Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-136

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mrs. Lila Goodspeed** **Mr. F. Les Cox**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Tom Strutt** **the Appellant, [text deleted], appeared on her own behalf, accompanied by her daughter**
HEARING DATE:	**July 15th, 1998**
ISSUE(S):	**Whether Appellant entitled to resumption of income replacement indemnity.**
RELEVANT SECTIONS:	**Section 81(1)(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 Appellant], who is now [text deleted] years of age, was fully trained as a registered nurse and enjoyed a very active life, domestically, recreationally and professionally, at least until some time in or about the year 1985.

She was diagnosed, some time in 1981 or 1982, as having degenerative disc disease in her lumbar spine, although it is not clear what symptoms gave rise to that diagnosis, nor who made it.

1985 may be termed a watershed year for [the Appellant]: her marriage ended; she was obliged to close down the last vestige of a retail business that she had operated successfully from 1977 until 1984; after a 1984 refresher course at [text deleted] and a short term job at [hospital #1], she started to work for the [text deleted] at the [hospital #2] in the [text deleted] Unit; she sustained the first of a number of back injuries, this one while attempting to prevent a patient from falling, which caused her to lose two days from work.

In 1986, [the Appellant] sustained a further, work-related injury while lifting another patient, from which the resultant pain to her shoulder, upper back, neck, lower back and limbs kept her off work for about eight weeks. She returned to work and continued there until September 29th, 1988. On the latter date, she sustained yet a third, work-related injury when turning a bedridden patient, becoming aware of increased pain in her neck and upper back. She consulted her physician, [text deleted], who prescribed medication for her back pain, referred her to physiotherapy and recommended that she remain off work until symptom free.

She was still away from work when, on January 4th, 1989, the vehicle that she was driving was rear-ended by another car; she was wearing a lap belt and her car seat had no head restraint.

Later that same day she felt a recurrence of pain in her lower back, made worse by her accident, pain about her hips, arms, shoulders and neck and, more specifically, pain in her back from levels T3 to T7. [Appellant's doctor], although expressing the view that the accident of 1989 had resulted in mainly soft tissue injury, which should clear in due course, suggested that, with her back history, he felt it unwise for her to continue lifting large, adult patients and that she should look for an occupation in which she could be more sedentary. [The Appellant's] claim arising out of that accident was under the old tort system, and was settled some time in early 1994.

At the end of January, 1989, her child support payments from her former husband ceased. Within the ensuing weeks [the Appellant] started developing serious anxiety attacks and, at her request, [Appellant's doctor] referred her to [text deleted], a psychiatrist. At about the same time, [the Appellant] applied for an intake position with the [text deleted]. This was a 'disability position', where she started on a part-time basis. That job became full-time in August of 1990, when she started working a 35 hour week.

In the meantime, on November 27th, 1989, [the Appellant] had been involved in a second automobile accident which resulted in the total destruction of her car although, fortunately, she appears to have suffered minimal physical trauma. By March 20th of 1990 [Appellant's doctor] was able to report that a physical examination in February had shown her to be in very good shape, except for continuing discomfort in the muscles of her back, shoulders and neck. He reported that [the Appellant] had made an excellent recovery from all of her injuries in the

previous two years and was then working part-time, although with restricted work activities, at the [text deleted].

Despite [Appellant's doctor's] encouraging report in March of 1990, a year later he felt obliged to refer her to [text deleted], a specialist in rehabilitation medicine at the [text deleted], who reported that his findings from a clinical examination of [the Appellant] were "consistent with fibromyalgia, a chronic soft tissue pain syndrome". He expressed the opinion that, in [the Appellant's] case, the occupational injury of September 29th, 1988 had precipitated the onset of the fibromyalgic syndrome and that stress and anxiety appeared to have served as perpetuating factors, while the motor vehicle accident of January 1989 had aggravated the condition and increased its intensity. [Appellant's rehab specialist #1] also noted that a soft tissue examination of [the Appellant] revealed tenderness at 18 out of 18 fibromyalgic loci, following the diagnostic procedure suggested by the American College of Rheumatology. Noting that [the Appellant] had undergone physiotherapy, deep muscle massage, spray-and-stretch and acupuncture, all of which had alleviated her pain to some extent, he referred her for treatment in a fibromyalgia group therapy program at the [hospital #3], commencing in May of 1991, recommended Amitriptyline to modulate her sleep disorder, and concurred in the need for ongoing psychiatric counselling for stress and anxiety. [Appellant's rehab specialist #1] expressed the view that [the Appellant] would probably be unable to return to regular nursing duties in the future, other than public health nursing which, he felt, would be appropriate.

In March of 1994 [the Appellant's] mother died, leaving [the Appellant] as the sole executrix and, thus, adding further burdens to her existing stress.

On June 20th of 1994, [the Appellant] was involved in another motor vehicle accident, in which her vehicle was written off although she, herself, does not appear to have been seriously injured. Her claim related to that accident was settled with MPIC in October of 1994.

In December of 1994 [Appellant's doctor] writes to the [text deleted], recommending that [the Appellant] be kept on disability and noting that her fibromyalgia had not improved.

Next, on February 7th, 1995, the car that [the Appellant] was then driving was rear-ended by a small truck, causing her to sustain a Grade II whiplash associated disorder. By the end of June, 1995, there were clear indications of improvement in the symptoms resulting from the February accident. [Appellant's rehab specialist #2], of the [text deleted] reported, on June 29th of 1995, that actual pain on palpation was present in only 4 out of the 18 anatomical areas for a fibromyalgia syndrome. Myofascial taut bands were detectable only in the upper trapezius muscles bi-laterally and in the right quadratus lumborum and gluteus medius muscle. [Appellant's rehab specialist #2] also noted that some of [the Appellant's] earlier problems remained unresolved - specifically, tenderness over the cervical posterior joints at a C2-3 level, associated with some hypersensitivity of the left posterior scalp and left eyebrow.

[The Appellant] testified indicated that, following the February 7th, 1995 accident, she continued to work for as long as she could, until March 3rd when the pain, both physical and emotional, became unbearable and her cognitive skills had become seriously disrupted. On [Appellant's doctor's] advice, she left the workplace. As she put it "My life was coming to a halt - I felt I just couldn't cope". However, with continued physiotherapy, psychiatric counselling, educational counselling with respect to coping with pain and other lifestyle issues, together with medication, she continued gradually to improve, to a point when, on June 1st of 1995, [the Appellant] was able to return to work on a part-time basis. Even then, she testified, she was in pain and "in a state of mindlessness and confusion". Fortunately, the Employee Benefits Board of the [text deleted], along with representatives from the [text deleted] and others, were all working cooperatively in order to ease [the Appellant's] return to the workplace. Despite that, attempts to increase her workdays from 3 to 4 per week were unsuccessful; she could not tolerate the increased demand upon her system. Her fibromyalgia syndrome had become much more active and, as [Appellant's rehab specialist #2] put it in a report of September 29th, "This lady has a well established history of fibromyalgia which preceded her motor vehicle accident, which incident in turn added to her regional myofascial pain syndrome". In a subsequent letter of November 11th, 1995, [Appellant's rehab specialist #2] offers the comments that, while there was possibility of some very slow functional improvement, it was "not to be expected that she will lose her soft tissue discomforts in the foreseeable future. There is no doubt that the motor vehicle accident has added to her problems."

By February of 1996, [the Appellant] testified, she had become acutely conscious of cognitive impairment, particularly loss of memory and this, combined with continuing sleep disturbance, fibromyalgia and a general feeling of vulnerability, sent her back to see [Appellant's doctor] who, on February 2nd of 1996, told her that she should cease work immediately. [The Appellant] described her condition, at the beginning of February of 1996, as being similar in nature to her pre-accident condition, but with greater intensity.

On July 5th of 1996 the [text deleted] decided that it could no longer accommodate her, and her job there was terminated. Meanwhile, she had again been referred by [Appellant's doctor] to [Appellant's rehab specialist #2] who, after examining her on June 25th, 1996, reiterated his earlier diagnosis of continuing chronic regional myofascial pain with a fibromyalgia syndrome and clinical anxiety depression.

On October 17th, 1996, MPIC wrote to [the Appellant] to tell her that her income replacement indemnity benefits would end as of October 31st of that year. The basic reason for that decision was that, in the view of MPIC, any significant limitation affecting [the Appellant's] return to work probably stemmed from her pre-existing fibromyalgia. Although the original decision letter of October 17th, 1996 does not say so specifically, there is an implied conclusion that the myofascial pain, even if caused by the accident, had been ameliorated at least to the point of pre-accident status.

From that decision, [the Appellant] appealed to the Internal Review Officer of MPIC and, in support of her position, adduced some additional, written reports from [Appellant’s rehab specialist #2] who was also present at [the Appellant’s] internal review hearing on the 5th day of March 1997. While [Appellant’s rehab specialist #2], in several of his written reports, reiterates the view that [the Appellant’s] myofascial pain had been initiated by her motor vehicle accident of February 1995, the notes prepared by the Internal Review Officer following their meeting reflect [Appellant’s rehab specialist #2's] belief that "[the Appellant] is physically capable of returning to work, but he remains concerned that the cognitive demands of her employment may still prevent her from returning to work".

It should be noted, here, that although [Appellant’s rehab specialist #2's] reports speak consistently of "myofascial pain", what he describes appears more properly to fall within what is known as "myofascial pain syndrome". The difference, as we understand it, may be summarized this way: myofascial pain is a form of intra-muscular pain of which the most frequent cause is some unusual exertion, particularly when the affected part of the body has become deconditioned; myofascial pain syndrome is a label used to describe a somewhat more complex situation wherein a number of so-called "trigger points" on the patient's body, when subjected to reasonably firm palpation, cause referral of pain to specific areas. That is to say, pain at a given location can be reproduced by pressure on another specific location. Myofascial pain syndrome is almost always accompanied by taut bands of musculature that have been described as feeling somewhat like strips of spaghetti under the patient's skin, most frequently in the upper

trapezius, thoracic iliocostalis and quadratus lumborum muscles. Trauma can, in some instances, activate latent trigger points that have lain dormant, sometimes for years. We have not been able to find any reliable literature, however, indicating trauma such as that of a motor vehicle accident as the cause of myofascial pain syndrome. To the best of our knowledge, its etiology has not yet been determined by medical science.

The same thing cannot necessarily be said of fibromyalgia, which may be described as generalized musculoskeletal pain and stiffness, constant fatigue, poor sleep, often accompanied by a clinical depression and feelings of helplessness. The American College of Rheumatology has distinguished 18 possible "tender points" (not to be confused with "trigger points" referred to above) and, if at least 11 of those 18 tender points are present for a period of 3 to 6 months, fibromyalgia syndrome can be diagnosed with reasonable certainty. One of the factors that it shares with myofascial pain syndrome is that its etiology is still unproven and speculative at best.

The difficulty that [the Appellant] faces in establishing her proposition that her accident of February 7th, 1995 gave rise to the myofascial pain syndrome, adding it to the pre-existing fibromyalgia syndrome, is two-fold:

- as noted above, we have not yet been able to find any reliable literature linking motor vehicle accident or other, similar trauma as a cause and myofascial pain syndrome as the effect; at best, it is possible that a trauma of that kind can cause latent myofascial pain syndrome to surface;

- more importantly, however, almost all of the symptoms of myofascial pain syndrome described by [Appellant's rehab specialist #2] following his several examinations of [the Appellant] are reflected in the reports of other medical and paramedical caregivers well before February of 1995.

For example, [text deleted], of [text deleted] Physiotherapy and Sports Injury Clinic, writing to [Appellant's rehab specialist #1] on March 6th, 1991, says, in part: "I reassessed [the Appellant] today. She has chronic myofascial pain as a result of a work accident September 29th, 1988. This was aggravated further by a car accident January 4th,, 1989." [Appellant's physiotherapist] goes on to describe a number of active trigger points, fatigue and sleep disturbance - all for practical purposes identical to the problems besetting [the Appellant] after her 1995 accident.

Similarly, [Appellant's rehab specialist #2] in a letter of May 6th, 1993 addressed to [Appellant's doctor], reports in part that "clinically general examination was essentially negative. There was evidence of myofascial trigger point activity bi-laterally in the trapezius, scaleni, pectoralis major, thoracic iliocostalis and quadratus lumborum muscles. The only muscle mentioned by [Appellant's rehab specialist #2] in his post-accident description of [the Appellant's] regional myofascial pain, not listed in any descriptions of her myofascial pain syndrome prior to the accident of February 1995 was the sternocleidomastoid muscle and we are not persuaded that the myofascial taut band at that location resulted from her 1995 accident.

As [Appellant's rehab specialist #2], himself, reports in his letter of February 16th, 1998 to [Appellant's doctor]:

> In review, this patient has now had soft tissue pain due to fibromyalgia since the mid-1980's. She sustained injury in a workplace accident in 1988 and subsequently sustained soft tissue injuries in 7 motor vehicle accidents between January 1988 and February 1995. When initially seen at the [hospital #4] by [Appellant's rehab specialist #1], the diagnosis of a fibromyalgia syndrome was confirmed. Her subsequent motor vehicle accidents established chronic regional myofascial pain and sequential aggravations of her fibromyalgia. ([Appellant's rehab specialist #2's] use of the plural 'accidents' is significant.)

We are not persuaded, either, that [the Appellant's] cognitive dysfunction has been caused by the February 1995 motor vehicle accident. [Appellant's neuropsychologist], of the [text deleted], to whom [the Appellant] was referred for a neuropsychological consultation, concluded that what he terms her "memory variability" was secondary to the rapid level of fatigue that she demonstrated, along with her constant pain, both of which antedated February of 1995 and do not appear in any material way to have been caused by the last of her motor vehicle accidents.

An analysis of the many medical reports that have been provided to us, covering periods both before and after February 7th, 1995, persuades us that the effects of the Grade II whiplash associated disorder that she appears to have suffered on that date, although undoubtedly

prolonged and intensified by her pre-existing condition, had largely been resolved by the end of June of 1995 at which point, although psychologically distressed, [the Appellant] was in much the same condition has had prevailed before February 7th, 1995.

As early as March 6th, 1991 [the Appellant's] own notes indicate that her overall fatigue was adversely affecting her cognitive function. That condition is again reflected in her letter to [Appellant's rehab specialist #1] of October 15th, 1991, wherein she says, in part (referring to her work as intake nurse):

> This is a job I can do within my limitations. However, working full-time is difficult - after 1 to 2 P.M. my energy levels are depleted. Many days I can barely stay awake in the P.M. I am drained and exhausted and pain increases with the fatigue. I do the bulk of my work in A.M., as my mental and physical abilities decrease as the day progresses.

[Appellant's doctor], in his report of an examination of [the Appellant] on August 21st, 1993, speaks of the troubles that she was experiencing in concentrating.

While it seems clear that [the Appellant's] cognitive dysfunction became more pronounced in the months and years following her accident of February 7th, 1995, it is equally clear to us that that last of a series of accidents was not by any means the cause of that dysfunction.

We would not wish any portion of these reasons to be interpreted as a criticism of the Appellant nor of any of her caregivers. Indeed, we have been much impressed with [the Appellant's] apparent honesty and with the equally obvious dedication with which her physicians and physiotherapists approached her multiple problems. However, every motor vehicle accident in which [the Appellant] was involved prior to February 7th, 1995 was settled in one way or another, and every work related accident in which she was involved prior to that date was dealt with by a combination of the [text deleted] and the Workers Compensation Board. Our task, simply put, is to determine whether her inability to retain or obtain employment at any time since October 31st of 1996 (when her IRI was terminated) can rationally be laid at the door of that February 7th, 1995 event. It was in pursuit of the answer to that question that we embarked upon the foregoing analysis. As a result, we are unable to find, on a reasonable balance of probabilities, that the accident in question was the cause of her present problems, and are therefore obliged to dismiss her appeal.

Dated at Winnipeg this 13th day of August 1998.

______________________________ **J. F. REEH TAYLOR, Q.C.**

______________________________ **LILA GOODSPEED**

______________________________ **F. LES COX**