

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]

AICAC File No.: AC-97-68

PANEL: Mr. J. F. Reeh Taylor, Q.C. (Chairperson)
Mr. Charles T. Birt, Q.C. Mr. F. Les Cox

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC') represented
by
Mr. Keith Addison
the Appellant, [text deleted], was represented by [appellant's
representative]

HEARING DATE: March 12th, 1998

ISSUE: Entitlement of Non-earner to IRI from 180 days post-accident.

RELEVANT SECTIONS: Sections 70(1), 85(1)(a), 86(1) and 106 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 FACTS:

The Appellant, [text deleted], had just alighted from a [text deleted] transit bus and was crossing a gas station parking lot in Winnipeg on September 15th, 1995 when another vehicle, reversing, struck her and knocked her to the ground. While the wheels of that vehicle did not actually run

over her, she lost consciousness and woke up underneath the car. She again became unconscious and finally woke up on the street shortly before the arrival of an ambulance that someone had called for her. She was diagnosed with multiple contusions and abrasions, a whip-lash injury and chest wall pain.

Her initial treating physician, [text deleted], saw her first on the date of her accident and made the foregoing diagnoses. On March 4th of 1996 [Appellant's doctor #1] expressed the view, in a letter to MPIC, that [the Appellant] was not incapable of employment by reason of the injuries sustained in her accident. On March 11th, 1996, in a discussion between [the Appellant] and her Adjuster, the Appellant indicated that she had obtained a second opinion from [Appellant's doctor #2] and complained that she still had pain under her skull down the neck and right shoulder and numbness in her right arm. On March 7th, 1996, [Appellant's doctor #2] reported to MPIC that the Appellant was complaining of pain in her right neck into her shoulder, aching and heaviness in that same shoulder giving rise to migraine headaches, numbness in her right arm, occipital pain, constant headaches and pain when rotating the head left and right. She also complained of tenderness of supraspinatus muscle on the right side, difficulty lifting her right arm forward above 90 degrees and a tenderness in the right anterior chest wall. [Appellant's doctor #2] also noted that the hip and leg pain of which [the Appellant] had earlier complained appeared now to have been resolved. His recommendation was that "She is encouraged to go back to school and work through her pain".

On March 22nd, of 1996 [the Appellant] again spoke with her Adjuster, but in the context of her physical condition only mentioned the need to try to strengthen and build up her upper body.

On May 1st of 1996 [the Appellant] completed an application for compensation (long form) noting only injuries to her neck, abrasion, migraine headaches on the right side, numbness in her right arm and hand and limited use of her arm and shoulder.

On May 7th, 1996, [the Appellant's] Adjuster again contacted [Appellant's doctor #2] who offered the opinion that the Appellant was not disabled from an occupation and should be encouraged to go back to school or to work through her pain.

On June 3rd, 1996, in a letter to MPIC's Rehabilitative Case Management team, [Appellant's doctor #2] reported minimal physical findings with respect to the Appellant and, specifically, made no mention of any lower back pain.

[Appellant's doctor #2] then referred [the Appellant] to [text deleted], a neurologist at the [text deleted] Clinic. In his report of July 31st, 1996, [Appellant's neurologist] reports tenderness and markedly restricted range of motion in [the Appellant's] neck and right shoulder, plus tenderness in her right trapezius and cervical para-spinals, with some mild muscle spasm and tenderness in most of the muscle groups in [the Appellant's] right arm. He suspected myofascial pain and recommended referral to a rehabilitation specialist.

[Appellant's doctor #2] then referred the Appellant to [Appellant's rehab specialist], [text deleted], who provided [Appellant's doctor #2] with a thorough report bearing date December 20th, 1996. That report deals with the Appellant's neck and shoulder problems but says, specifically "The patient does not admit to any low back pain". [Appellant's rehab specialist] concludes:

This patient's accident has resulted in three clear musculo-skeletal problems. The findings at the C2-3 level of the neck represent painful minor intra-vertebral dysfunction of the posterior vertebral joints which require manual therapy and mobilization of the cervical spine. The second outcome has been a chronic regional myofascial pain syndrome involving cluster of muscles which would fit with the patient's pattern of pain complaints and associated symptoms. There has been extension of muscle involvement into the back by way of relatively silent myofascial taut bands since the patient is not complaining of low back pain.

Finally, she has developed a capsulitis of the right shoulder joint with a bicipital tendonitis as a secondary problem to her shoulder not being used because of painful muscles in the neck and shoulder girdle.

All of these conditions require physical therapy and the treatment given earlier in physiotherapy is not appropriate to the diagnosis.

[Appellant's rehab specialist] apparently referred [the Appellant] to [Appellant's rehab specialist] where she saw a psychologist for her pain and was also referred to [Appellant's dental surgeon] for chronic disk degeneration in the right side of her jaw. The resultant diagnosis of temporomandibular joint disorder seems clearly to have been a result of the motor vehicle accident and that fact has, indeed, been accepted by MPIC. Prior to the surgery, [the Appellant] was referred for a magnetic resonance imaging scan that was performed in Saskatchewan. The TMJ surgery was performed in [Manitoba] on November 5th of 1997, following which [the Appellant's] jaw was wired for a period of three weeks. She now uses a splint 24 hours a day

and is awaiting a second MRI which is slated to be done in [Manitoba] in July of this year. She is currently receiving physiotherapy on the other muscles of her neck, shoulders and upper arms; she is receiving trigger point injections behind the right ear, at the left shoulder and in the mid-upper back; she goes there twice a week and, as well, does her exercises, including stretching, light weights and spray and stretch.

[The Appellant] testified that it was her dentist, [text deleted], who first noticed her temporomandibular joint problem in 1997. [Appellant's dentist #1] consulted [Appellant's rehab specialist] who, in turn, referred her to [Appellant's dentist #2], who referred her to [Appellant's dental surgeon] for the surgery.

On September 16th, 1997 [Appellant's rehab specialist] had written to [the Appellant's] solicitor, in which he makes the comments that:

.....It is these difficulties arising from her motor vehicle accident injuries which are preventing her from working.

In addition to the regional myofascial pain syndrome and cervical intervertebral dysfunction, she has considerable problems with temporomandibular joint dysfunction and myofascial pain.....

Given the multiple problems of TMJ and facial muscle dysfunction, regional myofascial pain, general deconditioning and some continuing difficulty in coping, the occupational requirement of this patient is to re-establish a healthy lifestyle.....

[Appellant's rehab specialist] examined [the Appellant] again on March 31st of this year. He notes that he first saw [the Appellant] on December 18th of 1996, but expresses the view that, given the widespread muscle problem clinically evident in December, he felt it unlikely that the Appellant could have gone back to work earlier that year. [Appellant's rehab specialist] felt that the TMJ problem had relatively little to do with the main issue of [the Appellant's] employability. He felt that the problem was "the involvement in the trunk and low back where the severity of her myofascial pain renders her unemployable in an office capacity until we obtain further improvement".

Immediately prior to her TMJ surgery, [the Appellant] had been assessed by [Appellant's rehab specialist] again on November 4th. He reported that she was a little sore from the previous day's reassessment in physiotherapy but was showing objective improvement in neck, back and shoulder girdle mobility, strength and function. The Appellant had been advised to contact her physiotherapist as soon as she had been cleared for further treatment, so that her physical therapy program might be re-established.

THE ISSUE:

Since [the Appellant] was a non-earner, within the meaning of the MPIC Act, at the time of her accident on September 15th, 1995, and since there is no evidence that, during the first 180 days following her accident, there is any employment that she would have held had the accident not occurred, it is clear that she is not entitled to any income replacement during that first 180 days.

Section 86(1) of the Act requires the insurer to determine an employment for [the Appellant] from the 180st day after the accident, and to decide whether, because of the accident, she was unable to hold that employment.

Our task would be much easier were it not for the most recent opinion of [Appellant's rehab specialist] which, for the first time in the medical history of [the Appellant] to which we were made privy, expresses the view that it is myofascial pain in [the Appellant's] lower back that is the primary factor that precludes her gainful employment. Nowhere else in the reports of the other physicians or physiotherapist who have examined, assessed and treated [the Appellant], not even in the earlier reports of [Appellant's rehab specialist], is there any suggestion of lower back problems of any major consequence. We can only assume that some new factor, unrelated to [the Appellant's] motor vehicle accident, must have intervened between the dates of the earlier medical reports and this most recent report of [Appellant's rehab specialist], causing the lower back problem to have arisen so many months after the accident.

After analysing all of the medical reports that were tendered to us, both as part of MPIC's ongoing file and through [the Appellant's] counsel, and after hearing the evidence of [the Appellant] herself and observing the obvious although, it is to be hoped, temporary disability from which she suffers as a result of the surgery to her jaw, we find as follows:

1. immediately prior to her motor vehicle accident [the Appellant], who was already a fully trained licensed practical nurse, had successfully completed an administrative assistant course and was, for all intents and purposes, ready and able to return to the workforce;

2. by the 180th day immediately following her motor vehicle accident, although not fully recovered in the physical sense from the effects of her motor vehicle accident, she would have been able to return to the work force, albeit with some discomfort and the need to continue with an active physiotherapy program of the kind prescribed by [Appellant's rehab specialist];
3. in 1997, in the course of a normal, annual, dental checkup, she is found to have sustained a temporomandibular joint disorder which, by common accord, was attributable to her motor vehicle accident although not recognized as such until that dental visit; on November 5th, 1997 she undergoes surgery for that problem;
4. from the date of that surgery up to the present time and at least until some reasonable time has elapsed following the magnetic resonance imaging scan for which she is apparently slated in July of this year, to enable her caregivers to arrive at, and to execute, whatever treatment they deem appropriate to complete the correction of her TMJ disorder, [the Appellant] has not been employable and is likely to remain that way.

The Appellant is therefore entitled to have an occupation determined for her under the provisions of Sections 86(1) and 106 of the MPIC Act, to have the income for that occupation calculated in accordance with the appropriate table, and to be paid that income replacement indemnity from November 5th, 1997. The Appellant will be entitled to interest on the arrears until paid.

Dated at Winnipeg this 4th day of May 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

F. LES COX