AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-50

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairman)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by M. T. B. Kumka;** **Appellant represented by [Appellant's representative]**
HEARING DATE:	**November 22nd and 23rd, 1999**
ISSUE:	**Whether Appellant justified in discontinuing graduated return to work program.**
RELEVANT SECTIONS:	**Sections 110(1) and (2), 116 & 160 of the Manitoba Public Insurance Corporation Act ('the Act')**

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:

On March 6th, 1997, the Appellant was driving east on [text deleted] when a car, in the traffic lane to her right, attempted a left turn at [text deleted] and struck her vehicle in the right front fender causing it to spin 180 degrees . The impact caused her injuries that are the subject of this appeal.

At the time of the accident [the Appellant] was working 38 3/4 hours a week as a housekeeper at [text deleted] and 16 hours a week at her husband's commercial cleaning business.

A few hours after the accident the Appellant began to experience headaches and intense pain in her shoulders and neck; the next day she sought the advice of her family doctor, [text deleted]. He diagnosed her as suffering from post-traumatic headaches, strain to her neck, upper body and both shoulders and what he describes as 'post-traumatic nervous shock'. He advised her to stay off work, recommended a program of physiotherapy and gave her a prescription for Toradol and Flexeril.

The physiotherapy treatment gave the Appellant temporary relief but the muscle spasms in her shoulders and neck did not diminish. The pain became so excruciating over time that she appeared to have become clinically depressed and, in May of 1997, [Appellant's doctor] referred her to a psychiatrist, [text deleted]. In a July 3rd , 1997 report, [Appellant's psychiatrist] notes that "the clinical picture favours anxiety state as seen in post traumatic cases, which at times perpetuates and aggravates the physical condition". He recommended that she continue to take her medication in small doses for the next six to eight weeks, take a brief course of psychotherapy, continue with her physiotherapy and be monitored by her family physician in consultation with himself. [Appellant's psychiatrist] concludes "There has been considerable improvement on the new medication and psychotherapy in the past two weeks, it is anticipated she will continue to make progress. From psychological point of view could return to work on trial basis in mid August of 1997".

In a report dated July 3rd, 1997, [text deleted], [the Appellant's] treating physiotherapist, states

> [The Appellant] has been complaining of 'depression' and 'stress' apparently from the onset following her motor vehicle accident. She had been on medication for this, which seems to provide the best relief for all her complaints. She was unable to tolerate many treatment techniques and positions due to a feeling of 'pressure' which in turn made her anxious, restless and 'depressed'.
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> As per our discussion of 12/06/97, I am undecided regarding [the Appellant's] ability to succeed in a return to work program. I believe that trying to get back into some semblance of a normal routine will be psychologically as well as physically beneficial for her. We were, however, unsuccessful in increasing her exercise level or tolerance during treatment. I believe her limitations are at this point more psychological than physical and that these issues must be dealt with before [the Appellant] will regain normal function.

A troubling aspect of this case is the apparent lack of co-operation and consultation by [Appellant's doctor] with the other caregivers involved in [the Appellant's] recovery program. [Appellant's psychiatrist] advises MPIC in early August that he has not heard from [Appellant's doctor] since reporting to him about the Appellant. [Appellant's doctor] did not respond to a letter, dated September 26th, 1997 from [text deleted], medical consultant to MPIC, asking him if there is any medical reason why the Appellant should not be enrolled in a gradual return to work program, nor does he respond to several phone calls placed over the next two months.

In an inter-office memo dated November 20th, 1997, [MPIC's doctor] advises the adjuster handling this case that he had finally made contact with [Appellant's doctor] and asked him if [the Appellant] had been placed in the gradual return to work program which had been recommended by [Appellant's psychiatrist] and [Appellant's physiotherapist]. [Appellant's doctor] advised she had not entered the program because of her persistent pain. [MPIC's doctor] then states in his memo "It is

my opinion that [the Appellant's] care has been difficult to monitor as a result of [Appellant's doctor's] negligence in providing the necessary medical reports that would provide information pertaining to [the Appellant's] symptomatology and her response to various treatments". Having heard all of the evidence in this case we can't help but concur with this observation.

Without advising MPIC, [Appellant's doctor] referred [the Appellant] to [Appellant's rehab specialist #1] [text deleted]. She saw the Appellant on August 22nd, 1997, at which time [the Appellant] advised that her main complaint since the accident was constant neck pain. After four visits, [Appellant's rehab specialist #1] reports to MPIC on December 12th, 1997, that the Appellant had myofascial pain in the shoulder and neck areas of her body. [Appellant's rehab specialist #1] felt that physiotherapy had been a failure and she prescribed a home exercise program for [the Appellant] to relieve the pain in certain of her muscles. She observed that [the Appellant] was not too enthusiastic about learning these stretching exercises.

[Appellant's rehab specialist #1] tried a program of needling, as well as spraying and stretching, of the taut bands she found in the Appellant's neck and shoulder muscles. [Appellant's rehab specialist #1] reports that the Appellant was always crying and wailing when being treated or examined - "every time you touched her she yelled out in pain" - and felt she needed psychological counselling to help her to cope with her discomfort. [Appellant's rehab specialist #1] observed that the Appellant "was over-reacting to any kind of pressure over her muscles". She referred [the Appellant] to [text deleted], a clinical psychologist, for counselling and emotional support.

In the same report [Appellant's rehab specialist #1] states:

> As far as your information regarding the psychiatrist and the physiotherapist being of the opinion that she was ready to return to work by mid August, I was not even aware of this and she never did tell me that it was their opinion that she could return to work. When her family doctor sent me the referral it was that she was having a lot of problems and with the hysterical reactions she was having, I do not think she could return back to her occupation because of her inability to cope.

[Appellant's rehab specialist #1] goes on to say:

> …….the mobility of her neck has certainly improved to a large degree and there is less tightness of her muscles around her neck as well as her shoulder girdle. But it is emotional problems which seem to be limiting her from her return to work…….I have no problem with [the Appellant] at this stage attending [Appellant's psychologist] first to see if any counselling was necessary on his part. If not, she should be capable of returning to a graduated return to work program, starting at 2 hours per day and then working herself up to 4, 6 and 8 hours and at the same time attending [Appellant's psychologist] if he thinks this is necessary.

On December 27th, 1997 [Appellant's doctor] writes to MPIC stating that he agrees with [Appellant's rehab specialist #1's] opinion that [the Appellant] is unfit to do any work due to her psychological state and she needs psychological treatment before she will be fit to return to work.

[Appellant's psychologist] reports, in a letter dated January 12th, 1998, that he saw [the Appellant] on November 14th, 1997, on a referral from [Appellant's rehab specialist #1] and that he had interviewed and tested her on December 10th and 17th, 1997. His findings were that she is not "psychologically-minded, but is dealing with circumstantial life issues, some frustration, and she has obvious risk and presents with somatoform pain (or pain disorder with psychologically perpetuating factors). The need is to focus on her motivation, task orientation, her understanding of issues, the

general consistency of her symptom reports over time, as well as her application in physiotherapy".

He goes on to recommend the following:

1. She needs an active physiotherapy program. Start with an assessment with both occupational therapist and a physiotherapist to develop a reconditioning program which may be followed with a work-hardening program.

2. Psychological treatment to be provided concurrently with the physical reconditioning program.

3. She has a high level of anxiety and this should be treated with medication.

4. A graduated return to work program could be started in two months in co-ordination with her family physician.

On March 9th, 1998, [Appellant's doctor] advises MPIC that [the Appellant] is still experiencing spasms in neck, upper back and right trapezius muscles and is nervous and is still unable to work. He goes on to state that she has the following conditions due to the accident:

1. myofascial pain in her neck, upper back and right shoulder;

2. developing fibromyalgia;

3. hypertension;

4. post-traumatic depression and anxiety.

Unfortunately [Appellant's doctor] does not provide any clinical evidence to support these findings. He does recommend that [the Appellant] continue to see [Appellant's psychologist].

On May 11th, 1998, [Appellant's psychologist] reports to MPIC that he has seen [the Appellant] on a weekly basis since January 12th, 1998, for psychological treatments, pain management, post-

traumatic depression and anxiety. In his opinion she does not have symptoms that are sufficient to warrant a diagnosis of major depression or post-traumatic stress disorder and her psychological status is no longer a barrier to commencing a return to work program.

In response to [Appellant's psychologist's] report, MPIC arranged a meeting with [the Appellant] and her employer to map out a six-week graduated return to work program starting May 19th, 1998, commencing with two hours of work per day for the first week. MPIC also arranged physiotherapy treatment for [the Appellant] at the [text deleted] Physiotherapy Clinic [text deleted].

On June 1st, 1998, [the Appellant] attended the [text deleted] Physiotherapy Clinic for assessment, and a rehabilitation program was developed for her. The Clinic sent an outline of her program to MPIC on June 4th, 1998, and indicated they would evaluate her progress in 4 to 6 weeks.

[The Appellant] worked approximately 4 days of her graduated return to work program and then stopped because of too much pain. She did not tell MPIC about her decision but went to see [Appellant's doctor] on June 2nd, 1998, who gave her a note saying she was "unfit to continue her graduated return to work program" for the period from June 1st to the 20th. He issued another note on June 13th, 1998, excusing her from the program for the period from June 13th to August 30th, 1998. On July 7th, 1998, [the Appellant] along with her family left Canada to visit her parents in [text deleted] with her family and didn't return to [Manitoba] until August 22nd, 1998.

In a letter to MPIC dated June 25th, 1998, [Appellant's doctor] states that [the Appellant] was unable

to continue her graduated return to work program "as even this light work was precipitating severe attacks of the spasm of muscles". The Appellant had reported that these attacks caused severe pain in the right side of her neck, chest and right arm. He goes on to state:

> Therefore, she was unable to continue with the gradual return to work program as it was aggravating her condition. She should benefit from physiotherapy program which she started and she should continue the post traumatic stress disorder (sic).

The Adjuster assigned to this case had met with [the Appellant] and her husband on June 11th, 1998 to determine why she had not continued with her graduated return to work program. [The Appellant] told him that she could not participate in that program due to her ongoing pain symptoms. This meeting was followed by a letter dated July 8th, 1998, from MPIC advising [the Appellant] that they would only pay her IRI up to July 6th, 1998, and nothing further, until their medical team could evaluate [Appellant's doctor's] latest medical report. On September 3rd, 1998, MPIC advised the Appellant that, based on the review of all of her medical evidence, they were of the opinion that she was physically capable of participating in her graduated return to work program and that she had chosen not to do so. Therefore they were terminating her IRI pursuant to Sections 110(1)(a) and 160 of the Act, based on her refusal to participate in the rehabilitation program.

THE ISSUE(S):

The question before this hearing is whether or not [the Appellant] was capable of participating in the return to work program established by MPIC in June of 1998, and whether MPIC was right in terminating her IRI benefits because of her refusal to continue in that program.

On the same day that MPIC informed [the Appellant] that they were terminating her benefits she saw [Appellant's rehab specialist #2], [text deleted] on a referral by [Appellant's doctor]. He discovered taut bands and tender trigger points in her right posterior cervical muscles high in the neck, right upper trapezius and right levator scapula muscles, leading him to the opinion that she had myofascial pain syndrome. He also diagnosed that she was under stress and had emotional problems that were due to the chronic pain she was suffering. He arranged for a series of trigger point needlings in the affected muscles, together with stretching procedures, and provided her with a home program of stretching exercises. [Appellant's rehab specialist #2] was of the view that the Appellant was not capable of working, nor even of doing a modified return to work program, until her pain could be brought to a more tolerable level.

Contrary to the expectations of MPIC's in-house medical team, [Appellant's rehab specialist #2] was able successfully to treat the Appellant over the next several months and, in a report dated January 14th, 1999, stated:

> I saw her in follow-up on January 6th, 1999. She was completely asymptomatic with no symptoms of headaches, neck pain, right or left upper trapezius. She had no inter-scapular pain and no pain involving the upper limbs. She indicated that she now had no symptoms related to the motor vehicle accident of March 6th, 1997. Sleep was excellent and she woke up feeling refreshed with no symptoms of fatigue during the day. She noted no symptoms related to mood disorder and was eager to return to work.
>
> It is my opinion that she should return to work as soon as arrangements can be made for a graduated return with full duties and no restrictions likely to be successful within four weeks.

It is clear from [Appellant's rehab specialist #2's] reports that the Appellant was not able to participate in MPIC's graduated return to work program in mid-1998 because of her medical

problems; she was right in not proceeding with it as it was too painful for her and she was not physically capable of carrying out the tasks of her former job without a great deal of pain. Based primarily on the medical evidence of [Appellant's rehab specialist #2], we find that MPIC improperly terminated the Appellant's IRI on July 6th, 1998. Therefore, for the following reasons, her IRI benefits will be reinstated from July 7th, 1998 to July 31st, 1999 except for the period and amounts hereinafter set out.

Shortly after [the Appellant] stopped attending her graduated return to work program she went to [text deleted] from July 7th to August 22nd, 1998, a period of 6 weeks and 4 days. [Appellant's doctor] provided [the Appellant] with two notes excusing her from attending her rehabilitation program but not from her physiotherapy program. In his letter of June 25th, 1998 he stated that it was imperative for her to continue with this program. Therefore [the Appellant] on her own accord and without any valid reason, medical or otherwise, refused to participate in a rehabilitation program provided to her by MPIC; the IRI to which she would otherwise have been entitled must therefore be reduced by the amount applicable to that 6 weeks and 4 days, pursuant to Section 160(g) of the Act.

The Appellant has requested that she be paid IRI up to November 13th, 1999, when she was involved in another automobile accident, but we do not agree that she is entitled to IRI to that date. [Appellant's rehab specialist #2] stated that [the Appellant] could have returned to her pre-accident job full-time on February 3rd, 1999, (i.e. four weeks after her visit to his office on January 6th). Due to her lengthy absence from work [the Appellant] lost her job as a housekeeper at [text deleted]; this

loss of her job was a result of her automobile accident. The Act, in Section 110(2), stipulates that when someone loses her job due to a motor vehicle accident and has received IRI for more than one year but less than two years, then she becomes entitled to receive an additional 180 days of IRI from the date she became capable of returning to her pre-accident job. [The Appellant] could have returned to work, in the opinion of [Appellant's rehab specialist #2], on February 3rd, 1999; she is therefore entitled to another 180 days of IRI, which would take it up to July 31st, 1999. However this sum will be reduced by the amount set out in Section 116(1) of the Act because [the Appellant] worked part-time during this period.

On March 13th, 1999, the Appellant was able to obtain a part-time (.2) position as a Unit Support Worker in [text deleted] that (as far as we can tell) paid $11.589 per hour for 15.50 hours bi-weekly. On April 13th, 1999 she was able to secure a part-time (.7) position as a supply attendant in [text deleted] working 54.25 hours bi-weekly. We leave the calculations of the total amount of IRI payable to [the Appellant] up to MPIC. It goes without saying that she will be entitled to receive interest on the balance due her, as set out in the Act.

We feel obliged to deal with one issue that surfaced during the hearing, namely the credibility of [the Appellant]. After hearing her evidence and her responses to a number of the questions put to her in cross-examination we came to the conclusion that much of her evidence lacked credibility. If the appeal had turned on her credibility then she would not have been successful. Fortunately for the Appellant, the outcome of this appeal hinged on the medical evidence, in particular that of [Appellant's rehab specialist #2], which we found to be compelling.

DISPOSITION:

The Acting Review Officer's decision of January 27th, 1999, is hereby rescinded and the foregoing substituted therefor.

Dated at Winnipeg this 14th day of January, 2000.

J. F. R.TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED