Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-99-30

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Ms Joan McKelvey;** **the Appellant, [text deleted], was represented by [Appellant's representative]**
HEARING DATE:	**August 27th, 1999**
ISSUE(S):	**(a) Whether income replacement indemnity ('IRI') prematurely terminated; and** **(b) whether Appellant entitled to cost of rental or purchase of TENS machine and Obus form.**
RELEVANT SECTIONS:	**Section 110(1)(a), 110(2)(d), 160(e) and (g) of the MPIC Act ('the Act') and Section 34 of Manitoba Regulation 40/94**

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

From some date in 1986 until the 15th of December 1994, [the Appellant] was employed as a dietary aid at [hospital]. Her work consisted, for the most part, of preparing the food tray line, preparing dessert dishes and juices; making toast and sandwiches; serving tea into mugs; placing milk, jams and cutlery onto trays and pushing those trays along the belt line. She was required to lift and carry cartons of milk. She also had to work in the dishroom area, removing dirty dishes

and garbage from trays; removing clean dishes from the belt line and stacking them onto carts and, occasionally, collecting food carts from the wards and returning them to the kitchen. Her normal, maximum lifting requirement was about 20 pounds, although she was infrequently called upon to lift up to 30 pounds. She worked 7.75 hour shifts.

On December 15th, 1994, the Appellant was the victim of a motor vehicle accident in which her car was rear-ended, causing it to collide with the median strip where it was hit a second time on the passenger side. She sustained soft tissue injuries to the left side of her neck; pain down the left side of her back also emerged one or two days later, accompanied by headaches. At the time, she was married with one child, born on [text deleted].

[The Appellant] received IRI, was attending at the [rehab clinic #1] where she was progressing well, and had started a gradual return to work for two hour shifts in early May of 1995. On May 31st, 1995 she was involved in a second, two-vehicle collision which resulted in damage to the left front corner of her vehicle (approximately $2,000.00 worth). She sustained an exacerbation of her previous injuries and, as well, she appears to have suffered soft tissue injury in the area of her right shoulder.

In June of 1995 [the Appellant] discovered that she was pregnant. Although she did continue with her physiotherapy at the [rehab clinic #1], that program had to be modified because of her pregnancy. By July 18th, 1995, the Appellant reported that her back pain was much improved, but she continued to complain of neck pain despite full cervical range of motion. Meanwhile, she had been taken off the return-to-work program.

By August 15th, 1995, [rehab clinic #1] was reporting that the Appellant could only tolerate two to three hours of therapy, which was limited by frequent reports of abdominal pain and, since her family physician was then recommending that she not attempt any lifting, her therapists at [rehab clinic #1] felt that she was unlikely to benefit from further mechanical treatment nor even from the most passive modalities. She was therefore discharged from [rehab clinic #1] on August 15th. However, upon the urging of her adjuster and her physiotherapists, and with encouragement from her physician, [the Appellant] returned to the [rehab clinic #1] for therapy on or about August 25th. This seemed to produce improvement in [the Appellant's] tolerance for standing and energetic walking, to the point where her therapists again recommended a gradual return to work on a basis of two hours per day in early September. That plan had to be postponed until the beginning of October due to reported pain and increase of numerous symptoms on the part of the Appellant. Her doctors then approved her return to work, starting at two hours a day for three weeks at light duties, to be followed by four hours per day. However, [hospital] was unwilling to accommodate a return to work on that basis. They would only accept a gradual return to work if the result would be to have the Appellant working full hours with full duties within six weeks. [Rehab clinic #1] asked the Appellant to make an appointment to see her family physician for an assessment of her then current condition, and to see whether there was any medical reason why she could not return to work in accordance with the requirements of [hospital]. More specifically, the therapy team were anxious to know whether, if the Appellant were unable to return to work, that inability was due to her neck or back injuries or related more to her pregnancy.

MPIC was apparently advised in the late Fall or early Winter of 1995 by one or more of [the Appellant's] caregivers to discontinue any attempts at physical rehabilitation and to continue

with psychological therapy only, pending the delivery of [the Appellant's] child. [The Appellant] undertook to contact her case manager at MPIC six weeks after the birth of her child, at which point rehabilitation could be readdressed. MPIC continued paying IRI to [the Appellant] during her pregnancy. Her second child was born on [text deleted]. On February 12th, 1996, [the Appellant] contacted her case manager to say that she proposed to travel to [text deleted] to take the ashes of her deceased mother home, and would be away for some two months.

MPIC had requested [rehab clinic #2] to develop a rehabilitation plan for [the Appellant] but her family physician, [text deleted], would not approve that plan unless [the Appellant] came to see him. Being unable to contact [the Appellant] by phone, the insurer mailed a letter to her, to say that an appointment had been made for the Appellant and her case manager to attend at [Appellant's doctor #1's] office on March 20th, 1996. [The Appellant] responded on March 18th by phone, to say that she had bought her tickets and would be leaving for [text deleted] on March 24th. She would not be attending the rehabilitation program.

From the records on file, it does not appear as if [the Appellant] ever did return to [rehab clinic #1] and, apart from a series of consultations she had had with [text deleted], clinical psychologist, in November and December of 1995, the next significant step reflected on the file is a letter to [the Appellant] from her case manager at MPIC dated March 19th, 1996. That letter, noting that the Appellant would be travelling to [text deleted] and would be away from March 24th until May 24th, 1996, advised her that her IRI and any other benefits would be terminated, effective March 24th, pursuant to the provisions of Section 160(e) and (g) of the MPIC Act. (Copies of any sections of the Act referred to in these Reasons will be annexed hereto.)

[Appellant's psychologist] confirmed to MPIC that, although it is a valid part of the Appellant's religious faith that her mother's ashes be released into flowing water, this does not have to be done in [text deleted]; the location is a matter of personal preference. He also confirmed that the duty of returning the ashes could have waited until the completion of the rehabilitation program, since [the Appellant's] mother had died some four years previously and there was no immediate urgency about making that trip.

It follows, therefore, that MPIC was justified in terminating [the Appellant's] benefits when it did, effective March 24th, 1996.

However, MPIC's internal review officer, [text deleted], in a decision bearing date October 10th, 1996, held that the Appellant's two month trip to [text deleted] did, in fact, constitute a valid reason for her failure to participate in the rehabilitation program, and that she was not in breach of Section 160(g) of the Act. He also found that, since none of her medical practitioners was recommending any specific medical treatment at the time of her departure, she was not in breach of Section 160(e) of the Act, either. Those facets of [MPIC's Internal Review Officer's] findings were not, therefore, disputed during the appeal to this Commission.

[MPIC's Internal Review Officer] made the further finding that he had no medical information that would enable him to restore [the Appellant's] benefits following her return to Canada. He referred that question back to MPIC's adjusting team.

Income replacement indemnity seems to have been reinstated since, by January 31st, 1997, the Appellant was in receipt of $816.43 bi-weekly and, as well, had been referred to the [rehab clinic

#3] for a functional capacity evaluation, which took place on February 11th, 13th and 14th, 1997. [Rehab clinic #3] recommended that, since [the Appellant] had become seriously deconditioned and was presenting with Abnormal Pain Behaviour, she should first undergo a six-weeks reconditioning program and be re-evaluated at the end of that program. [rehab clinic #3] also recommended that [the Appellant] attend pain management and medication education sessions with the Institute's clinical psychologist and that further information be obtained from the [clinic] to which the Appellant's family physician had referred her.

It was obvious at that juncture that the Appellant saw herself as being seriously disabled, believing that she could not lift even five pounds, sit for more than 30 to 45 minutes nor stand for more 15 to 20 minutes.

On February 20th, 1997, MPIC had to write to the Appellant, pointing out that the rehabilitation team at [text deleted] had been trying for three working days to contact her, since her rehabilitation program was to have started on February 20th. They had not been able to have anyone answer the phone nor was there an answering machine on which to leave a message. [The Appellant] testified that she has caller identification on her telephone at home and that no one had ever called her without having that call returned. This, patently, is at odds with the reports from [text deleted], who reported to MPIC that "She (the Appellant) was telephoned a total of ten times over the last three days. There was no answer and no machine was available to leave a message."

The commencement date for her reconditioning program having been deferred until February 25th, the Appellant was reported by the [rehab clinic #3] on April 15th, 1997, to have made very

slow improvement, with a number of barriers interfering with and limiting further progress. The Appellant had been unwell for a couple of weeks and her physician, [text deleted], had suspended her rehabilitation for the period; the Appellant said she had developed a rash from the chemicals in the swimming pool and the pool component of her rehabilitation had therefore also been eliminated for some time although, in the event, her absence from the pool had made no difference in her skin condition; she was still extremely pain focused and a pain and swelling in her left knee had, in some manner, become exacerbated.

On April 25th, 1997 [text deleted], then director of the [clinic], recommended a trial of a transcutaneous electrical nerve stimulator ('TENS') for a month with a view to long term use, and the provision of an Obus back support for her chair and car seat. Those recommendations were not accepted by MPIC.

During a reassessment by her physiotherapist on April 15th and 16th, 1997, [the Appellant] was still reporting left shoulder and arm pain, lower back pain, aggravated by bending, lying supine with the legs straight, and walking for more than fifteen or twenty minutes, together with frequent headaches and occasional episodes of dizziness. A report from the [rehab clinic #3] to [Appellant's doctor #1] on May 12th, 1997 again reported slow progress, mainly because [the Appellant] continued to be pain focused. A similar report from the [rehab clinic #3] to MPIC bearing date June 24th, 1997 concluded with the comment that:

> [The Appellant] continues to complain of pain, particularly in her lower back, and despite a variety of treatment techniques and stabilization exercises she has not made significant functional progress. Based on the lack of recent objective improvement, continuation of the program is not warranted.

In the interim, [the Appellant's] job at [hospital] had been terminated under a provision of a collective agreement giving the hospital that right after an employee's absence from the workplace of two years or more.

On August 1st, 1997, [text deleted], medical consultant to MPIC's Claims Services Department, expressed the view that further rehabilitative programs would not be beneficial for the Appellant, for the following reasons:

1. she was pain focused and attempts to work through her symptoms had been unsuccessful due to self-limitation;

2. the Appellant's perception of her functional capability was not good; she perceived herself to be significantly handicapped and felt that rest was an appropriate response to pain;

3. overall deconditioning as a result of inactivity, and an inability to rehabilitate the necessary supporting structures to her spine and pelvis as a result of her pain focus and self-limitation; and

4. no job was then available for her and, therefore, motivation for returning to work would probably be low.

[MPIC's doctor] felt that the Appellant had reached maximal medical improvement and that it was now up to her to continue with her home exercise program. He recommended a new functional capacity evaluation. (In the meantime, her rehabilitation program at the [rehab clinic #3] appears to have been continued until early September 1997, pending receipt by the Appellant's case manager of a report from the insurer's medical team.

On October 2nd, 1997 [the Appellant] was assessed for vocational potential by [vocational rehab consulting company #1] who also recommended a functional capacity evaluation, the obtaining

of a report from a chiropractor ([text deleted]) whom the Appellant had just started seeing, and the development of a list of occupations for which she might be suited.

[Appellant's chiropractor #1] diagnosed a Grade 3a Whiplash Associated Disorder with a rather startling list of related disorders, when he examined the Appellant on October 1st, 1997. We are obliged to note that [Appellant's chiropractor #1] is the only caregiver to have made such a diagnosis, and this was two years and five months after [the Appellant's] accident. With respect, we are satisfied that [Appellant's chiropractor #1] was mistaken, at least in this facet of his diagnosis. He appears to have believed the Appellant was already back at work full-time and indicated that she could continue to work full duties although, in that same report, he also notes that she had less than full function due to symptoms and/or functional deficits. The apparent anomaly is troubling. [Appellant's chiropractor #1] also recommended spinal adjustments three to five times per week together with light stretching and general exercises while maintaining the Appellant's usual activities.

On January 12th, 1998 [vocational rehab consulting company #1] reported to MPIC that they had held a meeting with [Appellant's doctor #1] and [the Appellant]. [Appellant's doctor #1] expressed his opinion that [the Appellant] had been pushed beyond the normal range to perform exercises in her functional capacity evaluation. She was currently complaining of soreness and swelling of her knees as a result of the work hardening program at the [rehab clinic #3]. [Appellant's doctor #1] felt that the Appellant should not return to work for more than three hours per week. He had referred the Appellant to a specialist for her knees. He adopted [Appellant's doctor #2's] recommendation for a TENS machine and a Obus form, and recommended that the Appellant continue to see [Appellant's chiropractor #1] and [Appellant's doctor #2]. X-rays taken of the Appellant's knees had produced normal results.

MPIC then referred [the Appellant] to the [vocational rehab consulting company #2] for a transferable skills analysis to identify occupations that were physically compatible and matched the Appellant's occupational profile. In response to an inquiry from [vocational rehab consulting company #2], [text deleted], physiotherapist at the [rehab clinic #3], reported that he had no concerns about the Appellant's standing tolerance as related to the position of a dietary aid at [hospital]. Although the Appellant's demonstrated abilities did not match the requirements of her job description, those demonstrated abilities were not representative of [the Appellant's] true maximum ability. He felt that her behaviour suggested voluntary, non-compliant behaviour and that [the Appellant] was, in fact, physically capable of employment at a light level. Since her original job description did require rare instances of lifting at a medium level, based on demonstrated (not necessarily true maximum) abilities, the Appellant was not observed to have matched medium category demands.

We interpret [Appellant's physiotherapist's] report as indicating that, if [the Appellant] was performing at her actual capacity, she was quite capable of work as a dietary aid within the job description provided by [hospital]. [Vocational rehab consulting company #2] expressed the same view in a memorandum of March 13th, 1998, qualified by the belief that "probably this would take a gradual return-to-work schedule to build up".

A more detailed report from [vocational rehab consulting company #2] of March 23rd, 1998, contained a list of occupations for which, that organization felt, [the Appellant] would be well qualified, some of which required on the job training. There were ten such occupations listed. [Vocational rehab consulting company #2's] rehabilitation consultant noted that the success of

placement into one of those occupations would be dependent upon [the Appellant's] motivation and her perception of her physical abilities.

A memorandum prepared by [text deleted], a new adjuster taking over the Appellant's file at MPIC, notes difficulty in reaching the Appellant by telephone and the fact that, after the phone at the Appellant's home had rung for a number of times, someone there picked it up to stop the ringing and then hung up again. There are other, earlier indications between February 19th, 1997 and April 7th, 1998 of difficulties encountered by [the Appellant's] caregivers of her failure to respond to telephone calls - she said she was either at her sister's home or had simply failed to hear the telephone ring. This is somewhat at odds with her earlier comment that she always responded to phone calls because she had caller identification.

On April 8th, 1998, [vocational rehab consulting company #1] reported that the Appellant had not been participating in a rehabilitation plan since January, because she had either been sick or having problems with her knees. [Vocational rehab consulting company #1] also noted that they had contacted 20 personal care homes, all of whom had indicated that [the Appellant] would be required to start work on a casual basis with no guaranty of full-time hours. [the Appellant] was reluctant to work on that basis, although she had been given the names and addresses of a number of them.

On April 14th, 1998, [Appellant's MPIC adjuster #1] wrote to [the Appellant] outlining all of the treatments and services that [the Appellant] had received and, having expressed the view that the Appellant was then able to hold the employment that she had held at the time of the accident, applied the provisions of Sections 110(1)(a) and 110(2)(d) of the Act. In consequence, the

Appellant was told that she would continue to receive income replacement until April 9th, 1999 or such earlier date as she was able to regain employment. Meanwhile, said [Appellant's MPIC adjuster #1], MPIC would provide assistance in job search techniques or resume preparation; [the Appellant] was expected actively to seek employment.

This last letter was followed by a brief note on April 17th, expressing the opinion of MPIC's medical consultant that there was no support for the proposition that the use of TENS machine would have any beneficial effects in treating myofascial symptoms that had been present for over two years. The provision of a TENS machine by MPIC was, therefore, denied.

[The Appellant] applied for a review of the foregoing decision on June 2nd, 1998. The basis of that review application was that, despite all of the treatments that the Appellant had received during her rehabilitation process, there was no appreciable relief from symptoms of pain and the Appellant had been obliged to seek the intervention of pain specialists to enable her to cope with the physical demands of the rehabilitation programs. She also sought a reversal of the decision not to give her a TENS machine nor an Obus back support. Her request for the use of a TENS and an Obus back support was supported by [text deleted], director of the [text deleted] Clinic, in a letter of July 22nd addressed to [Appellant's doctor #1].

In further support of her review application, [the Appellant's] consultant and advisor, [text deleted], advanced the arguments that:

(a) she was at all times following medical advice when participating in or refraining from any rehabilitation programs;

(b) none of her caregivers had reviewed their progress reports with [the Appellant], the most important person in therapy. For example, it was argued, she had been required to undertake extensive marital counseling without her consent and

without knowing what was purportedly wrong with her marriage, since she still maintained that there was and is nothing wrong with either her marriage or her family life, and the benefit from those services was therefore questionable;

(c) [Appellant's doctor #1] and two separate physicians at the [text deleted] Clinic had all recommended the use of a TENS machine and an Obus support, whereas MPIC was relying upon the opinion of [MPIC's doctor], who had never seen the Appellant;

Since this new review application had been referred back to [MPIC's Internal Review Officer], he met with the Appellant and [Appellant's representative] on October 2nd. After waiting for some further information promised by [Appellant's representative], [MPIC's Internal Review Officer] was able to render his decision on December 15th, 1998. That decision was to the effect that:

1. the material on file did not support any suggestion that [the Appellant] had not been kept informed as to her progress. Indeed, there was much evidence of what [MPIC's Internal Review Officer] called "a pattern of willful non-communication" on the part of [the Appellant];
2. the material on file also supported the view that, in spite of her protestations to the contrary, [the Appellant] had been capable of performing her pre-accident employment duties for well over a year and also had sufficient transferable skills to move into another line of similar work at any time she chose to do so;
3. [MPIC's Internal Review Officer] preferred the position of [MPIC's doctor] with respect to the TENS machine. His decision is silent on the matter of the Obus form.

In short, [MPIC's Internal Review Officer] upheld the decision of [Appellant's MPIC adjuster #1]. It is from [MPIC's Internal Review Officer's] most recent decision that [the Appellant] now appeals to this Commission. Her Notice of Appeal bears date March 3rd, 1999.

On March 22nd, 1999, [the Appellant's] new case manager at MPIC, [text deleted] wrote to the Appellant to confirm approval of funding for further chiropractic care, at a frequency of four times per month up to and including April 30th, 1999. This was based upon a report from [text deleted], chiropractor, of February 5th.

A lengthy report addressed by [Appellant's chiropractor #1] to this Commission bears date May 12th, 1999 and is accompanied by X-ray reports from [Appellant's chiropractor #2] of the [text deleted] Chiropractic X-ray Service covering [the Appellant's] cervical and lumbosacral spine. The essential points that emerge from [Appellant's chiropractor #1's] report may be summarized as follows:

> When first presenting to [Appellant's chiropractor #1's] office on October 1st, 1997, [the Appellant] complained of headaches, dizziness, pain in the ears, loss of balance, eye disturbances, neck pain/stiffness/grating/discomfort, mid-back pain, arm and shoulder pain bilaterally, neck and mid-back muscle spasms, lower back pain that spread into the hips and legs bilaterally and affected her walking, sitting, standing, bending and lying, stomach trouble, gas and mood changes. She attributed all of these symptoms to her motor vehicle accidents since, she said, none of those symptoms was present prior to her accidents. She had been unable to perform her normal job-related duties, daily activities or housework and, as [Appellant's chiropractor #1] puts it, "She has been off of work indefinitely". [Appellant's chiropractor #1] diagnosed;
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> 1. traumatic chronic subluxation complexes of the C2-C3 and C6-C7 cervical motor units, concomitant with decreased and altered cervical range of motion, positive orthopaedic tests, positive neurological findings, muscle weakness and spinal fixations;
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> 2. traumatic chronic subluxation complexes of the T5-T6 and T10-T11 thoracic motor units, concomitant with a decreased and altered dorsal lumbar range of motion, positive orthopaedic tests, spinal fixations and myospasms; and
>
> 3. traumatic chronic subluxation complexes of the L5-S1 and both sacroiliac articulations, concomitant with a decreased and altered dorsal lumbar range of motion, positive orthopaedic tests, spinal fixations and myospasms.

His care plan consisted of specific spinal adjustments, ice therapy, a rehabilitative exercise program and prescribed spinal exercises and stretching. From October 1st, 1997 to May 12th, 1999, [the Appellant] received 101 spinal adjustments and accompanying treatments from [Appellant's chiropractor #1], who reported substantial improvement by May 7th, 1999, except in the lumbosacral regions. Despite that, [Appellant's chiropractor #1] reports that

> She is still unable to perform her everyday duties, work-related duties and housework without physical discomfort and exacerbation (of) her symptoms. It seems that it is not possible for her to return to her previous job due to physical limitations and that her job no longer exists. It has been my position since the outset that ([the Appellant]) should have been retrained and gainfully employed for the last few years. It is my opinion that not returning to some kind of work has been detrimental in her recovery both from a physical and psychological perspective.

[Appellant's chiropractor #1] recommended retraining and gradual integration back into the workforce for the Appellant, to an extent to be determined by an occupational therapist in conjunction with her physician and with [Appellant's chiropractor #1]. He also recommended that she continue with supportive chiropractic spinal care indefinitely and that she receive "some sort of psychological counseling to aid her with the transition back to work".

It is not clear whether [Appellant's chiropractor #1] was aware of the counseling and active occupational assistance made available to [the Appellant] through the [vocational rehab consulting company #2], briefly noted above. Similarly, it is not clear whether [Appellant's chiropractor #1] was aware of the extensive psychological counseling made available to [the Appellant].

There are some anomalies reflected in this file, both before and after the December 15th, 1998 decision of [MPIC's Internal Review Officer]. We do not wish to make too much of them but they are, nonetheless, somewhat troubling. For example,

(i) [Appellant's chiropractor #1] reports substantial improvement over the nineteen months during which he had been treating [the Appellant] and yet her family physician, [text deleted], says that she has found no relief from those treatments nor, indeed, from all of the physiotherapy, rehabilitation programs and treatments at the [clinic] and at the [rehab clinic #3].

(ii) [Text deleted], MPIC's consultant, in an interdepartmental memorandum of August 12th, 1999, finds no documentation of a psychological condition arising from the motor vehicle collision and is "uncertain as to what conditions [Appellant's chiropractor #1] is referring to when he recommended that psychological counseling be provided to [the Appellant] during her transition back to work". Yet, in an earlier memorandum of November 5th, 1997, [MPIC's doctor] said "It is interesting to note that the treatments that would probably be most beneficial for her (psychological counseling or a referral to a psychiatrist) are no longer felt to be necessary by [the Appellant]".

(iii) In that same memorandum of November 5th, 1997, [MPIC's doctor] offers the opinion that he "cannot see any beneficial effects [Appellant's chiropractor #1] could provide to [the Appellant] to assist her in becoming more functional". He did not feel that [Appellant's chiropractor #1] could provide any more in the way of rehabilitation for her. [MPIC's doctor] may or may not have been right, but the fact is that MPIC continued to pay for [the Appellant's] chiropractic treatments from [Appellant's chiropractor #1] at least up to and including April 30th of 1999.

(iv) Although [MPIC's doctor], in his November 5th, 1997 report, suggested that the insurer's Claims Department might wish to speak to its chiropractic consultants respecting the need for further chiropractic treatment, that advice never seems to have been followed.

(v) By the same token, the advice of the pain control specialists that attempts to lessen or control the Appellant's pain by the use of a TENS machine and an Obus form seems to have been discarded by MPIC, mainly because [MPIC's doctor] expressed the view that these modalities were only of subjective use in lessening pain. We have to say that we find this logic difficult to follow: if the claimant's functional capacity is limited by pain, and if there are modalities, recommended by specialists in the field, that might lessen that pain and, thus, remove an obstacle to functional restoration, the use of those modalities might, in our respectful view, at least be worth trying.

(vi) A report from [Appellant's doctor #1] of July 13th, 1999 speaks of [the Appellant] "suffering from myofascial pain syndrome post-MVA". With deference, we believe [Appellant's doctor #1] is confusing myofascial symptoms with myofascial pain syndrome - the latter, as we understand it, requires the identification of a minimal number of so-called 'trigger points', of which there is no mention whatsoever throughout [the Appellant's] medical record, whereas myofascial symptoms are merely those that relate to the musculature and to the thin layer of tissue or membrane covering the muscle.

(vi) [Appellant's doctor #1], having stated that chiropractic treatments have brought [the Appellant] no relief, concludes his letter by saying that "She is to continue with her chiropractor treatments hoping to be able to return to work with some back exercises, work endurance and psychological support". Apart from the patent contradiction in the concurrent finding of "no relief" from chiropractic and yet a continuance with those same treatments, [Appellant's doctor #1] is recommending work training and strengthening

programs which had already been provided to [the Appellant] with patience and persistence on the part of her caregivers, but with no great success - none, at least, that the Appellant herself seemed able or prepared to recognize.

(viii) Again, [Appellant's chiropractor #1's] last report speaks of his opinion that the Appellant "displays both disability and permanent impairment", although the nature of that impairment is not made clear and no other caregiver refers to one. In the event that [the Appellant] did sustain a permanent impairment, that would have to be the subject of a separate claim, since it is not part of the material before us.

Consideration of the merits of [the Appellant's] appeal has been made difficult by a number of factors:

1. by the varying medical and paramedical opinions placed before us;
2. by the fact that the injuries sustained by [the Appellant] in December of 1994 and May of 1995 all appear to have been of the soft tissue variety and yet, by September 1999, four years and four months later, she is still complaining of much the same symptoms as those that prevailed soon after the second accident, even to complaints of dizziness, headaches, ear aches, with the recent addition of nausea. There are no neurological nor any skeletal deficits, or so her medical history tells us. While we do not wish to be seen as minimizing unfairly the extent of [the Appellant's] problems, it has to be said that musculo-tendinous injuries of the kind that she sustained should, from our experience but, more importantly, in the opinion of several of her caregivers and of [MPIC's doctor], have resolved long since. The question then arises whether the continuance of those problems beyond, say, April of 1998 can rationally be attributed to either or both of her motor vehicle accidents;

3. a few questions of credibility arise in connection with [the Appellant's] testimony - her explanations for the inability of a number of people to reach her by telephone, and on many occasions, do not ring true; her testimony that neither her adjuster nor the team from [vocational rehab consulting company #2] ever discussed with her the proposition that she could start returning to work on a casual basis is in direct conflict with their reports (prepared at the time), which clearly document that such discussions did take place but that the Appellant did not wish to pursue those possibilities; [the Appellant] denies that her psychologist ever suggested her husband's participation in therapy - a statement that contradicts the therapist's own report - and yet, in almost the same breath, she complains that her therapist wanted to push her into marriage counseling when there was nothing wrong with her marriage; the Appellant testified that she had not been told why her job at [hospital] had been terminated whereas, it seems clear, she did know that it was due to her continuous absence from the workplace for more than two years; [the Appellant] testified that "I always try to keep working, even when I have pain", but that is clearly contradicted by almost all of the other evidence available to us;

4. the fact that [the Appellant's] path to recovery was, of necessity, affected by her two pregnancies;

5. the fact that, although a graduated return-to-work plan was recommended by the [rehab clinic #1] and approved by [Appellant's doctor #1] and [text deleted] (obstetrician and gynaecologist in September 1995, the administrative personnel at [hospital] were not prepared to accept it unless that program could assure them of a full 7.75 hour shift at the end of a six week period. Since that was not a promise that anyone felt able to make, the gradual return to work was not, in fact, ever undertaken. Ultimately, the job itself

disappeared with reorganization within the hospital and also by virtue of the collective agreement referred to above.

The issue is simply stated: would the Appellant, [the Appellant], have been capable of returning to her pre-accident employment by April 8th, 1998, had that position as a dietary aid still been available to her?

We believe that the answer to that question is affirmative. A detailed functional capacity evaluation performed on October 21st and 22nd, 1997, indicates an ability to return to work although that report, along with several others, notes an apparent lack of effort on the part of the Appellant. From the list of 'significant abilities' contained in that evaluation, it seems clear that [the Appellant] could have performed all of the duties required of her as a dietary aid. The only 'significant deficits' noted in the evaluation were a moderately limited tolerance for elevated work tasks, for standing forward flexion of the trunk, for sitting and for standing. We do not believe that any of those limitations would have precluded her return to work, particularly given her willingness (expressed although not demonstrated) to continue working in spite of pain or discomfort. Even the report of [Appellant's chiropractor #1], when he first saw her on October 1st, 1997, suggests that she should be working at modified duties, and that report was followed by some 16 chiropractic treatments in October, 11 treatments in November, a further 9 treatments in December and an average of 4.5 per month thereafter until and including May, 1999.

The report of [vocational rehab consulting company #1] in April, 1999, indicates that work was available for her, albeit on a casual basis to start with, although [the Appellant] now denies any discussion of it. She, herself, says that she was willing to work as of April 8th, 1998.

[The Appellant's] trip to [text deleted], while certainly desirable from a religious, cultural and familial viewpoint, was not a matter of urgency and could readily have been postponed until she had finished the programs already established for her. The delays and lengthy interruptions caused by the trip to [text deleted] and the two pregnancies, while no doubt desirable in almost every respect, resulted in serious deconditioning which cannot be laid at the door of the insurer.

DISPOSITION:

We do not find any of the medical evidence that postdates the decision of the internal review officer to be particularly useful in helping us to determine whether, by April 8th, 1998, the Appellant had regained functional capacity to a point that would have allowed her return to her former workplace. By the same token, that evidence does not give us much indication whether the problems of which [the Appellant] still complains have their origins her motor vehicle accidents. It is apparent, however, that immediately prior to her second accident she had been doing very well and had started a graduated return-to-work program at [hospital], spending two hours per day there and two hours at the [rehab clinic #1]. While the damage to her vehicle in the second accident required about $2,000.00 worth of repairs, the evidence available to us does not show any serious personal injuries resulting from it. All of the reports from the [rehab clinic #1] in the weeks and months following her 1995 accident are indicative of problems caused, not

by her motor vehicle accident but, rather, by her pregnancy or by time missed from her rehabilitation program due to strep throat, flu and other unrelated illnesses.

After a careful re-examination of all of the evidence on file, including the oral testimony given to us by [the Appellant] herself, we can find no cogent, supporting evidence that would allow us to extend the period for payment of her income replacement indemnity past April 9th, 1999, nor extend her chiropractic treatments at the expense of the insurer beyond April 30th, 1999. As to the proposal for a TENS machine and an Obus form, their provision has been recommended by [text deleted], former director of the [text deleted] Clinic and, more recently, by [text deleted], the current director of that Clinic; their recommendation was supported by that of [Appellant's doctor #1]. Although [MPIC's doctor] was reluctant to approve the provision of those two devices, questioning their beneficial effects in treating myofascial symptoms that had been present for over two years, we prefer to adopt the recommendations of [Appellant's doctor #2], [Appellant's doctor #3] and [Appellant's doctor #1]. We find the Appellant entitled to have those devices provided for her at the expense of the insurer. The fact that she is capable of returning to work does not necessarily disentitle her to all forms of therapy recommended by experts in the field, and we find that those two devices fall within Section 34 of Manitoba Regulation 40/94.

In sum, therefore, MPIC will provide [the Appellant] with an Obus form support for her use at home and in her car, together with a TENS machine for home use along with the exercises which, she says, she is continuing to perform. In all other respects the decision of MPIC's internal review officer, dated December 15th, 1998, is confirmed.

Dated at Winnipeg this 7th day of October, 1999.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED