Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-59

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Mr. Dean Scaletta** **the Appellant, [text deleted], represented by [Appellant's counsel]**
HEARING DATE:	**November 29th, 1996**
ISSUE(S):	**(i) Whether automobile accident was primary cause of termination of Appellant's employment;** **(ii) Period of income replacement indemnity entitlement, if any.**
RELEVANT SECTIONS:	**Sections 81(1) and 110(2) of the M.P.I.C. 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 injured in an automobile accident on November 1st, 1995, when the car that she was driving was rear-ended by another vehicle.

At the time of the accident, [the Appellant] was employed by the [text deleted] as an Assistant Custodian, a task which, from the job description with which we were provided, clearly entails a good deal of strenuous physical activity.

[The Appellant] had fallen down a flight of stairs at [text deleted] where she was employed, in November of 1990, injuring her lower back. As an apparently direct consequence of that fall and her resultant injuries, she was absent from work on a number of occasions and, indeed, was in receipt of Workers' Compensation for a time.

Treatment for [the Appellant's] back injury appears to have been largely completed by mid to late September of 1995, by which point she had returned to work for the [text deleted].

Following her motor vehicle accident of November 1st, 1995, [the Appellant] was off work for a short time but then returned to work, full-time, in December of 1995. Following her return to work, she began to experience headaches and pain in the cervical spine, of increasing frequency and severity, to a point at which she again had to take time off work. [The Appellant] gave evidence that, during the period between December of 1995 and March of 1996, she worked approximately 60, non-consecutive days, more or less. These most recent absences proved to be too much for the [text deleted], which then terminated her employment, effective May 8th, 1996, upon the grounds of ‘innocent absenteeism'.

In the course of launching an appeal to the [text deleted] against her dismissal, [the Appellant] wrote a letter to the [text deleted] in which she says, in part:

> "...The fact of the matter is that 95% of my absenteeism is related to my lower back injury that occurred which I was working for the [text deleted]."

That letter, of course, was written in order to persuade the [text deleted] that her absenteeism was certainly not due to any fault of hers but, rather, that it stemmed from an injury that she sustained in the course of her employment. The statement is probably true, since her workplace accident had taken place in November of 1990 and had caused her to be absent from work on many occasions between then and the date of her automobile accident on November 1st of 1995, just five and one-half months prior to the date of her letter.

We have been provided with several medical opinions and, as is not infrequently the case, those opinions do not all reach the same conclusion. Without attempting to analyse each such opinion in detail for the purposes of these reasons (although we have certainly studied them with care in the course of reaching our conclusions), we are of the opinion that the lower back injury sustained by [the Appellant] in 1990 had been largely cured, at least to the point at which it was ever likely to be cured, before November 1st of 1995. We further find that it was the neck and upper back injury that she sustained on November 1995 that was the cause of her absences from work after the latter date, and that it was these most recent absences that constituted the 'final straw' that caused the [text deleted] to terminate her employment. The chain of causation seems to us to be quite clear: in the absence of the automobile accident it is doubtful, at least, that she would have needed to take further time away from work; it was primarily, if not entirely, the accident that caused her subsequent absenteeism and, therefore, the termination of her

employment for ‘innocent absenteeism'.

The Appellant has, through her Union, launched an appeal against her dismissal by the [text deleted]. We have sought the further submissions of counsel for the parties, with a view to ensuring the proper distribution of any funds paid by M.P.I.C. to [the Appellant], and the proper distribution of those funds (if any) to which she might be entitled in the event of a favourable decision by the board of arbitration established to deal with her appeal against dismissal. We have received useful suggestions from both counsel, which are embodied in the disposition of this appeal which follows.

Section 110(2) of the M.P.I.C. Act reads, in part, as follows:

> "Temporary continuation of I.R.I. after victim regains capacity
>
> 110(2) Notwithstanding clauses (1)(a) to (c), a full-time earner or a part-time earner who lost his or her employment because of the accident is entitled to continue to receive the income replacement indemnity from the day the victim regains the ability to hold the employment, for the following period of time:....
>
> (b) 90 days, if entitlement to an income replacement indemnity lasted for more than 180 days but not more than one year;"

Since [the Appellant] was apparently entitled to income replacement indemnity from the 9th day of November 1995 up to and including the 19th day of August 1996, a period of 284 days, and since her I.R.I. amounted to $763.57 bi-weekly, she is entitled, pursuant to the section cited above, to receive $763.57/14 X 90, or $4,908.66.

Because, since the date when her benefits from M.P.I.C. were terminated, [the Appellant] has been in receipt of certain funds from the Unemployment Insurance Commission and from Social Services, those monies will need to be repaid. [Text deleted], counsel for [the

Appellant], has undertaken to receive the full amount of this award in trust, and to reimburse U.I.C. and Social Assistance before disbursing the balance to the order of [the Appellant].

If [the Appellant's] pending grievance is successful and she is awarded a lump sum of retroactive salary, then, to the extent that she has received benefits from M.P.I.C. covering all or any part of the period for which her retroactive pay will then have been awarded, then she must direct her counsel to reimburse M.P.I.C. for the benefits paid to her during the period in question, as a first charge against that lump sum, retroactive pay. Since [the Appellant] is being represented by counsel for her Union in the context of her forthcoming arbitration, [Appellant's counsel] should send a copy of these Reasons to counsel for the Union, who can then ensure that, in the event of a successful arbitration award of retroactive pay, the appropriate repayment is made to M.P.I.C.

Dated at Winnipeg this 12th day of December 1996.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED