Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-23

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 Mr. Keith Addison;** **the Appellant, [text deleted] , appeared on her own behalf, accompanied by her husband**
HEARING DATE:	**February 2nd, 2000**
ISSUE:	**Whether Appellant wrongfully denied Income Replacement Indemnity ('IRI') and rehabilitation program of limited duration**
RELEVANT SECTIONS:	

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 Appellant] was a victim of two motor vehicle accidents less than one month apart—on November 27th and December 22nd, 1997.

We do not believe that any useful purpose would be served by a detailed analysis of her medical history following those two accidents. It is enough, we believe, to say that her care-givers included her family physician ([text deleted]), [text deleted] (a specialist in physical medicine

and rehabilitation to whom [Appellant's doctor] referred the Appellant), the [rehab clinic] (where she was assessed by [text deleted], clinical psychologist, and by [text deleted], physiotherapist), [Appellant's physiotherapist #2] of [physiotherapy clinic #1], [Appellant's physiotherapist #3] of [physiotherapy clinic #2], [text deleted], occupational therapist, [text deleted], physiotherapist, personnel at [vocational rehabilitation consulting company] and, for purposes of assessment and consultation only, [independent rehab specialist #1] and [independent rehab specialist #2], [text deleted].

It is primarily the opinions of [independent rehab specialist #1] and [independent rehab specialist #2] that are material to this Commission's decision. [The Appellant] was referred to [independent rehab specialist #1] by [vocational rehabilitation consulting company] for an independent medical examination which took place on October 13th and 19th, 1998. [Independent rehab specialist #1's] report, dated November 2nd, 1998, diagnoses a chronic pain disorder or syndrome, abnormal illness behaviour, cardiovascular deconditioning, and musculoskeletal deconditioning, accompanied by inaccurate representation by the Appellant of her true abilities. He observed that symptom magnification was evident. He comments "although the examinee meets several criteria for malingering, her behaviour would best be described as an abnormal response to illness." *(This same set of exaggerated responses to areas of discomfort was noted by other caregivers.)*

[Independent rehab specialist #1's] summarized recommendations were that no further diagnostic testing was required, no further physical treatment was called for, and that [the Appellant] should simply return to full-time work immediately, without restrictions.

Upon the basis of [independent rehab specialist #1's] report, MPIC's adjuster wrote to [the Appellant] on November 19th, 1998, terminating her benefits as of December 7th, 1998. Sometime in February 1999, [Appellant's doctor] referred [the Appellant] for an independent medical examination and assessment by [independent rehab specialist #2] who, by coincidence, is a colleague of [independent rehab specialist #1] in [text deleted]. [Independent rehab specialist #2's] report to [Appellant's doctor] bears date February 24th, 1999. He says that there was little to find on a current musculoskeletal neurological examination, other than some muscle tenderness and muscular symptomatology, resulting in slowness of movement and guarding. His examination did not suggest any significant mechanical symptomatology in the neck and the low back, and he could find no evidence of neurological involvement such as cervical or lumbosacral root. [The Appellant] had not described any significant, ongoing sleep dysfunction, nor any signs of depression. [Independent rehab specialist #2] recommended that [the Appellant] should continue with her regular flexibility program. He felt that she should have further symptomatic improvement and improvement in her conditioning and endurance, with the addition of some regular general fitness activity. For example, he suggested a low-impact aquacising program and that, since [the Appellant] was complaining of current symptomatology with her work activities,

> it would be reasonable as well to decrease the number (of) hours at work while she attempts to work upward with her general fitness activities. When she has worked these in on a regular basis, her symptoms should improve and she should be able to progress upward in the number of hours. I would also suggest that the screening serology be done to rule out metabolic conditions that may cause pain enhancement.

Following inquiry from MPIC's Internal Review Officer, to whom [the Appellant] had appealed, [independent rehab specialist #1], although commenting that he did not believe it essential, agreed that [independent rehab specialist #2's] recommendation was "acceptable medical practice and if he is her treating physician that is up to his judgment to include that in her rehabilitation program." [Independent rehab specialist #1] added that a rehabilitation program

for [the Appellant] should not exceed eight weeks, and that the treating physician re-evaluate at that point and then begin to re-establish [the Appellant's] work hours.

[Independent rehab specialist #2] concurred and, in consequence, the Internal Review Officer issued a decision on June 11th, 1999, whereby [the Appellant] was to be allowed to enter a rehabilitation program for six to eight weeks, during which her IRI benefits would be continued. At the end of that program, [independent rehab specialist #2] would begin to re-establish [the Appellant's] work hours and her IRI would be adjusted in accordance with that return to work. If, after the reconditioning program, [independent rehab specialist #2] decided that she could not return to work, the matter would be reviewed by MPIC's adjuster and a decision made as to how her IRI benefits would continue.

Following the issuance of the Internal Review Officer's decision, MPIC's adjuster contacted [text deleted], physiotherapist, to ask for a report outlining [the Appellant's] reconditioning and work hardening program, exercises, duration of program and discharge. The purpose of that request is unclear, since [Appellant's physiotherapist #2's] reports were already fully available on the file. The adjuster then contacted [independent rehab specialist #1] by telephone to ask if he had been aware of the extensive rehabilitation and reconditioning program already extended to [the Appellant]. At his request, she sent [independent rehab specialist #1] a copy of [Appellant's physiotherapist #2's] handwritten memorandum, whereupon [independent rehab specialist #1], on July 5th, 1999, wrote to the adjuster to say that he was now opposed to any further functional restoration or work hardening program for [the Appellant]. Upon being shown [independent rehab specialist #1's] most recent letter, [independent rehab specialist #2] concurred with it.

MPIC's adjuster then, on July 20th, 1999, and apparently without further consultation with the Internal Review Officer, wrote to [the Appellant] to tell her that the insurer would not, after all, be paying for any further functional restoration or work hardening, nor any Income Replacement Indemnity, but would simply pay for a couple of aquacising sessions of $22.

MPIC's Internal Review Officer became aware of this contradiction of her own decision by way of a phone call from [the Appellant] on July 22nd, 1999. Some further, intramural discussions therefore took place, following which the Internal Review Officer wrote to [the Appellant] on August 13th revoking her earlier decision and denying the benefits that had been awarded by it.

This complete reversal of direction on the part of the insurer seems to have been based upon the premise—in our respectful view, quite erroneous—that [independent rehab specialist #1] and [independent rehab specialist #2] had not been aware of the rehabilitation programs in which [the Appellant] had already been involved. [Appellant's physiotherapist #2's] undated, handwritten letter addressed to MPIC's Internal Review Officer does not seem to have told [independent rehab specialist #1] anything that he had not already known. Indeed, he refers to [the Appellant's] treatments by [Appellant's physiotherapist #2] in his lengthy report to [vocational rehabilitation consulting company].

This Commission wrote to [independent rehab specialist #1] and [independent rehab specialist #2] on February 8th, 2000, asking each of them why, having agreed that it was acceptable medical practice for [the Appellant] to undergo a further six- to eight-week rehabilitation program, they had changed their minds when given a copy of [Appellant's physiotherapist #2's] letter, since they were already aware of the facts set out in that letter.

[Independent rehab specialist #2] indicated by telephone that he had "misinterpreted what the file manager had written" and did not now feel that any program was needed for [the Appellant] beyond home exercises. (His promised, confirmatory letter has yet to arrive.) [Independent rehab specialist #1] did reply on February 11th, but his letter merely points out that the initial, slight difference in opinion between himself and [independent rehab specialist #2] was insignificant, medicine being both an art and a science, and that [Appellant's physiotherapist #2's] report supported once again his opinion that [the Appellant] would not profit from further physiotherapy.

With deference to [independent rehab specialist #1] and [independent rehab specialist #2], we have no reason to doubt the evidence of [the Appellant] that she had, in fact, advised each of them, both orally and, in one instance at least if not both, by way of a written questionnaire, of her medical history since her two accidents, and that history included her treatments by [Appellant's physiotherapist #2]. In our view, therefore, there was nothing new in [Appellant's physiotherapist #2's] undated letter that should have caused them to change their respective minds. It follows, therefore, that there were insufficient grounds for the Internal Review Officer to revoke her earlier decision with which, at the time, we would have agreed.

From all of the evidence on file, it seems unlikely that [the Appellant] will ever be completely and permanently free from discomfort, but there are numerous techniques that she can learn that will help her to live a more normal life and to enjoy most, if not all, of her former activities.

DISPOSITION:

Had this matter come before us a year ago, we would have simply reinstated the original decision of the Internal Review Officer. Now, a year later, we have insufficient evidence to enable us to

determine the type or duration of a rehabilitation program that would be appropriate for [the Appellant]. That question is therefore referred back to MPIC's case manager, and to her supervisor, for the purpose of arranging an up-to-date independent assessment. If that assessment concludes that [the Appellant] is still in need of a time-limited rehabilitation program, then, to the extent that she is obliged to be absent from her workplace while participating in that program or in a graduated return to work thereafter, she will be entitled to Income Replacement Indemnity based upon the income thus lost.

Dated at Winnipeg this 11th day of April, 2000.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED