Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-129

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mrs. Lila Goodspeed, and** **Mr. F. Les Cox**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Tom Strutt;** **[Text deleted], the appellant, appeared on her own behalf.**
HEARING DATE:	**July 22nd, 1998**
ISSUE:	**Causation - whether appellant entitled to Income Replacement Indemnity ('IRI') - whether loss of work necessitated by motor vehicle accident.**
RELEVANT SECTIONS:	**Sections 85(1)(a), 85(3), 85(4), 86(1) and 110(1) 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 appellant, unemployed at the time, was a passenger on a [text deleted] Transit bus on May 17th, 1995. Her evidence was that the bus was travelling on a main thoroughfare at about noon and passed a bus stop without stopping. Suddenly a man ran across the thoroughfare and in front of the bus, causing the bus driver to bring the bus to a sudden and full stop. The appellant admits the bus was not travelling fast but says that the stop was forceful enough to cause her entire body to

slide heavily into the back of the seat in front of her. At the same time a large parcel sitting on her lap slid off to the left and landed on the unoccupied seat beside her. The appellant apparently bruised one of her knees in hitting the seat in front of her. She testified that she felt a warm sensation in the back of her neck as her head whipped back and forth because of the sudden stop.

She did not report her injuries to the driver of the bus. She does not appear to have sought medical advice or treatment until May 25th, 1995, when she attended at the office of [Appellant's doctor] for an examination.

It is material to our consideration of [the Appellant's] present claim for Income Replacement Indemnity ('IRI') following her motor vehicle accident (MVA) of May 17th, 1995, to note that, as her family physician, [text deleted], puts it in a narrative report to MPIC of April 30th, 1998, [the Appellant] had been involved in several MPIC claims predating her 1995 MVA and "it is difficult to extract out what part of her present condition is from the previous injuries and how much of it is an exacerbation of those injuries via the accident of May 17th, 1995." The most significant of those prior injuries stemmed from a MVA of September 2nd, 1993, before the introduction of the present, so-called 'no fault' system.

[Appellant's doctor's] reports.

The 1993 accident.

We were provided with a number of reports, both in the standard MPIC format and in narrative form, rendered by [Appellant's doctor]. They were thorough, comprehensive and indicative of a practitioner who showed great concern for the well-being of his patient.

[Appellant's doctor's] reports following the 1993 MVA may be summarized this way: [The Appellant's] accident had occurred on September 2nd, 1993; she had first consulted [Appellant's doctor] on September 21st, complaining of neck pain posteriorly and left anterior chest pain, at which time she had not been interested in pursuing physiotherapy nor in taking medication of any kind. She was next seen in March of 1994 because of continued pain in the left anterior chest and between the shoulder blades. She was referred to physiotherapy, but with only marginal improvement. [The Appellant] was examined by an independent specialist, [text deleted], and, seeking a second opinion, was referred by [Appellant's doctor] to another independent specialist, [text deleted]. Their respective reports are noted later in these Reasons. Meanwhile, [the Appellant] continued to work in residential child care as a nanny, although only on a part-time basis, but still complained of pain, particularly when lifting children or after physiotherapy. [Appellant's doctor] reported, on November 30th, 1994, that "there are very few objective findings other than the X-ray findings.....", and recommended a formal assessment by the [rehab clinic]. The Appellant reported that she would be replaced as a child care worker in December 1994 by her employer as she was not able to perform her full duties due to her MVA of September 2, 1993.

The 1995 accident.

In his report of June 7th, 1995, to the Manitoba Public Insurance Corporation following [the Appellant's] May 17th MVA, [Appellant's doctor] stated that the appellant's injuries consisted of:

(a) a bruise to her right knee that, by that time, had resolved itself, and

(b) pain in neck and back that had been re-aggravated.

He found that [the Appellant's] cervical spine range of motion was normal, although she

complained of pain in the back of the neck on flexion and extension; thoracolumbar range of motion showed flexion down to the mid-chin and extension was full. She was treated with analgesics and referred for physiotherapy. The physiotherapists found a decreased range of cervical motion because of pain and muscle tightness, but no signs of neurological involvement. [Appellant's doctor] reported that the main occupation of the appellant was baby care and that she was capable of resuming her main occupation. His report notes "has a job starting June 12, 1995, 8 hours a day".

In August, 1995, the appellant presented herself to [hospital] Emergency because of severe headache; she had a complete work up for this including a lumbar puncture to rule out meningitis. The results of all of these tests were normal. [Appellant's doctor] felt that the headache likely had its origin in her neck as a result of her motor vehicle accident injuries. A physiotherapy report of August 31, 1995, indicated that [the Appellant's] pain level fluctuated but seemed to be getting better, especially since she was no longer working at child care. The appellant told [Appellant's doctor] that she started going to [text deleted] to take a secretarial course in September, 1995. Unfortunately, by October she noted that her neck pain was worse due, she felt, to carrying her bags to and from school with the strap over her neck. In December, 1995, [Appellant's doctor] decided to discontinue [the Appellant's] physiotherapy as little further progress had been noted from this mode of therapy.

In January 1996 the appellant reported to [Appellant's doctor] that she had fallen while downtown and injured herself in the right knee, right calf and the right elbow. Since those injuries were not related to her motor vehicle accidents and X-rays were negative, he decided that no medical

intervention was required. In that same month of January, 1996, the appellant went back to a gym in an effort to find relief from her pains and stiffness.

On March 4, 1997, [the Appellant] reported to [Appellant's doctor] that she had been standing on a bus when it jerked forward and she hit her right calf against a metal seat. She developed a large 7 x 2.5 cm bruise on the right calf and increasing pain on the left side of her neck on range of motion to the left. She had left chest wall tenderness but no bruising. She started seeing [Appellant's chiropractor] again in the spring of 1997 because MPIC had declined her request for a resumption of physiotherapy. [Appellant's doctor] summarizes [the Appellant's] injuries as a long and complicated problem and states its very difficult to sort out where one injury starts and the other one stops.

[Independent specialist #1's] report.

[Independent specialist #1], who examined [the Appellant] on May 9th, 1994, some eight months following her 1993 accident, found evidence of pre-existing degenerative disc disease in the lower back which, he appeared to conclude, was the primary cause of her lower back pain.

[Independent specialist #1] noted that the appellant [text deleted]. She had full range of motion in the cervical spine. The motions of the cervical spine were painless. She had full range of motion in the dorsolumbar spine. The motions of the dorsolumbar spine were painless. She had full range of motion in both shoulder joints. The motions of the shoulder joints were painless. There was no sign of muscle weakness or wasting in the upper limbs or the lower limbs. Her grips were strong in both hands. She could toe walk and heal (sic) walk without any difficulty. The arms and forearms, thighs and calves measured equal. Sensation in the limbs were normal. All the deep reflexes were present and equal bilaterally in the upper limbs as well as the lower limbs.

There was no sign of thoracic outlet syndrome. She was said to have tenderness at the back side of her neck and over the xiphisternum".

[Independent specialist #1] reported that X-rays of [the Appellant's] cervical spine were normal in appearance except for slight loss of cervical lordosis. " X-rays of the lumbar spine do show narrowing of the disc space at L4-5 level. There also seemed to be anterior marginal spur formation of the anterosuperior aspect of L3 vertebral body without any appreciable disc narrowing at L2-3 level. "

[Independent specialist #1] reviewed the medical reports that were submitted by her physician and states "It appears that this lady did sustain bruising to her chest wall and soft tissue strain involving the musculoligamentous structures of her cervical spine. However, at the time of my examination there were no positive physical findings. She has evidence of pre-existing degenerative disc disease in her lumbar spine. This may be partially responsible for her continued symptoms. At the time I saw her I found no reason to think that the car accident of September 2, 1993 should result in any permanent impairment to her chest wall, to her neck or to her back. At the time I saw her there was no indication for any further investigation or active treatment. She is likely to find it useful to continue with exercises of her neck, shoulder and her back on a regular basis in the way she has been doing. She is also likely to find it useful to lose some weight and refrain from heavy lifting so as to avoid any aggravation of her low back pain where she has evidence of pre-existing degenerative disc disease."

The appellant told [independent specialist #1] that she had worked as a nanny for 3 small children age 1-3 from January 1993 putting in about 8-9 hours a day, five days a week. She then voluntarily stopped work November, 1993, 'because of symptoms'.

[Independent specialist #2's] report.

While we were not provided with a copy of [independent specialist #2's] report, it was summarized for MPIC by [Appellant's doctor] who said ".....she (*i.e. [independent specialist #2]*) saw [the Appellant] on August 30th, 1994. It was her opinion that there was minor degenerative arthritis in the spine and that with physiotherapy and weight loss her condition would improve. There was nothing more specific than that."[independent specialist #2] is reported by [Appellant's doctor] to have "given her the okay to go back to work".

[Rehab clinic]

[The Appellant] had first attended at the [rehab clinic] on December 5th, 1994, for a full assessment, as a result of which she had completed a comprehensive rehabilitation program at the [rehab clinic]. In their report accompanying her discharge on or about February 17th, 1995, the [rehab clinic's] Program Coordinator, Physiotherapist and Exercise Therapist all express the view that [the Appellant] can return to work full hours and full duties.

[Appellant's doctor] reports that [the Appellant] attended the [rehab clinic] for a further assessment on the 13th and 14th of February, 1996. It was at their recommendation supported by [Appellant's doctor], that MPIC purchased an ergonomic chair and a foot rest to enable [the Appellant] to continue with her studies although, in light of the fact that she discontinued her

course, they do not appear to have achieved much benefit. The [rehab clinic] did not feel further physiotherapy was needed, since the appellant knew what kind of exercises needed to be done.

[Appellant's chiropractor]'s report.

The appellant's chiropractor, [text deleted], reported that he had examined [the Appellant], and had given her one spinal adjustment, on July 31st, 1995. On May 14th, 1998, [Appellant's chiropractor] reported that "the injuries and complaints presented at the July 31st, 1995, examination were of sufficient magnitude to totally disable [the Appellant] from her occupational, recreational and many domestic activities". (At the time of that examination, [the Appellant] had described her injuries resulting from both the 1993 and the 1995 MVA's.) However, in [Appellant's chiropractor's] first medical report, dated August 24th, 1995, he had reported on his examination of the Appellant on July 31st, 1995, that the Appellant was capable of resuming her main occupation as a day care worker with some restrictions on lifting and bending. That casts a substantial shadow of doubt upon the reliability of his report of May 14th, 1998, particularly since, although [Appellant's chiropractor] lists cervical and lumbar strain in some detail, there appears to be no objective evidence of total disability in his 1995 report. He also answered "No" to the question "Do you believe the victim will remain with permanent impairment due to the accident?".

While the appellant had apparently felt unable to perform her duties for approximately 1 ½ years after the September 2nd, 1993 motor vehicle accident, all her medical and paramedical specialists - [Appellant's doctor], [independent specialist #1], [independent specialist #2], her physiotherapist and the [rehab clinic], - deemed her ready by the spring of 1995 to return to her normal work, with the qualification from one source that she should avoid heavy lifting

whenever possible. The job of baby sitting she started on June 12th, 1995 did require the usual amount of lifting involving a one-year-old child.

On or about the 25th of November, 1995, [the Appellant] settled her outstanding tort claim arising out of the 1993 MVA, receiving payment for lost wages for the period from September 2nd, 1993 to May, 1995.

Meanwhile, [the Appellant] had returned to full time work as a baby sitter/nanny on June 12th, 1995, looking after a one-year-old child. She occupied that position until July 26th, 1995, when she withdrew from her duties because, she stated, the pain of lifting the child was no longer bearable due to the injuries she had suffered in her MVA of May 17th, 1995. She told [Appellant's doctor] that, by about a week following the cessation of her work, her pain was much better. It was [Appellant's doctor's] hope that by quitting her job the appellant would find relief from her pain.

At the hearing of her appeal, the Appellant stated she had not worked since July 26th, 1995, and that she abandoned the secretarial course she was taking because Manitoba Public Insurance Corporation would not pay for it and she ran out of money. This appears to be somewhat at odds with the reason reportedly given by [the Appellant] to [Appellant's doctor] for the discontinuance of her course. In 1996 the Appellant did volunteer work as a receptionist for 3 hours per day during the months of March and April and that was the only work she had done outside her home since 1995. There is an indication, in the material provided to us, that as a result of her 1993 accident

for which she had received a lump sum settlement, [the Appellant] might be unable or, at least, unwise to resume her child care work by reason of the additional strain that this might place upon her lower back, and that she would therefore be undertaking some retraining for a more sedentary type of work. On the other hand, and in addition to the views of all her caregivers referred to above, MPIC hired [vocational rehab consulting company] to do a vocational assessment and a job search for her and it was they who found her the job as a nanny that she started on June 12th, 1995.

The Commission was furnished with a copy of a Government of Manitoba certificate dated September 22nd, 1997, stating that the Appellant "has met qualifications for classification as a child care worker 1, under the Community Child Day Care Standards Act". When questioned about the certificate the Appellant told the commission that she got the certification because she needs a job but still insisted that she could not do all the duties of a child care worker because she still can't lift children.

THE ISSUE.

The issue before us is whether the injuries sustained by the Appellant on May 17th, 1995, entitle her to Income Replacement Indemnity either during or at any time after the first 180 days immediately following that accident.

THE LAW:

Given that [the Appellant] was unemployed on May 17th, 1995, for whatever reason, she must be classified as a non-earner for the purposes of this claim. The relevant portions of the MPIC Act are, therefore, to be found in Sub-sections 85(1)(a), 85(3), 85(4), 86(1), 86(2) and 110(1). A copy of each of those Sub-sections is attached to and forms part of these Reasons.

DISPOSITION

We note, firstly, that there is little, if any, objective evidence in the medical reports from doctors, physiotherapists or the [rehab clinic] that identifies the May 17, 1995 MVA as the cause of the Appellant's ongoing problems in her neck and back.

In the [rehab clinic] report of February 17, 1995 the Appellant is described as able repeatedly to lift 18 lbs, but having difficulty lifting 20 lbs. Her lumbar flexion & extension were 87% and 70% of ideal respectively. He rotation left and right were 79% and 71% of ideal respectively. It was the [rehab clinic] opinion that the pain had decreased so that the Appellant could return to work full hours and full duties and tolerate the pain. She expressed a desire to go back to work as she had been off work since December of 1994.

[Appellant's doctor's] report to MPIC dated June 8, 1995, notes that, although [independent specialist #2] and the [rehab clinic] had given the Appellant 'the OK to return to work', she continued to complain of various aches and pains in the back. [Appellant's doctor] was unable to find objective evidence for most of these pains.

On June 15, 1995 [Appellant's doctor] saw the Appellant and stated without reservation that the Appellant could resume her main occupation of baby sitting; he reduced the physiotherapy treatments from three times to twice a week. He also notes that she began work June 12, 1995 for 3 days a week and was expected to work at that part-time level for the next 4 weeks. In [Appellant's doctor's] letter of April 30, 1998 he points out that separating the Appellant's injuries from the May 17, 1995 MVA and her injuries prior to that from the previous MVA is very difficult and subsequently compounded by a third MVA in August, 1997.

We were impressed by the comments of [text deleted], the Medical Coordinator of Claims Services for MPIC. In a review of the medical and para-medical evidence on file, dated September 2nd, 1997, he points out that the impact upon the Appellant, as a passenger in a [text deleted] Transit bus, without the restraint of a safety belt, would be distributed over the Appellant's whole body as opposed to a whiplash of the spine occasioned in the earlier MVA. As [MPIC's doctor] puts it, in referring to the MVA of May 17th, 1995:

> It is improbable that the forces involved would lead to any substantial injury of this claimant's neck.....the entire trunk would move *en bloc* as the bus decelerated. The accident mechanics are substantially different from a motor vehicle collision where the occupant is restrained and the head is the only part of the body that moves appreciably and absorbs most of the energy of the impact. In the claimant's case, the energy would be distributed over the entire trunk and would therefore be significantly dampened at the neck.....There are few, if any, findings to suggest any ongoing deficit that distinguishes her condition in any way from her previous condition prior to May 17, 1995.....on the balance of probabilities and with a reasonable degree of medical certainty, it is improbable that the.....accident of May 17, 1995, resulted in any substantial injury to this claimant. Furthermore, it is improbable that these alleged injuries would result in any sustained disability.

A careful review of the current literature, including but not limited to the Scientific Monograph of the Quebec Task Force on Whiplash-Associated Disorders, Dr. Lawrence Nordhoff's text on Motor Vehicle Collision Injuries (1995 edition), the Clinical Guidelines for Chiropractic Practice in Canada, and the text by Drs. Arthur Croft and Stephen Foreman on Whiplash Injuries - the Cervical Acceleration/Deceleration Syndrome (1995, 2nd Edition), persuades us that, even allowing for any

residual sequelae from her 1993 accident and for any of the accepted risk factors that may have existed at the time, the natural history of any injuries sustained by [the Appellant] in the accident now under review would have seen them resolved by the end of August, 1995.

We are prepared to accept that the discomfort that caused [the Appellant's] quitting of her job in July of 1995 may reasonably be laid at the door of her May 17th accident, even though there is some real doubt whether she was, in fact, functionally deficient at the time. It follows that she is entitled to Income Replacement Indemnity for the period from July 26th to August 31st, both inclusive, of 1995, since she can properly be said to have been unable to hold an employment that she would have held during that period if the accident had not occurred. The amount of her I.R.I. will be calculated in the manner set out in Section 85(3)(a) of the Act. [The Appellant] will also be entitled to interest on that amount from August 31st, 1995, to the date of actual payment, at the prescribed rate.

Dated at Winnipeg this 1st day of September 1998.

LILA GOODSPEED
F. LES COX
J. F. REEH TAYLOR, Q.C.