Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-50

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C. Mr. F. Les Cox**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by** **Mr. Keith Addison** **the Appellant, [text deleted], represented by [Appellant's representative]**
HEARING DATE:	**September 18th, 1998**
ISSUE:	**1. Whether Appellant obliged to quit work due to mva-related injuries;** **2. Whether Appellant entitled to income replacement indemnity ('IRI') due to cessation of work.**
RELEVANT SECTIONS:	**Section 81(1), 81(2)(a), 110(1)(a) and 116(1) of the MPIC Act - copies of which are annexed 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 Appellant], a [text deleted] year old nursing attendant at the time, was involved in a motor vehicle accident on July 6th, 1994 at 6:40 in the morning when, as she was on her way to work as a passenger in her husband's car, their vehicle was struck by another vehicle that ran a red light. The [Appellant] vehicle would have required in excess of $10,000.00 of repairs, and was therefore

written off.

She sustained a soft tissue injury to her neck and left shoulder. Her physician, [text deleted], prescribed extra strength Tylenol and physiotherapy, the latter at a frequency of three times per week.

We should note, here, that [the Appellant] had been employed at the [text deleted] since November of 1972. She had an excellent attendance record, averaging no more than about four days per annum of sick time. Her work was physically very demanding and included what her employer refers to as "predominantly complete care" of nine or ten persons at all times, bathing them either by way of a bed bath or transporting them to shower or whirlpool, dressing, grooming and positioning residents in beds and wheelchairs, moving them from bed to wheelchair and doing this several times for each of her patients over each eight hour shift, with the patients weighing anywhere between 77 and 175 pounds.

The several reports from [Appellant's doctor] to MPIC reflect persistent left shoulder pain, aggravated at her workplace, a prescription for physiotherapy two to three times a week, plus extra strength Tylenol. [Appellant's doctor] referred [the Appellant] initially to [text deleted], an orthopedic specialist, from whom there appears to be no report of any kind on file. He also referred her to[text deleted], a specialist in rehabilitation medicine, on May 29th of 1995.

Meanwhile, [the Appellant], who had been receiving income replacement indemnity from MPIC after the seventh day following her accident, returned to work on September 7th, 1994, but soon encountered major difficulties in performing many of her duties. [Appellant's doctor]

recommended further physiotherapy and suggested that she should stay away from work for a number of weeks to give her shoulder and neck an chance to recover more completely. [The Appellant] was therefore away from work from October 12th to November 7th, both inclusive, of 1994, returning to work on November 8th.

[The Appellant's] discomfort and difficulties at work seem to have persisted and, as noted above, her family physician referred her to [Appellant's rehab specialist] in May of 1995. [Appellant's rehab specialist] suggested that she return to work for four hours a day for two weeks, then gradually increasing that work shift by one hour per week until she re-attained a full, eight hour day. [The Appellant], with the cooperation of her employer, followed that advice and regained full working status by July 17th of 1995. Meanwhile, she continued to attend physiotherapy, after an hiatus from the end of May to the end of August when, on the advice of her doctor, she resumed physiotherapy treatments. By May 20th, 1996, [the Appellant's] left shoulder and neck were continuing to give her pain and to impair her ability to do her job without assistance from her co-workers. [Appellant's rehab specialist] suggested that she reduce to four hours a day again. She continued with her physiotherapy, on [Appellant's rehab specialist's] advice; he also recommended acupuncture treatment.

By the end of July 1996, hoping that a complete break from work would aid her in full recovery, [the Appellant] took six weeks of unpaid vacation, from which she returned on September 9th, 1996; even that seems only to have been of marginal benefit, since she found that returning to her reduced work day of four hours still caused considerable pain and difficulty in lifting her patients. She testified that, on a couple of occasions, she had actually dropped a patient by reason of the pain

that she experienced when trying to lift them. Seeking the assistance of other workers was something that she could only do for a limited time, she testified; her co-workers were growing tired of having to assist her while still carrying out their own duties - a fact borne out by [the Appellant's] employer. [Appellant's rehab specialist's] report of July 16th, 1996 reflects subjective complaints of pain on the part of [the Appellant], with significant aggravation of that pain as a result of work beyond four hours per day. He added "On a balance of probabilities her regular work duties with their high demands for lifting are likely a significant factor in perpetuating and aggravating her current symptomatology that appeared to have onset with the motor vehicle accident of July 1994. I would not feel that any further physiotherapy would be of benefit. I have, however, referred her to [Appellant's pain management specialist] for some specific, directed treatment at the apparent myofascial pain involvement in the left shoulder girdle area."

[Appellant's pain management specialist] reported, on September 11th, 1996, after [the Appellant's] seventh attendance at his clinic, that she had returned to work that week after some eight weeks of vacation, but was complaining of increased symptoms in her left neck and shoulder. She was then only working four hours a day. [Appellant's pain management specialist] referred her to [text deleted], physiotherapist, to monitor and set up a home stretching program.

On November 13th, 1996 [the Appellant] wrote to [text deleted], the Director of Nursing at the [text deleted], as follows:

> Dear [Director of Nursing]:
>
> Due to circumstances well beyond my control, I find it very difficult to perform my duty as in the past. In fairness to myself, the residents and my co-workers, I have

> no alternative but to opt for early retirement (much to my regret). I am therefore giving you notice of my intention to retire effective November 28th, 1996. Will you please have all forms and documents necessary to complete this transition ready on or before that date?

As a result of that retirement, [the Appellant] was entitled to a cash payment of $8,509.00 as a retirement benefit under the collective agreement in force at the [text deleted], plus a very small pension from her employer's pension plan that had only been in force for a short time. She also elected to start receiving her Canada Pension Plan payments on a reduced basis at age [text deleted].

[The Appellant] explains that decision to take early retirement by pointing to the language of her retirement letter. She was finding it too painful to carry out her full duties, even for four hours a day; her employer could not find any work for her requiring less than four hours daily; her co-workers could not be called upon indefinitely to help her every time she needed to lift one of her patients; as well, when playing with her [text deleted] granddaughter she had dropped the child into her crib "a little too fast for my own peace of mind", due to her inability to control the muscles of her left shoulder adequately. [The Appellant] points out that her doctor had felt that further physiotherapy would be of little use. Since discontinuing that modality, she had been doing her stretching exercises at home, also using a stationary bicycle and taking the anti-depressant Amitriptyline.

[The Appellant] acknowledged that she had not consulted any of her physicians nor her adjuster before deciding to quit her job. She had intended working until reaching at least [text deleted] years of age but had simply felt that she could no longer cope with the demands of her job. She

had no other work lined up and therefore sought payment of income replacement indemnity from MPIC, upon the basis that her resultant unemployment was a direct result of her motor vehicle accident.

[The Appellant] advised [Appellant's pain management specialist] on November 22nd, 1996, and confirmed to her adjuster on November 25th that she would, indeed, be quitting work as of November 28th. [Appellant's pain management specialist] expressed surprise, since he felt that [the Appellant] had been making progress during recent months with treatment. He indicated that, had he been consulted by [the Appellant] before her decision to retire, he would have kept her at four hours per day and would have implemented other pain control measures such as medications, more frequent follow up with physiotherapy, et cetera, to see if she could manage. [Appellant's rehab specialist], also, felt that the proposed return to work schedule that had been provided by [Appellant's pain management specialist] had been an appropriate one and felt that a resolution of [the Appellant's] musculoskeletal problems would have occurred had she followed the directed treatment and exercises. The treatment to which both [Appellant's pain management specialist] and [Appellant's rehab specialist] refer was to keep [the Appellant] on a four-hour per day regimen of work, gradually increasing by one-half hour per day until she had become able to work on a full-time basis. But that, of course, begs the question whether she was, in fact, able to work effectively for even the four hours thus prescribed; her evidence was that she could not do so without assistance, that she was already doing her home stretching exercises and taking medication for her pain.

[Appellant's pain management specialist], in a letter of December 3rd to [the Appellant's]

adjuster, added a postscript to say that "I did not have a full (return to work) schedule planned for [the Appellant]. Based on the severity of her symptoms and difficulty with half time duties a reasonable plan would have been to increase her hours one-half hour every two weeks' that is full-time in eight weeks."

After considering [the Appellant's] case, MPIC decided, on December 16th, to continue to pay her income replacement indemnity "by way of top off under Section 116 during the period of what would have been her graduated return to work until the program suggested by [Appellant's pain management specialist] would have restored her to a full eight hour work day". This took her to March 8th of 1997, at which point MPIC terminated her income replacement.

Counsel for [the Appellant] submitted the arguments briefly referred to above, pointing out that, whether the word "retirement" was used or not, the simple fact was that [the Appellant], with the best will in the world, found herself unable to fulfill the requirements of her job and was obliged to quit. Her counsel further submitted - correctly, so far as we can tell from the file - that the medical opinions expressing surprise at her unilateral decision to quit work all seemed to be based upon the erroneous assumption that she could, in fact, tolerate a four-hour shift and that it was only when attempting to increase that number of hours that [the Appellant] found the situation intolerable. Her medical advisors and MPIC combine to say that, had they been consulted before she quit work, they would have tried some other regimen in order to restore her full use of her left shoulder. However, the fact is that she did advise both her doctors and MPIC between the date when she handed in her resignation and the date when that resignation was scheduled to take effect. In other words, MPIC and her caregivers did have ample opportunity in which to devise

other plans of action which, they subsequently said, they would have done had they known about her intention to retire ahead of time. It is our view that, since the [text deleted] had no work for [the Appellant] requiring less than four hours a day, and since she was unable to tolerate four hours per shift, any alternative plan devised by her caregivers would have required off-site treatment of some sort, such as a work hardening program with [rehab clinic]. There was nothing to prevent that being done even after she had quit work. [The Appellant] took a lengthy vacation in her home country, but began seeing [Appellant's pain management specialist] again in March of 1997 when, he reported

> She continued to have marked shortening of the supraspinatus and upper fibres of the trapezius on the left, with a lot of associated tenderness....She appears to be subjectively and objectively better with needling of the musculature of the left shoulder. However, she appears to be still in significant pain and distressed functionally because she cannot do much heavy work with her left shoulder.
> Although I had outlined a return to work schedule for [the Appellant], the return to work was contingent on her being able to tolerate activity without significant pain.

We view those comments, together with [the Appellant's] own testimony, as reasonable, objective evidence of her continuing, although certainly not permanent, disability, rendering the return to work program that had been outlined by [Appellant's pain management specialist] as impracticable; she was unable to meet the contingency that, as [Appellant's pain management specialist] says, was the condition precedent to her adoption of that return to work plan.

It is our view, therefore, that MPIC, upon learning that [the Appellant] had found it necessary to quit work for the reasons noted above, had an obligation, working in conjunction with. [Appellant's pain management specialist] and [Appellant's rehab specialist], to do the very things that MPIC says would have been done had the insurer and the caregivers been given prior notice of [the Appellant's] intention to quit. That is to say, a functional capacity assessment should have

been done and, depending upon the outcome of that assessment, either a referral to a work hardening program or, perhaps, some more suitable, alternative employment recommended. Taking into account the usual delays that are incurred in setting up such appointments, completing assessments and giving effect to either the retraining or the work hardening program that would probably have been recommended, we are of the view that by the end of April of 1997 [the Appellant] would have been either fully restored or, at least, engaged in a more suitable occupation.

Having said that, we must also say that [the Appellant], herself, had an obligation to take responsibility for her own rehabilitation. Shortly after her retirement from the [text deleted] she took an extended vacation, which she prefers to regard as a period of curative rest. Her evidence was that she had "considered" looking for child care work but, after her experience with her granddaughter, had thought better of that. She therefore considered caring for older children, in the four to six year old range who, perhaps, would need less lifting and would certainly be substantially lighter than the patients with whom she had had to deal at the nursing home. However, [the Appellant] does not seem to have translated that "considering" into any kind of action, since she readily acknowledged that she has not sought employment of any kind, even work for which she might well be qualified such as home care for individual clients (as opposed to total care of nine or ten patients every day), telemarketing or, indeed, work at a day care centre of the very kind for which she considered herself suitable and well equipped. We are of the view that it would be quite unreasonable for us to order MPIC to pay [the Appellant] a full income replacement from March 8th of 1997 to date and, indeed, beyond this date and for as long as she remains unemployed, which is the remedy that her appeal seems to be seeking.

DISPOSITION:

We find, therefore, that [the Appellant] was obliged to quit work on November 28th, 1996 by reason of the injuries sustained in her motor vehicle accident. We find, further, that had the insurer and the Appellant fulfilled their respective obligations, [the Appellant] would, on a reasonable balance of probabilities, have been restored to the work force by April 30th of 1997.

We therefore find that she is entitled to income replacement indemnity, based upon the wages that she would have been receiving from the [text deleted] had she been working full-time, from November 29th, 1996 to April 30th, 1997, both inclusive, less the income replacement monies that she did, in fact, receive to cover the period from November 29th, 1996 to March 8th, 1997. The net amount thus calculated will bear interest at the statutory rate from April 30th, 1997 to the date of actual payment.

Dated at Winnipeg this 5th day of October 1998.

_____ **J. F. REEH TAYLOR, Q.C.**

_____ **CHARLES T. BIRT, Q.C.**

_____ **F. LES COX**