Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-37

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Mrs. Lila Goodspeed** **Mr. Colon C. Settle, Q.C.**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Mr. Keith Addison;** **the Appellant, represented by [Appellant's representative]**
HEARING DATE:	**May 7th, 1999**
ISSUE(S):	**(i) Termination of income replacement indemnity ('IRI') - whether Appellant able to hold employment by date of termination;** **(ii) whether Appellant withdrew from rehabilitation plan without valid reason; and** **(iii) whether Appellant's symptoms constituted 'bodily injury caused by an automobile (or) by the use of an automobile.....'.**
RELEVANT SECTIONS:	**Section 70(1), 86(1), 106(1), 110(1)(c) and 160 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

On January 31st, 1995 [the Appellant], [text deleted] years old at the time, was driving North on [text deleted], in the second lane from the median. Her vehicle was hit on the driver's side, at the fender and door, by a car that had been headed South but had turned left into the side of her vehicle. The impact pushed her car into the lane to her immediate right, where it was hit by a

third vehicle and pushed back into the car that had originally hit her. In other words, her vehicle sustained three separate, heavy impacts in quick succession. Her car was completely written off. Her head came in contact with the window on the driver's side of the car, and she sustained temporomandibular joint injury and what appeared to have been quite extensive musculo skeletal problems to the left side of her body, including her head, neck, shoulder, arm, lower back and leg.

At the time of her accident, [the Appellant] was not employed, having been laid off from her former employment as a credit manager in the [text deleted] industry in which she had worked for some eight years. She was, in fact, engaged in a retraining program sponsored by what was then called [text deleted]. She attempted returning to her course in March of 1995 but was unable to do so because of substantially increased pain in her left shoulder and arm. She is right-hand dominant.

X-rays taken at the [hospital #1] shortly after her accident disclosed no fracture but, despite opinions to the contrary expressed in some of the medical reports submitted to us, it is quite clear that, at least within a very short space of time immediately following her accident, [the Appellant] complained to her family physician, [text deleted], to her adjuster and to her physiotherapist of pain in her lower back as well as to her neck, her left shoulder and arm, as well as complaints of numbness in her left hand and fingers.

The documentary evidence related to [the Appellant[‘s] appeal is voluminous and reflects, amongst the many forms of therapy and other rehabilitative measures made available to her, the following:

- care by [Appellant’s doctor #1] throughout;

- the referral of [the Appellant] by [Appellant's doctor #1] for physiotherapy, starting at three times weekly;
- [Appellant's doctor #1] refers [the Appellant] to [Appellant's doctor #2] at the [text deleted];
- the referral of [the Appellant] to [text deleted], a specialist in neurology, who examines [the Appellant] on a number of occasions;
- treatment by [Appellant's dentist], with respect to a temporomandibular joint problem caused by the impact of [the Appellant['s] head against the door of her vehicle;
- the referral of [the Appellant] by MPIC to the [rehab clinic], specialists in the treatment of chronic pain and trauma;
- separate physiotherapy, occupational therapy and psychological assessments and evaluations coordinated by [rehab clinic] and performed by [text deleted], clinical psychologist, [text deleted], occupational therapist and [text deleted], physiotherapist;
- a reference to and report from [text deleted], a specialist in orthopaedic surgery;
- various X-rays and CT Scans;
- numerous multi-disciplinary team meetings involving, at various times, [Appellant's doctor #1], [Appellant's psychologist], [Appellant's physiotherapist], [Appellant's occupational therapist #1], [text deleted] (program coordinator for [rehab clinic]), [text deleted] (the senior adjuster in charge of [the Appellant['s] case at MPIC) and, of course, the Appellant herself;
- treatments by [text deleted], chiropractor;
- efforts by all parties to reinstitute [the Appellant['s] courses at [text deleted], where she had been studying immediately prior to her accident;
- the purchase of a so-called 'ergonomic chair' and the involvement of [text deleted], a second occupational therapist at [rehab clinic];

- the purchase of a one-year membership for [the Appellant] at the [gym], commencing April 9th, 1997;
- physiotherapy from the [text deleted] Physiotherapy Clinic, concurrently with the provision of a Obus form, cervical collar, the use of a transcutaneous electrical nerve stimulator ('TENS') and sundry medications;
- referrals by [Appellant's doctor #1] to the [text deleted] Clinic at the [hospital #2] where, amongst other things, [the Appellant] was given epidermal steroid injections and facet joint injections by [Appellant's doctor #3];
- more physiotherapy under the overall direction of [Appellant's rehab specialist] from the Department of Physical Medicine and Rehabilitation at the [hospital #2].

Despite all of the modalities of treatment and the cooperative efforts of all of her caregivers and MPIC, [the Appellant['s] symptoms do not appear to have improved - indeed, they seem to have become steadily worse, from the time of her accident until about March, 1998, when the injections that she commenced receiving from [Appellant's doctor #3] at the [text deleted] Clinic finally brought her some sense of relief.

Meanwhile, however, [text deleted] (her MPIC adjuster) wrote to [the Appellant] on August 26th, 1997 to tell her that, since she was expected to have completed her training program at [text deleted] by September 13th, 1997, and since MPIC, with the apparent concurrence of [Appellant's doctor #1] and [rehab clinic program coordinator], believed that there were no objective functional deficits that might prevent her from completing her school program and reaching a work capacity of five hours per day, MPIC would continue to pay her IRI until the end of her school program, plus two weeks' vacation time plus another month in which she would have time to find employment. As a result, MPIC told her that her IRI would cease on

November 1st, 1997, at which point, in the view of MPIC, she would be capable of holding an employment determined for her under Section 106(1) of the Act, namely that of a credit manager.

That letter was closely followed by a second, dated September 5th, 1997, telling [the Appellant] that her IRI would be terminated as of August 23rd, 1997 pursuant to Section 160 of the Act because she had, in the view of the Corporation, refused without valid reason to follow or participate in a rehabilitation program made available to her by the Corporation or, without valid reason, had prevented or delayed recovery by her activities.

This second letter was triggered by the fact that [the Appellant] had, indeed, contacted [text deleted] on August 18th, 1997, to tell them that she would no longer be attending her courses at that institution. These were courses arranged and paid for by MPIC, and were intended to broaden her base of training so that she would have more skills to offer a potential employer; those courses were, in part, a continuance of and, in part, an addition to the courses in which [the Appellant] had been registered at the time of her motor vehicle accident.

[The Appellant] appealed from those two decisions to MPIC's internal review officer who, in a decision bearing date January 21st, 1998, elected to ignore the decisions of the adjuster that were being appealed from and, instead, in reliance primarily upon memoranda prepared by [text deleted], medical consultant to MPIC's Claims Services Department, decided that

> regardless of ([the Appellant['s]) compliance with the rehabilitation plan as set out by the Manitoba Public Insurance Corporation, the condition that she is now suffering from is not as a result of her accident of January 31st, 1995. Therefore, as her physical and psychological symptoms do not stem from a motor vehicle accident she is not entitled to any further treatment or income replacement indemnity benefits to be funded by the Manitoba Public Insurance Corporation.

The internal review officer, without specifically saying so, appears to have decided that [the Appellant] had, after all, a valid reason for quitting her courses at [text deleted] shortly before their completion, since the internal review officer makes reference to reports from [Appellant's doctor #1] who "decided that for both physical and psychological reasons ([the Appellant]) could not return to work".

The internal review officer makes no reference, in her decision, to the proposition that [the Appellant] would, upon completion of her courses at [text deleted], have been able to return to a regimen of five working hours per day. This, while a rather strange omission, is perhaps just as well, because we have great difficulty in accepting the idea - an idea which runs as a constant thread throughout the internal memoranda and external correspondence of MPIC - that, just because [the Appellant], unemployed at the time, was only attending classes for five hours per day immediately prior to her motor vehicle accident, that was the extent of her ability. We can find no evidence on the file that [the Appellant['s] functional capacity was so limited; so far as we can tell, she was only going to classes for five hours a day because that's what her course requirements called for. There is nothing in the evidence before us to suggest that, had employment been available to her at the time, [the Appellant] could not have worked a full, eight-hour day. If, at the time of her accident, she had that functional capacity, then it follows that the obligation of MPIC was to do its best to restore her, not to a point where she could work for five hours per day but, rather, to full functional capacity of an eight-hour day.

If, as [Appellant's doctor #1] reports and the internal review officer accepts, [the Appellant] was not capable of working for five hours a day by November 1st, 1997, it is even more certain that she could not have worked for eight hours a day, five days a week, by that date.

At the hearing of this appeal, we made a preliminary determination that implicit in the decision of the internal review officer was a finding that the adjuster's decisions of August 26th and September 5th, 1997 were wrong. We confirm that preliminary finding.

Turning, now, to the question whether the decision of the internal review officer was correct or whether, instead, the condition of [the Appellant] on January 21st, 1998 was, at least for the most part, a result of her motor vehicle accident, it is necessary to examine the apparent condition of [the Appellant] immediately prior to that accident. In that context, the following facts emerge from the evidence:

1. [the Appellant] had a history of clinical depression, stemming from a combination of work-related stress and an emotionally abusive relationship. Although, for some time prior to her accident, [the Appellant] seems to have weathered that psychological storm, it seems clear that she was left with a psyche more fragile than would otherwise have been the case. This is born out by the fact that [text deleted], her post-accident clinical psychologist, notes [the Appellant['s] tendency to overdramatize and exaggerate her emotions; he and several other caregivers speak of chronic pain behaviour and abnormal pain behaviour, although we do not find any serious suggestion of purposeful malingering. At a meeting on July 16th, 1997 with [Appellant's psychologist], [rehab clinic program coordinator] and [Appellant's MPIC adjuster], upon learning that MPIC only planned to get her to a point of being able to work five hours per day, [the Appellant] is described by [rehab clinic program coordinator] as becoming hysterical, throwing her belongings and yelling that she "can't take it any more". She was very tearful and shaking;

2. she had long-standing back problems, as reflected in the report of [Appellant's orthopaedic surgeon #1] and the testimony of [Appellant's orthopaedic surgeon #2]. [The Appellant] explained that she had hurt her lower back in the early 1990's when lifting 150 pound blocks; she said this had caused pain at the time, not only in the lumbar region but also in the centre of her back and in her groin area but that, by the end of January 1995, she had been symptom-free for quite some time;
3. a CT Scan of her lumbar spine, taken in 1993, revealed no pathology of that region;
4. she had a Grade [text deleted] and partial Grade [text deleted] education with some further technical training at [text deleted]; she was a manager, earning a good salary; despite her psychological history referred to above, the fact is that she had led an extremely active life, socially and athletically, playing baseball, golf, curling, gardening, snow clearing, working six days a week most weeks, and was Manitoba arm wrestling champion. Having been laid off her former employment, as noted, she was attending [text deleted] and looking into new areas of employment;

The accident of January 31st, 1995 brought about some dramatic changes in [the Appellant['s] life. Symptomatically, she underwent a transition from the very active lifestyle described above to a point at which she felt able neither to stand nor to sit for any extended period and from being asymptomatic to displaying chronic pain syndrome. Whereas the CT Scan taken in 1993 revealed no pathology of her lumbar spine, a similar scan taken on September 20th, 1996 shows advanced bilateral apophyseal joint osteoarthritis (referred to elsewhere in the evidence as degenerative or hypertrophic arthritis). This disorder is described variously in the medical literature but, essentially, is a form of arthritis characterized by the erosion of articular cartilage, either primary or secondary to trauma or other conditions, which becomes soft, frayed and thinned; pain and loss or serious loss of function almost always result.

In addition to osteoarthritis of her lower back, [the Appellant] has been diagnosed by [text deleted], a specialist (now retired) in orthopaedic surgery, as having sustained brachial neuropathy. We understand this to be a degenerative disease affecting the network of nerves located in the lower part of the neck and in the armpit, supplying nerves to the entire arm and known as the brachial plexus. Brachial neuropathy may be due to trauma, although it may also have its origin in poor blood supply, diabetes, lead poisoning or other causes. [Appellant's orthopaedic surgeon #2] bases that diagnosis upon earlier reports by [Appellant's doctor #1] and by the [rehab clinic], to the effect that [the Appellant] had undergone a significant decrease in the strength of her left hand, which often shook after use and often swelled and turned purple and blue. Her arm felt very cold on a regular basis and atrophy was revealed by circumferential measurements of the left arm as compared to the right. [Appellant's orthopaedic surgeon #2] expressed his opinion, when testifying, that both the hypertrophic arthritis and the brachial neuropathy must have been caused by the accident now under review. He pointed out that, while none of the radiological studies done in 1993 showed anything more than a moderate, central, spinal stenosis, but no arthritic joint spurring nor any vertebral body spurring yet, about one and one-half years later, a CT Scan shows spurring of both joints and vertebral bodies.

[Appellant's orthopaedic surgeon #2] had first treated [the Appellant] in the early 1980's "after she had fallen and hurt her tailbone", he had treated her for back pain in 1985 and, in 1993, when she had "aggravated her back doing something else".

[Text deleted], medical consultant for MPIC, has several times recorded his opinion that [the Appellant['s] condition could not be attributed to her motor vehicle accident at all. He is of the view that any injuries caused by that accident were of a non-disabling kind and that the more

serious symptoms shown by [the Appellant] were simply the continuance of degenerative changes that were well under way before the accident ever occurred. In other words, he believes that [the Appellant] would be in her present condition had the accident never happened.

It is a matter of common accord that if [the Appellant] has been, and continues to be, unable to complete her studies and to resume gainful employment, the primary causes of that disability are her hypertrophic arthritis of the lower back and, perhaps to a somewhat lesser extent, the brachial neuropathy referred to above. We note, here, that [Appellant's orthopaedic surgeon #2['s] diagnosis of brachial neuropathy may well be correct - there is certainly objective, clinical evidence to support it - although neither of the reports by [Appellant's neurologist] makes mention of any neurological deficits. It is not clear whether [Appellant's neurologist] ever addressed that possibility.

Without intending to over-simplify [MPIC's doctor['s] reasoning, which he explains at some length in a number of carefully detailed memoranda, it does appear to this Commission that the foundation of [MPIC's doctor['s] view is his belief that it was not until about a year after her accident that [the Appellant] started to complain about her lower back pain. However, that belief is clearly mistaken since, on February 3rd, 1995, [the Appellant['s] adjuster notes that she was complaining of lower back problems. Even more significantly, however, [text deleted] Physiotherapy Clinic records that:

> Treatment for low back pain is frequently documented. A referral from [Appellant's doctor #1] February 2nd, 1995 requested treatment for neck, lower back and sacroiliac joints. Physiotherapy reports sent to [Appellant's doctor #1] September 25th, 1995 and February 16th, 1996 also make reference to this treatment.

Unfortunately, [Appellant's doctor #1] himself does not seem to have made mention of the lower back pain in his clinical notes, but we ascribe that omission to the fact that, in the weeks immediately following her motor vehicle accident, [the Appellant] was emphasizing the pains in her head, neck and shoulders. The fact is that he took her lower back pain complaints seriously enough to direct the attention of the [text deleted] Physiotherapy Clinic to those regions.

The Appellant's CT Scan of September 20th, 1996 records advanced bilateral apophyseal joint osteoarthritis and, in the considered opinion of [Appellant's orthopaedic surgeon #2] such an extreme change from the condition reflected in the 1993 CT Scan could only have been brought about by trauma which, acting upon the pre-existing condition, exacerbated that condition and hastened the degenerative changes immeasurably. [Appellant's orthopaedic surgeon #2] acknowledges that it is not possible to gauge, with anything close to accuracy, the period within which [the Appellant['s] condition would have reached its present state of degeneration in the absence of the motor vehicle accident. He says, merely, that it borders on the impossible for a patient to, as he puts it, "go from nothing to advanced bilateral apophyseal joint osteoarthritis in two years". He opines that [the Appellant['s] facet changes are not normal, natural history; he strongly holds the view that her motor vehicle accident must have accelerated the process of the spurring of those facets and offers the advice that what is needed is a decompression laminectomy, "to clean all those spurs away; then she'll be fine again".

It is clear that, although [the Appellant] was apparently asymptomatic and leading an unusually active life in the weeks immediately prior to her accident, her back (both upper and lower), as well as her psychological condition, were in a more delicate state of balance than she, herself, probably realized, but MPIC has to take its accident victims as it finds them. We are satisfied, upon a reasonable balance of probabilities and upon a careful review of all of the evidence, that

the condition of [the Appellant[‘s] lumbar spine referred to above resulted from the acceleration, caused by her motor vehicle accident, of a degenerative process that preceded her accident, and that the condition thus described did prevent her from completing her course of studies and taking up new employment thereafter.

We therefore find that the decision of MPIC's internal review officer of January 21st, 1998 should be set aside, and [the Appellant[‘s] benefits restored from August 23rd, 1997, with interest calculated at the statutory rate.

Dated at Winnipeg this 22nd day of October, 1999.

J. F. REEH TAYLOR, Q.C.

LILA GOODSPEED

COLON C. SETTLE