AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-61

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], Appellant represented by herself**
HEARING DATE:	**October 27th, 1997**
ISSUE(S):	**1. Whether victim entitled to reinstatement of Income Replacement Indemnity ('IRI');** **2. Whether victim entitled to reinstatement of home care assistance.**
RELEVANT SECTIONS:	**Section 81(1) & 131 and Regulation 40/94 of the MPIC 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:

The Appellant was injured while stepping on to a bus on February 17th, 1995. It was stopped about three feet from the curb and she had to stretch her right leg to get on to the bottom step; while doing so she heard a "pop" in her right knee. She testified that this became

quite painful and that she could barely walk when she got off the bus. While it is questionable whether this apparent injury may properly be said to have been 'caused by the use of an automobile', the parties have elected to treat it as falling within the ambit of the Act and, not without some hesitation; we shall do the same.

At the time of the accident [the Appellant] was the owner and operator of [text deleted]. She offered two courses; one on [text deleted] and the other on [text deleted]. She advises that she would normally conduct three two-hour classes a day starting at 11 A.M. Monday to Friday and each class had between two and five students. In addition to running the classes she would put together [text deleted] shows for her students to practise their skills.

When the condition of her knee did not improve, she consulted her family doctor, [text deleted], on March 6th, 1996 and he prescribed rest, ice packs for her knee and crutches. It was painful for her to walk and [Appellant's doctor] advised her not to return to the [text deleted] aspect of her job which was teaching [text deleted]. Her primary complaint was that she was unable to walk and show the students how to turn on the [text deleted] ramp. Due to her inability to work, MPIC provided the Appellant with Income Replacement Indemnity ('IRI') and home assistance. On this latter point she was evaluated on Grid B as set out in Regulation 40/94 of the Act, and she scored 27 out of 27. One must score 5 or more points to get any financial assistance for home care. The purpose of the Grid is to determine if an individual needs help in preparing food and operating their home and, initially, the Appellant qualified for the maximum amount of assistance.

[The Appellant's] condition gradually improved and a further evaluation for home assistance was done on May 29th, 1995 when she scored 14.5 out of a possible 27 points; the amount of financial aid for home assistance was reduced accordingly. She was now able to prepare her meals but needed assistance for housekeeping, cleaning and laundry. There was continual improvement in her ability to operate her home and [Appellant's homecare assessor], of the [text deleted] was hired to do a complete assessment of [the Appellant]. She prepared a report on the Appellant's condition in late December 1995 or early January 1996 (the cover sheet of the report containing the date is missing) and it states "Similarly, [the Appellant] should be able to manage her regular activities of daily living in the same way she did prior to the accident". This report was shown to the Appellant by the adjuster for MPIC on January 17th, 1996 and discussed with her; she was advised that based on this assessment MPIC would terminate her home assistance on February 1st, 1996.

Due to the slow improvement in the Appellant's right knee her family physician sent her to see [text deleted], an orthopaedic surgeon, on September 19th, 1995. He diagnosed her problem as a mild strain to the right knee. A detailed clinical examination performed by himself showed no structural change to her knee and X-rays did not show any abnormality of the joint. He advised that there was no current restriction or limitation associated with the knee strain and that she may occasionally feel a discomfort in her knee. [Appellant's orthopaedic surgeon #1] recommended to [Appellant's homecare assessor] of [text deleted] that the Appellant could do the more sedentary duties of her job if she had an assistant to demonstrate and [text deleted]. When [Appellant's homecare assessor] advised [the Appellant] of this recommendation she rejected it on the basis "she was afraid that there would be a loss of quality in the instruction".

Based on consultations with all of [the Appellant's] professional care givers [text deleted] advised her that she should be able to return to work at her [text deleted] agency including participating in her [text deleted] work. Upon receipt of this report MPIC advised [the Appellant] that her IRI benefits would terminate on February 1st 1996. She testified that shortly after her benefits were cut off she returned to work full time but due to her continuing knee problems she did not recruit any new students.

[The Appellant] was not happy with the opinion of [Appellant's orthopaedic surgeon #1] and asked [Appellant's doctor] to send her to another specialist for a second opinion. He arranged for her to see [Appellant's rehab specialist], of the [text deleted]. He saw her on January 11th and February 26th 1996 but did not report to MPIC until June 24th, 1996. [Appellant's rehab specialist] felt that [the Appellant] "should be able to do standing, sitting and walking activities (light work) but is not in any condition to do any bending, kneeling, stairs or lifting object". He added that he was sending her for an MRI to see if there was a tear in any of the ligaments associated with her right knee.

On August 13th, 1996 [Appellant's rehab specialist] confirmed that [the Appellant] had a tear in the medial meniscus of her right knee and he recommended surgery to correct this problem. He further advised that she would require a conditioning and strengthening program for her quadriceps, hamstrings and hip girdle muscles to restore them to normal. [the Appellant], for her own reasons, decided not to have her problem corrected surgically.

In an attempt to find relief and help [the Appellant] recover the full use of her knee, [Appellant's doctor] referred her for physiotherapy in the summer of 1995. Upon receiving eight

treatments [the Appellant] decided on her own that they were not helping her and she stopped attending the treatment program.

[the Appellant] also consulted [text deleted], an orthopaedic surgeon on January 22nd, 1997. He added nothing new about her condition except to say that "in this age group tears are present in over 60 % of people this age".

At the hearing of her appeal, [the Appellant] sought the reinstatement of her IRI in order that she could hire an instructor to teach her [text deleted] students how to handle themselves on the [text deleted] ramp, and the reinstatement of her home care assistance. She stated she could not even as of the date of the hearing demonstrate how a student should walk and turn on the ramp as it hurt her knee when she attempted the turn.

[The Appellant] provided her income tax returns for 1991, 1992 and 1993 to MPIC to determine her IRI benefits. [The Appellant] advised that she has operated her business for approximately 30 years. In 1991 her [text deleted] business earned $7,128.50 but had expenses, for heat, light, rent etc., of $10,024.80 for a loss of $ 2,842.30 which she applied against other income earned in that year. In 1992 her business generated an income of $8,210.00 but due to her expenses she suffered a loss of $2,105.452. In 1993 she grossed $7,225.50 for a net loss of $2,826.63.

[The Appellant] also provided a course outline, the cost of each and the number of hours of instruction for each for the two courses she offered. The [text deleted] course had ten parts, was 60 hours in length and cost $250.00. There was no specific reference to any [text

deleted] in this course but there was a section dealing with posture which teaches a person how to walk properly. The other course was P[text deleted] and it had twelve parts, was 30 hours in length and cost $490.00. One of these parts involved [text deleted].

When one divides the cost of the cheapest program, [text deleted], into the gross revenue earned for each of the three years (i.e. $7,200.00/8,2000.00 -:- $250.00) the result is between 29 and 33 students per year each requiring 60 hours of instruction. None of these students would have to be shown how to do [text deleted]. If all of the students took the [text deleted] course each year ($7,200.00/8,200.00 -:- $495.00) the result would be between 15 to 17 students per year requiring 20 hours of instruction. Each of these students would have to be taught [text deleted].

Due to [the Appellant's] continuing complaints about her inability to do her job, MPIC asked [text deleted], an occupational therapist from the [vocational rehab consulting company], to determine [the Appellant's] concerns and what, if anything, could be done about them. [The Appellant] advised [Appellant's occupational therapist] that she was unable physically to manage the following specific aspects of her job:

1. demonstrate some [text deleted] poses [text deleted] which involve the rotation inward of the right leg;
2. pivoting 360 degrees on right leg to demonstrate this [text deleted] technique to students;
3. occasionally squatting or kneeling down to floor level to physically assist students with their body positioning while posing; and
4. standing for extended periods of time while teaching or doing presentations.

[Appellant's occupational therapist] made a number of suggestions to help [the Appellant]. For example, she suggested that [the Appellant] should participate in an active physiotherapy program to improve the strength of her right leg. She also suggested a number of job modifications, such as raising the height of the [text deleted] to eliminate the need to squat or kneel, the use of a knee brace and the use of a high chair to alternate between sitting and standing during classes. [The Appellant] rejected all of these suggestions.

[Appellant's occupational therapist] also recommended that the job demands of [text deleted] be clarified and suggested a job demand analysis be done at another school to determine what was involved and what could be done to help [the Appellant].

[The Appellant] herself suggested that [Appellant's occupational therapist] should consult [text deleted], who was one of her former students, operating a [text deleted] school similar to hers. [Appellant's occupational therapist] conducted the evaluation with [Appellant's former student] and reported, amongst other things, "that the total duration of time spent teaching [text deleted] consisted of ½ hour per day in a week long course totalling approximately 2 hours per week. The critical physical demands of teaching ramp walking would involve occasional intervals of walking to demonstrate technique; walking is done with knees slightly flexed. Turns are also demonstrated. [Appellant's former student] stated that the instructor can turn on either right or left leg and is not required to demonstrate turns on both sides. [Appellant's former student] does not perceive that it is necessary to squat down nor to kneel down while instructing students in ramp walking". [The Appellant] rejected all of these suggestions and repeated her objections at the hearing.

THE LAW:

The Appellant was receiving home assistance pursuant to Section 131 and Regulation 40/94 of the Act namely:

> "**Section 131**
>
> Subject to the regulations, the corporation may reimburse a victim for expenses of not more than $3,000.00 per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance."

The key question in this case was when, if at all, the Appellant was able to perform the essential activities of everyday life without assistance. MPIC received a report from [text deleted] and they were of the opinion that [the Appellant] no longer required home assistance.

[The Appellant] did not present any evidence to MPIC after the termination on February 1st, 1996 to support her claim for reinstatement of this assistance. She did not present any evidence at the hearing of her appeal that would demonstrate a need for home assistance. Therefore we are of the opinion that MPIC were correct in terminating [the Appellant's] home assistance on February 1st 1996 as she was then capable of performing her essential everyday life activities.

The Appellant was receiving IRI pursuant to the following section of the Act:

> "**Section 81(1)**

A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment."

[The Appellant] claims that she was not able to resume her full-time employment when her IRI was terminated. To support her claim for reinstatement of her IRI benefits she provided a job description, dated November 7th, 1997, on what was involved in running her [text deleted] school:

"Daily work 7 hrs. or 8 hrs. sometimes longer.

I take care of the office work by myself plus teaching the students.

Classes begin at 11 A.M. to 1 P.M. (2-hr. class) next class at 1 P.M. to 3 P.M. last class at 5 P.M. to 7 P.M..

Then do xerox copies for the students, file cards to write up.

Bank deposit to be answered.

Interviews during working hours.

[text deleted] Shows and [text deleted] Shows.

Bookings to be done, fittings, rehearsals and finally the show, which requires many hours of work.

I also do outside work such as talking to high school students on [text deleted]."

Using [the Appellant's] own financial information and course information as set out above she would have averaged, in the three years preceeding her accident, between 15 to 33 students per year depending upon the type of course being taken. If all of the students in any given year took the [text deleted] course then should would only be teaching 15 or 17 students per

year at 20 hours per student for a total of between 300 and 340 hours of instruction. Given that [text deleted] is only one portion of this twelve part course it would appear the great majority of teaching required for this program could be done by [the Appellant], as she only felt limited in demonstrating ramp [text deleted] and turning. The amount of time required for that was minimal and could be accomplished by using her alternate leg as confirmed by her former student, [text deleted]. If there were a mixture of students then the time needed for [text deleted] would not be increased and might even decrease as the [text deleted] program did not require any of this type of training.

MPIC offered to hire an instructor to demonstrate [text deleted], to make adjustments to her work place and working conditions, to provide a leg brace and to surgically repair the tear in her medial meniscus. [The Appellant] rejected all of those forms of assistance. This support was intended to help her recover and allow her to return to the normal activities that she enjoyed pre-accident, or as close to that condition as was possible.

[The Appellant] was receiving $727.99 bi-weekly on IRI and when this is annualized it amounts to $18,927.74, which is considerably more than she received from her business. In fact, she subsidized its operations out of other income. MPIC met its obligation to assist [the Appellant] to return to her pre-accident status and she refused all of their proffered support other than cash.

Having chosen this course she cannot now expect or ask MPIC to continue to pay IRI forever. There is an onus on everyone to help in their own recovery and, if they choose not to, then they cannot expect MPIC to continue to provide all of their financial and other needs.

When we look objectively at all of the evidence we come to the conclusion that the [text deleted] on the [text deleted] and its associated activities was a very small portion of the activities [the Appellant] performed in running her school. We do not share her opinion that it was the major portion of this activity. [The Appellant] was able to return to full-time employment, with some minor limitations, when MPIC terminated her IRI. In our view, MPIC met its obligations set out in the Act. [The Appellant's] rejection of all types of assistance to help her reduce or eliminate the limitations related to the demonstrating of certain limited aspects of [text deleted] does not put an obligation on MPIC to continue to provide her with IRI.

DISPOSITION:

For the foregoing reasons, we conclude that the present appeal must fail and that the decision of the internal review officer should be confirmed.

Dated at Winnipeg this 11th day of December 1997.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED