Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-57

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mrs. Lila GoodspeedMr. F. Les Cox**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by** **Ms Joan McKelvey** **the Appellant, [text deleted], appeared in person**
HEARING DATE:	**October 8th, 1997**
ISSUE(S):	**(a) Whether victim entitled to cost of retraining;** **(b) Whether victim entitled to income replacement for time spent retraining; and** **(c) Whether victim entitled to income replacement for time taken for medical/chiropractic appointments.**
RELEVANT SECTIONS:	**Sections 138 and 152(2) of the MPIC Act and Sections 5 and 10(1)(e) of Regulation 40/94.**

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, [text deleted], was involved in a motor vehicle accident on the 25th of November 1994 when the vehicle that she was driving, [text deleted], was rear-ended by another car. At the time, [the Appellant] was employed as a desktop publisher by an in-house management company providing services to [text deleted]., and on a part-time basis was also teaching at.

Despite having sustained soft tissue injuries, in the form of a cervical thoracic sprain, with resultant pain in her neck and shoulders, [the Appellant] continued with her work but found it necessary to attend at the office of her chiropractor, [text deleted], nine times during December of 1994 and an average of 9.4 times per month throughout 1995. The frequency of her chiropractic treatments was reduced somewhat, to an average of 7 times per month throughout 1996. During 1997, those treatments have diminished to no more than once or twice per month, on what seems to be more of a maintenance basis. During the time that [the Appellant] was employed by [text deleted], she did her best to schedule her visits to [Appellant's chiropractor] toward the end of a day. Her evidence was that those visits usually took about two hours, including travelling time, for which she was not paid.

[The Appellant's] evidence was that the first six to twelve months constituted the worst period of her recovery, involving a great deal of pain and the restriction of many of her normal activities.

In the month of September of 1995 [the Appellant], together with all other employees of [text deleted], was asked to sign an employment contract requiring her to work seven hours a day for twenty-eight hours per week, that is to say, four days per week rather than the three days that she had been accustomed to. Although she was reluctant to take on that additional day of work, she signed the contract because, she testified, "I needed the job, as a single parent of two children, and had I not signed it I would have been let go". At that juncture, she was still teaching one day per week at [text deleted].

At some point shortly after her return from a brief vacation in the spring of 1996, [the Appellant] was fired from her position at [text deleted], upon the mistaken belief on the part of the President of the company that she had taken vacation time without permission. She was apparently rehired on the following day, when the true facts became known. However, being convinced that her employer was now looking for any available reason to terminate her employment, [the Appellant] gave notice of her intention to quit and did, in fact, quit her work at [text deleted] on or about June 28th, 1996.

Meanwhile, [the Appellant] had applied to [text deleted] for retraining, in order to obtain her teaching certificate - something that she had to have if she was to be allowed to teach more than twenty-seven days in any one year. She was accepted for that training on or about May 29th of 1996 and actually returned to school in September of that year, four days per week. Starting in October, she went back to teaching at [text deleted] for five nights per week under a six-month contract which terminated on April 26th of 1996. She returned to school in July of 1996, taking and passing the one course that she still needed and, at the time of the hearing of her appeal, was back working at [text deleted] on a full-time basis, five nights per week.

It should, perhaps, be noted here that the reason given by [the Appellant] both to her former employer and to [Appellant's chiropractor] for quitting her job was that the prolonged sitting and working at the computer caused her additional stress and pain, and that she anticipated having to take more time away from her work if she did not change occupations. This is not necessarily a contradiction of the reason that she gave to this Commission - namely, that she believed her employer was looking for a reason to fire her. The fact is that her employer had indeed expressed unhappiness with the amount of time that she had to take off work for chiropractic visits, and it is not unreasonable that, with increasing physical discomfort, she could foresee the possible

need for more absences from the workplace, an increasingly unhappy employer, and the termination of her job.

[The Appellant] seeks compensation for the time missed from work for appointments with [Appellant's chiropractor], compensation for the time that she had to spend, unpaid, while retraining, and the sum of $1,132.00 which was the cost of registering for her course at [text deleted].

It is not clear, from the material before us, whether the question of entitlement to the cost of the course at [text deleted] was ever raised before the Internal Review Officer but, since it does form an integral part of [the Appellant's] claim for compensation for her retraining program, we have elected to deal with it.

THE LAW:

Turning, firstly, to the question of [the Appellant's] entitlement to reimbursement for wages lost as a result of her visits to [Appellant's chiropractor], we are of the view that Section 5 of Regulation 40/94 is applicable. That section reads, in part, as follows:

> "5. Subject to Sections 6 to 9, the Corporation shall pay an expense incurred by a victim....for the purpose of receiving medical or paramedical care in the following circumstances:
>
> (a) when care is medically required and is dispensed in the province by a physician,....chiropractor, physiotherapist....or is prescribed by a physician;...."

That form of compensation, in our view, differs from income replacement

indemnity ('IRI'), in that it is applicable to situations wherein the claimant has been able to resume full-time employment but needs the occasional, brief absence for medical treatment or examination; IRI is intended to cover absences due to the victim's being unable to resume full-time employment. In this context, we refer to our decision of June 7th, 1995 in the appeal of [text deleted]. In the particular circumstances of that case, we denied the Appellant's claim for reimbursement of expenses, since none of [text deleted's] absences from work seemed to have been for medical visits. That is not the case here, and we are of the view that when a victim of an accident, losing hourly wages by reason of having to attend a physician or chiropractor, has made reasonable efforts to schedule those visits during his or her non-working hours, those lost wages become 'expenses' within the meaning of Section 5 of Regulation 40/94 quoted above.

In addition to the times that [the Appellant] had to take away from her work to attend at [Appellant's chiropractor's] office, she also testified that she missed about six days of work between the date of her motor vehicle accident and the end of 1996. It seems fairly clear that all six of those days occurred after the seventh day immediately following [the Appellant's] motor vehicle accident and would not, therefore, be affected by the provisions of Section 152(2) of the MPIC Act, which reads as follows:

> "Waiting period before first IRI payment
>
> 152(2) No income replacement indemnity shall be paid in respect of the first seven days after the date of the accident, except an income replacement indemnity payable under Subsection 117(3) (relapse after more than two years)."

In other words, the waiting period of seven days commences as of the date of the accident, not from the onset of disability, and [the Appellant's] entitlement to payment for those missed days is therefore established.

The Appellant's claim for the cost of her retraining is more problematic. Section 138 of the Act and Section 10(1)(e) of Regulation 40/94 seem relevant. Section 138 of the Act reads as follows:

"Corporation to assist in rehabilitation

138 Subject to the Regulations, the Corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market."

The relevant portions of Section 10(1) of Regulation 40/94 read as follows:

"Rehabilitation expenses

10(1) Where the Corporation considers it necessary or advisable for the rehabilitation of a victim, the Corporation may provide the victim with any one or more of the following:....

(e) funds for occupational, educational or vocational rehabilitation that is consistent with the victim's occupation before the accident and his or her skills and abilities after the accident, and that could return the victim as nearly as practicable to his or her condition before the accident or improve his or her earning capacity and level of independence."

Does [the Appellant] fall within the scope of the foregoing sections, sufficiently to justify our requiring MPIC to pay for her retraining?

[The Appellant] testifies that she did everything that she was advised to do, including attending upon [Appellant's doctor] at [text deleted], attending upon three different physiotherapists at that same location, attending upon [Appellant's chiropractor] with the frequency noted earlier in these Reasons, taking anti-inflammatory drugs, getting up from her computer to stretch and move about at regular intervals, all the while holding down two jobs and raising two small children. Prior to her motor vehicle accident, she had been able to hold those same jobs - albeit working three days per week for [text deleted] rather than the four days that were required of her from September of 1995 onwards - without any material, physical difficulty. With time, however, following her motor vehicle accident she started to experience hypertonia, i.e. extreme muscular tension, accompanied by severe headaches, some sporadic limitations of range of motion in cervical flexion, extension and rotation, low back pain and some tingling in her arms.

We used the word 'problematic' in relation to this aspect of [the Appellant's] claim, since it raises two questions that have no clear answers:

(a) Were the myofacial pain and the chronic pain syndrome reflected in her medical reports and the symptoms briefly described in the preceding paragraph caused by the motor vehicle accident, or were they, rather, the results of an extremely conscientious and hard-working woman pushing herself beyond the limits of which her system was capable?

(b) Was [the Appellant] obliged to quit her job by accident-related difficulties, or had she merely decided upon a career change, using her pain and anticipated absences as a rationale for quitting?

[Text deleted], Chiropractic Consultant to the Claims Services Department of MPIC, offers his professional opinion that, since [the Appellant] was able to perform her duties of desktop publishing for more than a year following her accident, she sustained no impairment nor

any permanent disability. Certainly, the available literature seems to indicate that a victim sustaining the forms of injury suffered by [the Appellant] should have been improving steadily and reaching a state of normalcy within six to eight weeks after her accident.

[MPIC's chiropractor] also suggests, wisely in our view, that "A well supervised or structured cervical thoracic stabilization program would be of benefit in helping her to reach maximum medical improvement. Such a structured stabilization program has not yet been undertaken. It would also appear to me that, prior to reaching maximum medical improvement, ergonomic intervention at her workplace would have been appropriate. To my knowledge, an ergonomic evaluation of her workplace has not been undertaken."

[MPIC's chiropractor] expresses the view, with which we concur, that "In the absence of the above noted interventions....all reasonable therapies have not been undertaken".

As we now know, [the Appellant] left her former employment before any such ergonomic intervention could be initiated, but we do not believe that any blame can be laid at the door of the Respondent insurer for that decision.

[Appellant's chiropractor] is clearly of the view that the problems from which [the Appellant] was suffering for the period from the date of her accident until early this year were, in fact, directly caused by her motor vehicle accident. [Appellant's doctor], a specialist at [text deleted], impliedly adopts the same view. We found [the Appellant] to be straight-forward and credible and we find, on a balance of probabilities, that the physical problems referred to above were caused by her motor vehicle accident, and were probably an underlying cause of her decision to leave the employ of [text deleted] and upgrade her training to a point at which she could

support herself as a teacher. But, at the same time, it is entirely probable that, had [the Appellant] remained off work for a period of three or four weeks following her accident, she would have been fully restored at least to the point at which she could reassume her earlier tasks indefinitely. Her employment contract would have allowed that without endangering her job. Unfortunately, the very fact that she is conscientious and anxious to give her work her maximum effort militated against her - a situation that we see not infrequently. Each such case must, of course, be decided upon its own facts and merits. In the present case, while we have no doubts as to the bona fides of [the Appellant], the fact is that she elected to change the direction of her career without any prior consultation with MPIC which, therefore, had no opportunity to offer the 'ergonomic intervention' to which [MPIC's chiropractor] refers.

We find that, while [the Appellant's] new career seems, fortunately, to have given her relief from her earlier problems in that she is now fully restored, the course at [text deleted] was not made necessary by her motor vehicle accident.

DISPOSITION:

MPIC will therefore pay [the Appellant] for the six full days that she missed from work, and reimburse her for the wages that she had to forego when attending at [Appellant's chiropractor's] office for chiropractic treatments.

The decision of MPIC's Internal Review Officer is therefore varied accordingly.

Dated at Winnipeg this 29th day of October 1997.

J. F. REEH TAYLOR, Q.C.

LILA GOODSPEED

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