Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [text deleted]
AICAC File No.: AC-96-72

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Keith Addison** **the Appellant, represented by [Appellant's representative]**
HEARING DATE:	**April 8th, 1997**
ISSUE(S):	**Termination of I.R.I.; whether Appellant fit to return to work and,** **if not, whether continuing impairment caused by MVA.**
RELEVANT SECTIONS:	**Sections 81(1)(a) and 110(1)(a) of the MPIC Act - copies are annexed as Schedule hereto.**

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], married with two adult children, was [text deleted] years of age when, in March of 1996, he was involved in two separate motor vehicle accidents that took place on the 18th and 28th respectively of that month. He had been employed for about thirty-five

years, and was still employed at the time of his accidents, as a health care aid worker, the most recent five years of that employment having been spent at [text deleted]. His occupation entailed working in the Geriatric Ward and, in cooperation with two other health care aid workers, looking after about seventy-five elderly patients - waking up, washing, dressing and helping to feed many of them, taking some of them to the toilet, bathing or assisting with their baths, getting them ready for lunch, helping to feed them their lunches, et cetera. His work was primarily of a physical nature and, not infrequently, the demands upon his musculoskeletal system would be quite heavy.

There is no evidence of any pre-accident impairment or disability. The Appellant testified that he had never had any disabling pain prior to the accident now under review.

In each of those accidents [the Appellant's] vehicle was struck from behind by another vehicle. After the first accident, although suffering from some discomfort in his neck and upper back, [the Appellant] returned to work for a couple of days but, as that initial discomfort developed into real pain, he consulted [Appellant's doctor], who prescribed naproxen, myoflex cream and the use of a cervical collar. [Appellant's doctor] diagnosed a Class 2 whiplash associated disorder and recommended that [the Appellant] take some time off work.

Before his initial injuries had healed sufficiently to allow a return to work, [the Appellant] was involved in his second accident, on March 28th of 1996. He continued, on a fairly regular basis, to consult [Appellant's doctor], since his second accident had obviously exacerbated the injury resulting from the first one. [Appellant's doctor's] diagnosis and prescribed treatment remained much the same - anti-inflammatory, analgesic drug, the use of a cervical collar, time off

work and regular monitoring of progress.

[The Appellant] had also been referred by his staff adjuster at MPIC, [text deleted], to the [text deleted], where a musculoskeletal assessment was conducted on April 25th, 1996 by [text deleted], a physiotherapy consultant. After a detailed and careful examination of the claimant, [Appellant's physiotherapist] concurred in the earlier conclusion of [Appellant's doctor] that [the Appellant] had sustained a second grade of whiplash associated disorder, "musculo-ligamentous in nature with no evidence of neurological involvement". His recommendation was that [the Appellant] would benefit from a short course (about three sessions would suffice, he thought) of physiotherapy, with the emphasis on education and on a home program designed to maintain the flexibility of the cervical musculature. [Appellant's physiotherapist] also recommended, as part of that course, education respecting the stretching of the upper fibres of trapezius and, possibly, isometric strengthening exercises. He suggested that the therapy be conducted at [text deleted], the place of [the Appellant's] employment and, commenting that [the Appellant] believed that he was recovering from his motor vehicle accidents, felt that a return to work at or about the end of May could reasonably be expected. [Appellant's physiotherapist] was at pains to emphasize that all of his recommendations should be reviewed by, and deemed to be subject to the approval of, [the Appellant's] physician, [text deleted].

[The Appellant] tried returning to work on or about May 29th of 1996 but says that, after a few hours, the pain in his neck and upper back became too acute and he was obliged to quit. He went back to see [Appellant's doctor] shortly thereafter, and [Appellant's doctor] referred him to [text deleted], an orthopaedic specialist with the [text deleted] Clinic.

[Appellant's orthopaedic specialist's] report of June 6th, 1996 reflects markedly restricted neck movements on [the Appellant's] part, much muscle spasm at the nape of the neck and pain at the extremes of neck motions as well as in the spinal area between the shoulder blades. X-rays taken at the [text deleted] Clinic, while showing no fracture nor any dislocation, did disclose marked degenerative changes in the cervical spine with slight narrowing at the disk C5-6 and marked narrowing at C6-7. [Appellant's orthopaedic specialist], while not suggesting that the neck collar should be dispensed with altogether, did advise [the Appellant] to remove the collar several times a day and suggested that he might be able to do some sedentary work but should do no heavy work for a further one month. (There were no sedentary duties of any consequence forming part of the Appellant's job description, thus rendering it impossible for [the Appellant] to follow that portion of [Appellant's orthopaedic specialist's] advice.) In essence, [Appellant's orthopaedic specialist's] report and recommendations were closely parallel to those of [Appellant's doctor], with the addition of the degenerative changes noted above, as disclosed by the X-rays.

It was not until about February 6th of 1997 that [the Appellant] felt well enough to return to work on a full-time basis, and then only out of economic necessity rather than because he was free from pain, he says. In the interim, he had been attending [Appellant's doctor] on a regular basis.

[The Appellant] received Income Replacement Indemnity from March 28th until July 6th, 1996 at which point MPIC, acting mainly upon the strength of [Appellant's orthopaedic

specialist's] letter, discontinued those payments. No further assessment of [the Appellant's] condition was made by or at the behest of M.P.I., other than the preparation of an internal memorandum by [text deleted], MPIC's in-house consultant, who merely perused the existing file and advised the insurer's Internal Review Officer that, contrary to that Officer's suggestion, he saw no purpose in referring the appellant back to [Appellant's orthopaedic specialist] for a final, confirmatory opinion. In other words, the only material presented to us reflecting any direct examination of [the Appellant], in order to determine whether he was, in fact, fit to return to work after [Appellant's orthopaedic specialist's] examination of June 6th, 1996, was a brief note from [Appellant's doctor] dated October 17th, 1996, reading as follows:

> " NAME: [the Appellant]
>
> *The above named has been under my care for neck strain/MVA since March 25/96. (First accident March 18/96) (2nd accident/March 28/96) continuously until to-day. He has not been working because of deterioration of his cervical spondylosis/neck strain since that time & unlikely to work soon because of the pain.*
>
> *17/10/96* *[Appellant's doctor]"*

With great respect to [Appellant's doctor], that information was not particularly helpful: it told us that the appellant was not likely to be going back to work, but it did not tell whether, in the physician's opinion, he was **able** to do so.

The background facts of this appeal give rise to two troublesome questions: firstly, to what extent have [the Appellant's] ongoing, subjective symptoms been caused by his automobile accidents, and to what extent have those symptoms, or their continuance, been the result of his pre-existing, degenerative, spinal condition? Secondly, had [the Appellant] followed the advice of [Appellant's physiotherapist], in which [Appellant's doctor] seems to have

concurred, is it probable that he would have been ready to return to work sooner than the 6th of February, 1997 and, if so, how much sooner? The answers to both those questions lie in the realm of speculation, yet speculate we must, for the following reasons:

(i.) while the description of the degree of spondylosis apparent from [the Appellant's] X-rays is, in our view, quite normal for a man of f[text deleted] years of age, particularly in light of his occupation, we are satisfied that it contributed to the duration, and probably to the intensity, of the discomfort triggered by his two automobile accidents in such quick succession. That discomfort, in turn, is an outward sign of both an impairment and a disability, neither of which had been manifest to the appellant before his accidents. We are left to estimate the extent by which the duration of his impairment was affected by his pre-existing condition;

(ii.) we do not know the extent to which [Appellant's physiotherapist] and [Appellant's doctor], between them, tried to ensure that [the Appellant] fully understood the nature of the treatment, training and education that he might expect to receive from a physiotherapist. He seems to have concluded that physiotherapy equals manipulation of the neck and upper spine whereas, in fact, this was not what his advisors had in mind at all. It was not made clear to us whether [the Appellant] was ever given a sufficiently full explanation of what was expected of him but, although English is not his mother tongue, his understanding of English seems to be very good. It follows, then, that although we are satisfied that the short course of physiotherapy training recommended by [Appellant's physiotherapist] would almost undoubtedly have helped to hasten the Appellant's return to work, we are left to estimate to what extent his recovery period would have been shortened by it.

It is important, in our view, to note that [Appellant's orthopaedic specialist], the only medical specialist who personally examined [the Appellant], never did say in his report of June 6th, 1996, that the Appellant would be able to resume his full duties on or about July 6th. What he did say was that [the Appellant] "might be able to do some sedentary work and....should do no heavy work for a further one month". While it appears that [Appellant's orthopaedic specialist], in responding to a telephoned enquiry from [text deleted] (MPIC's Medical Co-ordinator of its Claims Services Department) on June 17th, 1996, did say that [the Appellant] 'should return to his duties in an unrestricted fashion' after July 6th, that comment was made after a review of his original chart notes only, and not as a result of any further examination of the patient to verify the earlier prognosis. Similarly, [Appellant's physiotherapist's] report of April 30th, 1996, although suggesting a return to work "in approximately 4 weeks time", emphasized that his suggestions were all subject to the concurrence of the Appellant's attending physician. That [Appellant's physiotherapist's] forecast of the Appellant's rate of recovery was premature is borne out by the fact that [Appellant's orthopaedic specialist], over a month later, finds that the Appellant is still at least a further month away from readiness to resume his normal duties.

[The Appellant] appears to have been told by [Appellant's doctor] that his cervical problem "would never get better". While [Appellant's doctor] was undoubtedly referring to the mild osteo-arthritic condition disclosed by [Appellant's orthopaedic specialist's] report, the Appellant has interpreted this to mean that he is never going to be free from the pain resulting from his accident nor fully restored to his pre-accident physical condition. It is our view that this is another misinterpretation on [the Appellant's] part that has contributed to the delay in his

recovery: one who believes that he will never get better probably won't. It is not too late for the Appellant to seek the kinds of physiotherapeutic assistance and training recommended by [Appellant's physiotherapist] and apparently concurred in by [Appellant's doctor] and [text deleted] (MPIC's own consultant); he should do that promptly. His counsel will be able to give him a copy of [Appellant's physiotherapist's] letter of April 30th, 1996, addressed to [Appellant's MPIC adjuster], which [the Appellant] can, in turn, show to the physiotherapy department at [text deleted]. That course of training and education, followed by a faithful adherence to the prescribed program of exercises and accompanied by an explanation that there is, of necessity, almost bound to be a bearable but, initially at least, unpleasant level of discomfort associated with those exercises, will restore him to maximum potential a lot faster than the mere continuance of Tylenol 3 tablets which has hitherto been the case.

In the meantime, having returned to work on a full-time basis (although still apparently suffering) on February 6th, 1997, [the Appellant] seeks an order from this Commission requiring MPIC to restore his I.R.I. benefits for the period from July 6th, 1996, the date on which those benefits were terminated, until February 5th, the day before his return to work. For the reasons noted above, we are of the view that, even if the medical prognoses proved to be unduly optimistic, [the Appellant] could have returned to work sooner than he did. It is not unreasonable to assume, based on the reports of [Appellant's orthopaedic specialist] and [Appellant's doctor], that he could have started his physiotherapy consultations and exercise program at, say, the beginning of July, 1996, and have become able to return to work on a full-time basis by the end of September, at the latest.

DISPOSITION:

We therefore find the Appellant entitled to the re-instatement of his Income Replacement Indemnity of $678.03 bi-weekly, for the period commencing July 7th, 1996 up to and including September 30th, 1996, together with interest thereon at the prescribed rate.

Dated at Winnipeg this 10th day of April 1997.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED