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Indexed as:
R.M.H. (Re)

IN THE MATTER OF an appeal by R.M.H. née P.)
AICAC File No.: AC-96-24

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[1997] M.A.I.C.A.C.D. No. 14

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C.,
and L. Goodspeed
Heard: April 22, 1997.
Decision: April 28, 1997.
(7 pp.)

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Issue(s):

- (a) Entitlement to IRI - whether victim 'entirely or substantially' unable to perform essential duties of employment;
- (b) Whether victim entitled to reimbursement for cost of retraining program.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, s. 83, 110 and 138.
Regulation 37/94, s. 8.
Regulation 40/94, s. 10(1)(e).

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Appearances:

Manitoba Public Insurance Corporation ('MPIC')
represented by Joan McKelvey.
R.M.H., the Appellant, appeared in person, together with
her husband, C.H.

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MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE
PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING
PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

REASONS FOR DECISION

THE FACTS:

[para1] R.M.H. appeals from a decision of Mr. T. R.

Strutt, Acting Internal Review Officer for Manitoba Public Insurance Corporation ('MPIC') bearing date June 14th, 1996. Mr. Strutt's letter to R.M.H., embodying that decision, appears to cover the background facts in sufficient detail (subject to certain qualifications that appear below) that we shall append it to these reasons with the intent that, save only where we specifically differ from it, our factual findings are identical to those of Mr. Strutt.

[para2] R.M.H. is claiming lost wages - that is to say, income replacement indemnity ('IRI') for the period from November 1st, 1995 to June 30th, 1996, this being the period during which she was attending at Hallcrest Career College in order to complete a Legal Assistant's course of training. She also seeks reimbursement of the cost of her tuition and books for that course which, she says, amount to \$6,700.00. She took out a student loan for \$[text deleted] toward the cost of that course, of which part still remains unpaid.

[para3] In order to make clear the factual basis upon which we arrive at our decision, we note our disagreement with Mr. Strutt on the following points:

- (a) it seems clear that R.M.H. was not off work as a result of her slip and fall accident on August 14th, 1994 "for some 2 1/2 months". Her Application for Compensation says that she was "off work about 6 weeks" - a statement that she contradicted at her hearing by saying that she was only disabled for about two weeks, after which she did have to take a few hours off work each week (usually by leaving work early) in order to attend for chiropractic treatment;
- (b) Mr. Strutt indicates, on page 3 of his June 14th, 1996 decision, that R.M.H.'s return to the lighter duties of her waitressing job, on a restricted basis, until she lost that job at the end of May, 1995, was 'clearly inconsistent with the suggestion that you were not able to do the work'. With deference, we would have thought that the surrounding facts were, if anything, more consistent than inconsistent with that suggestion - R.M.H. had, after all, been holding down that job well enough prior to her accident, and the limitations upon her ability to perform some duties after the accident might well indicate a causal relationship;
- (c) we do not attribute the same significance as do Mr. Strutt and his medical consultants to the frequency, or lack of it, of R.M.H.'s chiropractic treatments, and the lapses of time between those treatments, during the period between August of 1994 and August of 1995.

[para4] However, after digesting all of the medical and chiropractic evidence tendered to us, both by R.M.H.'s caregivers and MPIC's in-house consultants, as well as by Dr. Andrew Gomori, this Commission's own neurological consultant, we are still left to determine the puzzling question whether, as a result of a physical or mental injury caused by her motor vehicle accident, R.M.H. was rendered 'entirely or substantially unable to perform the essential duties of the employment that were performed by her at the time of the accident'.

[para5] At the time of the accident, R.M.H. was employed at [text deleted] as a waitress, where she had started work in or about October of 1994. After her motor vehicle accident of January 13th, 1995, R.M.H. was away from work on her doctor's advice until January 24th, when she returned to work. Her employer accommodated her need for lighter duties by assigning her to a smaller section of the Restaurant and allowing her to reduce her hours of work each week until her health became restored. Her employment at [text deleted] ended on May 22nd of 1995 and we were provided with a copy of the employer's letter of that date, setting out the reasons advanced by the employer for terminating her employment. If the employer's allegations are valid - and, with one possible exception, we have no real cause to doubt them - the management of the restaurant appears to have had reasonable grounds for her dismissal, although R.M.H. maintains staunchly that her troubles there all stemmed from the extreme discomfort from which she was suffering and her resultant inability to perform her duties in the manner that her employer required.

[para6] Counsel for MPIC points out that, according to that employer's letter of termination, R.M.H.'s problems predated her motor vehicle accident and simply added up to what the employer called a 'bad attitude'.

[para7] At or about the beginning of July of 1995, R.M.H. started a new job at the [text deleted], but quit after a couple of weeks because, she testified, the discomfort from which she was still suffering made it difficult, if not impossible, properly to fulfill the duties of this new and somewhat more demanding job.

[para8] During the month of August, R.M.H. held another position, this time at [text deleted], as an assistant in the shipping area. Her duties consisted, in the main, of working at a table doing light packaging and filling orders. Her former employer says that it would not have been necessary for R.M.H. to lift anything heavy and that, had she encountered trouble with lifting, the employer would merely have had one of the male employees lift the packages in question. That job was terminated by the employer after about three weeks, upon the grounds that R.M.H. had been taking too much time away

from work for reasons that were unacceptable - for example, the need to drive C.H. to medical appointments, the desire to go home in order to receive a parental telephone call - and general dissatisfaction by the employer with R.M.H.'s performance.

[para9] It is noteworthy that none of those three employers made any mention of R.M.H. having complained about disabilities related to her automobile accident. Indeed, each of them appears to have said that R.M.H. did not at any time mention her automobile accident as a reason for her inability to perform the duties of her employment. That testimony, although unsworn and merely reflected by signed statements, in two cases, and by a memorandum of a telephone discussion in the other, was uncontradicted.

THE LAW:

[para10] The question of R.M.H.'s entitlement to IRI is governed by Section 83(1) of the Manitoba Public Insurance Corporation Act ('the Act'). A copy of this, and of other relevant sections of the Act and Regulations referred to below, will be found attached to these reasons, with the governing portions being highlighted in the copy that is going to R.M.H. (It is a matter of common ground that, at the time of her accident, R.M.H. was a 'part-time earner', within the meaning of the Act.) The first question that we need to address, therefore, is whether she was unable to continue the employment, or to hold an employment that she would have held, during the first 180 days following her accident, if the accident had not occurred.

[para11] Section 8 of Regulation No. 37/94 provides that

"A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident."

[para12] After a careful review of all of the available evidence, we are not satisfied that, upon a balance of probabilities, R.M.H.'s accident rendered her 'entirely or substantially unable' to perform the essential duties of her employment as a waitress. While the accident had required her to take approximately two weeks away from work in order to recuperate, she was able to carry out the essential duties of her employment from the date of her return to work on a part-time basis on January 24th, 1995 until about May 21st, when her employment was terminated for cause; she quit her job at [text deleted] (contrary to the suggestion on MPIC's file that she was "let go because they were not happy with her work"), primarily because she found that the duties required

of her exceeded those that she had been led to expect. Her work at [text deleted] encompassed about the first two weeks of July of 1995. The termination of her employment at [text deleted] after about three weeks in August of 1995 appears also to have been terminated for cause: she had been taking time away from work for reasons unacceptable to the employer to whom, as with her two previous employers, R.M.H. had apparently not indicated any inability to perform her tasks as a result of pain caused by her automobile accident.

[para13] R.M.H. elected, perhaps not unwisely, to effect a change in the direction of her career, and enrolled in the course at Hallcrest in November of 1995. While that decision may be a commendable one, we are of the view that the cost of it is not something that MPIC can properly be required to pay, either in terms of the tuition fee or the income that R.M.H. was unable to earn while completing the course. We do not find that R.M.H. falls within the provisions of Section 10(1)(e) of Regulation 40/94.

DISPOSITION:

[para14] It follows, therefore, that R.M.H.'s appeal must fail.

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