Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-48

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** **[Text deleted], the Appellant, appeared in person accompanied by her husband, [text deleted]**
HEARING DATE:	**April 8th, 1998**
ISSUE(S):	**Whether Appellant is entitled to reinstatement of income replacement indemnity.**
RELEVANT SECTIONS:	**Sections 83(1)(a), 84(1), 106(1), 106(2), 110(1)(c) and 110(2)(a) 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's] claim arises out of an automobile accident in which she was involved on February 14th, 1996, wherein she sustained soft tissue injuries to her right shoulder and the right side of her

neck, accompanied by persistent headaches.

At the time of the accident, [the Appellant] had been off work and in receipt of worker's compensation benefits by reason of an injury to her lower back that she had sustained on July 11th, 1995 in the course of her part-time, casual employment as a [text deleted] in the employ of [text deleted] at its [text deleted].

Some time in early April the Workers' Compensation Board decided that [the Appellant] was able to return to work, although with some restrictions, namely:

no repetitive flexion-extension;

no lifting greater than 30 pounds;

no overhead work (i.e. hands over head).

[Text deleted] was apparently willing to accommodate those work restrictions and had made tentative arrangements by May 2nd, of 1996 to return her to work as a Casual [text deleted] or [text deleted] Volunteer Co-ordinator at [text deleted].

However, in the interim [the Appellant] had sustained the shoulder and neck injury in her motor vehicle accident on February 14th of 1996, as noted above.

The Workers' Compensation Board continued to pay income replacement benefits to [the Appellant] until June 13th of 1996, by which date she was deemed by the Workers' Compensation Board to be

fit to return to work. From that date, Manitoba Public Insurance Corporation commenced paying her income replacement indemnity and continued doing so up to and including December 4th, 1996. The insurer had also completed a 180-day determination, pursuant to Sections 84 and 106 of the MPIC Act and determined her employment to be that of a [text deleted] Attendant.

MPIC, in terminating her benefits as of December 4th, 1996, based that decision upon a report from her attending physician, [text deleted] of November 29th, 1996 and a report submitted by [text deleted], a physiotherapist with [text deleted] Physiotherapy, of November 28th, 1996. [Appellant's doctor #1], while noting slow progress despite physiotherapy and exercises, and also noting mild limitation of neck extension and flexion to the left, added that there was no objective spasm and that neurological examinations of [the Appellant] had been normal. [Appellant's doctor #1] concludes:

> [The Appellant] should avoid duties that "pull on her neck" but, as discussed on the phone, "suspender-type straps" should be more tolerable. I am not aware of other specific functional deficits precluding her from her duties as [text deleted] Attendant.

[Appellant's physiotherapist] assessment of [the Appellant] indicates that, between September 5th and November 28th of 1996 her cervical range of motion had improved from 71% to 95.5% of normal value.

[The Appellant] sought an internal review of the decision to terminate her income replacement indemnity and, on April 1st, 1997, MPIC's internal review officer wrote to her to confirm that termination. It is from this latter decision that [the Appellant] now appeals.

This Commission commenced hearing [the Appellant's] appeal on October 30th of 1997, but adjourned it when it became apparent that additional medical information would be required. This Commission then referred [the Appellant] for an independent medical examination to [text deleted], an orthopaedic specialist, who examined her on November 10th, 1997. The only objective signs detected by [independent orthopaedic specialist] were of "some localized tenderness....on deep pressure over the dorsum of the right sacroiliac joint, over the upper border of the right trapezius muscle and at the tip of the right shoulder joint." Based on her explanation that she felt carrying a load of 40 pounds around the right shoulder joint was intolerable, particularly if she has to work standing up for very long hours and considering her physical findings, [independent orthopaedic specialist] felt that it was understandable that she would have left her job, and that she might be happier working at less strenuous chores.

[Independent orthopaedic specialist] also noted that [the Appellant] had "had all the usual available remedies for her musculofascial discomfort, such as physiotherapy, acupuncutre, analgesic medication with muscle relaxant, as well as chiropractic adjustment and manipulation". He felt that she would benefit from continuing with her home exercises but that, with respect to her persistent and sleep disturbance, he felt that a consultation with a neurologist might be helpful.

[Independent orthopaedic specialist] also noted that, although at the time of the accident [the Appellant] was wearing a shoulder strap pressed snugly against her left shoulder, her symptoms appeared to be with the opposite shoulder, namely, the right side. He expected that [the Appellant's] "minor muscular fascial ligamentous sprain" would heal within a few months to a year. He found that she had an excellent range of motion of her right shoulder girdle with normal power and sensation of the upper limb. He concluded that, in the absence of any other recent cause for her symptoms, "one tends to attribute her physical findings to her previous road traffic accident which occurred on 14th February, 1996". Following [independent orthopaedic specialist's] recommendation, [the Appellant's] general practitioner, [text deleted], referred her for a neurological examination to [text deleted], a neurologist at the [text deleted] Clinic, who examined [the Appellant] on February 4th, 1998. [Appellant's neurologist] found no evidence of neurological damage and concluded that [the Appellant's] main problem was related to muscle spasm in the right cervical and trapezia regions. He recommended that she should return to physiotherapy and should be referred to a physician at the [hospital]. He did feel that her ongoing pains in the neck and trapezius area did relate to the automobile accident although, he said, it was difficult to say what proportion of her inability to return to work was related to the neck and what proportion to the back, since he did not actually examine her back. It is our understanding that [the Appellant] has, in fact, been referred to [Appellant's doctor #2] who, in turn, has indicated the need for some further diagnostic procedure, and [the Appellant] is also making an appointment with the [hospital] upon the recommendation of [Appellant's neurologist].

Much of the evidence contained in MPIC's file, as well as that which was adduced at the hearing of [the Appellant's] appeal which was resumed on April 8th of 1998, revolved around the question of whether [the Appellant], despite the discomfort that she continued to have in the right side of her neck and shoulder, would actually have been able to fulfill the duties of a [Appellant's doctor #2] Attendant had she returned to work on or about December 4th of 1996, upon which latter date MPIC had terminated her income replacement payments. That work consisted, almost entirely, of dispensing quantities of coins to customers of the Casino who wished to play the slot machines. The coins were carried by [the Appellant] in two large pouches, each of which was suspended from a broad, leather belt carried around her waist. The belt itself was, in turn, held in place not only by the waist that it encircled but, as well, by straps attached to the front of the belt, going over the shoulder and meeting in a 'Y' at or about the middle of her back before separating and being attached to the belt again at the back, akin to a pair of men's suspenders. As her supply of coinage dwindled, she would have to return to the cashier's cage to replenish that supply. [The Appellant] agreed that any given supply of coins tended to diminish fairly rapidly, commensurate with the voracious appetites of the [text deleted] machines and their customers. She agreed, therefore, that she would only be carrying the maximum 'pay-load' for fairly brief periods, but pointed out that, during busy times at the [text deleted], she would have to replenish that pay-load back up to maximum weight quite frequently.

There is evidence on file to indicate the employer's view that no [text deleted] Attendant was necessarily required to carry 40 pounds at a time; she could have carried, say, 20 pounds at a time,

simply returning to the cashier's wicket more frequently. [the Appellant] responds to that by saying that such a comment might be well and good in theory, but that each member of the staff was under constant surveillance and that too frequent trips to the cashier's cage were interpreted as socializing or fraternizing, 'brownie points' were docked and the casual employee would, therefore, find herself being called in for work less frequently. She was, as she put it, "really required to hustle: the more you hustle, the better marks you get, the more calls to work you get".

However, offsetting [the Appellant's] view that her employer would not have tolerated the carriage of a lighter load of coinage is the fact that same employer had already made tentative plans to move [the Appellant] into a less physically stressful position by reason of her earlier, low back injury for which she had been receiving worker's compensation. We are of the view that, had [the Appellant] explained to her employer the nature of her disability, expressing a willingness to return to work but pointing out the need for lighter loads and more frequent visits to the cashier, at least for a limited time, there is no reason why the employer would not have been willing to accommodate that. Such a willingness had already been displayed.

THE ISSUE:

The only issue before us is whether MPIC was justified in terminating [the Appellant's] income replacement indemnity on December 4th, 1996.

CONCLUSION:

We find that, on the basis of the evidence that was then available to it, the decision that MPIC made at the time was proper. Even the evidence that has emerged since that time, while certainly tending to support [the Appellant's] claim that the injury she sustained to her neck and shoulder at the time of her motor vehicle injury continues to cause her discomfort, does not necessarily persuade us that she was unable to return to work. Physiotherapy sessions, if the need for them remained paramount, could easily have been scheduled for times in the morning before [the Appellant's] normal working hours were likely to begin. No approach appears ever to have been made by [the Appellant] to her employer with a view to explaining the effects of her most recent injury and the limitation that she might need, at least for some limited time, to be placed upon the weight that her right shoulder would need to support.

It does seem clear that [the Appellant] does require some further form or forms of therapy, although whether that therapy is required for her shoulder and neck, for her lower back, or for both, is not entirely clear to us. She continues to receive competent medical advice in that context, and it may well be that, to the extent that any of her current problems have their origins in her motor vehicle accident, MPIC will be responsible for paying for any treatment thus made necessary.

There is one other factor that, in our view, does entitle [the Appellant] to an additional benefit. There is evidence on file which, while it could by no means be called a certainty, causes us to find

that, on a reasonable balance of probabilities, the termination of [the Appellant's] employment by [text deleted] was caused by the motor vehicle accident. We refer, in particular, to one letter and one memorandum prepared by [text deleted], Human Resources Officer at [text deleted]. The first, dated April 22nd, 1996, is a letter addressed to [the Appellant] in which [Appellant's employers' Human Resources Officer] notes that he has reviewed the recommended work restrictions indicated by the Workers' Compensation Board and would like to discuss and develop a plan for her return to work at [text deleted]. He invites her to contact him within 24 hours and leaves his phone number. That letter, read by itself, is a strong indication that the employer was, indeed, willing to accommodate any limitations imposed upon [the Appellant] in the context of her lifting abilities. (It must also be said, of course, that the employer was almost undoubtedly more willing to accommodate her against the background of a worker's compensation claim since, by doing so, the employer would be helping to keep its own WCB premiums at a better level.) The second document is an internal memorandum from [Appellant's employers' Human Resources Officer], dated May 2nd, 1996. It is short enough to be quoted in full here, as follows:

> I spoke to [the Appellant] yesterday afternoon with respect to her return to work, as a Casual [text deleted] or Volunteer Co-ordinator at [text deleted]. She expressed interest in returning to work and will look forward to hearing from the [text deleted] Manager.
>
> On the down side, she has indicated that she was in a car accident some time in February and is concurrently seeing a physiotherapist for her neck as result of the accident and for her back which is a result of her WCB claim. Apparently she visits the Therapist five days/week (two days for her back and three days for her neck and alternates the visits the next week.
>
> What will probably end up happening is that she will be dismissed as a result of lack
>
> of availability if she is seeing the therapist five days/week.

While there is also some evidence on the file to indicate that both Workers' Compensation Board and [text deleted] experienced no little difficulty in maintaining contact or receiving timely replies from [the Appellant], and that the [text deleted] had certainly contemplated terminating her employment as early as October 19th of 1995 because, although the Workers' Compensation Board had found her capable of returning to work, she had neither contacted her employer nor responded to the employer's efforts to reach her, the fact is that the [text deleted] had not dismissed her at that juncture. Rather, it had attempted to accommodate her and, in our view, had it not been for her motor vehicle accident she might well be working for the [text deleted] today. That being the case, [the Appellant] is entitled to the benefit of Section 110(2)(a), of the MPIC Act, of which a copy is annexed to these Reasons. Since her entitlement to income replacement indemnity had lasted for not less than 90 days nor more than 180 days (specifically, from June 14th to December 4th of 1996) she is entitled to an additional 30 days of IRI, with interest thereon from June 4th, 1996 to the date of actual payment.

Dated at Winnipeg this 10th day of April 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

F. LES COX