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Indexed as:
V.K.W. (Re)

IN THE MATTER OF an appeal by V.K.W.
AICAC File No.: AC-97-61

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[1997] M.A.I.C.A.C.D. No. 46

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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: October 27, 1997.
Decision: December 11, 1997.
(11 pp.)

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Issue(s):

1. Whether victim entitled to reinstatement of Income Replacement Indemnity ('IRI');
2. Whether victim entitled to reinstatement of home care assistance.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36 ("the Act"), secs. 81(1) & 131.
Regulation 40/94.

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Appearances:

Manitoba Public Insurance Corporation ('MPIC')
represented by Joan McKelvey.
V.K.W., appellant, represented herself.

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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] The Appellant was injured while stepping on to a bus on February 17th, 1995. It was stopped about three feet from the curb and she had to stretch her right leg to get on

to the bottom step; while doing so she heard a "pop" in her right knee. She testified that this became quite painful and that she could barely walk when she got off the bus. While it is questionable whether this apparent injury may properly be said to have been 'caused by the use of an automobile', the parties have elected to treat it as falling within the ambit of the Act and, not without some hesitation; we shall do the same.

[para2] At the time of the accident V.K.W. was the owner and operator of [text deleted]. She offered two courses; one on Self Improvement and the other on Professional Modeling. She advises that she would normally conduct three two-hour classes a day starting at 11 A.M. Monday to Friday and each class had between two and five students. In addition to running the classes she would put together fashion and luncheon shows for her students to practise their skills.

[para3] When the condition of her knee did not improve, she consulted her family doctor, Dr. Woo, on March 6th, 1996 and he prescribed rest, ice packs for her knee and crutches. It was painful for her to walk and Dr. Woo advised her not to return to the modeling aspect of her job which was teaching modeling. Her primary complaint was that she was unable to walk and show the students how to turn on the modelling ramp. Due to her inability to work, MPIC provided the Appellant with Income Replacement Indemnity ('IRI') and home assistance. On this latter point she was evaluated on Grid B as set out in Regulation 40/94 of the Act, and she scored 27 out of 27. One must score 5 or more points to get any financial assistance for home care. The purpose of the Grid is to determine if an individual needs help in preparing food and operating their home and, initially, the Appellant qualified for the maximum amount of assistance.

[para4] V.K.W.'s condition gradually improved and a further evaluation for home assistance was done on May 29th, 1995 when she scored 14.5 out of a possible 27 points; the amount of financial aid for home assistance was reduced accordingly. She was now able to prepare her meals but needed assistance for housekeeping, cleaning and laundry. There was continual improvement in her ability to operate her home and Pat Malanchuk, R.N., of the Independent Healthcare Network Ltd. ('IHN') was hired to do a complete assessment of V.K.W. She prepared a report on the Appellant's condition in late December 1995 or early January 1996 (the cover sheet of the report containing the date is missing) and it states "Similarly, [V.K.W.] should be able to manage her regular activities of daily living in the same way she did prior to the accident". This report was shown to the Appellant by the adjuster for MPIC on January 17th, 1996 and discussed with her; she was advised that based on this assessment MPIC would terminate her home assistance on February 1st, 1996.

[para5] Due to the slow improvement in the Appellant's right knee her family physician sent her to see Dr. Huebert, an orthopaedic surgeon, on September 19th, 1995. He diagnosed her problem as a mild strain to the right knee. A detailed clinical examination performed by himself showed no structural change to her knee and X-rays did not show any abnormality of the joint. He advised that there was no current restriction or limitation associated with the knee strain and that she may occasionally feel a discomfort in her knee. Dr. Huebert recommended to Pat Malanchuk of IHN that the Appellant could do the more sedentary duties of her job if she had an assistant to demonstrate and model. When Pat Malanchuk advised V.K.W. of this recommendation she rejected it on the basis "she was afraid that there would be a loss of quality in the instruction".

[para6] Based on consultations with all of V.K.W.'s professional care givers IHN advised her that she should be able to return to work at her modeling agency including participating in her runway work. Upon receipt of this report MPIC advised V.K.W. that her IRI benefits would terminate on February 1st 1996. She testified that shortly after her benefits were cut off she returned to work full time but due to her continuing knee problems she did not recruit any new students.

[para7] V.K.W. was not happy with the opinion of Dr. Huebert and asked Dr. Woo to send her to another specialist for a second opinion. He arranged for her to see Dr. A. Arneja, of the Department of Rehabilitation Medicine of the University of Manitoba. He saw her on January 11th and February 26th 1996 but did not report to MPIC until June 24th, 1996. Dr. Arneja felt that V.K.W. "should be able to do standing, sitting and walking activities (light work) but is not in any condition to do any bending, kneeling, stairs or lifting object". He added that he was sending her for an MRI to see if there was a tear in any of the ligaments associated with her right knee.

[para8] On August 13th, 1996 Dr. Arneja confirmed that V.K.W. had a tear in the medial meniscus of her right knee and he recommended surgery to correct this problem. He further advised that she would require a conditioning and strengthening program for her quadriceps, hamstrings and hip girdle muscles to restore them to normal. V.K.W., for her own reasons, decided not to have her problem corrected surgically.

[para9] In an attempt to find relief and help V.K.W. recover the full use of her knee, Dr. Woo referred her for physiotherapy in the summer of 1995. Upon receiving eight treatments V.K.W. decided on her own that they were not

helping her and she stopped attending the treatment program.

[para10] V.K.W. also consulted Dr. Longstaffe, an orthopaedic surgeon on January 22nd, 1997. He added nothing new about her condition except to say that "in this age group tears are present in over 60 % of people this age".

[para11] At the hearing of her appeal, V.K.W. sought the reinstatement of her IRI in order that she could hire an instructor to teach her modeling students how to handle themselves on the modeling ramp, and the reinstatement of her home care assistance. She stated she could not even as of the date of the hearing demonstrate how a student should walk and turn on the ramp as it hurt her knee when she attempted the turn.

[para12] V.K.W. provided her income tax returns for 1991, 1992 and 1993 to MPIC to determine her IRI benefits. V.K.W. advised that she has operated her business for approximately 30 years. In 1991 her modeling business earned \$[text deleted] but had expenses, for heat, light, rent etc., of \$[text deleted] for a loss of \$[text deleted] which she applied against other income earned in that year. In 1992 her business generated an income of \$[text deleted] but due to her expenses she suffered a loss of \$[text deleted]. In 1993 she grossed \$[text deleted] for a net loss of \$[text deleted].

[para13] V.K.W. also provided a course outline, the cost of each and the number of hours of instruction for each for the two courses she offered. The Self Improvement course had ten parts, was 60 hours in length and cost \$[text deleted]. There was no specific reference to any modeling in this course but there was a section dealing with posture which teaches a person how to walk properly. The other course was Professional Modeling and it had twelve parts, was 30 hours in length and cost \$[text deleted]. One of these parts involved ramp modeling.

[para14] When one divides the cost of the cheapest program, Self Improvement, into the gross revenue earned for each of the three years (i.e. \$[text deleted] [divided by] \$[text deleted]) the result is between 29 and 33 students per year each requiring 60 hours of instruction. None of these students would have to be shown how to do ramp modeling. If all of the students took the modeling course each year (\$[text deleted] [divided by] \$[text deleted]) the result would be between 15 to 17 students per year requiring 20 hours of instruction. Each of these students would have to be taught ramp modeling.

[para15] Due to V.K.W.'s continuing complaints about her inability to do her job, MPIC asked Ms Davidson, an occupational therapist from the Occupational Rehabilitation

Group, to determine V.K.W.'s concerns and what, if anything, could be done about them. V.K.W. advised Ms Davidson that she was unable physically to manage the following specific aspects of her job:

1. demonstrate some modeling poses (e.g. hesitation pose) which involve the rotation inward of the right leg;
2. pivoting 360 degrees on right leg to demonstrate this modeling technique to students;
3. occasionally squatting or kneeling down to floor level to physically assist students with their body positioning while posing; and
4. standing for extended periods of time while teaching or doing presentations.

[para16] Ms Davidson made a number of suggestions to help V.K.W.. For example, she suggested that V.K.W. should participate in an active physiotherapy program to improve the strength of her right leg. She also suggested a number of job modifications, such as raising the height of the modeling ramp to eliminate the need to squat or kneel, the use of a knee brace and the use of a high chair to alternate between sitting and standing during classes. V.K.W. rejected all of these suggestions.

[para17] Ms Davidson also recommended that the job demands of modeling be clarified and suggested a job demand analysis be done at another school to determine what was involved and what could be done to help V.K.W.

[para18] V.K.W. herself suggested that Ms Davidson should consult G.W., who was one of her former students, operating a modeling school similar to hers. Ms Davidson conducted the evaluation with G.W. and reported, amongst other things, "that the total duration of time spent teaching ramp modeling consisted of hour per day in a week long course totalling approximately 2 hours per week. The critical physical demands of teaching ramp walking would involve occasional intervals of walking to demonstrate technique; walking is done with knees slightly flexed. Turns are also demonstrated. G.W. stated that the instructor can turn on either right or left leg and is not required to demonstrate turns on both sides. G.W. does not perceive that it is necessary to squat down nor to kneel down while instructing students in ramp walking". V.K.W. rejected all of these suggestions and repeated her objections at the hearing.

THE LAW:

[para19] The Appellant was receiving home assistance pursuant to Section 131 and Regulation 40/94 of the Act namely:

"Section 131

Subject to the regulations, the corporation may reimburse a victim for expenses of not more than \$3,000.00 per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance."

[para20] The key question in this case was when, if at all, the Appellant was able to perform the essential activities of everyday life without assistance. MPIC received a report from Independent Healthcare Network Ltd and they were of the opinion that V.K.W. no longer required home assistance.

[para21] V.K.W. did not present any evidence to MPIC after the termination on February 1st, 1996 to support her claim for reinstatement of this assistance. She did not present any evidence at the hearing of her appeal that would demonstrate a need for home assistance. Therefore we are of the opinion that MPIC were correct in terminating V.K.W.'s home assistance on February 1st 1996 as she was then capable of performing her essential everyday life activities.

[para22] The Appellant was receiving IRI pursuant to the following section of the Act:

"Section 81(1)

A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment."

[para23] V.K.W. claims that she was not able to resume her full-time employment when her IRI was terminated. To support her claim for reinstatement of her IRI benefits she provided a job description, dated November 7th, 1997, on what was involved in running her modeling school:

"Daily work 7 hrs. or 8 hrs. sometimes longer.

I take care of the office work by myself plus teaching the students.

Classes begin at 11 A.M. to 1 P.M. (2-hr. class) next class at 1 P.M. to 3 P.M. last class at 5 P.M. to 7 P.M..

Then do xerox copies for the students, file cards to write up.

Bank deposit to be answered.

Interviews during working hours.

Fashion Shows and Luncheon Shows.

Bookings to be done, fittings, rehearsals and finally the show, which requires many hours of work.

I also do outside work such as talking to high school students on modeling."

[para24] Using V.K.W.'s own financial information and course information as set out above she would have averaged, in the three years preceeding her accident, between 15 to 33 students per year depending upon the type of course being taken. If all of the students in any given year took the modeling course then should would only be teaching 15 or 17 students per year at 20 hours per student for a total of between 300 and 340 hours of instruction. Given that modeling is only one portion of this twelve part course it would appear the great majority of teaching required for this program could be done by V.K.W., as she only felt limited in demonstrating ramp modeling and turning. The amount of time required for that was minimal and could be accomplished by using her alternate leg as confirmed by her former student, G.W. If there were a mixture of students then the time needed for modeling would not be increased and might even decrease as the self-improvement program did not require any of this type of training.

[para25] MPIC offered to hire an instructor to demonstrate modeling, to make adjustments to her work place and working conditions, to provide a leg brace and to surgically repair the tear in her medial meniscus. V.K.W. rejected all of those forms of assistance. This support was intended to help her recover and allow her to return to the normal activities that she enjoyed pre-accident, or as close to that condition as was possible.

[para26] V.K.W. was receiving \$[text deleted] bi-weekly on IRI and when this is annualized it amounts to \$[text deleted], which is considerably more than she received from her business. In fact, she subsidized its operations out of other income. MPIC met its obligation to assist V.K.W. to return to her pre-accident status and she refused all of their

proffered support other than cash.

[para27] Having chosen this course she cannot now expect or ask MPIC to continue to pay IRI forever. There is an onus on everyone to help in their own recovery and, if they choose not to, then they cannot expect MPIC to continue to provide all of their financial and other needs.

[para28] When we look objectively at all of the evidence we come to the conclusion that the modeling on the ramp and its associated activities was a very small portion of the activities V.K.W. performed in running her school. We do not share her opinion that it was the major portion of this activity. V.K.W. was able to return to full-time employment, with some minor limitations, when MPIC terminated her IRI. In our view, MPIC met its obligations set out in the Act. V.K.W.'s rejection of all types of assistance to help her reduce or eliminate the limitations related to the demonstrating of certain limited aspects of modeling does not put an obligation on MPIC to continue to provide her with IRI.

DISPOSITION:

[para29] For the foregoing reasons, we conclude that the present appeal must fail and that the decision of the internal review officer should be confirmed.

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