AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-121

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Mr. Charles T. Birt, Q.C.** **Mr. Colon Settle, Q.C.**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Keith Addison;** **the Appellant, [text deleted], was represented by [Appellant's representative]**
HEARING DATE:	**June 2nd, 1999**
ISSUE(S):	**1. Classification of Appellant for purpose of 180-day determination;** **2. Termination date of income replacement indemnity ('IRI').**
RELEVANT SECTIONS:	**Section 86(1), 86(2), 106(1), 106(2) and 110(1)(d) of the MPIC Act and Sections 2(c) and 7(2) together with Schedules A and C, of Manitoba Regulation 39/94.**

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

It has to be said, at the outset of these Reasons, that the time spent by all parties in preparing for this appeal has been unduly lengthened, and the actual hearing of the appeal has been confused and made more complicated than it needed to be, primarily because counsel's instructing solicitor, [text deleted], has followed a pattern of filing multiple Notices of Appeal, each such Notice containing several grounds or points of appeal (five in the first one, three in the second).

Several of the grounds for appeal concerned matters that had not even been the subject of decisions by MPIC's claims people, never mind decisions by an internal review officer. As [counsel's instructing solicitor] is well aware, this Commission has no jurisdiction to deal with matters that have not been the subject of a decision by an internal review officer. [counsel's instructing solicitor] also seems to adhere to the maxim "When in doubt, plead the Charter.", since one of his original grounds of appeal was a claim of discrimination against the Appellant, contrary to Section 15 of the Canadian Charter of Rights and Freedoms. His counsel wisely decided to withdraw that aspect of the appeal at the hearing. As well, a Notice of Appeal that reads, in part,

> Claimant claims impairment benefits
>
> Claimant claims medical benefits

tells this Commission and counsel for MPIC nothing; we are left to discover for ourselves, at the hearing, just what counsel has been instructed to seek by way of benefits under the MPIC Act. In the event, the two lines quoted above are two of the matters that have yet to be decided by an adjuster and their subject matter is, therefore, not before us. They are merely indicative of the preparation, or lack of it, that goes into some of [counsel's instructing solicitor's] appeals prior to their being heard. We have urged him before, and we again urge him by way of these formal Reasons, to seek the advice of his chosen counsel at the outset, before even preparing and filing a Notice of Appeal. In that way, his counsel will be less likely to feel obliged to defend untenable positions before this Commission.

The Appellant, [text deleted], was born and raised in [text deleted]. She had two years of post-secondary education, in the form of teacher training, after which she was employed for three

years on a full-time basis, teaching elementary school. [The Appellant's] husband, [text deleted], came to Canada from [text deleted] in 1989; she arrived in Canada in 1994 and they were married on [text deleted] of that year here in Canada.

The Appellant and her husband settled initially in [text deleted] where, on April 2nd, 1995 and while a passenger in the back seat of her husband's [text deleted] vehicle, she sustained some injuries when that vehicle was rear-ended. The vehicle was being driven by the Appellant's husband at the time of the accident and the Appellant was wearing a seatbelt. Damage to her husband's vehicle amounted to about $450.00, but, this Commission fully recognizes that while not relevant, the cost of repairing a vehicle is not always indicative of the extent of the damage to its occupants.

[The Appellant] was not employed at the time of that motor vehicle accident, and had not been gainfully employed since her arrival in Canada. She would not, therefore, be entitled to income replacement indemnity during the first 180 days following that accident, in the absence of some evidence that, on a reasonably strong balance of probabilities, she would have been employed during that period had the accident not taken place. While a claim for income replacement during that first 180 days was initially made on her behalf, that claim was subsequently abandoned and the only two issues that this Commission is called upon to decide are these:

(i) the proper employment to be determined for the Appellant from the 181st day immediately following her accident, pursuant to Sections 86(1) and 106 of the MPIC Act; and

(ii) the date when that income replacement indemnity should properly have been terminated,

under the provisions of Section 110(1) of the MPIC Act.

Copies of each of the sections of the MPIC Act referred to above will be attached to and are intended to form part of these Reasons.

(i) Employment classification.

The first question, then, is whether [the Appellant] should have be classified as a teacher from the 181st day after her accident, as is submitted on her behalf, or whether MPIC was correct in classifying her at an entry level occupation, entitling her to income replacement at minimum wage level.

It seems clear that the Appellant had the [text deleted] equivalent of a Manitoba Grade 12, followed by two years of teacher training and three years of actual teaching. Between the date of her arrival in Canada in 1994 and the date of her motor vehicle accident on April 2nd, 1995, she was not gainfully employed, nor did she seek employment. She testified that she had taken classes (two-hour sessions three days a week) in English as a second language ('ESL') at [text deleted], but had not felt sufficiently fluent in English.

The Appellant and her husband left [Manitoba] in July of 1995, having decided to move to [British Columbia] where her husband had relatives. Her oldest child was born in [British Columbia] on [text deleted]. In April or August of 1996 (MPIC's file seems to reflect a return date of August, 1996, but the Appellant testified that she returned in April of that year) [the Appellant] and her husband moved back to [Manitoba], where her second child was born on [text

deleted].

The Appellant, who had ceased her ESL courses after her motor vehicle accident, recommenced them in 1998 at the [text deleted] in [Manitoba] and, she says, started looking for work.

Her evidence was that the principal at the [text deleted], situated at [text deleted], told her that she would have to take some university courses and, assuming their successful completion, should be able to obtain her teaching certificate after about one and a half years. Her further evidence was that she volunteered to teach [text deleted], mathematics and some English songs at the [text deleted], some time in 1998. [Text deleted]. While she had originally worked at [text deleted] on a voluntary basis, she said that for the last few months of her employment there she had been paid $10.00 per hour as a substitute teacher, working one hour a day for four days each week. She testified that she had recently been offered a full-time job but had told the school that she could not accept it because she lacked the level of energy needed for the task. The last time [the Appellant] had taught at the [text deleted] was for one hour, a few months prior to the hearing of her appeal on June 2nd, 1999.

Was [the Appellant] qualified to teach in Manitoba on September 30th, 1995, the 161st day following the date of her accident?

From the foregoing facts, it is quite clear that she was not so qualified. It is doubtful whether she is qualified to teach in Manitoba even today but, if she is, she would not have reached that level until some time in 1998 after the completion of her ESL course. Counsel for the Appellant

argues that the reference to training and work experience in Section 106(1) of the Act, and the reference to "teaching" in Group 5 in the Table of Classes of Employment forming part of Manitoba Regulation 39/94, should not be limited to the victim's training and experience in Canada but should, rather, be interpreted to include experience and training anywhere in the world. While it may be true that, in some occupations, such an interpretation would be reasonable, it can hardly be applied to the teaching profession which requires two factors that [the Appellant] lacked: a fluency in either English or French, combined with teacher certification. Whatever [the Appellant's] qualifications may be today, we are of the view that in September of 1995 she could only have been classified at an entry level occupation in the context of employment in Manitoba. MPIC, having adopted this latter view, set [the Appellant's] gross yearly income at the minimum wage level of $10,920.00 until January 1st, 1996, when it increased to $11,232.00. She received IRI based upon those levels to cover the period from September 30th, 1995 , through August 16th, 1997.

(ii) Termination Date

Was August 16th, 1997, the proper date for the cessation of her IRI, or should she have received income replacement up to and even beyond the date of the hearing of her appeal, as is claimed on her behalf. To answer that question appropriately, an analysis of her medical history post-accident may be fruitful.

On the day of her accident, the Appellant attended upon [Appellant's doctor #1], in [Manitoba], who diagnosed cervicodorsal muscle strain and lumbosacral muscle strain, referring her for physiotherapy. She received about 22 physiotherapy treatments, at a frequency of twice weekly

for about 45 minutes each time. On July 6th, 1995, she and her husband moved to [British Columbia] where he had family living, and where she received 13 more physiotherapy treatments. She quit physiotherapy at that point, due to pregnancy, and her first-born was delivered on [text deleted]. ([The Appellant] was apparently being treated by a [Appellant's doctor #2] while in [British Columbia], but MPIC's attempts to obtain any kind of medical report from [Appellant's doctor #2] garnered no response until late May, 1996.)

On January 22nd, 1996, the Appellant's adjuster at MPIC telephoned her and was told that the Appellant, who was then two or three days away from her first confinement, was "still having pain in her neck and back as a result of the motor vehicle accident".

On about March 12th, 1996 [the Appellant] wrote to her adjuster, reiterating that she suffered a lot from back and neck pains and asking for financial assistance in hiring a babysitter so that she might return to physiotherapy since she had no one to look after her baby while she sought treatment.

MPIC then referred the matter to a firm of adjusters in [British Columbia], with instructions to arrange for a functional ability assessment and then a short treatment plan if that were recommended. The [British Columbia] adjuster was finally able to obtain a brief report from [Appellant's doctor #2] dated May 29th, 1996. His report reflects "back of head painful - low back pain. Severe with movement. Neck movements restricted by pain. Trapezius spasm and tender". He diagnosed cervical sprain and prescribed physiotherapy and indicated that "she may be moving to [Manitoba]".

A report from [text deleted] Physiotherapy Clinic in [British Columbia], dated June 4th, 1996, describes a series of 13 treatments given to the Appellant from August 17th to October 12th, 1995. The summary of her condition and those treatments reflected "a mild to moderate soft tissue injury to her neck and lower back as a result of a car accident….her low back discomfort was probably aggravated by her pregnancy and it is difficult to say if she would need treatment to her low back following child birth…..I have not seen [the Appellant] since October 1995". Because of [the Appellant's] pregnancy, physiotherapy treatment had been mainly focused on her neck which, on examination, had shown good range of movement with some discomfort at the end of full extension. The joints at the top of her neck appeared stiff and the muscles there and in the lower part of her neck seemed tight. She had been instructed in range of movement exercises for her neck and low back, as well as being given mobilization and ultrasound treatments. She had made gradual improvement.

In April of 1996 the Appellant and her family did return to [Manitoba], moving into an apartment at [text deleted].

MPIC, following a request from [the Appellant] for continued physiotherapy treatments, and having been unable to obtain any meaningful medical report from her [British Columbia] caregiver, [Appellant's doctor #2], referred the Appellant back to [Appellant's doctor #1] for an updated examination. The Appellant saw [Appellant's doctor #1] on or about November 10th, 1996, but the medical report resulting from that examination amounts to little more than a regurgitation of the complaints listed by the Appellant. [Appellant's doctor #1] does diagnose a

Grade 2 Whiplash Associated Disorder ('WAD') and suggests "massage therapy at home". She also notes that the Appellant was pregnant with her second child; the child was born on [text deleted].

In a subsequent discussion with [the Appellant's] MPIC adjuster, [text deleted], [Appellant's doctor #1] expressed the view that the Appellant's ongoing symptoms were a direct result of her motor vehicle accident. She felt that the victim had **myofascial pain syndrome** but never had received proper treatments due to her first pregnancy. As noted above, the Appellant was again pregnant. [Appellant's doctor #1] had recommended massage therapy but upon being advised that the Appellant and her family lived very close to [text deleted], issued a short and simple prescription for "further physiotherapy" on November 26th, 1996. On January 6th, 1997, the adjuster spoke with the physiotherapist at [text deleted] Clinic, who said that she had not seen the Appellant since December and could not do much for her in any event since she was well advanced in her second pregnancy. (In the event, [the Appellant] did attend at the [text deleted] Clinic once more, near the end of January, 1997.) The physiotherapist indicated that she had given [the Appellant] some exercises to do, that she seemed to have full range of motion in her joints but that her low back pain would probably increase rather than improve, by reason of the pregnancy.

On January 21st [Appellant's doctor #1] spoke with [Appellant's MPIC adjuster] by phone to say that she had seen the Appellant who was in an advanced stage of pregnancy; she felt it was too cold for her to go for physiotherapy and, instead, prescribed heating pads that could be bought at a pharmacy. [Appellant's doctor #1] now felt that the Appellant had **fibromyalgia** and was

advised that, if she were willing to prescribe a heating pad, MPIC would pay for it. It is not apparent whether that step was ever taken.

On April 16th, [Appellant's doctor #1] again phoned the insurer to say that the Appellant required ongoing massage therapy. It had been explained both to [Appellant's doctor #1] and [the Appellant], that MPIC could only pay for massage therapy if it were administered by a physician, chiropractor, physiotherapist or athletic therapist. That form of therapy was available at the [text deleted] Clinic; [the Appellant] did attend there for physiotherapy after her return to [Manitoba], but on only five occasions - on December 3rd, 10th, 12th and 18th of 1996 and on January 27th, 1997. She testified that her pregnancy and a fear of falling on icy streets had prevented her from seeking any further therapy.

On May 11th, 1997, in response to an inquiry from MPIC's adjuster dated April 21st, [Appellant's doctor #1] reported that the right side of the back of the Appellant's neck appeared tender on palpation, with tightness and palpable muscle spasms and several tender points in the shoulder blade area, bilaterally. The Appellant was complaining of lower back pain with radiation to her left lower extremity, particularly after prolonged sitting, standing, bending or lifting. However, at the time of [Appellant's doctor #1's] examination, the Appellant had no pain in the lower back area, her cervical spine range of motion appeared normal, her muscle strength was normal on both upper extremities as well as deep tendon reflexes; her range of movement in the lower back was normal and her muscle strength and tendon reflexes showed no abnormalities. She had mild discomfort on palpation of the paraspinal muscles, in the lumbosacral spine area. In sum, [Appellant's doctor #1] felt that [the Appellant] had "symptoms consistent with fibromyalgia"

and that, since the time of the accident, she had improved mostly in respect to her lower back pain and had achieved a normal range of motion in the neck area. [Appellant's doctor #1] felt that her patient would require physiotherapy, including massage therapy, for the next six to eight weeks. The only factor which could have delayed her recovery, said [Appellant's doctor #1], was her pregnancy. Her prognosis was good.

Upon receipt of the foregoing report from [Appellant's doctor #1], [text deleted], the adjuster, on May 20th authorized a further eight weeks of physiotherapy.

Becoming concerned about the Appellant's apparent lack of progress, MPIC arranged for her to be examined independently by [independent doctor], who examined her on June 23rd, 1997. [Independent doctor's] report to the insurer, dated July 24th, is quite complete. Some facets of that report which, to this Commission, seem particularly significant, may be summarized this way:

(a) [the Appellant] claimed that she had been unable to attend physiotherapy since January of 1997 "as she must look after her children with her husband";

(b) the Appellant was complaining of sharp and intermittent chest pain, nausea and loss of appetite, sleep disturbance, anxiety, depression and bilateral anterior knee pain;

(c) [Independent doctor] was of the view that the Appellant was suffering from neck and low back pain as a result of her motor vehicle accident. The symptoms and findings on examination were consistent with the mechanism of injury being the accident, and the timing of the complaints was also supportive of that fact. There had been no mention of chest or knee pain in previous reports and [independent doctor] could not confirm that

they were related to the accident. By the same token, despite [Appellant's doctor #1's] suggestion that fibromyalgia might be present, [independent doctor] could not find enough evidence to support that diagnosis. Treatment to date had been complicated by the Appellant's pregnancies which, although they had not worsened her pain, had not allowed her to attend for treatment;

(d) [Independent doctor] recommended further physiotherapy for about six to eight weeks, starting with pain-relieving modalities such as heat/ice, hydro therapy, TENS, ultra-sound, massage, stretching and acupuncture. That should be followed by a reconditioning program for a further six to eight weeks, said [independent doctor], who expressed the further view that, if the Appellant were to attend those sessions regularly and complied with a home exercise program, she could see no reason why the Appellant should be disabled from either work or domestic activities.

[Independent doctor] added that, although the Appellant claimed difficulty in attending physiotherapy because of her children, it was hard to understand why she could not leave the children with her husband while she went for therapy, since she claimed that her husband had had to quit school in order to look after her and the children.

[Appellant's doctor #1's] report of May 11th, 1997 makes no mention of the Appellant's functional capacity; it speaks primarily of the need for physiotherapy, including massage, for up to eight weeks and says that the only factor which could have delayed the Appellant's recovery was her pregnancy. [Independent doctor's] report, similarly, suggests an eight-week period of treatment followed by a six to eight week rehabilitation program. [The Appellant] agreed that she had been offered physiotherapy after her return to [Manitoba] but had not taken advantage of

it because MPIC would not pay for taxi transportation between her home and the physiotherapy clinic. She felt that she had to have transportation because of her pregnancy, although the clinic was located, quite literally, some five minutes walk away from her home.

The decision of MPIC's internal review officer bearing date August 20th, 1998, where the adjuster's decision to terminate IRI benefits as of August 16th, 1997 was confirmed, was based to some extent, at least, upon the absence, from [Appellant's doctor #1's] report of May 11th, 1997, of any finding that [the Appellant] was unable to work. However, this Commission was provided with a letter, signed by [Appellant's doctor #1] and bearing date February 25th, 1999, which says, in part:

> On examination, the range of movements in her neck was normal with noted discomfort at turning her neck to the right. There was a bilateral tenderness in both trapezius muscles, and over thirteen tenderpoints throughout the trunk. Most of them in the inter-blade area. The strength and tendon reflexes in the upper extremities were normal…..while on medication she improved in respect to the severity of her discomfort, however the pain still persisted. She had periods when she was improving, followed by relapses. She was unable to attend the Fibromyalgia Program to which she was referred twice, because she did not have any help with her two children at home at this time.
>
> In conclusion, her symptoms are consistent with fibromyalgia and started following the accident in April 1995. She remains symptomatic despite treatment. Her symptoms are elicited by activity, therefore affecting her life substantially. Household activities bring on her symptoms and she cannot avoid it (child care, cleaning, laundry, mopping floors, grocery shopping, et cetera). Because it is difficult for her to attend the fibromyalgia program, further physiotherapy (including massage therapy) would be recommended and the best solution would be to attend a physiotherapy clinic close to her home.

This letter from [Appellant's doctor #1] is the first and only indication reflected on the file that [the Appellant] had ever been referred to a 'fibromyalgia program' at all, not to mention 'twice'. The reasons for [the Appellant's] failure to attend further physiotherapy are obscure: certainly, the latter stages of her pregnancies would preclude such therapy and the eventual return of her

husband, [text deleted], to full-time work would have necessitated the services of a babysitter, but the Appellant has not, despite her doctor's advice, sought any form of therapy since January of 1997, so far as we have been able to determine. We have to assume, from this, that when [Appellant's doctor #1] speaks of the appellant remaining "symptomatic despite treatment ", the 'treatment' to which she refers consists solely of medication.

The internal review officer's decision also seems to have been based upon a misinterpretation of [independent doctor's] reporting letter of July 24, 1997. The case manager who made the decision to terminate benefits on August 16, 1997 appears to have done so because that was the date upon "which [independent doctor] felt your recovery would occur, had you pursued the exercise and physiotherapy program." A careful re-examination of [independent doctor's] letter does not allow that conclusion. Rather, [independent doctor's] view was that, if the appellant were given six to eight weeks of physiotherapy of the kind that [independent doctor] describes in detail, followed by six to eight weeks of reconditioning, <u>then,</u> given regular attendance and compliance with a home exercise program, the appellant should have been restored to her pre-injury state and level of functioning. As [independent doctor] put it "I see no reason for [the Appellant] to be disabled from her job or her home activities if the treatment program is carried through". That presupposes the commencement of therapy and reconditioning at a point shortly after [independent doctor's] opinion was given, and intended to continue over a period of some twelve to sixteen weeks. The appellant would have been entitled to income replacement during the course of that therapy and reconditioning and we are, therefore, prepared to extend her income replacement from August 17th to December 15th of 1997.

It has never been made clear to us why the recommendations of the [Appellant's doctor #1] and [independent doctor] were not followed but, in any event, the appellant's claim for continued physiotherapy does not appear to have been the subject of a decision by an adjuster or an internal review officer. That aspect of the claim is not, therefore, within our jurisdiction. If further therapy and reconditioning are made available, the Appellant will already have received the I.R.I that might, otherwise, have accompanied them.

Dated at Winnipeg this 9th day of July, 1999.

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J. F. REEH TAYLOR, Q.C.	**CHARLES T.BIRT, Q.C.**	**COLON SETTLE, Q.C.**