Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-85

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 his father, [text deleted]**
HEARING DATE:	**February 12th, 1998**
ISSUE:	**Whether Appellant was "disabled" at time of spouse's death by automobile accident?**
RELEVANT SECTIONS:	**Sections 119(1) and 120(1) of the MPIC Act ('the Act') and Schedules 1 and 2 to Section 120 of 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, [text deleted], a [text deleted] year old resident of [text deleted]Roblin, Manitoba, at the time, has suffered the major tragedy of losing his wife as the

result of an automobile accident in which he, himself, was not personally involved. That event happened on March 2nd, 1996, and the only issue before us in this appeal is whether the Appellant was "disabled" within the meaning of Section 119(1) of the Act. He has received the spousal benefit of $72,325.82, which was paid to him on May 23rd, 1996; if he was a disabled spouse within the meaning of the Act, then he would be entitled to $113,009.10, plus interest on that additional $40,683.28.

[The Appellant's] employment history may be summarized this way: his first full-time job appears to have been at the [text deleted], in [text deleted], Saskatchewan, which was owned by his family; he then came in to [Manitoba] where he worked for [text deleted], fabricating parts; he then returned to Saskatchewan where he worked for [text deleted] in [Saskatchewan] and, in the course of that employment, injured his shoulder and upper back when lifting a computer in 1987. He sustained a further injury, in the form of a separated shoulder, in an incident involving the use of a Jack-All which, so far as we can tell, occurred in 1988. He was treated in the Injured Worker's Program of the Saskatchewan Workers' Compensation Board and was off work, receiving worker's compensation, for several years thereafter.

In October of 1992, the Appellant was working a combine on his father's farm at [text deleted], Saskatchewan, when he fell from the combine and re-injured that same shoulder. Once again, he was treated in the Injured Worker's Program in 1993. His symptoms persisted, to a point at which, on March 30th, 1995, he was diagnosed with a left rotator cuff impingement and admitted to surgery by [Appellant's surgeon] who performed arthroscopic debridement of the

anterior labrum and arthroscopic acromioplasty of his left shoulder. [Appellant's surgeon] reported, in a subsequent examination on May 24th, 1995, that the wound has healed well, the shoulder was stable with full active and passive range of motion, although [the Appellant] was reporting continued discomfort in his shoulder with overhead activities and had not yet returned to work. [Appellant's surgeon] advised the Appellant to continue with his range of motion and strengthening exercises as part of the physiotherapy treatment that he was receiving, and felt that [the Appellant] should be able to return to full activities about four to six weeks thereafter.

[The Appellant] was admitted to a Work Hardening Program through the Saskatchewan Workers' Compensation Board on September 11th, 1995 but, in the course of that program, fractured the fifth metatarsal of his right foot. That entailed placing his foot in a cast and, of course, delayed the continuance and completion of his Work Hardening Program.

In a report bearing date December 14th, 1995, [Appellant's rehab specialist], consultant to the [text deleted] where [the Appellant] had been sent by the Workers' Compensation Board for rehabilitation and work hardening, it is recorded that the Appellant had not made any significant gains in the course of that program. [Appellant's rehab specialist] comments:

> "The therapists have recommended discharging him as his gains have been minimal since admission. They have suggested a home exercise program for [the Appellant] to maintain his strength and endurance. They felt he should be able to pursue suitable employment in the light to medium level. Unfortunately he is limited by his pain complaints. However there were minimal objective findings.

> His comfortable lifting and carrying tolerances are between 20 to 30 pounds.....
>
> I have encouraged [the Appellant] to become active, rather than letting the pain that he is experiencing from the muscle in his neck and back limit him, and seek employment within the abilities that he has demonstrated."

Because [the Appellant] reported continued pain, particularly in the left shoulder and neck muscles, he was referred by his general practitioner, [text deleted] of [text deleted], Saskatchewan, to the [text deleted] Clinic at the [text deleted] in [Manitoba]. The reports from [text deleted], the director of that clinic, are significant. In summary, and at some risk of oversimplification, [clinic director] concluded that, as he put it "As far as I can gather he ([the Appellant]) has had this pain for nine years and at this age of [text deleted] something doesn't make sense". All of the tests performed at the [text deleted] Clinic and by others, including blood analysis, magnetic resonance imaging, neurological examination, visual and palpation examinations all proved to be normal and negative in the context of pathological signs; [the Appellant] appeared to have become a chronic pain patient and, as [clinic director] put it in a further report of August 30th, 1996 "He has to take charge of his own life and realize that we doctors cannot do much more for him. Can do what he likes, I do not think he can do any damage, can only cause pain. .....If he continues like this, he will end up as a medical failure and useless to society."

Meanwhile, by letter of April 10th, 1996, the Saskatchewan Workers' Compensation Board had determined that [the Appellant] was now fit for pre-accident

employment, with no permanent restrictions. Their letter to that effect advised [the Appellant] that "The only medical recommendation is that you should return to work. Since you have been off work for quite some time, it is suggested that you start with light duties and gradually build back up, toward normal productive employment. Therefore, we are allowing you twelve weeks job search benefits. During those twelve weeks, you can either return to your pre-accident employment and slowly introduce yourself back to your full duties or find alternate employment."

[Appellant's doctor #1], who certainly seems to have been providing [the Appellant] with all reasonable care and who is, quite properly, most supportive of her patient, does say in a report of September 13th, 1996 that the Appellant is unable to work. However, she does not report any objective signs upon which she is able to base that opinion which, it seems fairly clear, has as its foundation the subjective reports of pain communicated by the Appellant to [Appellant's doctor #1].

More latterly, [the Appellant] has been seeing [Appellant's doctor #2] at the [text deleted] Medical Clinic who, in turn, referred him to [text deleted], a specialist is rheumatology in [Saskatchewan]. The report of [Appellant's rheumatologist] to [Appellant's doctor #2], dated September 17th, 1997 is enlightening. In essence, his findings are in accord with those of almost every other member of the medical profession who has examined [the Appellant] in recent years. "His general examination was completely normal or negative and the musculoskeletal findings were an exaggerated reaction to light pressure at all of the soft tissues pressed upon...." [Appellant's rheumatologist] concludes that the Appellant presents with fibromyalgia syndrome.

He gave the Appellant some information to read on fibromyalgia and suggested that the Appellant might help the situation by trying to get physically fit and involved in something that he enjoys doing. He felt that [the Appellant] might benefit from taking a tricyclic medication, such as Nortriptyline or any other anti-depressant at bed time, in order to induce a deep sleep pattern and, indirectly, take care of some of the Appellant's symptoms. [Appellant's rheumatologist] concludes by saying "No other investigations are needed; a conservative approach is recommended and no return appointment was arranged."

Fibromyalgia is not a disease but, rather, a label that many in the medical profession have attached to a bundle of symptoms for which no apparent cause can readily be discerned. Neither the causality nor the appropriate treatment seem yet to have become the subject of widespread consensus within the medical profession, although the view seems to be growing that the syndrome usually requires a multi-disciplinary approach, involving some combination of psychological, pharmacological and educational treatment as well as a planned program of stretching and strengthening exercises.

THE LAW:

Section 119(1) of the MPIC Act defines "disabled" as meaning

> "unable to hold **any substantially gainful** employment because of a physical or mental disability that is likely to be of indefinite duration...."

Fibromyalgic syndrome, by definition, includes a substantial compliment of pain, but is not necessarily so debilitating as to render employment impossible. We are prepared to accept, for the purposes of this appeal, that at the time of his tragic loss [the Appellant] was suffering from a measure of physical impairment as a result of his earlier problems. The question, here, is whether he was "disabled" within the meaning of the Section noted above. To that question, the answer must be in the negative. There is not one medical practitioner, whether generalist or specialist, who, having examined [the Appellant], has not concluded that he is able to return to at least some measure of employment, albeit light to moderate duties rather than heavy labour. The only exception is [Appellant's doctor #1], as noted above, and even she finds no objective signs to support the view that he is unable to work.

It may seem callous, to [the Appellant], to have anyone tell him that he should simply decide to get on with his life, but that, in truth, seems to be the best prescription that he has been given. He tells us that he is receiving chiropractic care and that this seems to be helping him. We would urge him to continue with that treatment for as long as it seems to be improving his condition and, if his physician or chiropractor can also recommend a suitable course of exercises that he is willing to pursue faithfully, there is every reason to believe that he can soon find himself close to 100% of his original fitness. Those treatments, however, would not be for the account of Manitoba Public Insurance Corporation.

As we have already held, in the appeal of [text deleted] that we decided on May 8th of 1996, to enable a claimant to qualify for the additional benefits of a disabled dependant his or

her medical advisors must be able to say that:

(a) as at the date of the accident, the claimant was suffering from a physical or mental disability, using those words in the normal, clinical sense;

(b) it would not have been practicable to forecast with any reasonable accuracy the duration of the recovery time, meaning the length of time that it would take to restore the patient at least to a point at which he or she could hold substantially gainful employment, whether or not that employment was the same as that held by the patient prior to the accident; and

(c) that the estimated recovery period, while not determinable at the time of the accident, would probably extend for the foreseeable future.

The phrase "*substantially gainful employment",* where used in the statute and in subparagraph (b) above, does not mean "*substantial gainful employment"*. Rather, we interpret that phrase to mean employment of a reasonably permanent and, if not full-time, then sufficient part-time to enable the patient to become self-supporting. We find that the Appellant, in the present case, had already been restored to the point where he could hold substantially gainful employment by the time of the tragic accident that took the life of his wife.

Finally, and although this factor, of itself, would not have strong probative value, we do note that the income tax returns of the late [text deleted], who was the bread-winner in her family at the time of her death, do not claim her husband as a disabled dependant. Had the Appellant and his wife felt that he was disabled, they would undoubtedly have described him as such since that would have reduced the tax otherwise payable upon her income.

DISPOSITION:

For the foregoing reasons, we have to find that [the Appellant] was not a disabled spouse at the time of the death of his wife, and that the present appeal must, therefore, be dismissed.

Dated at Winnipeg this 16th day of February 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

F. LES COX