Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-110

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C. Mr. F. Les Cox**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by** **Ms Joan G. McKelvey** **the Appellant, [text deleted], was represented by [Appellant's representative]**
HEARING DATE:	**January 30th, 1998**
ISSUE(S):	**Whether Appellant entitled to income replacement indemnity for:** **(a) any portion of the first 180 post-accident days; and** **(b) following the 180th post-accident day.**
RELEVANT SECTIONS:	**Sections 70, 85(1), 82, 106 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

Although the motor vehicle accident giving rise to the claim involved in this appeal occurred on May 27th, 1996, the prior history of the Appellant, [text deleted], including that of an earlier motor vehicle accident of May 24th, 1994, is highly relevant.

[The Appellant] was born in what was then [text deleted] on October 30th, 1939. He has the equivalent of a Grade IV education from that country but no further education since coming to Canada on [text deleted].

Following his immigration, he first worked for about eighteen months in a factory in Ontario, then came to work for [text deleted] at its refinery in [text deleted] Manitoba; he worked there as a labourer, 'just doing what I was told', he said. He worked at [Manitoba] for two or three years but sustained a back injury and was unable to return to work there. Subsequently, he went to work for [text deleted] at [Northwest Territories], making wooden chutes, where he stayed for about three years. He quit there voluntarily, he says, because his back was still giving him trouble, and he went to work at [text deleted], Alberta, for [text deleted] on a seasonal basis, [text deleted] from the spring through until October in each of a couple of years. He then returned to [Manitoba] where, he testified, he was sick again because of his back and remained unemployed.

By the winter of 1990 to 1991, [the Appellant] testified, his back had improved to a point where he was able to return to labouring work. He therefore started working on a part-time basis for another [text deleted] expatriate, doing odd jobs such as digging holes for signs, carrying materials, and the like. We were given no specific details of this latter employment which, however, seems clearly to have been of a sporadic nature, since the Appellant's counsel advised us that his client had not really been gainfully employed since 1980.

[the Appellant] was a patient of [Appellant's doctor #1] from November, 1985 to September, 1991. During that time his main complaints were of headaches and chronic, recurrent back pain. He was treated with analgesic, anti-inflammatory and anti-depressant medications. He was also treated by [text deleted], a neurologist, during that same period. When last seen by [Appellant's doctor #1] in September of 1991 he was sufficiently well to return to full work duties but, despite that, has been receiving social assistance for most of the fifteen years prior to his accident, the subject of this appeal.

The Appellant went on to testify that, by 1993, his back had finally been restored to its original condition but, in May of 1994, he was involved in an accident in which the bicycle that he was riding collided with a motor vehicle. He was taken to Emergency at [hospital], where he was examined by [Appellant's ER doctor]. [Appellant's ER doctor's] report indicates that X-rays were taken, there was no head injury nor any loss of consciousness, but abrasions to anterior right shin, back and elbows and a contusion at the lower leg. He indicated a full function without symptoms and an ability to return to full duties. However, it became apparent that [the Appellant] had sustained an injury to his left shoulder, and he was sent by his general practitioner, [text deleted], and by the orthopedic specialist to whom [Appellant's doctor #2] referred him, [text deleted], for physiotherapy; X-rays of his left shoulder had indicated that he had a fractured clavicle. It might be noted, here, that the Appellant also suffers from high blood pressure and narcolepsy and has been on medication for each of those problems for quite some time.

Since the physiotherapy appeared only to make his pain worse and to have been achieving very little benefit, [Appellant's orthopedic specialist] recommended surgery in the form of open reduction and internal fixation with bone grafting of the left clavicle. That recommendation was made by [Appellant's orthopedic specialist], initially, on October 18th of 1994 but it was not until August 17th of 1995 that the appellant finally consented to the surgery, which was initially carried out by [Appellant's orthopedic specialist] on August 28th of 1995. In subsequent reassessments by [Appellant's orthopedic specialist], during which [the Appellant] was still complaining of extreme pain in his left shoulder, it was determined that the fracture had again become displaced, (apparently as a result of a fight in which the Appellant had been involved) and the Mueller plate that had been used in fixation of the fracture had, itself, fractured. [The Appellant] was, therefore, operated upon a second time on October 11th of 1995 when the fracture was exposed, the old plate removed and a larger plate installed with iliac bone grafting. The sutures from this second operation were removed on October 19th of 1995 and the plate and screws finally removed in June of 1997.

As a result of that accident of May 24th, 1994, on which latter date [the Appellant] was properly classified as a 'non-earner' within the definition of that phrase contained in Section 70 of the Act, [the Appellant] was awarded income replacement indemnity ('IRI') of $232.02 bi-weekly, commencing on November 21st, 1994, the 181st day immediately following the date of that first accident.

On June 11th, 1996, [the Appellant's] case manager at MPIC wrote to him to advise him that his IRI benefits had been terminated, effective on May 24th of 1996. The basis for that termination was stated to be found in Section 106(1) of the Act, and the fact that the Corporation had determined that [the Appellant] was now capable of carrying out sedentary work such as a gas station or parking lot attendant. He was certainly not capable of returning to his former employment of heavy labour - a fact that his clearly borne out by all of the available, medical evidence.

We note that [the Appellant] does not appear ever to have been offered any program of rehabilitation or retraining, although, he testified, that was certainly something promised to him by his adjuster. Since he was obviously not able to do his former work, we are of the view that this would be the very kind of assistance contemplated by Section 138 of the Act. However, this facet of [the Appellant's] problems is not before us; we have no mandate to deal with it.

The end result of all of the foregoing is that, at the beginning of June of 1996, [the Appellant] is receiving no further IRI with respect to his first accident; he is illiterate, narcoleptic and suffering from high blood pressure (all of which conditions had existed for many years); while able to lift from fifteen to twenty pounds on a occasional basis, he was certainly not capable of resuming his former employment as a labourer or engage in any other heavy work. We are constrained to comment that it does not seem very realistic to suggest that [the Appellant] could have held employment as a gas station or parking lot attendant, since he appears to have had no

idea of how to operate a cash register (let alone a computer) and highly unlikely to have been trainable in those areas.

However, all of the foregoing relates to his accident of May 24th, 1994, and is only related here because of the impact that those facts may have upon the appeal now under review, which relates to a second accident that occurred on May 27th, 1996 - coincidentally, a short three days after an examination when [Appellant's orthopedic specialist] found him sufficiently recovered to go back to work in some sedentary job. The accident of May 27th, 1996 resulted in strained muscles to [the Appellant's] neck and lower back with some minor soft tissue injury and laceration to his lower legs.

There are two aspects to the Appellant's claim, namely:

Entitlement to IRI for first 180 days (Photocopy of each section of the Act referred to herein is appended and forms part of these Reasons.)

The Appellant first claims under Section 85(1)(a). He says that he was prevented, by his accident of May 27th, 1996, from holding employment as a labourer with a company that was in the business of stuccoing, plastering and general contracting, with whom he claims to have secured a full-time job working forty hours per week. Unfortunately, that claim does not hold up under scrutiny. He has produced to MPIC a letter, purporting to come from [text deleted], dated July 14th, 1996, which reads as follows:

"*To Whom It May Concern*

[The Appellant] came to me and asked me for a job, on the 16th of May, 1996. I told him

to come back on the 28th of May, 1996 and start work. His pay was going to $12.00 per hour, for 40 hours a week.

[The Appellant] phoned me later in the day to advise me that he was in a car accident. He was not sure if he was going to work the next day. Therefore, I had to find alternative solution."

However, it is clear from several reports from [Appellant's doctor #2] and [Appellant's orthopedic specialist] that [the Appellant] was in no way capable of doing the kind of work contemplated by that letter. As well, the report of MPIC's investigator, following a meeting with [Appellant's potential employer] (the owner of [text deleted]), makes it pretty clear that the Appellant had approached [Appellant's potential employer] some time between May 15th and May 28th, 1996, looking for work, and had been told to show up the following morning to be given a try. [Appellant's potential employer] stated that he was not surprised when [the Appellant] did not show up the next morning and was not heard from for about five days, when he stopped [Appellant's potential employer] and told him that he had been involved in an accident that prevented him from coming to work. The Appellant had not asked for a letter at that juncture but, some time later, had come by one evening with a prepared letter which, the Appellant had said, he required for his lawyer and for Autopac. [Appellant's potential employer] added that, having looked at the letter, he had taken it inside his home, stamped it and signed it in the hope that the Appellant would leave him alone. He further said that he had never discussed wages or hours of work and certainly would not have guaranteed the Appellant forty hours per week. The job that the Appellant would have been given for trial purposes would have involved physically demanding manual labour, mixing stucco and plaster, lifting and applying the materials.

[Appellant's potential employer] did not hire anyone else to do the job that [the Appellant], if successful, might have been given.

It will be apparent from the foregoing that there was not, in fact, "an employment that he would have held" during that first 180 days had the accident not occurred, and [the Appellant's] claim under this head must fail.

Entitlement to IRI after first 180 days

If [the Appellant] is entitled to IRI, commencing on the 181st day following the date of his accident of May 27th, 1996, it would be governed by the provisions of Section 86(1) and (2). The 181st day, in [the Appellant's] case, was November 24th, 1996. However, [the Appellant's] own physician, [text deleted], makes it clear that, by the time when she examined him on October 4th, 1996, any injury sustained by [the Appellant] in his accident of May 27th, 1996 would have healed, at least to a point where the Appellant would have been able to work in a sedentary occupation. She noted that the one limiting factor might be the Appellant's long standing narcolepsy, which might be a problem if his job required memory work and intense concentration. However, as noted above, his narcolepsy was not in any way related to any motor vehicle accident and is not, therefore, a responsibility of MPIC.

The condition of the Appellant described by [Appellant's doctor #2] in her letter of June 10th, 1997, wherein she says, in part:

"....physically however he would definitely be capable of light sedentary work. Initially

> after his accident on May 27th, 1996 the patient was quite stiff and sore. However, when I saw him by October 4th (1996), he had suggested we cancel his CT Scan as he no longer had severe headache or dizziness. I am sure by October 4th, 1996 he would have been able to work with sedentary occupation, requiring little or no concentration"

is effectively the same as that described by [Appellant's orthopedic specialist] following his examination of the Appellant on May 24th, 1996, a few days before the accident in question. We have to conclude, therefore, that by October 4th, of 1996 [the Appellant] had been restored to his pre-accident condition. It follows, therefore, that the Appellant was not precluded, by his May 27th, 1996 accident, from holding the employment determined for him by the Corporation under Section 106. It is, perhaps, unfortunate that, throughout the correspondence between MPIC and the Appellant's medical and legal advisors, the phrase "gas station attendant/parking lot attendant" recurs. That phrase seems to have surfaced originally as a simple example of the kind of sedentary occupation for which the Appellant might have been qualified; it is by no means the only occupation that he might have been able to do. It is unclear where the word "sedentary" came from in the first place, since there is really nothing on file to indicate that [the Appellant] needs to be seated most of the time, provided that too much strain is not placed upon his left shoulder. While it is not the mandate of this Commission to determine an employment for [the Appellant], such occupations as attendant at a full service car wash and various jobs in the restaurant and fast-food industry come to mind as examples. None of those requires heavy lifting, literacy nor much concentration.

In the event, we are satisfied on a strong balance of probabilities that, by November 24th, 1996, [the Appellant] had recovered fully from any injuries sustained on May 27th of that year, and that he had at least reached pre-accident status by that date. It therefore follows that his claim under this head must also fail.

DISPOSITION:

In light of the foregoing, we are obliged to dismiss [the Appellant's] appeal and to confirm the decisions of MPIC's internal review officer bearing date February 17th and June 18th of 1997.

Dated at Winnipeg this 16th day of February 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

F. LES COX