Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-90

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 Mr. Tom Strutt;** **[Text deleted], the appellant, appeared in person**
HEARING DATE:	**November 6th, 1998**
ISSUE:	**Whether the victim is entitled to Income Replacement Indemnity (IRI) because of a motor vehicle accident of September 24, 1994.**
RELEVANT SECTIONS:	**Section 85(1) (a) of the MPIC Act, and Section 8 of regulation 37/94 of the MPIC 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

On September 24, 1994, [text deleted], the appellant, was involved in a motor vehicle accident (MVA). He was riding his bicycle when it came in collision with a moving car and he was thrown to the ground. He reported to his family physician, [text deleted], that he was struck on the left side, fell on the right side and was pulled by the car about 20 feet.

The appellant attended [hospital] and was examined by [Appellant's ER doctor]. That attendance

seems to have been on the same day as the MVA although there is no report from the Emergency Department or [Appellant's ER doctor] in the file.

In the appellant's first meeting with his injury adjuster, [text deleted] of the Manitoba Public Insurance Corporation, on October 3, 1994, the appellant stated he had missed 2 days from his workplace because of the injuries sustained in the MVA of September 24, 1994. He stated that the only doctor he had seen since the MVA was [Appellant's ER doctor] at the [hospital], who had given him a prescription for pain killers and had discharged him. There was no follow-up scheduled with [Appellant's ER doctor].

The appellant told [Appellant's MPIC adjuster] that he was wearing a cyclist's helmet at the time of the MVA. He had not at that time determined the extent of the damage to his bicycle. He reported to [Appellant's MPIC adjuster] that the clothing he damaged in the MVA was an old jacket and a ripped old pair of shoes. He apparently agreed to a $20.00 allowance for these items.

On October 20, 1994 [Appellant's MPIC adjuster] spoke with the appellant and the only item discussed was whether his helmet had been checked out for damage. The appellant advised [Appellant's MPIC adjuster] that he would do so as soon as possible and call her back.

On November 16, 1994 [Appellant's MPIC adjuster] received a phone call from the appellant stating he had lost his job because he could not perform all his duties at work. He had not seen a doctor since [Appellant's ER doctor].

On November 21, 1994 the appellant went in to see [Appellant's MPIC adjuster] and produced a letter from his employer dated November 10, 1994, indicating he had been fired. He told [Appellant's MPIC adjuster] that he felt the MVA was to blame for his dismissal. [Appellant's MPIC adjuster] questioned the appellant about the cause and found that the appellant had apparently experienced some problems at work prior to the MVA. He would not disclose to [Appellant's MPIC adjuster] what those problems were. He stated only that he had been holding a desk job. He told [Appellant's MPIC adjuster] that he had not made an appointment with his family doctor since the original examination by [Appellant's ER doctor] but that he would make an appointment with [Appellant's doctor] as soon as possible. He also signed an authorization for [Appellant's MPIC adjuster] allowing her to approach his former employer's personnel manager, [text deleted], and the appellant's supervisor, [text deleted].

[Appellant's MPIC adjuster] spoke with [Appellant's former employer's personnel manager] on November 22, 1994. He would not tell [Appellant's MPIC adjuster] why the appellant was fired but did say that the MVA had nothing to do with the firing. According to [Appellant's former employer's personnel manager] the problems that the appellant had been causing his employer had been going on for a long time and "way before the MVA".

A report from [Appellant's doctor] dated February 21, 1995 was received by [Appellant's MPIC adjuster]; it referred to the one examination of the appellant by [Appellant's doctor] on December 1, 1994. The appellant had reported to [Appellant's doctor] that he was seen at [hospital] as he had experienced pain in his legs and knees from the MVA. He also reported some interior head pain

over the forehead area on the right side, which had been resolved by the time of the examination.

[Appellant's doctor] reported that the appellant "was still having some left elbow pain with some difficulty to use his hand, difficulty to open the door, some left and right knee pain in the lateral area .... on examination he was in no distress and there was some tenderness the medial area of the left elbow with decreased strength over the left hand due to the presence of pain. Examination of the knees and right and left side was unremarkable. He was assessed as having had a contusion of the left elbow with slight epicondylitis present, contusion of the left and right knee and head contusion. He missed two days of work and had been back to previous level of function since then".

In response to a letter from MPIC, the appellant's employer, [text deleted], wrote in a letter dated June 29, 1995,

> As for specific reasons for dismissal, a review of the details surrounding the termination of [the Appellant's] employment with [text deleted] clearly demonstrates that he was terminated because of documented performance deficiency; essentially the inability to achieve and maintain the expected level of job performance.

[Text deleted] was aware that [the Appellant] was absent from work in September for two days. However, upon his return [the Appellant] never informed [text deleted], either orally or by a medical certificate that this accident affected his ability to work at 100% efficiency. Given [the Appellant's] continued failure to meet expectations for his job responsibilities, despite the intensive training and guidance provided to him by his employer, the decision was taken by [text deleted] in October, 1994, to proceed with [the Appellant's] dismissal.

[Text deleted] had written to the appellant on June 7, 1994 (over 3 months prior to his accident) advising him that his current unsatisfactory performance would not be tolerated. [Text deleted] then placed him on a period of reassessment of up to 6 months from June 7, 1994, and told him that if, during that reassessment, significant improvement did not occur, he would be dismissed. In October 1994, only 4 months after that caution, his position with [text deleted] was terminated.

At the hearing the appellant acknowledged that he was normally able to use both hands equally well but that he was basically right handed. He admitted playing hockey after the MVA as a fully outfitted goalie, operating both a catching glove and a blocker from the time of the MVA up to the present. However, he said that he needed both hands to operate the key board at his computer and that his left hand would not perform that function because of the MVA and that is why he was dismissed by his employer.

Under cross-examination, [the Appellant] said that he had told both [Appellant's doctor] and [text deleted] (physiotherapist) of the trouble he was experiencing with the use of his hand and the numbness in three of his fingers, but could offer no explanation for the absence of any mention of this in the initial assessment notes made by each of them.

Of major significance, in our view, is [the Appellant's] own evidence that;

> (a) the difficulties he was encountering in attempting to fulfill the demands of his job related to his use of a computer as a word-processor.....his left hand and arm caused him discomfort and slowed him down;
>
> (b) only about 35% of his productive time was spent at the computer keyboard;

(c) his work was, essentially, the collection of outstanding debt owed to [text deleted];

(d) there were three collection letters for each file, but these were standard, form letters that could be retrieved from the computer's memory in a matter of seconds; [the Appellant] had merely to insert the name and address of the debtor, together with the salutation.

If his collision with the other vehicle resulted in an injury serious enough to impede even the work briefly described above (which, itself, only constituted about 35% of his total work-load), then one has to note that, after seeing [Appellant's ER doctor] at the [hospital] on the day of the accident, he waited about ten weeks before consulting [Appellant's doctor], all during a time when his job was in jeopardy due to poor performance.

The appellant told the Commission that he has not worked since 1994 and has collected his maximum unemployment benefits. While he acknowledges that he is not totally disabled, he offers no explanation of why he is not gainfully employed at some other occupation except to say, in his words, that he 'has numbness in 3 fingers of his left hand' and 'can't lift with that hand because it is weak'. He does not seem to have sought medical or other advice for this condition which, if it exists, is not in our view related to his MVA.

[The Appellant] appealed to MPIC's Internal Review Officer from a decision of that corporation dated December 7, 1995, which denied his claim for Income Replacement Indemnity (IRI) His Internal Review took place on November 20, 1997, when it was learned that there was a physiotherapist's examination performed by [Appellant's physiotherapist] of [text deleted], at the request of [Appellant's doctor]. Therefore, the Internal Review officer requested a report from [Appellant's physiotherapist].

MPIC received [Appellant's physiotherapist's] report and assessment bearing date April 27, 1998. The initial assessment was made on January 3rd, 1995, (just over 3 months after the MVA) following [Appellant's doctor's] diagnosis of "Left elbow contusion with epicondylitis". [Appellant's physiotherapist] had found, on his examination, that the left elbow was sore but that there was no visible bruising.

The appellant told [Appellant's physiotherapist] that the pain that he felt on the side of his left elbow was not constant but was sharp with movement. The pain, he said was aggravated by turning a door knob or lifting/twisting with the left hand, typing or after playing hockey. Relief was noted with rest. The appellant reported little improvement from the time of the MVA to the time of [Appellant's physiotherapist's] assessment.

[Appellant's physiotherapist's] report states there was no visible swelling nor bruising, that there was full active/ passive range of motion of the elbow and left wrist. Full passive wrist flexion with the elbow extended caused pain in common extensor tendon region on the lateral left forearm. Resisted tests revealed pain with resisted wrist radial deviation and extension as well as index and middle finger extension. Ligament stress tests were unremarkable. Palpation revealed tenderness at the common extensor tendon at the muscle-tendon junction on the right. Grip strength on the left averaged 37 lbs and on the right 51 lbs.

The impression of the appellant by [Appellant's physiotherapist] was that of a chronic lateral epicondylitis of the left elbow. Treatment was started consisting of education respecting the nature of the injury, whirlpool, ultrasound, acupuncture, stretch and strengthening program.

On February 10, 1995 [Appellant's physiotherapist] reports a decrease in tenderness at the common extensor tendon, an overall decrease in pain with resisted extension of the wrist and index and fingers on the left.

On February 24, 1995 [Appellant's physiotherapist] reports acupuncture was discontinued and joint mobilizations were added to the superior radio-humeral and radio-ulnohumeral complex. Transverse frictions to the common extensor tendon were also started as a specific area of tenderness remained.

By May 8, 1995 [Appellant's physiotherapist] reports that resisted radial deviation and ring finger extension were pain free but pain remained with wrist and middle finger extension. A Mill's manipulation was added to try to mobilize the scar in a more aggressive manner. Acupuncture was also started again May 29, 1995 to see if this would help reduce the residual pain. Complete relief was still not obtained so an elbow strap was prescribed which helped to reduce the sharp pain but the dull ache remained.

Treatment continued until on August 9, 1995, [Appellant's physiotherapist] reports that full resolution of subjective and objective complaints did not occur. A dull ache remained in the region of the common extensor tendon and some pain was still noted with resisted extension of the left wrist

and middle finger.

[Appellant's physiotherapist] was aware that the appellant alleged he was laid off from his job in November, 1994, because he was unable to perform all of his duties due to aggravation of his left elbow pain. [Appellant's physiotherapist] was unaware of any attempt by the appellant to return to his pre-accident duties and, therefore, could not predict whether the appellant would have been able to make a successful return to work.

THE LAW:

Section 81 of the Manitoba Public Insurance Corporation (the Act)

> **Entitlement to I.R.I.**
> **81(1)** a full time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
>
> (a) He or she is unable to continue the full time employment;

Regulation 37/94 - Section 8

> **Meaning of unable to hold employment;**
>
> A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The appellant fell on his right side; the injury that he says has not completely healed is to the lateral

side of the left elbow.

In the absence of [Appellant's ER doctor's] report and of a report from admitting Emergency at [hospital], there is no supportive evidence that such an injury is related to the MVA of September 4, 1994.

In the first documented medical exam from [Appellant's doctor] he refers to head and knee trauma that could be consistent with a fall off a bicycle onto a hard surface, but [Appellant's doctor] states these injuries had resolved themselves by the time of his examination of December 1st, 1994. The only injury under his consideration was the injury to the appellant's left elbow, for which he referred to [text deleted] a physiotherapist. [Appellant's physiotherapist's] initial impression, as noted above, is that the injury is that of a chronic lateral epicondylitis.

At the hearing the appellant stated he withheld information from his employer about his injury from the MVA because he was on probation and did not want to "rock the boat" with his employer. However, he offers no explanation as to why his alleged incapacity was not related to his injury adjuster at MPIC until after he received his termination notice from his employer dated November 10, 1994. There is evidence in the file that the appellant worked for his employer since 1989 and accepted a demotion to a Level 4 clerk in 1993. However, he continued to struggle to meet the requirements of his job until, on June 7, 1994, his employer sent him the ultimatum referred to above.

It has been 4 years since the MVA and this Commission understands the frustration expressed by the appellant about unexplained delays in getting his IRI claim processed and formally rejected and the rejection reviewed. Unfortunately, it is not within our mandate to investigate the cause of those delays, let alone award compensation because of them.

We note that [the Appellant's] first language is [text deleted] and we therefore provided him with the services of members of the Provincial Government's Translation Services Department although, in the event, those services proved to be unnecessary.

DISPOSITION

The appellant can only claim IRI from MPIC if he meets the condition of Section 8 of 37/94 of the regulation of the MPIC Act that he was rendered entirely or substantially unable to perform the essential duties of the employment that were performed by him at the time of the accident. We find, from the evidence before us, that [the Appellant] neither lost his employment nor was rendered unable to perform the essential duties of that employment by reason of his accident.

Dated at Winnipeg this 6th of November 1998

J. F. TAYLOR, Q.C.

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CHARLES T. BIRT, Q.C.

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LES F. COX