Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-64

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;** **[Text deleted], the appellant, appeared in person**
HEARING DATE:	**April 2nd, 1998**
ISSUE:	**Whether appellant's benefits properly terminated for non-compliance.**
RELEVANT SECTIONS:	**Sections 160(f) and (g) and 184 (1)(b) of the MPIC 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

The appellant was the driver in a single vehicle accident when she lost control of her vehicle, hit an embankment and rolled into the ditch. [The Appellant] attended at the office of her family physician, [text deleted], on July 28th, 1994, the day of the accident, where she was diagnosed with"extension-flexion injury of the neck and back", commonly known as a 'whiplash' injury. She was prescribed an anti-inflammatory medication and advised to undertake only light household duties. At the time of the accident [the Appellant] was a single parent, working as a

homemaker and caring for her children who were [text deleted] and [text deleted] years old. She was in the process of moving from [text deleted] to take up residence with [text deleted] at [text deleted], Manitoba.

In August 1994, [Appellant's doctor] referred [the Appellant] to [text deleted], physiotherapist, from whom she underwent a treatment program from August of 1994 to February of 1995. She was provided with a TENS unit to use at home and given directions for a daily home exercise program. [Appellant's doctor] had anticipated that her disability would end by about September 11, 1994, but reported on October 20, 1994, that [the Appellant] had suffered a relapse, requiring continued physiotherapy.

[The Appellant] was compensated for expenses she incurred for home and child care of $200 per week up to September 1995.

[Appellant's doctor] and [the Appellant] reported that the physiotherapy had not improved her condition; MPIC therefore referred her to [rehab clinic] where, in April of 1995, she commenced a functional restoration program which continued until October 6, 1995.

Meanwhile, [the Appellant's] adjuster had determined on March 22nd, 1995, that she was entitled to a caregiver weekly indemnity of $320.00 pursuant to the provisions of Section 132(1) of the MPIC Act and the insurer paid this amount to [the Appellant], retroactive to the date of the accident, until February 22nd, 1995 when [the Appellant] is reported to have agreed that she was again able to look after her children. [The Appellant] took issue with that allegation and MPIC,

after a further review of her condition, reinstated her indemnity for the period from February 23rd to October 6, 1995, the date when she was discharged from her functional restoration program by [rehab clinic].

The functional restoration program had provided education in, and practice of, a variety of light level activities for increasing [the Appellant's] ability to stand for longer periods, to increase balance while walking, ability to perform upper and low level activity, and for arm and shoulder strength. She was also directed in appropriate body mechanics to use for basic home management tasks. [The Appellant] had been fully instructed on her home exercise program and the use of her weights at the time of discharge. [rehab clinic] personnel emphasized to [the Appellant] the necessity of continuing those exercises at home in order gradually to improve her functional status.

[Rehab clinic] noted that, at the time of her discharge on October 6, 1995, [the Appellant] was able to manage her home responsibilities. There had been some improvement in [the Appellant's] condition but she had not used her best efforts at the level of which, by all objective standards, she should have been capable in order to help in her own restoration.

[Text deleted], [the Appellant's] adjuster reported on October 13, 1995 as follows:

> ....On Friday, October 6, 1995, [the Appellant] attended our office to address her incurred expenses for mileage, parking, and home care assistance. At the time of our meeting, [the Appellant] advised she has been discharged from the rehab program at [rehab clinic]. She looked to be in good spirits, and advised she felt pretty good on this date. She has been educated as to exercises she can do at home in order to keep herself conditioned and

> alleviate any pain or discomfort she may experience when returning to her active routine as a homemaker. ..... I suggested that, even though she has gone through a program at [rehab clinic], she may require a period of adjustment and it is important for her not to push herself too hard during this time frame.
> ....As our meeting was adjourning, I suggested that we contact one another in approximately 2 weeks' time in order to update the status of her progress at home. [the Appellant] agreed to contact me within 1 ½-2 weeks' time.

[The Appellant], at the hearing of her appeal, testified that the foregoing incident never happened, in that she had not attended at MPIC's office that day. The fact is, however, that there is copy of a receipt in the file, dated October 6 and signed by the Appellant, indicating that she received $602.97 to cover expenses for mileage and home care services up to October 6, 1995, at which point, in light of PAR's discharge report, her benefits were terminated by MPIC.

[Appellant's doctor] reported on December 6, 1995 that he had examined [the Appellant] on October 25 and November 14 and December 5, 1995 and noted that she had significantly deteriorated functionally since her discharge on October 6, 1995. [Appellant's doctor] requested that she be re-assessed and indicated his belief that, if [the Appellant] were to receive home care assistance, she would be able to carry out her regular exercise program in order to improve functionally.

On April 4th, 1996, [text deleted] (Medical Director of MPIC's Claims Services Department) assessed all [the Appellant's] medical reports to date and concluded: "([The Appellant's]) symptomatology appears to be validated by her family physician, as well as somewhat by the

neurologist in question. The final report from [rehab clinic] indicates that while the woman was in a [rehab clinic] program, her function would have been such that she would not have required any substantial home help." He goes on to report, " If indeed, the testimony of her caregivers is correct and her function has deteriorated since that point, I cannot necessarily refute her request for more help. I would suggest that further functional evaluation and/or treatment with [rehab clinic] may appear to be indicated in this case. I do not find any definitive evidence to the contrary on this file. "

On May 2nd, 1996, [text deleted], Acting Review Officer, informed [the Appellant] that she was recommended for further functional evaluation.

On May 23, 1996 [text deleted] an occupational therapist from [rehab clinic], together with her colleague, physiotherapist [text deleted], completed an assessment and concluded, in part , as follows:

> ....According to information contained in her old chart, [the Appellant] did make some progress in this program and at discharge required no home assistance. She was discharged with an extensive home program and weights were obtained for her to use at home. Interestingly, [the Appellant] now states that none of the previous treatments were of any benefit at all.
>
> **...SUMMARY OF OBSERVATIONS**
>
> * At discharge, it was emphasized that [the Appellant] continue with a regular exercise and activity program. She was provided with a set of weights to be used at home. So far there has been no indication that she has followed through on these recommendations.

* She consistently demonstrates decreased weight-bearing on the right leg, and poor posture consisting of rounded shoulders, cervical protraction and slightly increased lumbar lordosis. Objective findings include mild tightness of her right upper trapezius, right lumbar paraspinals and right quadratus lumborum.

* There is inconsistency between demonstrated right sided weakness of upper and lower extremities and any known myotomal or anatomical pathology.

* There is inconsistency between reported decreased light touch sensation of entire right side of the body, and any known dermatomal or anatomical pathology.

* There is inconsistency in measurement of thoracolumbar flexion. That is, when asked to bend forward in standing, she was able to move 1/4 range (mid-thigh), but in sitting was able to reach almost to her ankles (5 cm above ankles).

* There is inconsistency between her reported level of home management and the clean and orderly condition of her home; and between her reported difficulty with grooming and her appearance.

* Upon completion of the home visit, her right eye was ½ shut and her facial muscles appeared to twist to the right. This is consistent with her reports of temporomandibular discomfort.

* Self-limiting behaviours including complaints of pain limited the objectivity of the assessment process.

RECOMMENDATIONS

* Physiotherapy intervention at this point would be limited to a review of her home program of stretching and strengthening, should you feel this to be appropriate.

[Appellant's occupational therapist], in a report dated July 8, 1996, offered the following comments and recommendations:

....[The Appellant] appears to be functioning at a fairly low level and has expressed concern about coping with both home management and child care tasks. There has been mention about reinstating housekeeping assistance until she can increase her level of

> functioning to when she was discharged at [rehab clinic]. To achieve this, discipline, adherence and follow through on this client's part would be required. To date, there has been no indication of her managing her own care, or following through on recommendations. It is likely that had she continued a home maintenance program following discharge at [rehab clinic], she would be at a higher level of function than she is now.
> .... If the decision is made to re-instate housekeeping support, it should be time limited and [the Appellant] closely monitored for follow through, otherwise, it may be continued indefinitely. Rather, [the Appellant] should be encouraged to gradually increase her level of activity and resume her pre-accident responsibilities.

A Personal Assistance grid prepared for [the Appellant] on July 4th, 1996, produced a score of 6.5 out of 27 which, other things being equal, would have entitled [The Appellant] to the payment by MPIC of 16% of qualifying personal care expenses at home.

A further occupational therapy report of September 3rd, 1996 noted that the goals set for reorganizing [the Appellant's] work area and increasing her weights program were not achieved. A follow up visit provided an explanation of the labour saving equipment (long handled brushes etc.) that she had been given to make it easier for her to conduct her home management duties.

[Appellant's occupational therapist] reported on September 30, 1996 in part, as follows:

> ....This is the fourth visit over a five month period. It seems that [the Appellant's] condition has been steadily deteriorating.
> ....* Upon discharge from [rehab clinic], her functioning level was such that she should have been able to cope with functional activities at home, although she had not returned to pre-accident status. At that time, she had adequate strength and endurance to be able to take charge of her own rehabilitation at home.
>
> ....* There has been little evidence that she has followed through on any of the recommendations made upon discharge, and at this point appears to be increasingly less

> active. The danger of this is that the more inactive she becomes, the more painful any movement or activities will become. And, in the long run, her functioning level will be significantly reduced.
>
> ....* Her rehabilitation potential is very limited in that she does not seem to follow through on recommendations to manage her own recovery.
>
> ....* [The Appellant] appears unable to cope and manage home management tasks at present. Because both children are at school all day, I would encourage her to continue child care tasks especially in the evening.
>
> **...RECOMMENDATIONS**
>
> ....* It may be helpful to re-instate morning child care and housekeeping support for a time-limited period, (e.g. two months). [The Appellant] should be encouraged to use this time to work on her home rehabilitation program to increase her strength and flexibility. Even, so in light of her previous performance, follow-up potential is guarded.

During this period of functional assessment, [the Appellant] was also being treated by [text deleted], physiotherapist, prior to and following surgery that took place on July 26,1996, to correct a temporomandibular joint disorder apparently caused by her motor vehicle accident. The treatment was for mobilization, pain relief and strengthening. On October 8, 1996, [Appellant's physiotherapist #2] recommended a four week structured rehabilitation program at [rehab clinic] at a level of functioning to permit the Appellant to do her household work. She also suggested that [the Appellant] may benefit from some chronic pain counselling in order to increase motivation and compliancy to exercise.

THE ISSUE

The issue before us is whether the appellant's benefits of personal care assistance or care givers indemnity were properly terminated under Section 160 of the MPIC Act, upon the basis that her

conduct had prevented or delayed her recovery or that, without valid reason, she had failed to follow a program of rehabilitation made available for her by the insurer.

MPIC's decision to terminate the Appellant's program and weekly care givers indemnity was arrived at for the reasons that were outlined in the November 9, 1995 discharge report from [rehab clinic] and summarized in the decision of the Acting Internal Review Officer dated April 16, 1997.

The decision reads, in part, as follows:

> " 1. She progressed "very slowly" in her light weight/lumbar stabilization class and was "discharged from the class because of her lack of progress".
> 2. Throughout her program she was "very pain focussed and complained about taking over any of her home responsibilities".
> 3. On numerous reassessments, there was a significant discrepancy between her active and passive cervical range of motion."
> 4. "She needed constant supervision to complete her exercises."
> 5. "On several occasions, several Waddell signs were positive. *(Commission's note: the presence of these signs are an indication of abnormal illness behaviour - an abnormal response to organic pathology. Most frequently, and expressed in lay terms, they consist of exaggerated reaction to mild palpation or to other, standard tests, in the absence of any objective signs to support the disability complained of.)*
> 6. Her pain complaints were vague.
> 7. Her attendance was irregular.
> 8. She admitted to functional improvement until her home support was decreased and then she reported severe pain again but on reassessment there were no objective signs to explain her complaints.
> 9. She was discharged on October 5, 1995 "as she still refused to progress her weights"*(i.e. to increase gradually the amount of weight to be used in exercising*.)
> 10. The final assessment is that there has been an improvement in "strength, endurance, range of motion and function" although the therapist goes on to make qualifications which suggest to me that [the Appellant's] behaviour was making assessment of these things somewhat difficult....."

Slow progress does not, of itself, necessarily signify non-cooperation on the part of the patient:

People progress at differing speeds; some therapists are more skilful than others; there may be

factors hindering recovery of which the physician or other therapist is unaware, such as domestictensions or unspoken fears. But [the Appellant's] lack of effort seems to have been consistent throughout the entire period of the attempts to rehabilitate her and, without some explanation having been offered, we can not fault the insurer for its decision at the time.

The events leading to and following her discharge from the [rehab clinic] program clearly illustrate [the Appellant's] lack of commitment to her individualized home program and her non-compliance, which have prevented or delayed her recovery.

The Appellant was provided with two programs tailored to meet her needs and assure her rehabilitation. Support systems were provided to free her from homemaking responsibilities so that she could carry out her home exercise programs. The caregivers in each facility stated that the Appellant's symptoms were inconsistent with objective findings and that she failed to follow through with each program.

At the outset of [the Appellant's] rehabilitation programs there was an agreed upon and signed contract regarding the goals and expectations of the program. It is the collective view of the program providers that the Appellant has, whether consciously or subconsciously , been non-compliant with her agreement. The therapists were of the unanimous view that, had she used her best efforts to attain the programs' objectives, her functional capacity could have been restored. As well, had she not failed to complete her home exercises, she would not have deteriorated after her discharge from the program. It is evident that those who were

providing care for [the Appellant], both before the discharge and in the reinstated at-home program in 1996, made every effort to help her. However, by her lack of effort she allowed her condition to deteriorate. Her therapists expressed concern that, because the Appellant had not accepted responsibility for improving her level of function when she was provided with home assistance and child care support, she was not likely to utilize her time for her home exercise program if she were provided with further home assistance.

Despite access to all the services of her attending physician, physiotherapists, occupational therapists, neurologist and clinical psychologist, the Appellant, without any valid reason that we can discern, did not participate fully in her programs, thus preventing her recovery. We are convinced that, had the Appellant taken responsibility for working with her caregivers in her functional restoration program and because of the natural history for healing a Whiplash Associated Disorder of this nature, she would have at least gone a long way towards achieving functional restoration by October 6, 1995.

DISPOSITION:

In that there is a pattern of non-compliance expressed collectively by several objective program providers over 14 months of treatment after the accident and during the 1996 programs, we are persuaded that the decision of MPIC to terminate [the Appellant's] benefits was proper at the time when it was made.

However, there are several factors that persuade us that [the Appellant] should be given one more opportunity to regain her pre-accident condition with assistance from MPIC:

(a) the assessments in 1996 found that she had deteriorated further and that her functional limitations had qualified her for home assistance which, because she had apparently not been cooperative, she did not receive;

(b) the additional difficulties that she was experiencing from her temporomandibular joint disorder appear to have gone largely unnoticed by everyone except [Appellant's doctor] until May of 1996 - that, at least, is the first mention that we find of this problem on her file - and may well have contributed to what was perceived as an attitudinal fault;

© [Appellant's occupational therapist], in her reports of July 8th and September 30th, 1996, did recommend a time-limited re-instatement of child care and housekeeping support, with concurrent monitoring of [the Appellant's] exercise program;

(d) [the Appellant] testified that, as she put it, "I had no supervision, no real help, in the Occupational Therapy Department. When I complained about anything, (the therapist) would say ' I don't want to hear what you have!' That may or may not have happened, but at least the perception lingers in the mind of the victim that, given more concentrated tuition, she would have done better;

(e) [Appellant's physiotherapist #2], the physiotherapist who was treating [the Appellant] for pre- and post-surgical management of bilateral TMJ arthroscopy, had recommended "a structured, supervised, strengthening program of time limited duration" at a facility near her home to make her attendance more convenient for her. [Appellant's physiotherapist #2] also recommended "some chronic pain counselling in order to increase motivation and compliance to exercise". Those recommendations were not followed because, by that date, MPIC had made its

initial decision to cut off any further benefits, and the matter was on its way through the internal review process.

Based on the premise that [the Appellant] may now be ready to take responsibility for her recovery, and in the exercise of our jurisdiction under Section 184(1)(b) of the MPIC Act, we shall refer her for an independent, up-to-date assessment and, if recommended as a result of that assessment, we may well order a time-limited physiotherapy or occupational therapy program, with emphasis on re-instruction about home exercises. Upon receipt of the report, a decision will be made about whether there is anything further to be done by the insurer for [the Appellant], in which latter event the matter will then be referred back to her Case Manager at MPIC to make the appropriate arrangements.

Dated at Winnipeg this 15th day of April 1998.

J. F. REEH TAYLOR, Q.C.

LILA GOODSPEED

F. LES COX