Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-24

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C. Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Ms Joan McKelvey;** **[Text deleted], the Appellant, appeared in person, together with her husband, [text deleted]**
HEARING DATE:	**April 22nd, 1997**
ISSUE(S):	**(a) Entitlement to IRI - whether victim 'entirely or substantially' unable to perform essential duties of employment;** **(b) Whether victim entitled to reimbursement for cost of retraining program.**
RELEVANT SECTIONS:	**Sections 83, 110 and 138 of the MPIC Act, Section 8 of Regulation 37/94 and Section 10(1)(e) of Regulation 40/94**

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

THE FACTS:

[The Appellant] appeals from a decision of [text deleted], Acting Internal Review Officer for Manitoba Public Insurance Corporation ('MPIC') bearing date June 14th, 1996. [MPIC's Acting Internal Review Officer's] letter to [the Appellant], embodying that decision,

appears to cover the background facts in sufficient detail (subject to certain qualifications that appear below) that we shall append it to these reasons with the intent that, save only where we specifically differ from it, our factual findings are identical to those of [MPIC's Acting Internal Review Officer].

[The Appellant] is claiming lost wages - that is to say, income replacement indemnity ('IRI') for the period from November 1st, 1995 to June 30th, 1996, this being the period during which she was attending at [text deleted] in order to complete a [text deleted's] course of training. She also seeks reimbursement of the cost of her tuition and books for that course which, she says, amount to $6,700.00. She took out a student loan for $5,000.00 toward the cost of that course, of which part still remains unpaid.

In order to make clear the factual basis upon which we arrive at our decision, we note our disagreement with [MPIC's Acting Internal Review Officer] on the following points:

(a) it seems clear that [the Appellant] was not off work as a result of her slip and fall accident on August 14th, 1994 "for some 2 ½ months". Her Application for Compensation says that she was "off work....about 6 weeks" - a statement that she contradicted at her hearing by saying that she was only disabled for about two weeks, after which she did have to take a few hours off work each week (usually by leaving work early) in order to attend for chiropractic treatment;

(b) [MPIC's Acting Internal Review Officer] indicates, on page 3 of his June 14th, 1996 decision, that [the Appellant's] return to the lighter duties of her waitressing job, on a restricted basis, until she lost that job at the end of May, 1995, was 'clearly inconsistent

with the suggestion that you were not able to do the work'. With deference, we would have thought that the surrounding facts were, if anything, more consistent than inconsistent with that suggestion - [the Appellant] had, after all, been holding down that job well enough prior to her accident, and the limitations upon her ability to perform some duties after the accident might well indicate a causal relationship;

(c) we do not attribute the same significance as do [MPIC's Acting Internal Review Officer] and his medical consultants to the frequency, or lack of it, of [the Appellant's] chiropractic treatments, and the lapses of time between those treatments, during the period between August of 1994 and August of 1995.

However, after digesting all of the medical and chiropractic evidence tendered to us, both by [the Appellant's] caregivers and MPIC's in-house consultants, as well as by [text deleted], this Commission's own neurological consultant, we are still left to determine the puzzling question whether, as a result of a physical or mental injury caused by her motor vehicle accident, [the Appellant] was rendered 'entirely or substantially unable to perform the essential duties of the employment that were performed by her at the time of the accident'.

At the time of the accident, [the Appellant] was employed at [text deleted] as a waitress, where she had started work in or about October of 1994. After her motor vehicle accident of January 13th, 1995, [the Appellant] was away from work on her doctor's advice until January 24th, when she returned to work. Her employer accommodated her need for lighter duties by assigning her to a smaller section of the Restaurant and allowing her to reduce her hours of work each week until her health became restored. Her employment at [text deleted] ended on

May 22nd of 1995 and we were provided with a copy of the employer's letter of that date, setting out the reasons advanced by the employer for terminating her employment. If the employer's allegations are valid - and, with one possible exception, we have no real cause to doubt them - the management of the restaurant appears to have had reasonable grounds for her dismissal, although [the Appellant] maintains staunchly that her troubles there all stemmed from the extreme discomfort from which she was suffering and her resultant inability to perform her duties in the manner that her employer required.

Counsel for MPIC points out that, according to that employer's letter of termination, [the Appellant's] problems predated her motor vehicle accident and simply added up to what the employer called a 'bad attitude'.

At or about the beginning of July of 1995, [the Appellant] started a new job at the [text deleted], but quit after a couple of weeks because, she testified, the discomfort from which she was still suffering made it difficult, if not impossible, properly to fulfill the duties of this new and somewhat more demanding job.

During the month of August, [the Appellant] held another position, this time at [text deleted], as an assistant in the shipping area. Her duties consisted, in the main, of working at a table doing light packaging and filling orders. Her former employer says that it would not have been necessary for [the Appellant] to lift anything heavy and that, had she encountered trouble with lifting, the employer would merely have had one of the male employees lift the packages in question. That job was terminated by the employer after about three weeks, upon the grounds that

[the Appellant] had been taking too much time away from work for reasons that were unacceptable - for example, the need to drive [text deleted] to medical appointments, the desire to go home in order to receive a parental telephone call - and general dissatisfaction by the employer with [the Appellant's] performance.

It is noteworthy that none of those three employers made any mention of [the Appellant] having complained about disabilities related to her automobile accident. Indeed, each of them appears to have said that [the Appellant] did not at any time mention her automobile accident as a reason for her inability to perform the duties of her employment. That testimony, although unsworn and merely reflected by signed statements, in two cases, and by a memorandum of a telephone discussion in the other, was uncontradicted.

THE LAW:

The question of [the Appellant's] entitlement to IRI is governed by Section 83(1) of the Manitoba Public Insurance Corporation Act ('the Act'). A copy of this, and of other relevant sections of the Act and Regulations referred to below, will be found attached to these reasons, with the governing portions being highlighted in the copy that is going to [the Appellant]. (It is a matter of common ground that, at the time of her accident, [the Appellant] was a 'part-time earner', within the meaning of the Act.) The first question that we need to address, therefore, is whether she was unable to continue the employment, or to hold an employment that she would have held, during the first 180 days following her accident, if the accident had not occurred.

Section 8 of Regulation No. 37/94 provides that

> *"A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident."*

After a careful review of all of the available evidence, we are not satisfied that, upon a balance of probabilities, [the Appellant's] accident rendered her 'entirely or substantially unable' to perform the essential duties of her employment as a waitress. While the accident had required her to take approximately two weeks away from work in order to recuperate, she was able to carry out the essential duties of her employment from the date of her return to work on a part-time basis on January 24th, 1995 until about May 21st, when her employment was terminated for cause; she quit her job at [text deleted] (contrary to the suggestion on MPIC's file that she was "let go because they were not happy with her work"), primarily because she found that the duties required of her exceeded those that she had been led to expect. Her work at [text deleted] encompassed about the first two weeks of July of 1995. The termination of her employment at [text deleted] after about three weeks in August of 1995 appears also to have been terminated for cause: she had been taking time away from work for reasons unacceptable to the employer to whom, as with her two previous employers, [the Appellant] had apparently not indicated any inability to perform her tasks as a result of pain caused by her automobile accident.

[The Appellant] elected, perhaps not unwisely, to effect a change in the direction of her career, and enrolled in the course at [text deleted] in November of 1995. While that decision

may be a commendable one, we are of the view that the cost of it is not something that MPIC can properly be required to pay, either in terms of the tuition fee or the income that [the Appellant] was unable to earn while completing the course. We do not find that [the Appellant] falls within the provisions of Section 10(1)(e) of Regulation 40/94.

DISPOSITION:

It follows, therefore, that [the Appellant's] appeal must fail.

Dated at Winnipeg this 28th day of April 1997.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED