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Indexed as:  
D.C.B. (Re)

IN THE MATTER OF an appeal by D.C.B.  
AICAC File No.: AC-98-56

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[1998] M.A.I.C.A.C.D. No. 34

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Manitoba Automobile Injury Compensation Appeal Commission  
J.F.R. Taylor, Q.C. (Chairperson), L. Goodspeed, and  
F.L. Cox

Heard: October 6, 1998.  
Decision: November 4, 1998.  
(24 paras.)

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Issues(s) :

1. Whether Appellant entitled to income replacement indemnity ('IRI') during the first 180 post-accident days;
2. What employment, if any, should have been determined for Appellant following the first 180 days post-accident;
3. Whether Appellant's benefits properly terminated for non-compliance.

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Relevant Sections:

Sections 70(1), 86(1), 106, 110(1)(c), 135 and 160 of the MPIC Act, copies of which are annexed hereto.

[Ed. note: Please see paper copy for one page appendix containing the relevant sections of the Manitoba Public Insurance Commission Act.]

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Appearances:

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

The appellant, D.C.B., represented by Patricia M. Fitzmaurice.

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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] D.C.B. was injured in a motor vehicle accident in Winnipeg on November 7th, 1994. The information on file indicates that D.C.B. had stopped at a four-way stop intersection. She noticed another vehicle approaching from her right; it appeared to be slowing down and she thought that the driver would come to a complete stop. She proceeded forward into the intersection but the other vehicle did not stop. She was forced to swerve to the left and then to the right in order to avoid a collision but, as a result, her vehicle struck the curb. It is not clear in what way her vehicle was rendered unusable, but that appears to have been the case and the driver of the other car drove D.C.B. home. She complained of 'neck whiplash and body whiplash', headaches, a sore right shoulder and spasms from her lower back to her upper neck of moderate severity.

[para2] On the day following her accident, D.C.B. was examined by Dr. Terry Chlysta, who diagnosed "myofascial back strain, greater on the right than on the left, together with paracervical and paralumbar muscle irritation". He recommended physiotherapy, along with the application of ice and muscle relaxants.

[para3] Prior to her accident, having worked for the [text deleted] for a number of years, D.C.B., with her husband, had decided to move to [text deleted] to establish a bed and breakfast business there on a farm that they had already purchased. Their plans were to move to [text deleted] with all of their household belongings at the end of November, 1994, with a view to getting their bed and breakfast business up and running by May of 1995. That, in fact, is what Mr.B. and D.C.B. did. She attended Dr. Chlysta again on November 23rd of 1994, when her condition appeared to be improving. She was prescribed some 282 MEPS, a preparation containing a muscle relaxant, Codeine and ASA, by way of additional pain control for her intended car trip to [text deleted]. At that juncture, she was considered able to do light duties at home only and able to lift up to 20 pounds, but with no excessive sitting or bending. Dr. Chlysta felt that her disability should come to an end by the end of December and foresaw no permanent impairment.

[para4] D.C.B. consulted, or was referred to, several medical practitioners in [text deleted]: her general practitioner, Dr. Church, Dr. N. Erdogan, an orthopaedic surgeon, and Dr. Ken Chisholm, of the Pain Clinic at [text deleted] Health Sciences Centre.

[para5] From all of the medical evidence on file, it remains difficult to ascertain just what aspects of D.C.B.'s problems are properly attributable to her motor vehicle accident. Dr. Erdogan noted a slight limitation in D.C.B.'s cervical spine range of motion and a slight tenderness in her

right trapezius muscle as well as in the upper thoracic region at T3-T4 levels. He found tenderness over the acromion, and positive impingement signs. He also found some tenderness along the ulnar nerve at D.C.B.'s right elbow, with pain radiating into her little finger. He describes her as having sustained an injury to her cervical spine at the time of the accident, with some evidence of nerve root irritation going down the right arm. He felt that this was consistent with a facet joint injury. Dr. Erdogan also noted that D.C.B. had a previous neck injury and he was unable to apportion her current findings between the previous injury and the motor vehicle accident now under review.

[para6] Dr. Ken Chisholm diagnosed a chronic cervical sprain and myofascial pain syndrome of the upper and posterior cervical regions. He recommended the use of a TENS unit, a non-steroidal anti-inflammatory agent and an exercise program with a physiotherapist. He also recommended tricyclic anti-depressant medicines.

[para7] Dr. Church, who initially saw D.C.B. on March 14th, 1995, diagnosed her then as having cervical strain and lumbar strain, for which she prescribed an anti-inflammatory medication, Tylenol No. 3 and physiotherapy. Dr. Church also arranged for D.C.B. to be referred for X-rays. By August 11th of 1997, Dr. Church was reporting that D.C.B. had continued to experience a chronic pain syndrome and, although she also indicates a diagnosis of fibromyalgia, the clinical evidence of that syndrome is lacking.

[para8] There seems to be no doubt that D.C.B. did sustain a Grade II Whiplash Associated Disorder as a result of her motor vehicle accident. She also seems to be suffering from what is sometimes called chronic pain syndrome, although the underlying, physical signs that might be expected to account for her discomfort are not apparent. We shall return, later in these reasons, to the question of what, if anything, ought to be done to help restore D.C.B. to her pre-accident condition, but first we need to deal with the question of whether she was entitled to any income replacement during the first 180 days following her accident.

[para9] Having decided that she needed some practical experience in business before leaving for [text deleted], D.C.B. had volunteered to work at a restaurant in Winnipeg where she was receiving training in several aspects of that business, including working as a cashier, receiving and stocking merchandise, 'customer service' and, in general, making herself useful there. She had not been gainfully employed for about four months immediately prior to her motor vehicle accident and we therefore find that she was a 'non-earner' within the meaning of Section 70(1) of the MPIC Act. That being the case, she is not entitled to income

replacement indemnity during the first 180 days immediately following her accident, unless she is able to establish that, but for the accident, she would have been gainfully employed. From D.C.B.' own evidence, it is clear that neither she nor her husband expected the bed and breakfast operation to generate income during that first 180 days.

[para10] Counsel for D.C.B. submits that, by virtue of Section 135 of the Act, D.C.B. should be entitled to reimbursement of expenses that she incurred to have performed by others the duties that she could not perform herself, up to a maximum of \$500.00 per week. She provided MPIC with documentation supporting expenses of \$5,587.76 and, in this context, we accept as valid the ruling of MPIC's Internal Review Officer bearing date January 8th, 1998 which reads, in part, as follows:

.....While there was no expectation of any income from the bed and breakfast operation in the first 180 days, the [Bs] clearly hoped that it would eventually commence operations and show a profit. [D.C.B.] did work in the operation during the 180-day period. I accept that her ability to do so was limited by (her) partial disability....IRI claims where the disability is only partial sometimes present problems. Section 116 cannot be applied because [D.C.B.] had no income at all (and no reasonable expectation of having one in the period in question). In such situations the Corporation has (on occasion and as a matter of policy) paid replacement workers by making available an IRI determined pursuant to Section C but only to the extent required to pay for the work the claimant cannot manage by...herself. On this basis, the \$5,587.76 claimed for replacement help should be paid to [D.C.B.]

[para11] So far as we can determine, that latter sum, with appropriate interest, has in fact been paid to D.C.B. and that, in our respectful view, is the proper disposition of that portion of the Appellant's claim.

#### Post-180 Day Entitlement

[para12] Section 86(1) of the Act requires the Corporation to determine an employment for a non-earner, as of the 181st day following the accident and, if the victim is unable, because of the accident, to hold that employment, he or she becomes entitled to an income replacement indemnity. Section 106 of the Act spells out the factors that the Corporation must take into account when determining that employment.

[para13] MPIC determined that the proper employment to be determined for D.C.B. was the occupation in which she was, in fact, employed as of the 181st day. That is to say, the

business of operating a bed and breakfast establishment. It is submitted, on D.C.B.'s behalf, that the nature of the employment for which she was best suited by education, training, work experience and physical and intellectual abilities was the work that she had been doing for the [text deleted], which was essentially a secretarial position.

[para14] Although it seems clear from the evidence that D.C.B. had indeed started working in the bed and breakfast operation before the expiry of that first 180 days, nevertheless a careful reading of Section 106 persuades us that, since she was a neophyte in that occupation but had been employed in senior secretarial positions with the [text deleted] from 1981 until June of 1994, it is the latter occupation that should have been determined for her. Unfortunately, however, the only evidence before us to indicate an inability on the part of D.C.B. to perform that secretarial work is a letter from her family physician in [text deleted], Dr. Rhonda Church, bearing date August 11th, 1997. Dr. Church's report, while expressing the view that D.C.B. was at that date capable of only about 10% of the duties of an office clerk, really contains no objective evidence of an inability on the part of the Appellant to perform those duties as of the 181st day following her accident. A victim, classified as a non-earner at the time of a motor vehicle accident, is only entitled to start receiving IRI as of the 181st day thereafter if he or she is unable to fulfil the requirements of the employment determined for her under Section 86 and we are not satisfied, on a reasonable balance of probabilities, that D.C.B. was, in fact, rendered unable to perform those clerical duties as a result of her accident. In order to qualify for IRI, the victim must be "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". While it is possible to draw the conclusion from Dr. Church's report that D.C.B. was disabled within the meaning of that sentence at the time of Dr. Church's report, the required degree of disability is not borne out by the reports of Drs. Chlysta, Erdogan and Chisholm, nor by Dr. Craton's review of the medical information on file.

Was the termination of benefits as of September 30th, 1996 justified?

[para15] By letter of September 24th, 1996, MPIC notified D.C.B. that, as at the end of that month, the Corporation would no longer pay for any further physiotherapy or related expenses. The Corporation based this decision upon Subsections 160(e), (f) and (g) of the MPIC Act.

[para16] So far as we can determine, MPIC paid for all of the physiotherapy received by D.C.B. from November 1994 until

the end of 1995. In addition, MPIC reimbursed her for the costs of her prescription medication. Her attendances for physiotherapy were far from regular during that time frame - for example, the physiotherapist's progress note of July 7th indicates that "[D.C.B.] has just returned to resume treatments after an absence of three months". She initially had five treatments from March 20th to March 31st, 1995. However, having returned to physiotherapy, the Appellant seems to have attended with some regularity until mid-December of 1995; MPIC paid for her travel expenses by taxi as well as for her physiotherapy.

[para17] By February 5th, 1996 the physiotherapy clinic that she had been attending concluded that her clinical findings and functional status had basically remained unchanged for the preceding six weeks or so. They added "[D.C.B.] has been unable to commit more time in our clinical environment in order to establish a monitored work conditioning program. Since a plateau has obviously been reached, she is currently discharged from active treatment until such time as she is able to attend on a daily basis for a four-to-eight-week work conditioning program within the clinic."

[para18] MPIC therefore retained the services of [text deleted] Work Hardening Limited. Ms Shirley McCarthy, an occupational therapist from that clinic, attended at D.C.B.'s home on July 23rd, 1996. Ms McCarthy recommended that D.C.B. participate in an updated functional evaluation with a follow-up treatment program addressing both muscular and cardiovascular conditioning, pain control and job simulation tasks. She further recommended that this would best be performed on a daily basis, up to four hours or more per session. In light of the fact that D.C.B. expressed concerns over her inability to be of help to her husband if she had to be away on the work hardening program on a daily basis, Ms McCarthy also recommended that help be hired for Mr. B. during the duration of the work hardening program.

[para19] Ms McCarthy had further discussions with D.C.B., whose reluctance to participate in a functional evaluation continued. D.C.B. said she would be contacting her lawyer for further advice. Not having heard from D.C.B., Ms McCarthy made further efforts to contact her but it was not until September 5th, 1995, that they were finally able to make contact. D.C.B. apparently wanted to return to physiotherapy for hourly sessions two or three times a week, rather than participate in a functional evaluation. Contrary to the advice given her by Ms McCarthy, D.C.B. seemed to have convinced herself that she would need a course of regular physiotherapy before being able to participate in a functional evaluation and a subsequent reconditioning program.

[para20] On January 5th, 1996 D.C.B.'s adjuster called her and advised her that MPIC was prepared to place her in a comprehensive four to six week program with intensive sessions to build up her physical capacity and to educate her with respect to limitations on her work around the bed and breakfast establishment. The program would consist of four to five hour sessions, five times per week, for six weeks. She was also advised that the Corporation would pay for a replacement worker for her during her absence, as well as her travel expenses.

[para21] D.C.B. apparently responded that she would require three persons to replace her while attending physiotherapy sessions - a farm labourer, a housekeeper and a bookkeeper/secretary. We note, in parenthesis, that this latter statement is pretty good evidence of the fact that D.C.B. was not as disabled as we are asked to believe, if she needs to be replaced by three different people. D.C.B. then asked whether MPIC would simply pay her the equivalent in cash while she continued to attend normal physiotherapy sessions. That suggestion was not acceptable to MPIC and, as a result, D.C.B. declined to attend the comprehensive program that had been recommended for her. In August of 1996, D.C.B. advised her physiotherapy clinic that "she couldn't see herself travelling to [text deleted] for an assessment, or participating in a daily rehabilitation program.....due to work at home and her future visitors".

[para22] We are of the view that D.C.B.'s refusal to participate in that program brings her clearly within the four corners of Section 160 of the Act. We find, therefore, that MPIC was justified in terminating any further payments on her behalf.

[para23] It is apparent from the evidence before us that D.C.B. did encounter some unusual difficulties. For example, she and her husband were trying to establish and operate a farm in conjunction with the bed and breakfast establishment and this entailed a great deal of heavy physical work for both of them. In the course of doing so, Mr. B. sustained a hernia which placed even more responsibility on D.C.B.'s shoulders. Concurrently with that, D.C.B. was encountering difficulties in communication with her lawyer in Winnipeg and she was apparently reluctant to take any positive steps in the absence of his advice. She has advised this Commission, through her counsel, that she is now prepared to cooperate with any rehabilitation program prescribed for her by the Corporation.

[para24] We are therefore referring this claim back to MPIC's out-of-province claims divisions for them to arrange for her re-entry into the work hardening program after:

- (i) obtaining details from D.C.B. of her anticipated

weekly expenses to be necessarily incurred as a result of that re-entry, including the weekly cost of hiring one person to replace her during the course of her program; and

- (ii) having D.C.B. contact [text deleted] Work Hardening Ltd. in order to set up a tentative program with dates that are mutually acceptable, for her to undergo a new, functional capacity evaluation to be followed by a treatment program. That program is not necessarily to be limited to the five to ten visits originally proposed by MPIC. Rather, the duration of the program should be left to the discretion of [text deleted] Work Hardening Ltd. Who, if they feel that D.C.B. is not being compliant, will doubtless advise MPIC accordingly.

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