Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-98-97

PANEL:	**Mr. J. F. Reeh Taylor (Q.C. (Chairperson)** **Mr. Charles Birt Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC')** **Represented by Ms Joan McKelvey;** **[the Appellant], appeared on her own behalf.**
HEARING DATE:	**March 2, 1999**
ISSUE:	**Reinstatement of Income Replacement Indemnity ('I.R.I.')**
RELEVANT SECTIONS:	**Section 110(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 FACTS:

On September 16, 1997, [the Appellant] was involved in a motor vehicle accident which is the basis of the appeal before us. A taxicab, traveling in the opposite direction, attempted to make a U-turn. and ran into the driver's side of her vehicle

[The Appellant] had also been involved in a motor vehicle accident (MVA) on May 13, 1997, for which she apparently made no personal injury claim. In that accident, her car was hit on the

passenger side and spun around, barely missing a tree and a fence on the boulevard, causing $1400 in damages to her vehicle. She sustained injuries to her neck, back and shoulders and was diagnosed by [text deleted], chiropractor, with a Grade 2 Whiplash Associated Disorder (WAD 2). Despite her discomfort, she continued to work and to undergo chiropractic treatments.

[Appellant's chiropractor #1] examined [the Appellant] on September 16th, 1997, for symptoms of neck and shoulder pain and muscular stiffness. He diagnosed an acute cervical spine strain, which he classified as a WAD 2 injury. [Appellant's chiropractor #1] expressed the view that she was unable to return to work for 3 to 4 weeks and required treatments twice per week for an indefinite period. [the Appellant] testified that, although she reported her shoulder pain to [Appellant's chiropractor #1] at the September examination, he said it was from sleeping on her shoulder, but she sleeps most of the time on her back. She kept reporting the shoulder pain and felt that the X-ray taken by [Appellant's chiropractor #1] after her September MVA should have been taken of her shoulder as well as of her neck area. (In the event, the X-ray eventually taken of the Appellant's shoulder disclosed no abnormality in her bone stucture.)

[The Appellant] attended upon her family physician, [text deleted], on September 18, 1997. [Appellant's doctor #1] reported her symptoms as headache, stiff neck and sore lower back with objective signs of restricted range of motion (ROM) of the neck and decreased ROM of the lower back. [Appellant's doctor #1] referred to the May 13th MVA and expressed her opinion that [the Appellant] was not at pre-accident level when she was re-injured on September 16th; as a result, she expected a slower recovery. On December 16th, 1997, [the Appellant] was referred by [Appellant's doctor #1] for physiotherapy at the [text deleted] Physiotherapy and Sports

Injury Clinic, where she started receiving physiotherapy from [Appellant's physiotherapist] for an anticipated duration of three months.

Subsequent medical records outline [the Appellant's] condition and progress, as follows:

On November 14,1997, [Appellant's chiropractor #1] agreed with [the Appellant] upon a graduated return to work program for her at [text deleted] to commence the week of November 17th. [The Appellant] was to work half of her normal hours, gradually adding hours at the [text deleted] until she reached her normal 15.5 hours as well as adding on her self-employed time. By the first week of December she was expected to have returned to her full pre-accident working schedule.

[Text deleted], physiotherapist, reporting upon her initial examination of [the Appellant] on December16th, noted the injuries sustained in the May 13th MVA and that these injuries were exacerbated in the September MVA. She classified [the Appellant] with a WAD 2 injury, a less than full function and a work capacity of modified duties.

In a report dated January 16, 1998, [Appellant's chiropractor #1] altered his opinion about a graduated return to work plan after [the Appellant] had attempted to return to work but found herself unable to resume her job. He discussed [the Appellant's] condition with [Appellant's physiotherapist] and they agreed that she should continue with her physiotherapy program of manipulation and electrotherapy and commence a work hardening program aimed at restoring

normal muscle tone and function. They concluded that after a four week program [the Appellant] should be able to commence a gradual return to work program.

[Text deleted], [the Appellant's] adjuster, sent her to [text deleted], physiotherapist, in January of 1998 for an independent assessment. [Independent physiotherapist] reported on February 17, 1998 that [the Appellant] had a resolving mechanical back and neck sprain/strain type injury. It was his opinion that, 4 ½ months post-injury with no neurological findings, further inactivity would only contribute to her problems through further deconditioning, muscle weakness and progressive tightness. He stated that she should return to work, initially for 3 hours a day.

[Appellant's chiropractor #1] examined [the Appellant] on February 19th and outlined her treatment program with a frequency of twice per week for 8 weeks and once per week for four weeks, with an anticipated discharge date of May 14, 1998.

At some point in that same month of February, 1998, feeling that she was not getting any relief from her current chiropractic or physiotherapy treatments, [the Appellant] changed her family physician to [Appellant's doctor #2] and commenced chiropractic care with [Appellant's chiropractor #2]. [Appellant's doctor #2] had instructed her in home exercises and told her to work through the pain, despite the discomfort. She continues to do the strengthening neck exercises prescribed by [Appellant's doctor #2] and those provided by her physiotherapist. She explained that [Appellant's chiropractor #2] had provided a thorough examination and she felt confident in the treatment he was providing that gave her instant relief to her back and shoulders. She believed that her treatment, prior to [Appellant's doctor #2] and [Appellant's chiropractor

#2], had been incorrect, causing a delay in her recovery and return to work.

On February 23, 1998 [the Appellant] informed her adjuster that she had attended at [Appellant's doctor #2's] office and [Appellant's doctor #2] had advised her to remain off work for at least another month and a half, and therefore she was requesting receipt of IRI benefits. Her adjuster advised her that based on the medical information before him there was no evidence to preclude her from working and therefore no further IRI benefits would be paid.

[Appellant's physiotherapist] reassessed [the Appellant] on February 24th, finding that the low back physiotherapy treatments only appeared to give her patient temporary relief and, concluding that continued physiotherapy seemed to be of little benefit, recommended active home exercises and discharged [the Appellant] from the program on March 11, 1998.

[The Appellant] attended at [Appellant's chiropractor #2's] office for an examination on February 23, 1998, and was diagnosed with a WAD 3 (a) and 4 (a) classification of Cervical Spine Disorder. Although [Appellant's chiropractor #2] opinion diverges greatly from that of all of the other caregivers and, it must respectfully be added, the file does not reveal evidence of any neurological disorder that would justify a grade III classification, his course of treatments was nevertheless approved by MPIC until May 13, 1998 at the same frequency rate as had been established by [Appellant's chiropractor #1]. [The Appellant] actually continued with a few treatments until May 31, 1998, and that program appears to have addressed and resolved her condition. [Appellant's chiropractor #2] referred [the Appellant] for an X-ray of her shoulder on

April 25th, which disclosed an absence of abnormalities in [the Appellant's] shoulder, and no evidence of dislocation, separation, recent fracture or gross osseous pathology.

At the time of her accident, [the Appellant] worked 20 hours a week - 15.5 hours per week at [text deleted] and the remaining hours as a self-employed hairdresser, providing services to senior clients in their homes. [The Appellant] testified that, as a hairdresser, she was required to do vigorous hairwashing, cutting, curling, combing, coloring and hairdrying. Although she could adjust her position in her lower back and stance she required lifting her arms and working with them in an elevated position which aggravated her left shoulder. [The Appellant] explained that she had attempted to return to her haircutting, completing six cuts in November and December 1997, with her personal clients. She had also attempted work at [text deleted] for three days, she said, but her hands began tingling and she was unable to operate the clippers in her left hand. She said it took her two hours to cut a customer's hair and that was unacceptable in a salon.

When [the Appellant] was asked whether in fact she had been able to go back to work part-time and then full-time by February 18th, 1998, (the date when the IRI payments were cut off), she testified that she did try and gave it her best effort but found that she just could not cope. She could not raise her arm, as it would lock in position, causing sharp, excruciating pain in her shoulder and 'pins and needles' in her hand.. She attempted a return to work again at the end of January by cutting her father's hair but, again, it took two hours to complete the cut. She decided at that point that she could only manage with seniors, since this allowed her to take as many rests as needed. They did not mind the slow pace as they welcomed the opportunity to visit. By mid-

April she was capable of returning to work part-time at [text deleted], only to learn that her job had been filled. At this time she returned to her private customers and believed that she had returned to pre-accident status by the end of May. She started full time work at [text deleted] in October along with her self-employed haircutting.

[Text deleted], [the Appellant's] adjuster, told her on February 3, 1998 that, because all her long-term caregivers were of the opinion that she was able to return to work, she would no longer be entitled to IRI benefits after February 18th. [The Appellant] responded that, because of her unsuccessful work attempts in December and late January and the direction of [Appellant's doctor #2] to remain off work , she did not intend to commence the graduated return to work plan in February. However, she did not at that juncture have a medical report from [Appellant's doctor #2] explaining her inability to work.

On February 24th, by fax, [Appellant's MPIC adjuster] requested a report from [Appellant's doctor #2] for his opinion whether or not [the Appellant] could resume working. On March 2, 1998, no response having been forthcoming, MPIC confirmed [Appellant's MPIC adjuster's] earlier, oral advice to [the Appellant] that her IRI benefits were terminated as of February 18, 1998. [The Appellant] appealed from that decision to MPIC's Internal Review Officer who, also in the absence of any response from [Appellant's doctor #2] and in light of an opinion rendered by [text deleted] (Medical Consultant to the corporation's Claims Department) supporting the adjuster's decision, felt obliged to uphold that decision.

A report from [Appellant's doctor #2], dated May 22, 1998 was finally provided to this

Commission, but had not been available for the Internal Review hearing nor even by May 25,1998, the date of the final decision of the Internal Review Officer.

[The Appellant] is appealing from the decision of the Internal Review Officer that reads, in part, as follows:

> ….Finally, you asked that the Corporation pay you IRI from February 19, 1998 to March 5, 1998. During that time you did not receive IRI at all, since it was your adjuster's opinion that you were capable of returning to work. On reviewing the medical reports on file it appears that all of your caregiver were of the opinion you were capable of returning to work by mid February 1998. Although [Appellant's chiropractor #2] appears to be of the opinion that you were incapable of working in March, 1998, I cannot attribute very much weight to his report, since he only began treating you several months following the accident. As well, we do not have any medical reports from [Appellant's doctor #2] to substantiate any ongoing disability, or any disability after February 18, 1998.
> Accordingly, I agree with your adjuster that you were capable of returning to work full-time as of February 18th, 1998 and therefore were not entitled to any IRI after that point in time.

THE LAW:

Section 110, (1), (a) of the Act reads, in part, as follows:

Events that end entitlement to I.R.I.

> **110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (a) the victim is able to hold the employment that he or she held at the time of the accident;….

The question is whether [the Appellant], at the date of termination of her IRI, was able to hold her former employment had it been available to her?

DISPOSITION

It is unfortunate, to say the least, that MPIC did not receive a report from [Appellant's doctor #2] within a reasonable time after it had been requested, since that report might well have enabled the parties to resolve the problem without the delay, frustrations and expense of a further appeal. That report of May 22nd, 1998, stated that [Appellant's doctor #2] had followed [the Appellant's] progress since February 9th of 1998 on a bi-weekly basis and he had found that she was not ready for a graduated return to work program by February 18, 1999.

We have concluded, upon a careful review of all the evidence including but, of course, not limited to, that of the Appellant whom we found to be a credible witness - that the injuries sustained by [the Appellant] in her accident of May 13th, 1997, for which she made no claim, was more serious than was thought at the time, and that the September accident further exacerbated her condition resulting in a delay to her recovery and ability to return to work. The Commission is of the view that the varied chiropractic care of [Appellant's chiropractor #2] and the exercise regime prescribed and monitored by [Appellant's doctor #2] materially assisted [the Appellant] in her ultimate recovery. The file reflects recommendations by her adjuster, chiropractor and physiotherapist for a work hardening program and the recommendation of the independent examiner for acupuncture and counselling in pain management. We can not tell why none of those recommendations was ever followed; we are of the view that, had they been adopted, there is at least a strong likelihood that [the Appellant] would have reached pre-accident condition sooner.

We find:

(i) that [the Appellant] was not able to resume her former employment as of February 18, 1998;

(ii) that [the Appellant] was able to commence a gradual return to work as of mid-April, 1998, when she could have returned to the salon on a part-time basis; finding that her former job was no longer available she worked with her senior customers, and had regained her pre-accident status by the end of April.

The Commission therefore directs MPIC to reinstate [the Appellant's] income replacement indemnity benefits from February 19th until April 30, 1998, after deducting her part-time earnings for that same period.

While, at the hearing of her appeal, [the Appellant] raised the question of her entitlement to reimbursement of chiropractic fees subsequent to May 13th, 1998, that matter does not appear ever to have been the subject of an Internal Review decision and is therefore not properly before us; we are only empowered to hear appeals from decisions of MPIC's Internal Review Officers.

The only other issue before us was [the Appellant's] entitlement to be paid her prescription costs of $62.41. That matter was resolved by agreement between [the Appellant] and counsel for the corporation to the effect that those expenses would, in fact, be paid to her upon substantiation, by [Appellant's doctor #2], of the prescriptions being medically required and related to the accident. It is therefore so ordered.

Dated at Winnipeg this 31st day of March, 1999.

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J. F. REEH TAYLOR, Q.C.

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CHARLES T. BIRT, Q.C.

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LILA GOODSPEED