Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-99-60

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Ms Joan McKelvey;** **the Appellant, [text deleted], was represented by [Appellant's representative];**
HEARING DATE:	**January 7th, 2000**
ISSUE(S):	**Whether income replacement indemnity ('IRI') terminated prematurely.**
RELEVANT SECTIONS:	**Section 110(1) 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

[The Appellant's] motor vehicle accident occurred on February 17th, 1998, when, as one of a number of vehicles stationary at a stop sign, the car that he was driving was rear-ended by another vehicle and slammed into the one ahead of it. The impact of the collision appears to have had fairly serious consequences to [the Appellant's] vehicle - the resultant damage was estimated at $4,800.00 - the injuries sustained by [the Appellant] fall into three categories, only one of which continues to be relevant to this appeal. He sustained a Grade 2 Whiplash

Associated Disorder affecting his cervical spine, and the evidence indicates that this injury was resolved by the 12th of May 1998, at which point his physician, [text deleted], was making no further reference to that injury in his progress reports.

He also sustained a contusion to his right knee but that, also, appears to have been completely resolved by mid-May of 1998, since the last mention made of it in [the Appellant's] medical reports was a brief comment by [Appellant's doctor] on April 14th, 1998.

The injury upon which this appeal is based relates to [the Appellant's] right shoulder. The orthopaedic surgeon, [text deleted], to whom [Appellant's doctor] initially referred [the Appellant], felt that the Appellant might have sustained a torn rotator cuff, but an arthrogram demonstrated that a rotator cuff tear was not in evidence. [Appellant's orthopaedic specialist #1] commented that [the Appellant] continued to have symptoms with the forward elevation of his shoulder which, said [Appellant's orthopaedic specialist #1], were "related to the strain of the rotator cuff tendons as well as the muscles around his neck and the muscles connecting his scapula to his spine". He recommended gentle stretching exercises to be followed by gentle strengthening exercises once range of motion had improved. He also suggested anti-inflammatory medication.

[The Appellant] received income replacement indemnity throughout the period commencing one week after the date of his accident until and including November 19th, 1998, at which point MPIC discontinued those payments pursuant to the provisions of Section 110(1)(a) which reads as follows:

> Events that end entitlement to IRI
>
> 110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident.

[The Appellant] testified that he returned to his employment on a full-time basis on February 1st, 1999, and he seeks an order that MPIC pay him IRI from November 20th, 1998 to January 31st, 1999, both inclusive.

THE ISSUES:

The issues before this Commission are simply stated: first, was the condition giving rise to [the Appellant's] symptoms caused by his motor vehicle accident of February 17th, 1998? Secondly, if so, was he precluded by that condition from returning to his employment on November 20th, 1998?

We have no hesitation in concluding that the injury to [the Appellant's] shoulder was, in fact, a result of his motor vehicle accident. There are references in the file to a pre-existing, bilateral carpal tunnel syndrome for which surgery had been scheduled; there is a further, passing suggestion that the carpal tunnel syndrome might have given rise to the symptoms of which [the Appellant] complained involving his right shoulder. With deference, we can only comment that there is no persuasive evidence that [the Appellant's] carpal tunnel syndrome, while doubtless present, has any real relevance to the appeal now before us.

In order to determine whether the Appellant's condition precluded his return to work, we must first examine the nature of that work. From the Appellant's own testimony and from a report prepared by [text deleted], an occupational therapist employed by [text deleted], [the Appellant] is a customer support representative [text deleted]. His working hours are normally from 8 A.M. to 5 P.M. with a one hour lunch break and a fifteen minute break each morning and afternoon. His work is primarily sedentary, involving the use of a computer, laser printer, photocopier, fax machine and, of course, a telephone headset. He maintains files on customer characteristics, types service orders into the computer, responds to customer inquires, monitors the status of customers' work orders, identifying potential problem areas and taking corrective measures when needed. His work is quite stressful in that he has to work to strict deadlines, following the movements of [text deleted] transportation carrying dangerous commodities and ensuring, as best he can, that those commodities move on time and according to customer requirements. He works, for the most part, without supervision.

[Appellant's occupational therapist's] report concludes that [the Appellant] "has all the appropriate equipment to satisfy an effective return to work, based on the medical information provided within this report…..he should be able to return to work without any limitations provided he does not have any other medical limitations that may hinder an effective return to work".

The position advanced on behalf of [the Appellant], as we understand it, may be summarized this way:

(a) the Appellant is suffering pain and the pain results from the injuries he sustained in his motor vehicle accident;

(b) the pain keeps him awake at nights and his resultant lack of sleep impairs his ability reliably to perform the stressful duties of his employment;

(c) as a result, he was obliged to stay away from work until January 31st, 1999, by which time he felt capable of resuming full-time employment.

This reasoning is at odds with the argument advanced by [the Appellant] in the course of his own testimony - testimony which was consistent with what he had been telling his physician and his orthopaedic surgeons, as well as his adjuster, throughout the period when he was receiving IRI, namely: he needed to take so many Tylenol No. 3 tablets to alleviate his pain and enable him to obtain a good night's sleep that the cumulative effect of that drug made him a danger on the highway and a potential danger to customers of his employer.

[The Appellant] testified that the Tylenol No. 3 tablets were prescribed by [Appellant's doctor] and that he was told to take them "as required". He was at no time advised by any physician that he should restrict his driving by reason of his intake of medication. He testified that, initially, he was taking one or two tablets every six hours but that, by some time in November or December of 1998 he had, by design and after discussion with [text deleted], his second orthopaedic specialist, reduced his Tylenol intake to two per day, taken at bedtime. By early January of 1999, he said, he was able to abandon the use of Tylenol No. 3 altogether.

We have been provided with copies of correspondence from [Appellant's orthopaedic specialist

#2] and [Appellant's doctor], expressing the view that [the Appellant] was not able to return to his employment, but it is quite clear that each of them was expressing that view upon the basis of the Appellant's advice that the ingestion of narcotic drugs would automatically preclude his return to the workplace.

When we examine the actual amount of Tylenol No. 3 tablets that [the Appellant] was taking during the relevant time frame, it becomes fairly clear that the effect of those tablets upon his ability both to drive and to perform his work efficiently must surely have been minimal. It must be borne in mind that we are dealing, here, with quite a short period, namely from November 19th to January 31st - approximately ten weeks, of which two weeks constituted paid vacation. On October 15th, 1998, [Appellant's orthopaedic specialist #2], in a letter to [Appellant's doctor], says in part "He ([the Appellant]) reports that he is not allowed to take Tylenol 3 analgesics on the job, and therefore he has not returned to work". [Appellant's orthopaedic specialist #2] added that "…..it does not seem right that he should continuously remain off sedentary work as a result of pain only". Similarly, in a report to MPIC dated September 4th, 1998, [Appellant's doctor] commented that "He ([the Appellant]) can't work because Tylenol No. 3 isn't allowed on the job". The Appellant had given similar indications to his Case Manager at MPIC, [text deleted], as appears from a letter to [Appellant's doctor] from [Appellant's MPIC case manager] dated June 8th, 1998.

Let us look, then, at the actual quantity of Tylenols being ingested by [the Appellant], having in mind that not one of his caregivers has suggested that his functional capacity was materially impaired by pain, in the context of his work, and that any contra-indication has stemmed only

from the belief by his caregivers that he would not be allowed to return to work while continuing to take large quantities of Tylenol No. 3:

(a) a report dated September 22nd, 1998 and prepared by [text deleted], physiotherapist at the [text deleted] Clinic reads, in part, as follows:

> With regards to [the Appellant] returning to work it is my understanding that [text deleted] will not accommodate a return to work for individuals who are taking medication. At present [the Appellant] is requiring three Tylenol No. 3s per day for pain management and liability is a strong issue with his possible return to work;

(b) a letter to the Appellant from his Case Manager, dated October 27th, 1998, contains the comment that "when we spoke on October 9th, 1998 you advised me that, if it was not for your being prescribed two to three Tylenol No. 3s in the afternoon, you could return to work";

(c) on October 23rd, 1998, the Appellant's Case Manager was advised by [text deleted], Medical Officer for [text deleted], that the intent of [text deleted] drug policy was to prevent addiction and abuse and to deal with safety issues involving the operation of equipment. Given [the Appellant's] job description, [Appellant's employer's doctor] did not feel that his return to work would be precluded by his prescription for Tylenol No. 3;

(d) a letter from [Appellant's employer's doctor] addressed to [Appellant's MPIC case manager] on December 8th, 1998, explains that, while each case had to be evaluated individually of course, "In this instance, I can see no reason why [the Appellant's] continued use of this narcotic analgesic would impair his performance at work or pose a safety hazard. For these reasons, I would permit [the Appellant] to work while taking this prescription medication."

(e) a letter from [Appellant's doctor] to MPIC Case Manager dated December 22nd, 1998

reports, in part, that [the Appellant]

> was given Tylenol 3, 50 tablets, on February 19th, 1998, initially using them up to four times a day. He was given a further 50 on March 13th, 1998. Because of his workplace's policy of not taking him back even on minimal medications containing narcotics, we tried a number of anti-inflammatories…..he was not able to tolerate any of these because of gastrointestinal upset. Because of this, June 19th, 1998 we went back to Tylenol 3.
>
> At present he is using only about two Tylenol No. 3 at bedtime. As far as his return to work is concerned, I agree that he could return to a non-physical job, as does [Appellant's orthopaedic specialist #2]. However, his own work physician, [text deleted], won't take him back as he is still requires (sic) some pain killers.

We know, from [Appellant's employer's doctor's] letter of December 8th, that this last statement by [Appellant's doctor] was based upon an erroneous belief in the policy of [the Appellant's] employer;

(f) consistent with the comments of [Appellant's doctor] and [Appellant's physiotherapist], in the context of the Appellant's consumption of Tylenol 3, we note that he obtained a renewal of his prescription for 100 tablets on October 28th, 1998, and a further renewal for another 100 tablets on December 18th. That amounts to the consumption of 100 tablets in 52 days, or approximately two tablets per diem which, [the Appellant] testified, he took at night time to enable him to obtain a good night's sleep;

(g) a letter from [Appellant's orthopaedic specialist #2] to [Appellant's MPIC case manager] on December 29th, 1998, makes the comment that [the Appellant] "reports that it is his shoulder that disables him from his work **at home**, and is the reason for his consumption of the Tylenol 3";

(h) meanwhile, [the Appellant] had been scheduled for surgery for his carpal tunnel syndrome in November, 1998, but that surgery was postponed. [Appellant's orthopaedic specialist #2's] letter to [Appellant's MPIC case manager] of December 3rd, 1998 says, in

part "He remains away from his job with his unresolved carpal tunnel syndrome, and symptoms even away from his work, by day and by night". We note, parenthetically, that [the Appellant] would not allow any of the medical documentation related to his carpal tunnel syndrome to be released to MPIC's Internal Review Officer, and that although he had agreed with [text deleted] occupational therapist to try working at his work station for four hours on November 25th, 1998, meeting the occupational therapist there, he did not attend nor did he contact the therapist to explain his absence. The evidence seems to indicate that [Appellant's employer's doctor] was then awaiting a further report from [Appellant's orthopaedic specialist #2] before deciding that [the Appellant] was fit for duty, and [Appellant's orthopaedic specialist #2] was still operating under the mistaken belief that the Appellant's intake of Tylenol No. 3 precluded his return to work;

(i) a further report from [Appellant's employer's doctor] dated April 5th, 1999 says, in part:

> The work [the Appellant] performs would not be jeopardized by use of narcotics……. [the Appellant] [text deleted] and must commute 150 kilometers per day to attend work. Use of narcotics and driving long distance does pose a potential safety hazard.

What becomes crystal clear from the foregoing, as well as from a careful reading of the remainder of [the Appellant's] file and from close attention to his own, oral testimony is that by the time his IRI was discontinued by the insurer, [the Appellant's] intake of Tylenol No. 3 tablets was down to a maximum of two per day, almost always taken at night. Not only is it unrealistic to suggest that such a comparatively small ingestion of that narcotic drug would have had an adverse effect upon [the Appellant's] functional capacity at work, but it is almost equally unrealistic to suggest that such a nominal quantity might pose a safety hazard to [the Appellant] on the highway.

In this latter context, the Appellant seems to have persuaded [Appellant's employer's doctor] that he must commute 150 kilometers per day to attend his workplace. In his testimony before this Commission, [the Appellant] made the point that, during the period to which his appeal relates, while he had little difficulty in driving between his home and [text deleted] for physiotherapy (of which, incidentally, he received approximately 105 treatments), he could not so readily manage the much longer drive between [text deleted] and [text deleted]. The fact is that, according to maps prepared by the Government of Manitoba, the distance between [text deleted] and [text deleted] is 38 kilometers while that between [text deleted] and [text deleted] is 46 kilometers - an additional 8 kilometers.

DISPOSITION:

In light of the foregoing, and while we do not suggest that [the Appellant] was free from pain during the period from November 19th, 1998 to January 31st, 1999, nor even that he was free from discomfort by the time he returned to work on February 1st, 1999, we are not convinced that, on a reasonable balance of probabilities, he was prevented from returning to work either by the pain or by the intake of Tylenol No. 3 tablets upon which so much of the medical evidence seems to be based. It follows that [the Appellant's] appeal must be dismissed.

Dated at Winnipeg this 13th day of January, 2000.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED