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Indexed as:
J.R. (Re)

IN THE MATTER OF an appeal by J.R.
AICAC File No.: AC-98-118

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[1999] M.A.I.C.A.C.D. No. 10

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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: March 26, 1999.
Decision: April 7, 1999.
(19 paras.)

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Issue(s):

- (a) Whether Appellant entitled to income replacement indemnity ('IRI');
- (b) Whether Appellant entitled to physiotherapy.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993,
c. 36 ('the Act'), ss. 85(1), 86(1) and 136(1).
Regulation 40/94, s. 5.

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Appearances:

Manitoba Public Insurance Corporation ('MPIC') represented by
Keith Addison.

The appellant, J.R., appeared in person, assisted by R.F.

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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

[para1] J.R. was a victim in a motor vehicle accident on March 3rd, 1997 when the front of the car in which she was a front-seat passenger collided with the right side of another vehicle that had attempted illegally to make a left turn. Within a few days following that accident, J.R., who had hit both of her knees against the dashboard of the vehicle in which she was riding, developed numerous trigger points in the

muscles around her shoulders and neck, tenderness in both knees and limited range of motion of her neck. Dr. Haligowski, her family physician who saw her on March 10th, 1997, diagnosed myofascial neck strain and contused knees, with a Grade 2 Whiplash Associated Disorder. He noted that J.R. was a chronic user of Tylenol #3. Dr. Haligowski referred J.R. for physiotherapy to Mr. Tom Berzish at the Rebound Physiotherapy Clinic; his referral note contains the diagnosis "MVA; rotator cuff; contused knees". Dr. Haligowski's initial health care report also records that J.R. had received previous chiropractic treatment and physiotherapy.

[para2] Mr. Berzish, in his initial physiotherapy report, speaks of reduced range of motion at both knees and the right shoulder of J.R.; he felt that she had bilateral patellofemoral syndrome and a left rotator cuff strain. Upon the recommendation of Dr. Michael MacKay, Medical Consultant to MPIC's Claims Services Department, multi-site physiotherapy treatments were authorized for a two-week period, to be followed by further physiotherapy for J.R.'s neck and shoulder for six weeks. Those treatments commenced on March 11th, 1997.

[para3] As a result of discussions between J.R. and her Adjuster at MPIC, a narrative report was sought from Dr. Haligowski on July 9th. He responded on September 9th and his report is of sufficient significance to merit reproduction in full:

Dear Mr. Smith:

[J.R.] suffered a cervical strain as a result of her motor vehicle accident in March of 1997. Since [J.R.'s] initial visit to myself she has not brought up any particular complaints with regards to her neck. She has fibromyalgia syndrome with multiple areas of pain, most notably in her left shoulder and her right knee. I do not think that [J.R.'s] fibromyalgia syndrome was aggravated to any great degree by the motor vehicle accident. [J.R.] uses Tylenol #3 chronically for her pain. I do not believe her use has increased since the motor vehicle accident.

I should note that [J.R.] also complained to me that both her knees were sore after the motor vehicle accident but examination at that time was normal. I do not believe that her knee pains are any worse as a result of her motor vehicle accident, that is her right knee pain that predated the motor vehicle accident. She has not complained to me recently of any knee discomfort, although I believe that she does have knee pain as a result of her previous fibromyalgia syndrome.

[J.R.] is not currently employed as a result of the fibromyalgia syndrome. I would like her to continue to participate in her usual leisure and work related activities because this would tend to help the pain component of her fibromyalgia syndrome. There is no reason, from her motor vehicle accident, that she should restrict her activities.

My prognosis with regard to the motor vehicle accident is for a full recovery if she has not already attained same. The full recovery is to her pre-accident status.

[para4] Despite the foregoing, the condition of J.R.'s right knee appeared to be deteriorating and Dr. Haligowski therefore referred her to Dr. K. B. Baria, orthopaedic specialist at the Winnipeg Clinic. On September 30th, 1997 MPIC wrote to Dr. Baria to ask for a narrative report regarding his treatment and assessment of J.R., particularly with respect to the knee surgery that had been scheduled for October 15th, 1997. Dr. Baria finally responded on January 19th, 1998.

[para5] In his report to MPIC, Dr. Baria said that J.R. had been laid off work from her job in the cafeteria at [text deleted] in October of 1996 because she could not do her job at the speed required; this, said Dr. Baria, was mainly because of her knee and back problems. (J.R., at the hearing of her appeal, denied this and testified that she had been obliged to quit work because of a loss of strength in her hands.) J.R. had been diagnosed with fibromyalgia syndrome some time prior to her motor vehicle accident, although it was never made clear to us just when that diagnosis was first made.

[para6] Dr. Baria first saw J.R. after her accident on July 22nd, 1997 with respect to her knee problems. He did not recall being informed by J.R., on that occasion, that she had been involved in the accident and says that the first knowledge that he had of it was on September 9th, 1997. At his first examination of her knees, Dr. Baria noted "Marked patellar crepitus in both knees, right worse than the left. Also there was medial and lateral joint line discomfort in both knees. Her problem was mainly for osteoarthritis and chondromalacia patella" (that is to say, a softening of the cartilage adjacent to the kneecap). Dr. Baria apparently suggested a variety of treatments, including corticosteroid injections, arthroscopy and debridement.

[para7] Since those signs were still present on September 9th, 1997, Dr. Baria scheduled an arthroscopy of the right knee which was done on October 15th, 1997. He noted degenerative changes in the medial femoral and tibial condyle, which were debrided. There was no meniscal tear noted.

Following that arthroscopy, Dr. Baria saw J.R. in followup visits on October 21st, November 18th, 1997 and January 6th, 1998. On the latter occasion, J.R. was still having some parapatellar pain in the right knee but no sharp medial nor lateral joint pain. She was still having difficulty standing for prolonged periods and going up and down stairs. She was referred for physiotherapy to Seven Oaks Hospital for mobilization and strengthening.

[para8] Dr. Baria summarizes his findings and prognosis from the January 6th, 1998 visit this way:

[J.R.] did have a pre-existing condition which was osteoarthritis of both knees, right slightly worse than left. I also understand from other reports that she was also diagnosed as having fibromyalgia syndrome, for which she was being treated by Dr. Haligowski and Dr. Lesiuk. This was prior to the accident. If, as she states, she did bump her knee on the dashboard, then she did definitely have an aggravation of her patellofemoral osteoarthritis because of the impact. I would not say that the osteoarthritis was caused by the accident but there was definitely aggravation of the problem that she had.

She is beginning to settle down. She still has some symptoms which she states she did not have prior to the accident. To give her the benefit of the doubt, I would recommend that she have physiotherapy for a period of about two to three months, by which time she should be back to her pre-accident status. I do not think that the accident itself would have caused permanent damage to the knee, more than what she already had.

I feel that the impact aggravated the already pre-existing condition of patellofemoral osteoarthritis and osteoarthritis around the medial joint space, but I do not think that this aggravation will be long lived and I think with adequate treatment she should settle down in the next three months or so.

[para9] There are some anomalies in the evidence presented to us by J.R. For example, she was adamant in her testimony that, prior to her accident, it was her left knee that gave her problems and that the right one had been, as she puts it, "perfectly fine". This, unfortunately, flies in the face of all of the medical evidence before us; it is quite clear that it was predominantly her right knee that was giving her trouble prior to her accident. Similarly, although J.R. testified that it was weakness in her hands as a result of her fibromyalgia that caused her to quit work in 1996, she does not appear to have mentioned that to any of her caregivers whereas there is the evidence of her own advice to Dr. Baria

that she had quit work primarily because of her knee and back problems. There is no reference in any medical report made available to us to any weakness in J.R.'s upper extremities prior to her automobile accident.

[para10] J.R. had been engaged as a short order cook at least from October of 1990 until, on October 5th, 1996, her employment by [text deleted] in the cafeteria at [text deleted] was terminated. Whether that termination was voluntary or involuntary is not clear but, there seems little doubt, it was brought about by the symptoms of fibromyalgia syndrome that were then giving J.R. much discomfort and reduced her work output to the point that it had become unacceptable both to her and to her employer. From October 5th, 1996 until the date of her accident on March 3rd, 1997 she had been unemployed and collecting employment insurance benefits. Those benefits ran out in July of 1997. J.R. would be classified as a non-earner for the purposes of the Personal Injury Protection provisions of the MPIC Act and, under Section 85(1) of that Act would not be entitled in any event to income replacement indemnity for the first 180 days immediately following her motor vehicle accident. The 180th day after that accident would be September 1st, 1997, and the question before us is whether, on the latter date, J.R. was not able, because of her accident, to hold an employment determined for her under the provisions of Section 106 of the Act. An employment determined for J.R. under Section 106 would patently be that of a short order cook, since that had been her primary skill and experience for the years preceding her accident. Was she precluded from performing the duties of that job because of the accident?

[para11] Having in mind that J.R.'s last employment had been terminated because of the combined effect upon her body and psyche of the fibromyalgia syndrome from which she was then suffering, and having in mind that, even had she reached pre-accident status by September 1st, 1997 she would still presumably have been unable to carry on her previous occupation - she was, after all, still unemployed and receiving permanent disability benefits at the time of the accident - we would have had little difficulty in concluding that her motor vehicle accident had not precluded her rejoining the workforce by September 1st, 1997.

[para12] The only factor that gives us any pause in reaching that conclusion is a letter bearing date August 13th, 1998 and addressed to J.R.'s Adjuster at MPIC by Dr. Haligowski. We must be frank to say that we find this letter troubling. It reads as follows:

[J.R.] has not returned to pre-accident status since her motor vehicle accident. She continues to have low back pain and because of this uses an Obus form lumbar

support. Her right knee is not back to pre-accident status. It tends to lock on her, gives her pain and there has been giving out. She also states she can't kneel on the right knee or stand for long periods because of the pain. She also still has left shoulder and knee pain since the motor vehicle accident. The right knee is the worst problem. She is awaiting an MRI.

[para13] We find Dr. Haligowski's August letter troubling because it seems to be so much at odds with his letter of September 9th, 1997. From the reports of Drs. Haligowski and Baria, it seems quite clear that J.R. was suffering from pain in the right knee, the left shoulder and low back for some considerable time before her motor vehicle accident and, although she does appear to have sustained a strained neck in that accident, the natural history of that strain would have seen it fully restored to normalcy well before Dr. Haligowski's last letter, seventeen months after the accident.

[para14] A magnetic resonance imagining performed on J.R.'s right knee on November 10th, 1998, following Dr. Baria's arthroscopic examination, disclosed only mild osteoarthritic changes with no evidence of meniscal nor ligamentous injury. There is no suggestion in any medical evidence before us that those mild osteoarthritic changes were the result of J.R.'s motor vehicle accident rather than normal degeneration - a degeneration that had patently existed well before her accident.

[para15] With deference to Dr. Haligowski, a careful reading of his letter of August 13th, 1998 discloses no objective evidence but, rather, reflects merely a recital of symptoms of which J.R. complained to Dr. Haligowski.

DISPOSITION:

[para16] We are persuaded that the arthroscopic examination performed by Dr. Baria on October 15th, 1997 had two objectives: first, to ensure that no permanent damage of any kind had been caused by the motor vehicle accident; second, to allow debridement (i.e. the removal of any dead tissue or foreign matter than might be found within the knee). While the fact is that the arthroscopic examination and subsequent MRI disclosed no abnormality - no damage caused by the motor vehicle accident - that surgical procedure was, at least in part, made necessary by the accident (if only to negate any permanent, trauma-induced damage). We are therefore prepared to award J.R. income replacement for the period from October 15th, 1997 to April 30th, 1998, being the period during which she was disabled as a result of the surgical procedure.

[para17] While J.R. herself felt that her knee had not

really reached full, pre-accident status until some time in July, 1998, we prefer the opinion of Dr. Baria that pre-accident status would have been reached by the end of April, 1998.

[para18] As to continued physiotherapy, J.R.'s evidence was that MPIC has paid for her physiotherapy until about October 12th or 13th of 1997 - shortly before her arthroscopy. Dr. Baria arranged for her to receive physiotherapy at Seven Oaks Hospital for mobilization and strengthening of her knee, starting about three months after her arthroscopy. If she received any physiotherapy at her own expense between January 19th and April 30th, 1998, she is entitled to be reimbursed for the cost of it and, in any event, for any transportation costs that she incurred while attending Dr. Baria or for physiotherapy during that same period.

[para19] The decision of MPIC's Internal Review Officer will be varied accordingly.

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