Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-160

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Ms. Yvonne Tavares** **Mr. Colon C. Settle, Q.C.**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC') represented by Ms. Joan McKelvey;** **the Appellant, [text deleted], was represented by [Appellant's representative]**
HEARING DATE:	**May 8th and 9th, 2000**
ISSUE(S):	**(i) whether Income Replacement Indemnity validly terminated for failure to participate in rehabilitation program or for refusal of new employment; and** **(ii) whether benefits validly terminated on grounds that Appellant provided false information.**
RELEVANT SECTIONS:	**Subsections (a), (c) and (g) of Section 160 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

Prior to the motor vehicle accident in which she was involved on September 18th, 1995, [the Appellant] held a physically demanding job, sorting and salting beef hides. She led a very active life.

On September 18th, 1995, [the Appellant] was driving home, headed north on Highway [text deleted] in [text deleted], Manitoba, when a truck headed south made a left-hand turn across her path; she could not avoid the resultant collision.

The pertinent evidence may be summarized this way:

1. Following her accident of September 18th, 1995, [the Appellant] was first attended by her family physician, [text deleted], who noted muscular leg and back pain, with muscle spasm, and prescribed Tylenol No. 3. He noted that [the Appellant] would be seeing her chiropractor, [text deleted]. She received chiropractic manipulations from [Appellant's chiropractor] for quite some time thereafter. Despite his expectation that she might be able to return to work by mid-December of 1995, she still complained of mid-back and neck pain, was still seeing [Appellant's chiropractor] three times a week, and was unable to return to work by that date.

2. Chiropractic x-rays taken on November 28th, 1995, apparently disclosed a slightly short right leg and mild lumbar scoliosis, multiple early discopathies of the cervical spine and, at the thoracic levels, "possible mild old compression of the body of T8 with discopathies above and below" and a very shallow thoracic scoliosis. Despite that, by mid-January, [Appellant's chiropractor] felt that [the Appellant] had full mobility and should be able to resume work, albeit with some pain in the early stages of that resumption. He emphasized the importance of a graduated return to work at the earliest possible date, in order to avoid serious deconditioning.

3. MPIC therefore sent [the Appellant] for a functional capacity evaluation at the [vocational rehab consulting company] and for a job demands analysis. The report resulting from those

assessments indicated that [the Appellant's] functional capacities for lifting, carrying, dynamic push/pull and work simulation were significantly below the demands of her job. The report, signed by [Appellant's occupational therapist], recommended a daily combination of reconditioning and work hardening program to improve muscular endurance and functional tolerances, to include both physiotherapy reconditioning and occupational therapy work hardening. The anticipated duration of that program was eight weeks, starting with a physiotherapy assessment before actually beginning the program. The work at Barrett Hides, where she had been employed, was obviously too heavy for her, in her condition at the time.

4. When discussing the [vocational rehab consulting company] report with her adjuster, the Appellant displayed some anger with some of [vocational rehab consulting company's] methodology, but agreed to start a physiotherapy program at [physiotherapy clinic #1]. She attended there on March 25th, 1996, but was reported to have displayed a negative attitude about many of the things she would be doing there. As the physiotherapist put it, "this girl seems to have a lot of anger and frustration, more than the usual one would expect." When she returned for her second appointment on March 29th, the physiotherapist reports that she had arrived, had not even spoken to him, was very surly and left without making another appointment.

5. [The Appellant] reported that she did not get along with her therapist at [physiotherapy clinic #1], did not like him, and did not feel that he was doing enough for her. As a result, [the Appellant's] adjuster arranged for her to attend the [physiotherapy clinic #2].

[The Appellant] started attending [physiotherapy clinic #2] in April 1996 but, by early August, had shown little, if any, improvement. She refused acupuncture, medication and, indeed, every option suggested to her, including psychological intervention for pain management. Her attendance record at [physiotherapy clinic #2] was poor; on several occasions she was unable to attend, on others she did not appear nor give any reason for her absence; she developed cough and flu symptoms at times when she was due to attend for physiotherapy and, also, on dates when she was due for reassessment. (We must add that it is entirely possible that these complaints of sickness were genuine, but none of them seems to have been supported medically.)

6. [The Appellant] was then referred to the [rehab clinic #1] for occupational therapy, physiotherapy, and psychological assessments, all of which appear to have taken place in December 1996. [Text deleted], Clinical Psychologist, diagnosed severe depression and a lack of pain management strategies which he proposed to treat with a cognitive-behavioural therapeutic approach.

7. On February 12th, 1997, the [rehab clinic #1] advised MPIC that [the Appellant] had not kept her first appointment for therapy with [Appellant's psychologist #1] but had telephoned him to say that she had slept in. She had met with [rehab clinic #1's] case coordinator, stating that she did not want to return to the [rehab clinic #1] program, as she felt it was a waste of time and there was no point in it. She had told [rehab clinic #1] that she would rehabilitate herself by attending a gymnasium in [text deleted]. (*This, in fact, does not seem ever to have happened.*)

8. By mid-April 1997, MPIC had planned to return [the Appellant] to a rehabilitation program at the [vocational rehab consulting company], but she had failed to show up for three

consecutive appointments. Since, toward the end of May, [vocational rehab consulting company] had indicated that it was discontinuing the multidisciplinary aspects of its work, MPIC then arranged for [the Appellant] to commence a new rehabilitation program at [rehab clinic #2] where she was assessed by [text deleted], clinical psychologist, on July 7th, 1997. His report of July 8th reflects his clinical impression that [the Appellant] was suffering from a major depressive disorder and, probably, a pain disorder associated with both psychological and physical factors. Her reported back pain and unemployment had contributed negatively to her mood and sleep difficulties. [Appellant's psychologist #2] noted a number of factors that, in his view, would constitute barriers to [the Appellant's] rehabilitation. They included: the time spent in rehabilitation after her accident; lack of motivation to start a new rehabilitation program; the Appellant's belief that she was not physically able to return to employment; focus on pain sensations; signs of chronic pain behavioural syndrome and self-limitations. [Appellant's psychologist #2] therefore recommended a four-week trial period that would include physiotherapy, occupational therapy and psychology to see whether [the Appellant] would actively attend and participate; she would be reassessed at the end of that trial, during which he felt she would benefit from psychological intervention to assist with her depression and pain disorder. He felt that counselling could increase [the Appellant's] pain management skills.

The occupational therapy assessment, completed on July 8th and 9th, reflects a statement by [the Appellant] that she was only there because she had to be there and could not understand why she had been referred to the [rehab clinic #2] program because "what's the difference between you and [rehab clinic #1]?" and "I would probably quit this after three weeks, too." The OT and PT members of the assessment team said that a four-week trial program could be attempted, but they believed potential for rehabilitation to be poor, due to the failed earlier

attempts at rehabilitation, record of absenteeism, negative attitude, lack of motivation and pain focus. [Appellant's doctor] concurred, adding that he knew of no medically based reason why [the Appellant] could not participate in that program. This was at the end of August 1997.

9. For reasons that are not clear, it was not until February 5th, 1998, that, at a meeting involving [the Appellant], a physiotherapist and an occupational therapist from [rehab clinic #2], MPIC's adjuster, and [text deleted], a vocational consultant, a functional restoration program was actually planned, to last for a trial period of four weeks and to include pain management counselling sessions with [Appellant's psychologist #2] on a weekly basis. [The Appellant] was to see her family physician to obtain medication for her sleep disorder. Meanwhile, [the Appellant] and her adjuster agreed that little further purpose would be served in attempting to return her to her former job. Rather, rehabilitation should be directed towards an overall reconditioning and strengthening, with attempts to find her alternative employment.

10. On March 18th, 1998, a case conference was held, attended by [Appellant's psychologist #2], the physiotherapist and the occupational therapist from [rehab clinic #2], MPIC's adjuster in charge of [the Appellant's] claim, and [Appellant's vocational rehab consultant]. [The Appellant], who had been invited to the meeting, attended at about the time when it was being adjourned. The two therapists advised that there had been no real change with [the Appellant's] functional restoration program, due to her extended sickness, resultant interruptions in the program and her ongoing sleep disorder. Her occupational therapist felt that job search efforts should be focused towards a sedentary or light occupation. [Appellant's psychologist #2] reiterated the opinions he had expressed in his report of July 8th, 1997; he had seen no material improvement. [The Appellant] confirmed that she, also,

felt that she had not obtained any measurable improvement in her functional capacity. The consensus was that [the Appellant] should be discharged from the [rehab clinic #2] program after being given instructions respecting a home exercise program. Membership in a local gymnasium was to be considered. [Appellant's psychologist #2] was to contact [Appellant's doctor] to suggest a complete physical examination and appropriate sleep and antidepressant medication; meanwhile, [Appellant's psychologist #2] would continue to be available for consultation with [the Appellant] as needed. [Appellant's vocational rehab consultant] would contact a physiatrist to arrange for an assessment and would continue to provide vocational guidance. [The Appellant] also agreed with her adjuster to provide a phone number at which she could be reached during the day, and to maintain and submit weekly a journal of her daily activities.

11. Since the rehabilitation consultant, [text deleted], was still unsure of [the Appellant's] functional capacities, she referred [the Appellant] to [text deleted], physiatrist, for rehabilitation assessment and planning. [Appellant's physiatrist], in a lengthy and detailed report of June 12th, 1998, recommended a graduated physical reconditioning program concurrent with a job placement program, education regarding the physiology of the affected musculature, and a prescription of Ativan (0.5 mg one hour before bedtime) to assist with normalizing sleep patterns. He noted that "due to the complexities of some of the psychological factors in this case, the physical rehabilitation may be difficult for this claimant and the treating practitioners."

12. Following that assessment, [the Appellant] commenced a program of physiotherapy on or about July 2nd, 1998, at the [gym], [text deleted].

13. Meanwhile, [Appellant's vocational rehab consultant] had arranged for two job interviews for [the Appellant]. The first of these was at [text deleted]. While [Appellant's physiatrist] had been provided with a job analysis provided by [text deleted] for the position of a cashier assistant, and had given his formal opinion that [the Appellant] was physically capable of meeting the critical job demands of that position, she had obviously left the interviewing personnel at [text deleted] with the clear impression that she, personally, did not believe that she was capable of doing it. They therefore advised her to return to her reconditioning program and to go back and see them in September 1998. She never did so.

14. Another interview was arranged for her, this time at the personal care home [text deleted]. We note, parenthetically, that [the Appellant] would probably have found some of the duties related to this position beyond her physical capabilities unless help were available from another employee from time to time. However, the person who interviewed her there reported that she had never, in her entire career, come across a job applicant as confrontational and disrespectful as [the Appellant] who, it seemed to the interviewer, was obviously anxious to be denied the position. [The Appellant] is quoted as having said that she simply wanted to get back to work and did not care whether she worked there, or across the road, or anywhere else. She apparently snatched back her résumé and instructed the interviewer to tear up her job application.

15. On September 14th, 1998, MPIC's adjuster wrote to [the Appellant], spelling out in some detail the efforts made by MPIC towards [the Appellant's] rehabilitation and return to the workforce. The adjuster's letter went on to tell [the Appellant] that her Income Replacement Indemnity would end on September 18th, 1998, citing the whole of Section 160 of the MPIC Act as the basis for that decision.

We find that this decision of September 14th, 1998, was premature. Although the adjuster did not say so, we have to presume that he was relying upon subsections 160(c) and (g) and, perhaps, upon subsection 160(f). Those three subsections read as follows:

> 160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person…
>
> (c) without valid reason, refuses…a new employment;
> (f) without valid reason, prevents or delays recovery by his or her activities;
> (g) without valid reason, does not follow or participate in a rehabilitation program made available by the Corporation.

We are conscious of the fact that [the Appellant] had been diagnosed as clinically depressed by two competent psychologists. She had not refused the offer of a job at [text deleted]. Rather, when asked during her interview whether she thought she could handle the job, she had replied, "Well, <u>they</u> [meaning her care-givers and her adjuster] think I can."—the implication being that she, herself, did not feel capable of doing so. Not, perhaps, the response of a cooperative person anxious to return to work but, at the same time, the honest response of a depressed patient.

Her reported behaviour during the interview at [text deleted] might have been inexcusable in an emotionally healthy person and, even in one who is clinically depressed, was rude to the point of being unacceptable. However, we express serious doubts whether [the Appellant] was then capable of handling the job requirements at that personal care home. She expressed great frustration, founded upon her belief that she was being sent for interviews for jobs of which her vocational consultant knew, or ought to have known, her to be incapable.

It is unquestionable that the attitude of [the Appellant] up to September 14th, 1998, was largely uncooperative and, not infrequently, downright rude. However, there is no evidence that anyone had sat down with her or written to her to explain, clearly and firmly, what was required of her and the possible consequences of her failure to cooperate. It is for that reason, and because her attitude to that point can not be judged in the same light as that of an emotionally healthy person, that we find the discontinuance of her Income Replacement to have been premature.

The letter of September 14th from MPIC's adjuster also told [the Appellant] that MPIC would continue to pay for her reconditioning program at the [gym], to be monitored by [Appellant's physiatrist].

From mid-August until early November of 1998, [the Appellant] continued to provide MPIC with detailed travel expense claims, indicating that she had travelled between her home in [text deleted] and the [gym] in [text deleted], five days per week. More specifically, she submitted six, formal records of travel expenses, covering the following periods:

(a) August 10th to 26th, 1998, seven days at 130 Km per trip for a total of 910 at 0.291¢/Km, for a total of $264.81. She was paid that amount on September 11th;

(b) August 27th to September 16th, 1998, 14 days at 130 Km per trip, for a total of 1,820 Km—$529.62. She received that amount on September 17th;

(c) September 17th to 30th, 1998, for 10 days' travel expenses at 130 Km per trip, for a claim of $378.30;

(d) October 1st to 15th, 1998, for 10 days' expenses at a total of $378.30;

(e) October 16th to November 4th, 1998, 14 days' travel expenses at 130 Km per trip, for 1,820 Km and a total of $529.62; and

(f) November 5th to 16th, 1998, seven days' expenses at 130 Km per trip, and a total claim of $264.81.

The last four of those expense claims were not paid to [the Appellant], since MPIC's investigations disclosed that she had not attended at [gym] since August 13th. That facility maintains a logbook for each client at or near the front desk; clients are required to sign in their own journals when attending. [The Appellant's] journal had been missing since August 13th.

[The Appellant's] explanation for the foregoing was that most of the people attending at [gym] were male body-builders who could lift a great deal more than she could; this made her feel most uncomfortable. As well, although [Appellant's physiatrist] and his nurse, [text deleted], were purportedly monitoring her on a regular basis, she only could recall seeing [Appellant's physiatrist's nurse] once, the management of the [gym] were conspicuous by their absence, and she felt she was getting no help. She therefore decided, without consulting anyone, to do her workouts in the home of a male friend who, she said, had a home gym. [The Appellant] agreed that she had never spoken to anyone about her apparent lack of supervision at [gym], had never mentioned to her adjuster, to [Appellant's physiatrist], to [Appellant's physiatrist's nurse], nor to anyone at [gym] that she was in any way uncomfortable and planned to change the location of her workouts. Her counsel explains this by suggesting [the Appellant] lied because she wanted MPIC to continue paying for her travel expenses and was afraid that, if she told them she was changing locations, they would cut off her benefits. The location, he argues, was really irrelevant; what was important was the fact that she was indeed exercising regularly and improving as a result.

With deference, we cannot accept that submission. Whether or not [the Appellant] was actually being monitored on a regular basis by [Appellant's physiatrist], by his nurse or by any of the [gym] personnel, the fact is that [the Appellant], by removing herself from that milieu, rendered any such monitoring impossible. None of [the Appellant's] care-givers had an opportunity to evaluate the equipment available at her friend's home. The very fact that [the Appellant] elected to lie about her destination indicates that she knew that the course of conduct she had embarked upon was wrong.

[The Appellant] explains the disappearance of her daily log by saying that this was something she often did ……"if there were a bunch of people milling about I didn't want to wait for 10 minutes in order to replace my paper." The suggestion that she would have had to wait for 10 minutes in order to replace her log is one that, of itself, lacks credibility. More important is the fact that the removal of that log also removes any reliable method of establishing how often [the Appellant] did, in fact, drive in to [text deleted] to continue with her physical rehabilitation. In this context, we have been provided with a memorandum bearing date February 22nd, 1999, and signed by [Appellant's friend], which reads as follows:

> To Whom It May Concern:
> Since August of 1998, [the Appellant] has been coming to my place roughly five days a week to work out on my home gym. I had a set of keys made so she could come and go at her convience [sic] but the majority of the time she chose to wait until I was here as well. I hope this is satisfactory.

Since this Commission receives a great deal of evidence in written form, we do not ascribe too much significance to the fact that [Appellant's friend] was not called to give oral testimony. By the same token, we do not regard his letter as very cogent evidence that [the Appellant] was, in fact, working out at his home gymnasium about five days a week. Even if it were persuasive of her attendance at his home, it tells us nothing about what she did while

she was there and in no event does it excuse her calculated series of untruths when claiming expenses from MPIC.

Because at least part of the submission of counsel for [the Appellant] was that her conduct had to be viewed against the background of her clinical depression, we wrote to [Appellant's psychologist #2], summarizing the relevant evidence and asking him whether, in his view, [the Appellant's] conduct could reasonably be ascribed to her depression and, if so, whether the depression was secondary to her motor vehicle accident.

[Appellant's psychologist #2] responded that his diagnosis of depression in [the Appellant's] case was based on her own oral complaints of some symptoms of depression, plus the result of a Beck Depression Inventory—a standard self-assessment; he felt her depression was probably secondary to her motor vehicle accident. His analysis of much of the correspondence on her file reflected anger, resentment and frustration with the rehabilitation process on the part of [the Appellant]. Occasionally she had declined services and did not seem enthused about continuing rehabilitation. His involvement with [the Appellant] had been short and was aimed primarily at assisting her with pain management and difficulties with her mood and sleep. He reported that [the Appellant] felt unable to resume the physical demands of her previous job. "This aspect of her treatment was very difficult to show any improvement due to what I believe to be a possible personality characteristics [sic] and she solidly believes her symptoms are not going to improve and therefore incapable of returning to employment." While expressing the view that, on a reasonable balance of probabilities, the conduct we had attempted to summarize in our letter to [Appellant's psychologist #2] might reasonably be ascribed to her depression, he felt that there might be other personality

characteristics which could contribute to her conduct during her rehabilitation. That possibility had not been evaluated.

Subsections (c), (f) and (g) of Section 160 of the Act all start with the words “without valid reason…” and, as noted above, it is at least arguable that the uncooperative, confrontational, negative and dismissive attitude displayed by [the Appellant] was attributable to a clinical depression brought about by her accident and, therefore, at least to some extent beyond her reasonable control at the time. We are prepared to make that finding, despite the fact that she was on a number of occasions offered medication and psychological intervention to help overcome her problem, but refused most of that help.

However, subsection 160(a) is clear and unequivocal. It reads:

> 160 The Corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person
>
> (a) knowingly provides false or inaccurate information to the Corporation…

The omission of the words “without valid reason” from subsection (a) cannot be regarded as inadvertent.

In the absence of [the Appellant’s] false claims for expenses, we would have been prepared to reinstate her Income Replacement Indemnity by reason of her depression and the absence of clear warning. Her systematic abuse of the expense account claims commenced in August 1998, well before September 18th when MPIC had quit paying her Income Replacement Indemnity. That fact negates any entitlement that she might otherwise have had to the reinstatement of IRI.

It follows that [the Appellant's] appeal must be dismissed.

Dated at Winnipeg this 1st day of August, 2000.

J. F. REEH TAYLOR, Q.C.

YVONNE TAVARES

COLON C. SETTLE, Q.C.