Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-56

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mrs. Lila Goodspeed** **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:	**October 6th, 1998**
ISSUES:	**1. Whether Appellant entitled to income replacement indemnity ('IRI') during the first 180 post-accident days;** **2. What employment, if any, should have been determined for the Appellant following the first 180 days post-accident;** **3. Whether Appellant's benefits properly terminated for non- compliance.**
RELEVANT SECTIONS:	**Sections 70(1), 86(1), 106, 110(1)(c), 135 and 160 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] was injured in a motor vehicle accident in [text deleted] on November 7th, 1994.

The information on file indicates that [the Appellant] had stopped at a four-way stop intersection. She noticed another vehicle approaching from her right; it appeared to be slowing down and she thought that the driver would come to a complete stop. She proceeded forward into the intersection but the other vehicle did not stop. She was forced to swerve to the left and then to the right in order to avoid a collision but, as a result, her vehicle struck the curb. It is not clear in what way her vehicle was rendered unusable, but that appears to have been the case and the driver of the other car drove [the Appellant] home. She complained of 'neck whiplash and body whiplash', headaches, a sore right shoulder and spasms from her lower back to her upper neck of moderate severity.

On the day following her accident, [the Appellant] was examined by [Appellant's doctor #1], who diagnosed "myofascial back strain, greater on the right than on the left, together with paracervical and paralumbar muscle irritation". He recommended physiotherapy, along with the application of ice and muscle relaxants.

Prior to her accident, having worked for the [text deleted] for a number of years, [the Appellant], with her husband, had decided to move to Nova Scotia to establish a bed and breakfast business there on a farm that they had already purchased. Their plans were to move to Nova Scotia with all of their household belongings at the end of November, 1994, with a view to getting their bed and breakfast business up and running by May of 1995. That, in fact, is what [Appellant's husband] and [the Appellant] did. She attended [Appellant's doctor #1] again on November

23rd of 1994, when her condition appeared to be improving. She was prescribed some 282 MEPS, a preparation containing a muscle relaxant, Codeine and ASA, by way of additional pain control for her intended car trip to Nova Scotia. At that juncture, she was considered able to do light duties at home only and able to lift up to 20 pounds, but with no excessive sitting or bending. [Appellant's doctor #1] felt that her disability should come to an end by the end of December and foresaw no permanent impairment.

[The Appellant] consulted, or was referred to, several medical practitioners in Nova Scotia: her general practitioner, [text deleted], [text deleted], an orthopedic surgeon, and [Appellant's pain management specialist], of the [text deleted] Clinic at [hospital].

From all of the medical evidence on file, it remains difficult to ascertain just what aspects of [the Appellant's] problems are properly attributable to her motor vehicle accident. [Appellant's orthopedic surgeon] noted a slight limitation in [the Appellant's] cervical spine range of motion and a slight tenderness in her right trapezius muscle as well as in the upper thoracic region at T3-T4 levels. He found tenderness over the acromion, and positive impingement signs. He also found some tenderness along the ulnar nerve at [the Appellant's] right elbow, with pain radiating into her little finger. He describes her as having sustained an injury to her cervical spine at the time of the accident, with some evidence of nerve root irritation going down the right arm. He felt that this was consistent with a facet joint injury. [Appellant's orthopedic surgeon] also noted that [the Appellant] had a previous neck injury and he was unable to apportion her

current findings between the previous injury and the motor vehicle accident now under review.

[Appellant's pain management specialist] diagnosed a chronic cervical sprain and myofascial pain syndrome of the upper and posterior cervical regions. He recommended the use of a TENS unit, a non-steroidal anti-inflammatory agent and an exercise program with a physiotherapist. He also recommended tricyclic anti-depressant medicines.

[Appellant's doctor #2], who initially saw [the Appellant] on March 14th, 1995, diagnosed her then as having cervical strain and lumbar strain, for which she prescribed an anti-inflammatory medication, Tylenol No. 3 and physiotherapy. [Appellant's doctor #2] also arranged for [the Appellant] to be referred for X-rays. By August 11th of 1997, [Appellant's doctor #2] was reporting that [the Appellant] had continued to experience a chronic pain syndrome and, although she also indicates a diagnosis of fibromyalgia, the clinical evidence of that syndrome is lacking.

There seems to be no doubt that [the Appellant] did sustain a Grade II Whiplash Associated Disorder as a result of her motor vehicle accident. She also seems to be suffering from what is sometimes called chronic pain syndrome, although the underlying, physical signs that might be expected to account for her discomfort are not apparent. We shall return, later in these reasons, to the question of what, if anything, ought to be done to help restore [the Appellant] to her pre-accident condition, but first we need to deal with the question of whether she was entitled to any income replacement during the first 180 days following her accident.

Having decided that she needed some practical experience in business before leaving for Nova Scotia, [the Appellant] had volunteered to work at a restaurant in [Manitoba] where she was receiving training in several aspects of that business, including working as a cashier, receiving and stocking merchandise, 'customer service' and, in general, making herself useful there. She had not been gainfully employed for about four months immediately prior to her motor vehicle accident and we therefore find that she was a 'non-earner' within the meaning of Section 70(1) of the MPIC Act. That being the case, she is not entitled to income replacement indemnity during the first 180 days immediately following her accident, unless she is able to establish that, but for the accident, she would have been gainfully employed. From [the Appellant's] own evidence, it is clear that neither she nor her husband expected the bed and breakfast operation to generate income during that first 180 days.

Counsel for [the Appellant] submits that, by virtue of Section 135 of the Act, [the Appellant] should be entitled to reimbursement of expenses that she incurred to have performed by others the duties that she could not perform herself, up to a maximum of $500.00 per week. She provided MPIC with documentation supporting expenses of $5,587.76 and, in this context, we accept as valid the ruling of MPIC's Internal Review Officer bearing date January 8th, 1998 which reads, in part, as follows:

> .....While there was no expectation of any income from the bed and breakfast operation in the first 180 days, the [the Appellant and her husband] clearly hoped that it would eventually commence operations and show a profit. [the Appellant] did work in the operation during the 180-day period. I accept that her ability to

> do so was limited by (her) partial disability....IRI claims where the disability is only partial sometimes present problems. Section 116 cannot be applied because [the Appellant] had no income at all (and no reasonable expectation of having one in the period in question). In such situations the Corporation has (on occasion and as a matter of policy) paid replacement workers by making available an IRI determined pursuant to Section C but only to the extent required to pay for the work the claimant cannot manage by....herself. On this basis, the $5,587.76 claimed for replacement help should be paid to [the Appellant].

So far as we can determine, that latter sum, with appropriate interest, has in fact been paid to [the Appellant] and that, in our respectful view, is the proper disposition of that portion of the Appellant's claim.

Post-180 Day Entitlement

Section 86(1) of the Act requires the Corporation to determine an employment for a non-earner, as of the 181st day following the accident and, if the victim is unable, because of the accident, to hold that employment, he or she becomes entitled to an income replacement indemnity. Section 106 of the Act spells out the factors that the Corporation must take into account when determining that employment.

MPIC determined that the proper employment to be determined for [the Appellant] was the occupation in which she was, in fact, employed as of the 181st day. That is to say, the business of operating a bed and breakfast establishment. It is submitted, on [the Appellant's] behalf, that the nature of the employment for which she was best suited by education, training, work experience and physical and intellectual abilities was the work that she had been doing for the

[text deleted], which was essentially a secretarial position.

Although it seems clear from the evidence that [the Appellant] had indeed started working in the bed and breakfast operation before the expiry of that first 180 days, nevertheless a careful reading of Section 106 persuades us that, since she was a neophyte in that occupation but had been employed in senior secretarial positions with the [text deleted] from 1981 until June of 1994, it is the latter occupation that should have been determined for her. Unfortunately, however, the only evidence before us to indicate an inability on the part of [the Appellant] to perform that secretarial work is a letter from her family physician in [Nova Scotia], [Appellant's doctor #2], bearing date August 11th, 1997. [Appellant's doctor #2's] report, while expressing the view that [the Appellant] was at that date capable of only about 10% of the duties of an office clerk, really contains no objective evidence of an inability on the part of the Appellant to perform those duties as of the 181st day following her accident. A victim, classified as a non-earner at the time of a motor vehicle accident, is only entitled to start receiving IRI as of the 181st day thereafter if he or she is unable to fulfill the requirements of the employment determined for her under Section 86 and we are not satisfied, on a reasonable balance of probabilities, that [the Appellant] was, in fact, rendered unable to perform those clerical duties as a result of her accident. In order to qualify for IRI, the victim must be "unable to hold employment when a physical or mental injury that was caused by the accident renders the victim <u>entirely or substantially unable</u> to perform the essential duties of the employment". While it is possible to draw the conclusion from [Appellant's doctor #2's] report that [the Appellant] was disabled within the meaning of that

sentence at the time of [Appellant's doctor #2's] report, the required degree of disability is not borne out by the reports of [Appellant's doctor #1, orthopedic surgeon, and pain management specialist], nor by [MPIC's doctor's] review of the medical information on file.

Was the termination of benefits as of September 30th, 1996 justified?

By letter of September 24th, 1996, MPIC notified [the Appellant] that, as at the end of that month, the Corporation would no longer pay for any further physiotherapy or related expenses. The Corporation based this decision upon Subsections 160(e), (f) and (g) of the MPIC Act.

So far as we can determine, MPIC paid for all of the physiotherapy received by [the Appellant] from November 1994 until the end of 1995. In addition, MPIC reimbursed her for the costs of her prescription medication. Her attendances for physiotherapy were far from regular during that time frame - for example, the physiotherapist's progress note of July 7th indicates that "[The Appellant] has just returned to resume treatments after an absence of three months". She initially had five treatments from March 20th to March 31st, 1995. However, having returned to physiotherapy, the Appellant seems to have attended with some regularity until mid-December of 1995; MPIC paid for her travel expenses by taxi as well as for her physiotherapy.

By February 5th, 1996 the physiotherapy clinic that she had been attending concluded that her clinical findings and functional status had basically remained unchanged for the preceding six weeks or so. They added "[The Appellant] has been unable to commit more time in our clinical

environment in order to establish a monitored work conditioning program. Since a plateau has obviously been reached, she is currently discharged from active treatment until such time as she is able to attend on a daily basis for a four-to-eight-week work conditioning program within the clinic."

MPIC therefore retained the services of [rehab clinic]. [Text deleted], an occupational therapist from that clinic, attended at [the Appellant's] home on July 23rd, 1996. [Appellant's occupational therapist] recommended that [the Appellant] participate in an updated functional evaluation with a follow-up treatment program addressing both muscular and cardiovascular conditioning, pain control and job simulation tasks. She further recommended that this would best be performed on a daily basis, up to four hours or more per session. In light of the fact that [the Appellant] expressed concerns over her inability to be of help to her husband if she had to be away on the work hardening program on a daily basis, [Appellant's occupational therapist] also recommended that help be hired for [Appellant's husband] during the duration of the work hardening program.

[Appellant's occupational therapist] had further discussions with [the Appellant], whose reluctance to participate in a functional evaluation continued. [The Appellant] said she would be contacting her lawyer for further advice. Not having heard from [the Appellant], [Appellant's occupational therapist] made further efforts to contact her but it was not until September 5th, 1995, that they were finally able to make contact. [The Appellant] apparently wanted to return to physiotherapy for hourly sessions two or three times a week, rather than

participate in a functional evaluation. Contrary to the advice given her by [Appellant's occupational therapist], [the Appellant] seemed to have convinced herself that she would need a course of regular physiotherapy before being able to participate in a functional evaluation and a subsequent reconditioning program.

On January 5th, 1996 [the Appellant's] adjuster called her and advised her that MPIC was prepared to place her in a comprehensive four to six week program with intensive sessions to build up her physical capacity and to educate her with respect to limitations on her work around the bed and breakfast establishment. The program would consist of four to five hour sessions, five times per week, for six weeks. She was also advised that the Corporation would pay for a replacement worker for her during her absence, as well as her travel expenses.

[The Appellant] apparently responded that she would require three persons to replace her while attending physiotherapy sessions - a farm labourer, a housekeeper and a bookkeeper/secretary. We note, in parenthesis, that this latter statement is pretty good evidence of the fact that [the Appellant] was not as disabled as we are asked to believe, if she needs to be replaced by three different people. [The Appellant] then asked whether MPIC would simply pay her the equivalent in cash while she continued to attend normal physiotherapy sessions. That suggestion was not acceptable to MPIC and, as a result, [the Appellant] declined to attend the comprehensive program that had been recommended for her. In August of 1996, [the Appellant] advised her physiotherapy clinic that "she couldn't see herself traveling to [text deleted] for an

assessment, or participating in a daily rehabilitation program.....due to work at home and her future visitors".

We are of the view that [the Appellant's] refusal to participate in that program brings her clearly within the four corners of Section 160 of the Act. We find, therefore, that MPIC was justified in terminating any further payments on her behalf.

It is apparent from the evidence before us that [the Appellant] did encounter some unusual difficulties. For example, she and her husband were trying to establish and operate a farm in conjunction with the bed and breakfast establishment and this entailed a great deal of heavy physical work for both of them. In the course of doing so, [Appellant's husband] sustained a hernia which placed even more responsibility on [the Appellant's] shoulders. Concurrently with that, [the Appellant] was encountering difficulties in communication with her lawyer in [Manitoba] and she was apparently reluctant to take any positive steps in the absence of his advice. She has advised this Commission, through her counsel, that she is now prepared to cooperate with any rehabilitation program prescribed for her by the Corporation.

We are therefore referring this claim back to MPIC's out-of-province claims divisions for them to arrange for her re-entry into the work hardening program after:

(i) obtaining details from [the Appellant] of her anticipated weekly expenses to be necessarily incurred as a result of that re-entry, including the weekly cost of hiring one person to replace her during the course of her program; and

(ii) having [the Appellant] contact [rehab clinic] in order to set up a tentative program with

> dates that are mutually acceptable, for her to undergo a new, functional capacity evaluation to be followed by a treatment program. That program is not necessarily to be limited to the five to ten visits originally proposed by MPIC. Rather, the duration of the program should be left to the discretion of [rehab clinic] who, if they feel that [the Appellant] is not being compliant, will doubtless advise MPIC accordingly.

Dated at Winnipeg this 4th day of November 1998.

J. F. REEH TAYLOR, Q.C.

LILA GOODSPEED

F. LES COX