by another vehicle. According to his family physician, [text deleted], [the Appellant] suffered a severe

sprain to his lumbosacral area muscles, a sprain to his right trapezius muscle and a sprain to his neck muscles.

At the time of this accident [the Appellant] was off work and receiving treatment for injuries he had sustained in an auto accident on January 5th 1995. The van he had been driving just outside [text deleted], B.C., rolled; he suffered injuries and was taken to the local hospital. On his release he returned to [Manitoba] and consulted [Appellant's doctor #2] who advised that when he saw him on January 16th, 1995 the Appellant had "guarded and slow neck movements limited to 50% of normal". [Appellant's doctor #2] advised that "there was spasms and tenderness involving the posterior neck, trapezius and sternomastoid muscles". He prescribed Tylenol and advised the Appellant to wear a cervical collar.

When [the Appellant] was examined on January 23rd, 1995 by [Appellant's doctor #2] he showed some improvement and his movements had improved to 75 - 80% of normal but there was still tenderness in the muscles.

At the time of the January 5th 1995 accident [the Appellant] was a self-employed home renovator working 10 hours per day 6 days per week. Occasionally he would drive cab on Sundays and he delivered newspapers every day on three different routes.

On January 17th, 1995 [the Appellant] started taking physiotherapy treatments at the [text deleted] Sports Injury and Physiotherapy Clinic to help speed his recovery. He went daily for the first week, then three times a week and then twice a week for his last two weeks. His

last day was March 6th, 1995 and it was reported that he had attained approximately 50 -70% of his normal neck range of motion. He then attended a work hardening program at [rehab clinic #1], but only for fifteen days as he quit due to a misunderstanding between himself and his doctor.

At the time of the accident on January 4th, 1996 [the Appellant] was not in any physical condition to return to his pre-1995 accident jobs except for newspaper delivery. His new family doctor, [text deleted], had recommended that he return for a twelve week program of physiotherapy at [text deleted] Physiotherapy services. The Appellant had been receiving and continued to receive IRI payments for the January 1995 accident.

MPIC hired [vocational rehab consulting company] Inc to assist with the co-ordination of [the Appellant's] rehabilitation and they became involved shortly after the January 1995 accident and continued to perform this job after the January 1996 accident. Their representative had to keep in touch with all of [the Appellant's] caregivers and try to develop and execute a plan of rehabilitation that would return him to his pre-accident status. Having been in touch with [the Appellant] as well as his caregivers throughout this time it is somewhat surprising to find that [the Appellant] had instructed the physiotherapist at [text deleted] Physiotherapy on January 23rd, 1996 not to speak to the representative of [vocational rehab consulting company].

As 1996 progressed there was little or no improvement in [the Appellant's] condition and his treating physician, [text deleted], was concerned enough on May 14th, 1996 to

recommend a new treatment plan that involved being assessed by an orthopaedic doctor, having his cardiovascular system checked and considering a psychological assessment. On June 7th, 1996 [Appellant's rehab consultant], of [vocational rehab consulting company], talked with [text deleted], [the Appellant's] treating physiotherapist at [text deleted] Physio, and was informed that she had been treating him three times a week since January 1996 and would continue to follow this regime for the next three months at which time she felt he would have received the maximum benefits from physiotherapy. Once again a rather strange occurrence took place. When [the Appellant] was informed that [Appellant's physiotherapist #1] had been talking to [Appellant's rehab consultant] he informed her that he did not want her to give any further verbal or written reports about him to [vocational rehab consulting company]

On June 17th 1996 [the Appellant] was referred to the [rehab clinic #2], which deals with the rehabilitation of chronic pain, trauma and fibromyalgia, for an assessment and treatment in the Chronic Pain Program and a psychological assessment by [Appellant's psychologist]. He was assessed by their case coordinator, occupational therapist, physiotherapist and psychologist; they recommended that a treatment program begin July 22nd, 1996 consisting of the following:

1. receive acupuncture treatments three times a week for three weeks with a five week physiotherapy program to follow with emphasis on posture, education, endurance, strengthening, stabilization exercises and coping mechanisms;
2. occupational therapy twice a week up to two hours per day,
3. psychological pain management once or twice per week,

4. a case conference be held on August 1st, 1996 to review [the Appellant's] progress.

On August 16th, 1996 [vocational rehab consulting company] reported to MPIC [the Appellant's] progress and advised that the treating therapist reported that [the Appellant] appeared drowsy in several classes and seemed to fall asleep at times. They also reported that he indicated that it is difficult for him to attend the 9.00 A.M. morning classes as his daughter was not awake to drive him. He described difficulty in "connecting" with the two buses he must take to [rehab clinic #2] and increased pain while standing and waiting at bus stops.

The Appellant continued to attend at the [rehab clinic #2] for treatment but he was not progressing very well. In late fall after discussions with his various caregivers it was felt that he might be depressed or suffering from some mental problems that were preventing him from recovering. He was referred to [text deleted], a psychiatrist, on December 23rd, 1996 for evaluation and help and he reported that "there is no evidence of psychosis at this time" but in his view "[the Appellant] is severely depressed, anxious and phobic about driving. It is recommended that he not be subjected to pressure to return to work". On [Appellant's psychiatrist's] advice the Appellant's physiotherapy and occupational therapy were reduced by 30%.

[the Appellant] does not improve and in fact he appears to be deteriorating both mentally and physically and this is causing great concern amongst all of his caregivers. On February 7th, 1997 the [rehab clinic #2] provided a lengthy report on [the Appellant's] progress to

date and their conclusion is that his improvement over this extended period was minimal. They advise that [the Appellant] still "complains of constant pain in the lower back, right side of the neck and head, and right shoulder regions".

[The Appellant] was referred to [Appellant's rehab specialist] of the [text deleted]. After he examined [the Appellant] on February 10th, 1997, he reports: "He now presents with right sided neck, parietal, shoulder girdle and central lumbosacral pain" and "he does not feel he is improving and in fact he states he is worsening with this treatment". At one point in the report [Appellant's rehab specialist] makes the following comment "during the physical examination there were several instances where he was seen to be moaning and gesturing. The claimant seemed to be embellishing his pain complaint". In his conclusions [Appellant's rehab specialist] makes the following comments:

"At this point there does not appear to be a rateable permanent musculoskeletal impairment. Despite the absence of an objective physical impairment, his observed global function is quite poor. It appears that his disability is out of proportion with respect to the objective findings."

For reasons not revealed to the commission MPIC retained the Services of [text deleted] Investigations to report on [the Appellant]. They filed a report dated February 24th, 1997 that covers their observations of [the Appellant] over five days during the period of February 12th through to February 20th, 1997. On February 19th and 20th [the Appellant] was observed taking a van, parked at the rear of his house, and driving it for long distances and for several hours throughout the city.

On February 20th, 1997 he drove to the rear of [text deleted], a house that [the Appellant] owns and has listed for sale, and the investigator reports:

"1227 hours: The operative drove to the rear of the dwelling and from the back lane observed him shovelling snow from a parking space at the rear. At 1235 hours she located an appropriate vantage point and commenced taping the subject as he shovelled. He appeared to shovel aggressively and with enthusiasm but rested every minute or so, standing straight and taking a few seconds to look at the house. He shovelled the snow, without any sign of restriction and using the strength of his shoulders, upper body and arms to throw the snow a significant distance."

Later, a videotape of the Appellant made by [text deleted] Investigations shows [the Appellant] leaving the front of the house, checking his mail box, walking to the road and up and over a snow drift then crossing the street, getting into his van and driving away.

In a later report dated March 4th, 1997 [text deleted] Investigations confirms that [the Appellant] was again observed driving a van for lengthy periods on February 28th and March 3rd, 1997. This tape was given to [Appellant's rehab specialist] to review and comment on and he reports on April 23, 1997 that:

> "Although the claimant appeared to move with some stiffness in his neck on the video tape, he did not display the significant degree of distress that he did during my physical examination of February 10th, 1997. His spinal range of motion with respect to the thoracic, lumbar and sacral spine as demonstrated on the video is markedly improved in comparison to his ability to move during my examination. He was unable to extend or side

bend at all during my examination where he clearly is able to do so when he is shovelling.

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I note that while shovelling his right shoulder is moving within a functional range and is doing so under load conditions which is inconsistent with the physical examination finding of ten days previously. This cannot be explained on the basis of recovery from tissue damage.

In conclusion, the presentation of this claimant on this video tape is inconsistent with the apparent limitations noted on physical examination of February 10th, 1997."

The film was sent to the [rehab clinic #2] and [text deleted], [the Appellant's] physiotherapist, comments in a report on April 30th, 1997:

"The shovelling movement demonstrates fluid range of movement of the right shoulder with a load. While attending [rehab clinic #2] the client would not progress past five repetitions with one pound of weight for a bicep strengthening exercise. The shovelling activity demonstrated definitely exceeds the observed clinical achievements as the shovel itself looks fairly heavy and likely weighs more than one pound. At one point in time the snow is actually being thrown a significant distance which requires an increased amount of strength. .....

No specific painful body language is observed throughout the shovelling activity. For example, forward bending of the lumbar spine is observed with no clutching for the lower back. No difficulty is observed with bending forward or with returning to neutral with respect to the lumbar spine. Decreased lumbar flexion with pain was a clinical

observation on assessment of the client.

The client is also observed to ambulate slowly and without an antalgic gait. In the clinical setting an antalgic gait was often observed.

On the subsequent filming, [the Appellant] is observed climbing over a snow bank and down a snow bank using both arms as balance. No hesitation is noted with the movement of the right arm during this activity or while opening the door of the vehicle. No painful facial expressions are observed. This is not consistent with the clinical presentation of activities requiring movement of the right arm."

[Text deleted], [the Appellant's] occupational therapist with the [rehab clinic #2], made the following comments on May 12th, 1997 after observing the video tape of [the Appellant]:

"On average, [the Appellant] tolerated approximately thirty-five minutes of sedentary activity in a one hour period. This activity was predominantly in sitting as [the Appellant] refused to participate in activity involving standing, walking. carrying or lifting. Reasons for not participating in these tasks were chronic neck and back pain, right upper extremity pain and weakness, and overall fatigue.

[The Appellant] would frequently lay down on a mat for five to fifteen minutes during the sessions as he stated this helped to relieve physical discomfort.

[The Appellant's] physical movements and abilities while shovelling snow are not consistent with demonstrated abilities while attending occupational therapy.

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In addition, while he presented as slow and guarded when walking during his attendance at the [rehab clinic #2], he appeared to climb over a snow bank without difficulty."

Based on the video evidence and what [the Appellant's] professional caregivers stated after reviewing the video tape, MPIC terminated all of [the Appellant's] financial and medical support pursuant to Section 160 of the Act.

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**THE LAW:**

The question before this Commission was whether or not [the Appellant] gave MPIC sufficient cause to terminate his benefits under Section 160 of the Act? This section reads in part:

"Section 160:

The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person:

(a) knowingly provides false or inaccurate information to the corporation;....

(f) without valid reason, prevents or delays recovery by his or her activities;

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation."

The hearing of this matter took almost a full day and [the Appellant] was on the witness stand for several hours and then remained throughout most of the hearing. [the Appellant] gave the impression that he was in a great deal of pain, that any upper body movement was very difficult and painful, had difficulty in lifting his arms to remove his overcoat and scarf and at times broke into tears and requested time to compose himself. In short he seemed to be in a great deal of pain and physical stress. Then we were shown the aforementioned video tape where we observed [the Appellant] shovelling snow, walking naturally and driving a van without any apparent difficulty. The contrast between the [the Appellant] giving evidence before us and the [the Appellant] on the video tape was like night and day.

When [the Appellant] completed his testimony he sat at the back of the hearing room and it was noticed by all of the commissioners at various times that he could do a great number of body movements with great ease and without pain, e.g. he was observed lifting his right arm away from his body and above his shoulder on more than one occasion without any difficulty or pain. This was in stark contrast from his performance on the witness stand.

Was the [the Appellant] on the video tape just having a good day without pain as was suggested or was that the real [the Appellant]?

When we consider all of the evidence and having observed [the Appellant] first hand we are of the opinion that the real [the Appellant] was the one on the video tape and that he merely was acting out a charade before us in an attempt to mislead us and all of his caregivers.

One can best summarize his medical teams' reaction as one of shock and disbelief when they review [the Appellant's] activities on the video tape in comparison to his activities before them.

There may have been a short period of time when [the Appellant] was indeed in pain and needed help but at some point he recovered and we will never know when that was. [the Appellant] has a credibility problem and we cannot accept anything he says or does as reflecting the truth. He fraudulently misrepresented his condition to everyone in order that he could continue to receive IRI benefits. In the event his conduct was not fraudulent it certainly bordered on it and we are of the opinion that at the very least he misrepresented his situation to all of the professionals who were trying to help him return to his pre-accident health.

[The Appellant] had no valid reason for not fully participating in his programs because if he had truly wanted to recover like most individuals, he would have been an active participant in them and been discharged much earlier. Instead he followed a course of conduct that amount to a charade that appeared to make his condition worse after two years of treatment than he was before his January 1995 accident.

One small example of this conduct of deception was his "fear of driving" that [Appellant's psychiatrist] described as "a phobia about driving". He advised that he could not make his 9.00 o'clock appointments because he had to take two busses to get to his treating clinic. This did not square with the evidence submitted by Target Investigations that he drove easily and freely all about the city for hours at a time.

[The Appellant] has lied to everyone who has tried to help him in order that he could receive benefits far beyond what he would normally have been entitled to. It is our view that there is more than sufficient evidence to justify MPIC terminating [the Appellant's] financial and medical benefits under any or all of the sub-clause (a), (f) or (g) of Section 160 of the Act.

**DISPOSITION:**

For the foregoing reasons, we conclude that the present appeal must fail and that the decision of the internal review officer should be confirmed.

Dated at Winnipeg this 27th day of January 1998.

**J. F. REEH TAYLOR, Q.C.**

**CHARLES T. BIRT, Q.C.**

**LILA GOODSPEED**