Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-3

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Ms Joan McKelvey** **[Text deleted], the Appellant, appeared in person**
HEARING DATE:	**February 26th, 1996**
ISSUE(S):	**Is the Appellant entitled to full compensation for I.R.I. for the period from January 11th, 1995 to April 26th, 1995?**
RELEVANT SECTIONS:	**Sections 136(1) & 138 of the Act and Section 8 of Regulation 40/94 of the Manitoba Public Insurance Corporation Act ('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:

On September 29th, 1994 the Appellant, [text deleted], while driving an automobile on [text deleted], was involved in an accident with another automobile and sustained injuries to her neck, lower back and left knee.

The Appellant was seeing her chiropractor, [text deleted], prior to the accident and consulted him about her injuries. He prescribed a number of treatments and had her attend his office three times a week. He advised her and M.P.I.C. that she would have to have these treatments for a period of 6 to 18 months. [Appellant's chiropractor] examined the Appellant on October 30th, 1994 and advised her at that time not to lift, bend, walk or move in any way that would place stress on her back.

At the time of the accident the Appellant was employed as a part-time service attendant/bellhop at the [text deleted] and worked on average 32 hours a week with shifts from five to midnight on week days and weekends. She was paid $7.95 per hour plus tips. The work entailed loading luggage into and out of buses and automobiles and conveying guests' luggage and personal affects to and from their rooms. She also provided food services to the rooms. The bulk of her job required bending and lifting of heavy objects.

The Appellant graduated from high school on [text deleted]. While there she carried a full academic load, was involved a full athletic program after school and worked out in a gym. Often she had to work at night on her school work to prepare assignments and study for exams. While doing all of this she was able to handle her part-time job at [text deleted] working shifts on week days from five to midnight and on the weekends.

The Appellant continued to work part-time for [text deleted] after graduation and often worked up to forty hours per week. Just prior to the accident she enrolled in a hairdressing

course at [text deleted] and it started on October 3rd, 1994. Classes were Monday to Friday from 9:00 A.M. to 4:30 P.M. and there was no homework nor any assignments after class. The course was approximately 10 months in length with first two being theory and this only required sitting in a class room. The next 6 months involved working and practising on mannequins or models and involved standing about one-half hour per day. The final two months were devoted to theory and did not require any standing.

The Appellant was able to attend her course notwithstanding the accident and visited her chiropractor after class. In mid-October she was able to resume limited shift work at [text deleted] duty only averaged two shifts per week. Her injuries and the resulting physical limitations prevented her from working her normal number of hours. During some shifts she would have to leave early as she was not able to carry on the physical work of a bell hop, despite the apparent willingness of her colleagues to help her. In recognition of the injuries limiting her ability to work, M.P.I.C. paid the Appellant Income Replacement Indemnity ('I.R.I.') of $509.76 bi-weekly up to December 17th, 1994. For any time worked at [text deleted] then her I.R.I. was reduced by the amount of the income earned. In mid-December she became ill with pneumonia and was not able to return to work until January 9th, 1995.

During all of this the Appellant was seeing [Appellant's chiropractor] three times a week from shortly after the auto accident until June, 1995.

THE LAW:

During the month of January 1995, the Appellant worked one full shift and one partial shift, with her last day of work being the 10th. [Text deleted] could not accept the Appellant working only two shifts per week, on average, as they need the services of a full-time bellhop. The employer had hired two additional staff in January and advised the Appellant that she would have to work five full shifts in a row if she wished to retain her job. The Appellant advised the management of [text deleted] that she could not work this type of schedule, with the result that she was officially terminated on February 23rd, 1995.

On hearing the evidence of the Appellant and reading the file material of this case we are of the opinion that she was unable to work her normal hours (i.e. 32 hours per week) at [text deleted] because of the injuries she sustained in the auto accident on September 29th, 1994. Her employer confirmed in writing on June 26th, 1995, that

> "in the position of Service Express Attendant, an employee is required to be flexible and available for scheduled shifts. [The Appellant] was unable to fulfill this basic requirement. .....Due to her inability to work required shifts, her employment was terminated effective 2/23/95".

[Appellant's chiropractor], in his medical report dated March 15th, states that;

> "Presently, I believe she would be capable of performing many of her work related activities, however, perhaps not for the full extent of and eight hour shift and barring any heavy lifting or prolonged moderate lifting. In my opinion, [the

> Appellant] would likely be capable of part-time work with respect to her pre-existing employment."

The Appellant was not able to work a normal number of full shifts as the majority of her work involved heavy lifting and bending. She lost her job as a result of the limitations arising out of the automobile accident.

The Appellant testified that her physical well-being had returned to normal by April 26th, 1995 and we are prepared to accept this date as the termination date of her I.R.I. payments. M.P.I.C.'s initial decision, based in large measure upon an ambivalent report from [the Appellant's] chiropractor, [Appellant's chiropractor], dated March 15th, 1995, was to terminate her I.R.I. benefits as of December 17th, 1994. [The Appellant] appealed that decision to the Acting Internal Review Officer of the insurer, who, while agreeing that she had established an entitlement to I.R.I. for the period from January 11th to April 26th, inclusive, felt that she would, if working at [text deleted], have missed 3 shifts bi-weekly during the first 5 weeks of that period, 2 shifts bi-weekly during the next 5 weeks, and 1 shift bi-weekly during the remaining five weeks. He therefore decided to reduce her total I.R.I. by the estimated value of those hypothetically missed shifts. We do not agree.

In our view, [the Appellant] was unable to meet her employer's reasonable job requirements and, therefore, lost that job as a direct result of physical limitations created by her accident. She should therefore receive full I.R.I. in the amount of $509.76 bi-weekly for the 15-week period from January 11th to April 26th, 1995, less the funds already advanced to the

Appellant for that same period.

There are two other points that were raised during the hearing that deserve comment. The first concerned the medical reports provided by [Appellant's chiropractor] dated March 15th and May 25th, 1995. They were at best unhelpful in attempting to assess the nature of the Appellant's state of health, ability to carry out her job and rate of recovery. In the March report we are advised that she can return to work on a limited basis but should not work full eight hour shifts and should not do any heavy lifting or prolonged moderate lifting. What else does a bellhop do? In his May report he advises that her disability ended on 94/12/17 but that she still needs treatments three times a week and should continue for another six to twelve months. Why, if she has recovered, does she still need these number of treatments over the next year? Only [Appellant's chiropractor] can answer these questions but luckily, the answers are not relevant to the findings in this proceeding.

We believe that M.P.I.C. acknowledged the shortcomings in [Appellant's chiropractor's] reports, and rightfully took what information they could to help the Appellant's case and also relied on information they received in communication with her in arriving at their decision.

The other issue raised was the applicability of Section 116 of the Act. We are of the opinion that this section does not apply in this case but, rather, that it only has application when the victim is working while receiving I.R.I. In this case the Appellant lost all of her income for

the period because she could not carry on her normal work due to injuries sustained in the auto accident.

DISPOSITION:

For the reasons stated above we vary the Review Officer's decision and award the Appellant I.R.I. of $509.76 bi-weekly for the period from January 11th to April 26th, 1995 less any payments already made to her for this period.

Dated at Winnipeg this 22nd day of March, 1996.

J.F. REEH TAYLOR, Q.C.

CHARLES BIRT, Q.C.

LILA GOODSPEED