Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-65

PANEL:	**J. F. Reeh Taylor, Q.C., Chairman** **Ms Yvonne Tavares** **Mr. Colon Settle, Q.C.**
APPEARANCES:	**[Appellant's representative] appeared for the Appellant;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Tom Strutt**
HEARING DATE:	**February 20th, 2001**
ISSUE(S):	**(i) Whether Appellant unable to work by reason of MVA;** **(ii) whether Appellant entitled to further therapy.**
RELEVANT SECTIONS:	**Sections 85(1), 86(1), 105 and 138 of the MPIC Act, Section 8 of Manitoba Regulation No. 37/94 and Section 5 of Manitoba Regulation No. 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

[The Appellant] came from [text deleted] to Canada with her husband in 1993. She worked for their son in [text deleted] during 1993 and part of 1994. They then moved to [text deleted] where, in July and August of 1994, [the Appellant] worked picking raspberries and, for a short time thereafter, also had a cleaning job; her husband did not work during their time in [text deleted].

In 1995 [the Appellant and her husband] moved to [text deleted] where [the Appellant] earned a little money sewing [text deleted] clothing while her husband remained unemployed.

On April 10th, 1996 [the Appellant] was a passenger in the back seat of a vehicle being driven by her husband. The car was stopped at a pedestrian crossing, behind other vehicles, when it was rear-ended by another vehicle. It was pushed forward a couple of feet but made no contact with anything in front of it. Estimated damage to the [text deleted] vehicle was about $562.00.

It is important to note, at this juncture, that approximately two months prior to her motor vehicle accident [the Appellant] had slipped and fallen on some ice, sustaining a distal radial fracture and a styloid fracture at the left wrist and a fracture of the coranoid process of the ulna at the left elbow.

[The Appellant]'s testimony before this Commission with respect to the mechanics of her accident was inconsistent. She first testified that her left shoulder and neck had hit the back of the seat in front of her; as a result, she said, her left shoulder and neck were still painful and it was hard for her to do any home activities such as cooking meals or lifting bags of groceries. She had done no sewing since her accident.

However, on cross-examination, she agreed that she had told [text deleted] (the physiatrist to whom she had been referred by her general practitioner) that she had hit her hand and wrist on the roof of the car. She further agreed that "I did not hit my shoulder and neck against the back of the front seat; it was only half way". Further questions from

the Commission elicited the explanation that [the Appellant's] body had been jerked forward by the impact from the rear, that she had made no contact with the seat in front of her but that, when her body was returning to its earlier position as part of the flexion - extension or whiplash movements, her left arm had somehow been jerked upwards and had collided with the roof of the vehicle. We are constrained to say that this explanation, which purports to attribute [the Appellant's] problems with her left shoulder and neck to her motor vehicle accident, lacks credibility.

In this context, there may be some significance to the fact that, when listing her complaints to her physiotherapist, [the Appellant] certainly indicated that she had sustained fractures at the left elbow but does not appear to have mentioned that the fractures were in no way related to her motor vehicle accident. If the slip and fall were mentioned at all, they are not reflected in the physiotherapist's reports, which speaks of "multiple injuries sustained at the impact (of the MVA), a loss of mobility of the left upper extremity, cervical and lumbar strain, fractures of the left elbow with extreme pain and restriction of the other joints", all under the general heading of a motor vehicle accident on April 10th, 1996.

The physiotherapy report should be contrasted with the initial report of [the Appellant's] family physician, [text deleted], bearing date April 18th, 1996. [Appellant's doctor #1] speaks only of "osteoarthritis with fractured left arm (12 February 1996)" and "pain and swelling of left arm (already had some pain and swelling from previous fractures"). [Appellant's doctor #1] describes [the Appellant's] occupation as "housewife" and, in listing occupational or domestic limitations, merely says "avoid use of left arm". He did not see the likelihood of any permanent impairment. It is not until the 12th of September

1996 that [Appellant's doctor #1] first makes mention of complaints by his patient of pain and stiffness on the left side of her neck and tenderness and some stiffness of the left trapezius, some five months after her motor vehicle accident.

It is also noteworthy that [the Appellant] does not seem to have mentioned any neck or shoulder condition to her adjuster when completing her Application for Compensation on April 18th, 1996. It speaks only of "sore left arm".

By January 24th, 1997, [the Appellant] had received about 53 physiotherapy treatments, although [Appellant's doctor #1] had advised her to discontinue physiotherapy on or about the 19th of September 1996.

EVIDENCE OF [APPELLANT'S PHYSIATRIST]:

[The Appellant] was referred by [Appellant's doctor #1] to [text deleted], a specialist in rehabilitation medicine, who saw her first on August 26th, 1996. Her primary complaints were of pain in the left shoulder and forearm, weakness of the left forearm and neck pain. [Appellant's physiatrist] saw her again on November 25th, 1996, March 3rd, March 24th and May 29th of 1997. In his first report, [Appellant's physiatrist] notes that [the Appellant] had a two-year history of right shoulder pain with radiation to her right third, fourth and fifth fingers of the hand, for which he had seen her on February 15th, 1996. At that time he had diagnosed a chronic right rotator cuff tendonitis and myofascial pain syndrome of the trapezius, paracervical and shoulder girdle muscles. She had mild peripheral neuropathy and suffered a recent Colles' fracture of the left radius - this was all slightly more than three weeks prior to her motor vehicle accident. We are somewhat

puzzled by the fact that [Appellant's physiatrist] makes no mention of the previous fracture at the left elbow of the Appellant. His initial assessment was that [the Appellant] had sustained a whiplash injury to her neck and left shoulder, complicated by musculoligamentous strain, left rotator cuff muscle strain, myofascial pain syndrome of the neck and shoulder girdle muscles, sleep disturbances and pain and disuse, related weakness of the left shoulder girdle and upper extremity muscles, all as a result of her April 1996 motor vehicle accident. Some of those complaints had surfaced prior to her motor vehicle accident and we have to assume that [the Appellant] omitted to mention that fact to [Appellant's physiatrist].

By March of 1997, [Appellant's physiatrist] was able to report that [the Appellant] had made good improvement in the myofascial pain syndrome of her neck muscles but still had mild residual restriction of the movements of her neck and had a frozen left shoulder with capsulitis and reduced functional capabilities. X-rays of her left shoulder showed minor cystic changes in the subchondral region of the head of the humerus, which [Appellant's physiatrist] felt were degenerative in nature. On being informed of the results of the x-rays, [the Appellant] indicated that, two weeks previously, she had felt generalized body aches and feverish. [Appellant's physiatrist] diagnosed chronic left rotator cuff tendonitis with frozen shoulder and spasm of the trapezius muscle and neck pain. He recommended further aggressive physiotherapy including the application of local ultrasound, aggressive mobilization and strengthening exercises. He felt that she might require between three and four months of further therapy. As a result of a further exam on May 29th, 1997, [Appellant's physiatrist] reiterated that [the Appellant] had developed a chronic left rotator cuff tendonitis with mild capsulitis and frozen shoulder. There was no evidence of nerve root or peripheral nerve compression. He felt that her

response to treatments had plateaued by that point. He recommended that [the Appellant] should continue attending a fitness centre, receiving steam therapy and aggressive mobilization of the left shoulder joint, with lightweight exercises. He felt that, nonetheless, she was unlikely to make a complete recovery of her left shoulder dysfunction.

EVIDENCE OF [APPELLANT'S DOCTOR #1]:

In addition to the earlier reports from [Appellant's doctor #1] referred to above, there is a significant letter that [Appellant's doctor #1] wrote to [the Appellant's] counsel, [text deleted], dated June 25th, 1999. The relevant portions of that letter read this way:

> [The Appellant] has been seeing me from January 1995 for diabetes mellitus, joint pains and muscular pains that she has been experiencing for years and pains in her right shoulder....
>
> Then in February 1996 she had slipped and fell down landing on her left arm. She was complaining of increased pain in her left arm and left wrist and she sustained fracture of the left wrist. [The Appellant] saw [Appellant's doctor #2] for this condition. (*No report from [Appellant's doctor #2] was made available to the Commission.)*
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> [The Appellant] was then involved in a motor vehicle accident on April 10th, 1996. Since the accident occurred she felt increased pains over her left arm, left shoulder and left side of neck. Since then [the Appellant] has been seeing me every one to two weeks for her joint pains and neck pains.....
>
> As far as [the Appellant's] ability to work is concerned. She was not able to find any employment before the accident due to lack of experience and her medical

> problems and I think that she may not be able to do any gainful employment now due to her increased symptoms.
>
> In regards to the request for the membership to a fitness centre, I feel that [the Appellant's] interaction with such a centre would be beneficial for her health and well being.

A careful consideration of the several, detailed reports from [Appellant's physiatrist] and the more brief, but equally candid reports from [Appellant's doctor #1], read against the background of [the Appellant's] oral testimony to this Commission, lead us to the conclusion that the frozen shoulder or capsulitis are more probably the result of inactivity stemming from her left upper extremity fractures than from any contact between her left hand and the roof of the [text deleted] vehicle. While it is certainly possible that, if there was any such contact between the hand and the roof, the result could have been an exacerbation of the earlier problem, but any such exacerbation would, in the normal course, have been resolved within a matter of weeks. It is well established in the medical literature that the constant guarding and non-use of the arm can result in the so-called 'frozen' shoulder which, unless treated early and aggressively, can become self-perpetuating.

In [Appellant's physiatrist's] report, dated December 11th, 1996, of his examination of the Appellant on August 26th, he describes [the Appellant's] problems with her left shoulder and neck. At the same time, [Appellant's physiatrist] also makes mention of her two-year history of almost identical problems with her the right shoulder and there is no suggestion that the problem with the right shoulder is in any way related to the motor vehicle accident. We are not prepared to draw the conclusion that the problem with [the

Appellant's] left shoulder was accident-related, but that the right shoulder problem was not.

There is evidence from [MPIC's doctor], after a review of this file, that:

(a) diabetes mellitus can predispose an individual to capsulitis, even in the absence of trauma;

(b) the fractured wrist may well have adversely affected [the Appellant's] left shoulder function and, as we have noted above, may have contributed to the development of capsulitis;

(c) the myofascial pain syndrome involving [the Appellant's] neck that was present prior to her MVA may also have contributed to the development of the capsulitis.

There is nothing on this file to indicate any structural changes to [the Appellant's] left shoulder nor to her previously fractured wrist, resulting from her MVA.

[Text deleted], counsel for [the Appellant], submits that his client was actively engaged prior to her MVA but is now effectively disabled. [Appellant's representative] is primarily emphasizing [the Appellant's] difficulty in completing certain domestic tasks which, he points out, in a family with an [text deleted] cultural background, the wife is expected to perform, but he seeks income replacement indemnity on her behalf from the date of her accident up to the present time and beyond.

Mr. Strutt, counsel for MPIC, submits that if the Commission accepts the report of [Appellant's doctor #1] of June 25th, 1999, quoted above, then Section 105 of the MPIC Act would apply. It reads:

No Entitlement to IRI or Retirement Income

105 Notwithstanding Sections 81 to 103, a victim who is regularly incapable before the accident of holding employment for any reason except age is not entitled to an income replacement indemnity or a retirement income.

However, Mr. Strutt acknowledges that, since [the Appellant] did at least have some work experience prior to her slip and fall accident (albeit her work as a seamstress is undocumented and no income from it has been reported) Section 105 might, perhaps, be inapplicable. In the latter case, Mr. Strutt submits, [the Appellant] must establish that her motor vehicle accident rendered her "substantially unable to perform the essential duties" of her occupation, and this she has not been able to do. We agree.

DISPOSITION:

In sum, although [the Appellant] may well be suffering from chronic left rotator cuff tendonitis with mild capsulitis and frozen shoulder, requiring ongoing therapy, we cannot find that these conditions have their origins in her motor vehicle accident. Rather, we find that the cause of her ongoing complaints is, on a reasonable balance of probability, to be found in her pre-existing conditions reflected in [Appellant's doctor #1's] letter of June 25th, 1999.

It follows that her appeal must be dismissed.

Dated at Winnipeg this 21st day of March 2001.

J. F. REEH TAYLOR. Q.C.

YVONNE TAVARES

COLON SETTLE, Q.C.