Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-99-11

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., (Chairman)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**The Appellant, [text deleted] appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Dean Scaletta**
HEARING DATE:	**June 18th, 1999**
ISSUE(S):	**Partial incapacity - claim for reinstatement, and increase in quantum, of Income Replacement Indemnity ('IRI')**
RELEVANT SECTIONS:	**Sections 81(1), 81(2), 107, 109 and 117(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, [text deleted], carries on a mixed farming operation on some four thousand acres that he, his mother and his brother own between them. [The Appellant] and his brother have herds of up to ninety cattle each and, in addition, [the Appellant] farms grain, including some specialty crops.

On May 6th, 1995, [the Appellant] was involved in a motor vehicle accident in which he sustained a trans-scaphoid fracture and a lunate dislocation, accompanied by median nerve numbness. He underwent surgery on May 10th, 1995, followed by extensive physiotherapy. His surgeon at that time was [Appellant's orthopedic surgeon #1].

[The Appellant] started to receive Income Replacement Indemnity of about $1,488 per month, from the 7th day following his accident.

[Appellant's orthopedic surgeon #1] departed and [Appellant's orthopedic surgeon #2] assumed conduct of [the Appellant's] treatment. [Appellant's orthopedic surgeon #2] performed a second surgery on [the Appellant's] hand on December 17, 1996, since x-rays had revealed a non-union of the right scaphoid which resulted in the need for bone grafting surgery.

Initial reports following that second surgery seemed to indicate that it had been successful since a solid union of the scaphoid bone appeared to have taken place and, although full recovery had not been realized by April 8th, 1997, [Appellant's orthopedic surgeon #2] anticipated no long term residual effects. It should be noted, here, that [the Appellant's] physiotherapist had emphasized that the high demand strength and motion loads placed upon [the Appellant's] wrist by his occupation should not be lost sight of. By May 6th, 1997, [the Appellant] seemed able to demonstrate a wrist-strength in his right wrist equal to about 75% of the strength of his left wrist. He was still experiencing right wrist pain at the extremes of movement which, [Appellant's orthopedic surgeon #2] felt, was due to the presence of scar tissue. [Appellant's orthopedic surgeon #2] indicated a

belief that [the Appellant] would be capable of resuming his farming duties on or about August 13th, 1997. That opinion resulted in a decision from [the Appellant's] adjuster at MPIC, terminating his Income Replacement Indemnity as of August 13th of that year. By that point, [the Appellant's] IRI benefits had already been reduced by 50%, based upon earlier reports of [the Appellant's] apparent partial recovery.

On September 5th, 1997, [the Appellant] attended at the office of [Appellant's doctor] at the [text deleted] Medical Centre in [text deleted], Manitoba. [Appellant's doctor] arranged for new x-rays which clearly showed "an old ununited scaphoid fracture. The scapho-lunate joint is widened and unchanged. Degenerative changes are present at the radiocarpal joint, and have progressed from before."

In response to [Appellant's doctor's] letter of September 16th, [Appellant's orthopedic surgeon #2] responded on October 6th to indicate that he would be pleased to re-examine [the Appellant] if requested. It was not until April 9th, 1998 that such a re-examination actually occurred and, as a result of it, [Appellant's orthopedic surgeon #2] reported on April 14th, 1998 that the new x-ray showed "bone resorption at the sight of the previous bone graft in his right scaphoid and the recurrence of his non-union." [Appellant's orthopedic surgeon #2] added that [the Appellant] had been offered revision surgery but "is uncertain whether he wishes to proceed. At the present time, he continues to work." A reluctance on [the Appellant's] part would not have been surprising, given the apparent failures of the first two surgical interventions.

In subsequent discussion and correspondence between [Appellant's orthopedic surgeon #2] and [text deleted], a rehabilitation consultant whose services were retained by MPIC for [the Appellant's] benefit, it appears that [Appellant's orthopedic surgeon #2] confirmed [the Appellant's] ongoing symptoms of pain, the diagnosis of non-union of his right scaphoid and the recommendation of further surgery with an anticipated success rate of 80 – 85%. A report from [Appellant's orthopedic surgeon #2] of April 29th, 1998 contains this comment:

> I have indicated to him that he could continue with his duties as a self-employed farmer using a splint when he needed it for pain control and that he is unlikely to cause his wrist further harm unless he suffers a major injury. The activities which he is unable to do would be those that are specifically limited by pain. I do not believe there are any other conditions not related to the motor vehicle accident that are impacting on the wrist.

A further report from [Appellant's orthopedic surgeon #2] dated June 9th, 1998 contains the following comments:

> It should be noted on the visit of June 8th, 1998 that he was having increased problems working. He has a decreased range of motion of his right wrist and grip strength on the right is 50% of the left.
>
> In my opinion, he is fit for light duties only. He is considering whether to undergo further surgery to his wrist and therefore he will remain fit for light duties only until further notice or until he decides to undergo a further surgical procedure on his wrist.

MPIC also retained the service of [text deleted], an occupational therapist, who attended at the appellant's home on June 19th to conduct a functional capacity evaluation. Somewhat surprisingly, [Appellant's occupational therapist] reported his opinion that [the Appellant] was able to complete 74% of his duties. We say 'surprisingly', in light of [Appellant's orthopedic surgeon #2's] report of June 9th and a further opinion expressed by [text deleted], a specialist in reconstructive surgery at [text deleted], of January 7th, 1999 in which he says:

> Continuing ongoing problems with his right wrist necessitate restricting to light duties only – no more than 10 to 15 pounds with right upper limb.

We are constrained to say, with great respect to [Appellant's occupational therapist], that any real knowledge of the manifold duties of someone engaged in mixed farming seems to render [Appellant's occupational therapist's] methodology unrealistic. As MPIC Internal Review Officer, [text deleted], puts it,:…… "the nature of your mixed farming operation is that your ongoing disability has an effect on the overall operation which is not necessarily measurable by either the amount of monies you have expended for replacement labour or the financial bottom line" – nor, we might add, by ascribing a given percentage to each physical activity, totalling those percentages and concluding that the result allows a man to farm.

[MPIC's Internal Review Officers] went on, in his decision, to say that, in the normal course, MPIC would have reimbursed [the Appellant] for the cost of replacement help required. However, both [the Appellant] himself and [text deleted], the rehabilitation consultant of MPIC, had confirmed that the nature of the mixed farming operation and the fact that [the Appellant] had exhausted many of the avenues available to obtain help made that approach impractical. It was open to [MPIC's Internal Review Officers] to direct the insurer's claims team to determine an employment for [the Appellant] as at the second anniversary of his accident, pursuant to Section 107 of thre MPIC Act and taking into account the provisions of Section 109 of the Act. However, although [MPIC's Internal Review Officer's] decision does not specifically say so, he effectively decided (wisely, in our view) to treat [the Appellant's] situation as one falling within the purview of Section 117(1)(a) - that is to say, as a relapse within two years after the date when the appellant had last received IRI. - and therefore rescinded the adjuster's decision and directed that [the Appellant's] IRI benefits be reinstated from

September 5th, 1997 on a 50% basis. He adopted the 50% basis since that had been the effect of the previous decision of MPIC's adjuster on May 7th, 1997, from which [the Appellant] had not appealed. The September 5th, 1997 date had been adopted since that was when [the Appellant] had attended upon [Appellant's doctor]. We are of the view that the decision of [MPIC's Internal Review Officers] with respect to both the quantum and the commencement date of the reinstatement of IRI benefits makes those two matters proper subjects for disposition by this commission.

[The Appellant] testified that, when fully functional, he normally works a fourteen-hour day, doing most of his own repairs. There is a limited amount of machinery he can now operate but others that he cannot. For example, he is unable to weld any more, since his right hand is too weak and his left hand is not skilled enough. For that, and for other chores such as the spraying of speciality crops, he has to hire outside personnel with particular skills or do without the crop altogether. It is primarily in the context of the cattle farming that [the Appellant] experiences the greater measure of his difficulties and that, he testified was really the only aspect of his farm that made good money; it would normally occupy three quarters of his year.

[The Appellant] testified that [Appellant's reconstructive surgery specialist #1] had referred him to another specialist, [Appellant's reconstructive surgery specialist #2], who had advised him that in about five years he may need to undergo fusion of the bones surrounding the fracture, and then five years later a further fusion of the entire wrist. While we agree with [MPIC's Internal Review Officer's] decision to reinstate [the Appellant's] IRI, we find that a 25% reduction would have been more appropriate. We find that the reinstatement, subject to that reduction, should continue to the

present time and hereafter, pending such further assessment and recommendations as may be forthcoming from [Appellant's reconstructive surgery specialist #1] and [Appellant's reconstructive surgery specialist #2], for which latter purpose the matter is referred back to [the Appellant's] adjuster at MPIC.

Dated at Winnipeg this 22nd day of July, 1999.

_____

J. F. REEH TAYLOR,Q.C.

_____

CHARLES T. BIRT, Q.C.

_____

LILA GOODSPEED