Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-64

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mr. Les Cox**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Ms Joan McKelvey** **the Appellant, [text deleted], represented by [Appellant's representative]**
HEARING DATE:	**February 10th, 1997**
ISSUE(S):	**(i) Entitlement to continuing I.R.I. - proper time of termination;** **(ii) whether aptitude testing a prerequisite in determining suitable employment under Part 2 of the M.P.I.C. Act ('the Act');** **(iii) personal assistance expenses - interpretation of Section 131 of the Act.**
RELEVANT SECTIONS:	**Section 86(1), 106(1), 110(1)(c) and 131 of the Act; Section 8 of Regulation 37/94**

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, [the Appellant], is [text deleted] years of age, married, with [text deleted] adult children. On August 21st, 1994 [the Appellant] was involved in an automobile

accident in which she sustained several injuries, of which the only one that is now relevant to her appeal is a fracture of the mid-shaft of the right third metacarpal - that is to say, a fracture of the middle bone on the third finger of her right hand. Following the accident, her hand was placed in a cast but, when the cast was removed, it was found that the fracture was displaced. As a result, [text deleted], a specialist in plastic and reconstructive surgery (particularly in surgery of the hand), to whom [the Appellant] was referred, gave the insurer his opinion that [the Appellant] had sustained a severe disability, associated with mal-union of the fracture and reflex sympathetic dystrophy, which had severely affected her dexterity.

We note, here, that 'sympathetic reflex dystrophy' is, technically speaking, described as 'diffuse superficial and deep burning pain in an extremity associated with vasomotor disturbances, trophic changes, and limitation or immobility of joints as a result of some local injury' (see Stedman's Medical Dictionary, 25th edition, 1990, at page 482). [Appellant's hand surgeon] describes it as 'a dysfunctional response of the autonomic nervous system to a hand injury, and can be very difficult to treat'. In consequence, [the Appellant] is unable to form her right hand into a fist, finds it difficult, if not impossible, to separate her middle finger from her forefinger on the right hand, experiences numbness and tingling sensation across the back of the hand and a resultant lessening of dexterity in that hand. For example, [the Appellant] testified that she has trouble vacuuming her home, since it is difficult for her to move heavy furniture; she says that she cannot easily clean windows, cannot cut or chop with her right hand, cannot scrub her head when washing her hair, since only two fingers on her right hand are independently usable, and cannot readily dig in her garden or pull up weeds.

[The Appellant] has been receiving help from her daughter, [text deleted], who is a trained and qualified hair stylist. [Appellant's daughter] was receiving about $850.00 per month while her mother's hand was still in a cast; that amount tapered off to $300.00 per month by December of 1995, as [the Appellant] became less dependent upon others. [Appellant's daughter] testified that she still helps [the Appellant] from time to time, helping her to cut meat, fill pots, vacuuming occasionally and helping to wash her hair. Prior to her mother's accident, [Appellant's daughter] would help out on the home front with meals, laundry, housekeeping and the like from time to time although not, she says, to the same extent as now appears to be necessary.

For some time prior to the accident, [the Appellant] and her daughter, [text deleted], had been planning to set up a hairstylist salon together; [Appellant's daughter] would be running it with [the Appellant] acting as her assistant.

[The Appellant] further testified that she had no medical problems prior to her accident; the only medication that she has been taking since the accident has been the occasional Tylenol tablet for pain. Her evidence was that she is now able to do light housekeeping, feed her birds, water her plants and make beds. She drives in the summertime occasionally but is scared of driving in the winter - she does not feel that she can control the car in light of the problems experienced with her right hand.

We have carefully examined the written evidence of [Appellant's doctor #1], who examined [the Appellant] immediately after her accident and who applied the cast; the evidence of

[Appellant's doctor #2], of [Appellant's doctor #3], of [Appellant's hand surgeon] (to whom [the Appellant] was referred by [Appellant's doctor #1]), and of [Appellant's doctor #4] of the [text deleted]. We have also given careful consideration to a report from [text deleted], medical consultant with the Claims Services Department of M.P.I.C., bearing date July 23rd, 1996, and to correspondence passing between M.P.I.C. and [Appellant's doctor #5].

Finally, we were given a copy of a detailed report, bearing date October 23rd, 1996, prepared by [Appellant's occupational therapist], an Occupational Therapist with [rehab clinic] and, as well, we have had the benefit of hearing the oral testimony of [Appellant's occupational therapist].

We do not think it necessary to attempt an analysis, in these Reasons, of all of the medical and paramedical evidence referred to above. It is sufficient to note, here, that we are persuaded that, to use the language of [Appellant's occupational therapist's] report, [the Appellant's] 'current functional abilities correspond to a LIGHT level of work as described in the Canadian Classification and Dictionary of Occupations'. This would include, but is by no means limited to, work in the area of retail sales, which is the field of employment determined for [the Appellant] by M.P.I.C. under Section 86(1) of the Act. We find, also, that almost all domestic activities, including washing, preparing and eating meals (particularly with the use of certain simple devices recommended by [Appellant's occupational therapist]) and general housekeeping are within [the Appellant's] range of capability; the only assistance that she might occasionally need in order, for example, to move heavy furniture, should be no greater than had always been available to her from her husband or her daughters prior to her accident.

THE LAW:

We shall set out, on a separate scheduled annexed to these Reasons, those sections of the Act and Regulations that are relevant to the determination of [the Appellant's] appeal. Their effect may be summarized quite simply, this way: [the Appellant] was a non-earner, within the meaning of Section 85 of the Act, at the time of her accident; since she appeared to be disabled on the 181st day after her accident, the Corporation had an obligation, under Section 86(1), to determine for [the Appellant] a level of employment which, but for the accident, she would have been able to perform; M.P.I.C., using the National Occupation Classification Guide, determined that [the Appellant] would have been qualified for any one of a number of basic level occupations, had the accident not taken place (she had worked briefly as a cashier and had had some training as a hair stylist, but had not been gainfully employed for at least twenty years); using the minimum wage rate of $10,400.00 per annum, and after deducting nominal income tax, Canada pension plan and unemployment insurance contributions, M.P.I.C. started paying her 90% of the net balance, or $343.04 bi-weekly; as of January 13th, 1996, basing its decision on the provisions of Section 110(1)(c) of the Act and Section 8 of Regulation 37/94, the Corporation decided that [the Appellant] was no longer unable to hold the employment that had been determined for her, and therefore discontinued the benefits that she had been receiving since February 18th, 1995.

Given our findings on page 4 of these Reasons, the issue that remains is not so much *whether* the insurer had the right to terminate [the Appellant's] benefits, but *when* that right arose. [The Appellant's] evidence was that she had not even been made aware of the intent of the Corporation to terminate those benefits until, when a cheque that she had been expecting from

M.P.I.C. failed to materialize, she phoned her adjuster, only to be told that she would not be receiving any more funds. Although there is nothing in the Act that requires M.P.I.C. to give advance notice of termination, we are constrained to say that failure to do so smacks of inequity, rendering the victim unable to plan even such a simple thing as food purchasing.

In the event, we find that the insurer did not have sufficient, clear and persuasive evidence before it of [the Appellant's] functional capacity until about October 25th of 1996 which, we estimate, would be the date upon which M.P.I.C. would have received the final report of [Appellant's occupational therapist] of [rehab clinic]. True, it had received on January 8th of 1996 a letter from [Appellant's hand surgeon], indicating his tentative opinion that [the Appellant] "probably could work as a sales clerk", but [Appellant's hand surgeon] strongly recommended an objective assessment by [rehab clinic]. It is significant that M.P.I.C. itself, two months after discontinuing [the Appellant's] benefits, was still seeking an assessment from [rehab clinic]. The same point applies to the discontinuance of both the I.R.I. benefits and home care assistance.

There are two other subsidiary questions that we should touch upon. Firstly, [text deleted], counsel for [the Appellant], submitted that, when determining an occupation for [the Appellant] pursuant to Section 106(1), the Corporation has an obligation not only to assess her physical, functional capabilities but also to have aptitude tests and other assessments of intellectual ability conducted. While the section in question certainly makes reference to the "physical and intellectual abilities of the victim immediately before the accident", we do not interpret this as requiring the insurer, in every case, to retain the services of a professional psychologist in order to conduct formal aptitude tests. It is our view that, in many cases - that of [the Appellant] being one

such case - the insurer can gauge the intellectual capacities of a victim with reasonable accuracy by looking at all of the other required factors, namely the education, training and work experience of the victim, when trying to decide where the victim would fit into the workplace. [The Appellant] had a Grade [text deleted] education, had worked briefly as a cashier and as a junior hair stylist, but had been out of the marketplace for at least twenty years. We find that M.P.I.C. had not omitted to take any reasonable step when determining an occupation for her.

The other point to which we should refer is the suggestion that appears on M.P.I.C.'s file that [the Appellant] had disqualified herself from further benefits by refusing to undergo some further nerve conduction studies of her wrist. This argument was not advanced by counsel for M.P.I.C. and is only mentioned here for greater certainty. [The Appellant] did, at one point, indicate an unwillingness to undergo further testing, but she explained that to our satisfaction with her testimony that she had already been advised that her condition was irreversible and, in any event, she did submit to whatever additional tests were required of her by M.P.I.C.

DISPOSITION:

We therefore find that [the Appellant] is entitled to the payment of income replacement indemnity in the amount of $343.04 bi-weekly from January 14th, 1996 until October 25th, 1996, both inclusive, and to the payment of personal home care assistance calculated at the rate of $300.00 per month for the same period, pro-rated to the extent required. She will also be entitled to interest on the total of the two, foregoing amounts, pursuant to Section 163 of the Act.

Dated at Winnipeg this 14th day of February 1997.