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Indexed as:
L.L.E. (Re)

IN THE MATTER OF an appeal by L.L.E.
AICAC File No.: AC-97-17

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[1997] M.A.I.C.A.C.D. No. 49

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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: December 12, 1997.
Decision: December 22, 1997.
(16 pp.)

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Issue(s):
Whether Appellant's benefits properly terminated for non-compliance.

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Relevant Sections:
Manitoba Public Insurance Corporation Act, S.M. 1993, c. 36, s. 160(e), (f) and (g).

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Appearances:
Manitoba Public Insurance Corporation ('MPIC') represented by Joan McKelvey.
L.L.E., the appellant, represented by Sydney Cohan.

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

REASONS FOR DECISION

[para1] L.L.E., the Appellant, was a few days short of her [text deleted] birthday on May 29th, 1995 when she was injured in a motor vehicle accident. At the time, she had been employed by [text deleted] at [text deleted], Manitoba, where she had worked since July 2nd of 1994, although on May 27th of 1995 she had given two weeks' notice of her intention to quit that employment.

[para2] L.L.E. was originally seen by Dr. Sharon Birnboim,

who referred her to physiotherapy once per week, prescribed Ibuprofen (a muscle relaxant) and a program of home exercises, all of which were aimed at improving a bilateral tenderness in L.L.E.'s cervical muscles and lower lumbar area, resulting from the accident.

[para3] L.L.E. started a program of physiotherapy at the Winnipeg Health Sciences Centre, but was obliged to end that program prematurely due to lack of funds. She had, however, filed a claim with Manitoba Public Insurance Corporation ('MPIC'), who started her on a program of functional rehabilitation with PAR Health Services on or about February 19th of 1996 after an initial assessment. The program required her to attend at the premises of PAR Health Services for two hours per day, three days per week. However, since she had only attended for seven complete sessions, plus two hours of health education, in the first six weeks of the program, she was discharged from it at the end of March by reason of non-compliance with the requirements of the program.

[para4] After being warned of the consequences of further non-compliance, both orally and in writing, L.L.E. was readmitted to the functional rehabilitation program on May 9th of 1996, with the agreed objective that, after four weeks of physiotherapy, occupational therapy, lumbar stabilization and light-weight exercising, she would be able to engage in a work-hardening program, if necessary, before returning to full-time employment.

[para5] On June 11th, 1996 she was again discharged from the functional rehabilitation program at PAR Health Services, having allegedly missed six days out of a possible fifteen days of treatment in occupational therapy, six out of sixteen days of light-weight classes and two out of a possible seven days of physiotherapy. In consequence, MPIC wrote to her on June 28th of 1996, formally terminating her income replacement indemnity benefits and citing Section 160 of the Act as the ground for that termination.

[para6] Section 160 reads as follows:

> "Corporation may refuse to or termination compensation
>
> 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;
>
> (b) refuses or neglects to produce information, or to provide authorization to obtain the information, when requested by the corporation in writing;

(c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;

(d) without valid reason, neglects or refuses to undergo a medical examination, or interferes with a medical examination, requested by the corporation;

(e) without valid reason, refuses, does not follow, or is not available for, medical treatment recommended by a medical practitioner and the corporation;

(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; or

(h) prevents or obstructs the corporation from exercising its rights of subrogation under this Act."

MPIC relies primarily upon subsections (a), (f) and (g) as the basis for its decision.

[para7] L.L.E. appealed to the internal review officer against that decision, and an internal review hearing was held on September 16th of 1996. The internal review officer's decision, dated November 4th, confirmed the termination of income replacement, and it is from this latter decision that L.L.E. now appeals.

[para8] It therefore becomes necessary to analyze the pattern of L.L.E.'s attendance at PAR Health Services, along with the reasons that she advanced for her several absences. In our view it is important to view the entire background of L.L.E.'s relationship with PAR Health Services since, patently, one absence could hardly be called non-compliance whereas a persistent pattern may, in due course, produce the final straw. In that context, and although L.L.E.'s IRI benefits were terminated by reason of her alleged failure to comply with the requirements of the second PAR program, the series that terminated at the end of March also become relevant.

[para9] We note, parenthetically, that we were provided with a series of typewritten notes which, L.L.E. testified, reflected a series of handwritten notes that she had made in her daytimer on a day-by-day basis. The typewritten notes were prepared some time after the events that they purported

to describe, and contain more substance than the original, holograph ones. Despite the fact that this Commission does not adhere too closely to the rules of evidence that obtain in a courtroom, we must admit to some difficulty in accepting those comments of the Appellant that were grafted on to her original notes when she came to reproduce them in typewritten form.

First PAR Program

Week No. 1 (February 19th - 23rd)

[para10] Appellant attends all scheduled sessions.

Week No. 2 (February 26th to March 1st)

[para11] Appellant says that she attended on February 26th and 28th, but not on March 1st due to weather conditions; PAR's records indicate no attendance during that entire week, due to weather conditions. Manitoba Department of Highways advises throughout that week Highway 75 had some sections that were ice-covered and slippery, but no reason why any careful driver could not have travelled on it. On March 1st, in fact, although there were some of those icy patches between Morris and St. Adolphe, the surface from St. Adolphe in to Winnipeg was bare. Apart from a snowfall of 0.4 cm. on each of February 29th and March 1st, there was no precipitation in the entire area that week, temperatures during the daytime average about -20 degrees and north-westerly winds averaged about 20 km. per hour except on March 27th when the velocity increased to 34.7 k.p.h.

Week No. 3 (March 4th - March 8th)

[para12] Appellant says she attended all classes on the scheduled days - March 4th, 6th and 8; PAR's records reflect an attendance only on March 8th and, even on that day, a program only partly completed. PAR also notes that, on March 6th, Ms Gail Archer, O.T.M., telephoned the Appellant's home to enquire as to her whereabouts, and was told by the Appellant's mother that L.L.E. had injured herself shovelling snow and, in consequence, had been bed-ridden for the previous week. Mrs. E. added that her daughter, the Appellant, planned to go to Winnipeg for therapy that day. In fact, the Appellant did not appear at PAR, and PAR's physiotherapy team apparently decided then to discharge her from their program. It is not clear whether that decision was communicated to the Appellant or, if so, by whom.

Week No. 4 (March 11th - 15th)

[para13] L.L.E. testified that she attended all classes scheduled for March 11th and 13th, but due to weather and road

conditions on March 14th had to cancel her classes as well as an appointment with her doctor. PAR's records reflect no attendance at all on the 11th, nor any telephone call; an attendance on the 13th, when the Appellant 'almost completed her entire program'; a telephone call on the 14th to say that L.L.E. would not be in because her car had broken down. Manitoba's Department of Highways advises us that the highway surface from Winnipeg through Morris and all the way to the U.S. border was bare.

Week No. 5 (March 18th - 22nd)

[para14] L.L.E. and PAR agree that she failed to attend for her scheduled program on the Monday, March 18th, without calling in and without offering any reason for the absence. They also agreed that she did attend and did complete her programs on March 20th and 21st.

Week No. 6 (March 25th - 29th)

[para15] This week, in addition to the regular program, health education classes were scheduled. On March 25th, the Monday, L.L.E. neither attended at PAR nor called in; she testified that a storm prevented her from driving in. On the 26th and 27th she attended only the health education classes; she testified that no occupational therapy nor physiotherapy sessions were scheduled, whereas PAR says they were scheduled but L.L.E. did not attend them. On March 28th, L.L.E. testified, she did attend but the class was cancelled because the instructor did not show up. At some point on March 27th or 28th Ms Archer records the fact that she told the Appellant that, since her attendances had been sporadic and because the Appellant's physiotherapy had already been terminated there was little purpose to be served in her continuing the program. L.L.E.'s recollection of that conversation is somewhat different: she says that she was not told that she was being discharged from the program, but merely that she did not seem to be benefitting from the therapy.

[para16] Whatever may have been the tenor of that last discussion, the fact is that L.L.E. attended no more classes until, on May 9th, 1996, upon the further referral from Dr. Birnboim and with the consent of MPIC, she re-entered a program involving physiotherapy, occupational therapy, light weight exercises and, she testified, lumbar stabilization. The records maintained by L.L.E. and those of PAR Health Services covering the weeks that followed are at times in conflict. It should be noted that, in a discussion between the Appellant and Ms Kelly Thompson, her MPIC adjuster, on April 19th, 1996, the Appellant made it clear that she was now aware of the fact that she was required to sign an attendance sheet at PAR which, she said, had not previously been brought to her attention. PAR confirmed to Dr. Birnboim on May 2nd, 1996,

that L.L.E. had been re-referred to their program 'since being discharged due to attendance problems', that she had been re-assessed on May 2nd for functional restoration and that a program had been designed for her consisting of one week of individual physiotherapy followed by daily participation in conditioning classes, education classes and occupational therapy. That program was expected to last four weeks, probably to be followed by a work-hardening program.

[para17] L.L.E., on May 13th, signed an agreement whereby she undertook to live up to the expectations of the program. That agreement included an emphatic requirement that she call ahead of any scheduled appointment that she was unable to keep, that all other appointments (including doctor's appointments) were to be scheduled so as not to conflict with therapy sessions and, if that proved not to be possible, the therapist was to be advised in advance.

Second PAR Program

Week No. 1 (May 9th - 15th)

[para18] Attended all classes, except missed Occupational Therapy ('O.T.') on May 15th according to PAR records; L.L.E. testified that she was there. They agree that she did not report for her light weight class that day.

Week No. 2 (May 16th - 22nd)

[para19] L.L.E. cancelled all her classes for May 16th 'due to car problems: her typed notes say that she did so 'well in advance' although how such problems can be anticipated well in advance is not explained. Her notes also say that she only had a lumbar stabilization session scheduled, whereas PAR records physiotherapy, O.T. and light weight classes as all having been missed. PAR's records seem to be more in keeping with the program outlined in their report to Dr. Birnboim of May 2nd. On May 17th and 21st, L.L.E. testified, she attended for Light Weight classes but was obliged to cancel her O.T. sessions by reason of severe headaches and muscle spasms.

Week No. 3 (May 23rd - 29th)

[para20] On May 23rd, 27th and 28th her attendance seems to have been good, but on the 24th she cancelled all sessions due to an unexplained sickness. She says that she saw Dr. Manness, her general practitioner at [text deleted], that day, although his records reflect an attendance on May 23rd but none on the 24th. She did, however, have an X-ray at the [text deleted] at 3:35 P.M. on the 24th of May, having been referred there by Dr. Manness. The X-ray disclosed no abnormalities. On May 29th she cancelled her Light Weight

class due, again, to headaches and muscle spasms. She testified that she had advised her therapist accordingly.

Week No. 4 (May 30th - June 5th)

[para21] On May 30th L.L.E. attended all sessions. On Friday, May 31st, however, having attended her physiotherapy and O.T. in the morning, she cancelled her afternoon class due to a personal commitment. In fact, she drove her father to Thunder Bay, Ontario, and back to [text deleted] that weekend. June 3rd, the following Monday, she attended her physiotherapy session in the morning when, she testified, she 'received a spray stretch, which caused dizziness, headache and muscle spasms', rendering her unable to attend O.T. or Light Weight class. The records of PAR merely shew her as absent from O.T. and Light Weight class, with no reason having been given. June 4th, she attended her O.T. session but, according to PAR's records, cancelled her Light Weight class. L.L.E. says that, although her typewritten notes do not reflect this, she in fact did attend a lumbar stabilization class and was not scheduled for a Light Weight class at all. On June 5th the Appellant attended her O.T. session in the morning but, she says, had to cancel her Light Weight class due to illness which turned out to be 'flu' - she became nauseated and vomited in the ladies' locker room.

Week No. 5 (June 6th - 11th)

[para22] The Appellant testified that she was ill with flu all week and therefore, unable to attend any sessions at PAR. She did call in sick on the 6th and the 10th.

June 12

[para23] When L.L.E. reported at PAR to recommence her program, she was told that her attendance record was unacceptable and that she was again being discharged. L.L.E. produced a note from Dr. Manness, dated June 12th, to the effect that "[L.L.E.] was unable to attend class from June 6th to June 12th/96", but, with deference to Dr. Manness, she had not consulted him at all during the week in question but had merely told him on June 12th that she had been sick - and then only after learning of her discharge from PAR. Dr. Manness' report to MPIC does not suggest the presence of any factor that would have precluded the Appellant's participation in her functional rehabilitation program.

[para24] In the course of her evidence at the hearing of her appeal, L.L.E. made reference to a number of instances when she was prevented by bad weather or by car trouble from travelling in to Winnipeg from [text deletd], which lies approximately 52 kilometers due south of Winnipeg on Highway 75: the first of those days was March 1st, 1996, when

Environment Canada reports a minimal trace of precipitation and a mean temperature of -15 degrees Celsius; as noted earlier, the highway, although having a few icy patches between [text deleted] and St. Adolphe, was bare from St. Adolphe to Winnipeg.

[para25] On March 14th, when L.L.E. told PAR that she would not be in because her car was not working and told this Commission that it was weather conditions that caused her to miss both her program and her doctor's appointment, Environment Canada records a relatively mild mean temperature at Winnipeg and Glenlea of -4 degrees Celsius, slight precipitation of 1.2 cm. of snow, with southerly wind of about 20 km. per hour. The road surface from Winnipeg to [text deleted] was bare.

[para26] On March 25th, the Appellant testified, a storm prevented her from driving in to Winnipeg. Environment Canada records no precipitation on March 25th at Glenlea (about half way to [text deleted]), a slight trace of snow at Winnipeg, a mean temperature of - 23.8 degrees and a wind from the north-north-west at about 26 km. per hour. There had not, in fact, been any snowfall of consequence since March 18th.

[para27] We are troubled by the many inconsistencies in L.L.E.'s evidence:

(a) she reports that weather conditions prevent her coming to Winnipeg when official weather and road reports indicate an absence of any problems beyond the normal Manitoba driving conditions - there were no blizzards, no plunging temperatures, no dangerous wind-chill factors;

(b) PAR records that weather conditions were given by L.L.E. as the reason for her absence during the entire period from February 26th to March 1st; her mother tells PAR that L.L.E. spent that same period in bed, having injured herself shovelling snow; whereas the Appellant herself testified that, according to her notes, she had indeed been present for her entire program on February 26th and 28th, missing only March 1st for reasons of bad weather. Even that excuse does not hold up under scrutiny, as reflected on page 5 of these Reasons;

(c) although the Appellant testified that, on a few occasions, the elderly car that she was driving would not start readily and that mechanical problems prevented her coming in for her program, at no point does she ever appear to have told this to anyone at PAR or at MPIC;

(d) during May and June, the period of her second PAR program, the difficulties that, she says, prevented her attendances or prevented the completion of her programs on some of the days when she did appear were largely medical, yet she sought no advice nor any treatment from any physician about those debilitating problems; she did not consult Dr. Manness until May 23rd (she said May 24th, but the doctor's report says 23rd), and even then does not appear to have reported to him the difficulties she was allegedly encountering in completing her programs at PAR - he, at least, does not record that;

(e) on May 16th, the Appellant telephoned MPIC (although not until 11:01 A.M.) to say that MPIC's income replacement cheque was late and she therefore had no money for gasoline and would not be coming in. MPIC apparently checked and confirmed that L.L.E.'s money had been remitted at the same time and in the same way as usual, but the vagaries of Canada Post leave open the possibility of delay. However, we would be surprised if no one in the family had either a gasoline credit card or enough money for fuel to take L.L.E. from [text deleted] to Winnipeg and back - she was, after all, living with her parents and was being paid in excess of $[text deleted] per month by MPIC;

(f) the Appellant, although complaining of upper and lower back pain and having quit her PAR program because of headaches and muscle spasms on May 29th, nevertheless is fit enough to drive her father to Thunder Bay and back on the May 31st weekend, driving the same car that had given her the mechanical problems that made her reluctant to drive in to Winnipeg in March;

(g) Mr. E., when contacted by MPIC, is reported to have said he had no idea that his daughter had been missing so many sessions, yet she testified that she was living with her parents and that her absences were almost all due to car trouble, ill health or bad weather. Mr. E. was at home, unemployed, at all material times and would surely have known of each such problem;

(h) the Appellant's evidence was that on Monday, June 6th, her friend had been driving her to Winnipeg when she (L.L.E.) became sick with 'flu'. The Appellant arranged for the friend to call PAR and to say that she was taking L.L.E. to hospital right away. There was some suggestion given to PAR that

evidence of that hospital visit would be forthcoming but, in the event, it never was produced nor do Dr. Manness's notes reflect such a visit. Meanwhile, when PAR contacted the Appellant's mother they were told that L.L.E. had left home at 6:30 that morning to go to her program and that there was nothing wrong with her of which Mrs. E. was aware;

(i) while we recognize the danger that lies in accepting written, unsworn evidence rather than testimony given orally and under oath, we are nevertheless impressed by a record, made by L.L.E.'s adjuster, of a report received from Mrs. Elaine Huzel, O.T., of PAR Health Services. That report is of a meeting between Ms Huzel and the Appellant, on or about June 12th of 1996, and reads as follows:

"When told she was discharged she became very upset and was crying and was telling Elaine that her parents are [text deleted] years old and dependent on her, they don't work, they don't drive, she supports them financially and has to drive them everywhere and do everything for them and that's why she missed so much time from the program. Elaine told her that is fine but it doesn't really matter what the reasons for her absences are, the fact is she is admitting that she is unable to commit to the rehab program because there are too many other things happening in her life. They've tried to be as flexible as possible and given her numerous chances, even this time Elaine had decided that if she showed up even on Tuesday and could provide documentation to prove that she had been at the hospital she would let her continue in the program."

[para28] We have spoken with Ms Huzel, who confirms that the extract from the report quoted above is accurate. However, recognizing that this evidence is unsworn and has not been tested under cross-examination, if either counsel wishes to have Ms Huzel respond to questions under oath we are prepared to subpoena her as a witness to be available for cross-examination by either or both parties. By the same token, we have obtained copies of the records maintained by Environment Canada covering relevant climatic conditions for each day during the months to which this appeal applies; those records are available for inspection by counsel and, should any question arise in that context, we shall be glad to hear further submissions on short notice. The Commission's information respecting road conditions was obtained by telephone from the Manitoba Department of Highways; if counsel wish to challenge it, we are prepared to issue a subpoena to the appropriate departmental officer and, again, to convene a further hearing on short notice at the convenience of both

parties. For the purposes of this paragraph we shall remain seized of this matter until January 16th, 1998; if neither party has requested a further hearing, in the limited contexts of highway conditions, weather conditions or the alleged conversation between L.L.E. and Ms Huzel, the Decision of which these Reasons form part will become final, so far as this Commission is concerned, at the close of business on January 16th, 1998.

DISPOSITION:

[para29] We are not satisfied, upon a balance of probabilities, that the reasons given to us by L.L.E. for her absences from her rehabilitation program were valid.

[para30] Where L.L.E.'s records differ from those of PAR, for the most part we prefer to accept the latter; PAR had nothing to gain from discharging a client for whose treatment it was being paid, whereas the evidence of the Appellant appears at times to be in conflict with the known facts. No one thread of the evidence referred to in these Reasons would, of itself, have been sufficient to justify termination of benefits, but an analysis of the whole cloth persuades us that the decision of PAR to discharge L.L.E. from the program and the resultant decision of MPIC to terminate her IRI benefits were proper.

[para31] We find, therefore, that her benefits were properly terminated pursuant to Subsections (f) and (g) of Section 160 of the Act, and that Subsection(a) would probably apply were it not for the fact that the information was being given to PAR Health Services rather than to the Corporation.

[para32] The decision of MPIC's acting review officer is, therefore, confirmed and the present appeal is dismissed.

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