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Indexed as:
C.M.A.K. (Re)

IN THE MATTER OF an appeal by C.M.A.K.
AICAC File No.: AC-98-97

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[1999] M.A.I.C.A.C.D. No. 7

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), C. Birt, Q.C., and
L. Goodspeed
Heard: March 2, 1999.
Decision: March 31, 1999.
(28 paras.)

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Issue:
Reinstatement of Income Replacement Indemnity ('I.R.I').

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Relevant Sections:
Manitoba Public Insurance Corporation Act, S.M. 1993,
c. 36 ('the Act'), s. 110(1)(a).

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Appearances:
Manitoba Public Insurance Corporation ('MPIC') represented by
Joan McKelvey.
C.M.A.K., appeared on her own behalf.

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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] On September 16, 1997, C.M.A.K. was involved in a motor vehicle accident which is the basis of the appeal before us. A taxicab, traveling in the opposite direction, attempted to make a U-turn and ran into the driver's side of her vehicle.

[para2] C.M.A.K. had also been involved in a motor vehicle accident (MVA) on May 13, 1997, for which she apparently made

no personal injury claim. In that accident, her car was hit on the passenger side and spun around, barely missing a tree and a fence on the boulevard, causing \$1400 in damages to her vehicle. She sustained injuries to her neck, back and shoulders and was diagnosed by Dr. Robert Palaschuk, chiropractor, with a Grade 2 Whiplash Associated Disorder (WAD 2). Despite her discomfort, she continued to work and to undergo chiropractic treatments.

[para3] Dr. Palaschuk examined C.M.A.K. on September 16th, 1997, for symptoms of neck and shoulder pain and muscular stiffness. He diagnosed an acute cervical spine strain, which he classified as a WAD 2 injury. Dr. Palaschuk expressed the view that she was unable to return to work for 3 to 4 weeks and required treatments twice per week for an indefinite period. C.M.A.K. testified that, although she reported her shoulder pain to Dr. Palaschuk at the September examination, he said it was from sleeping on her shoulder, but she sleeps most of the time on her back. She kept reporting the shoulder pain and felt that the X-ray taken by Dr. Palaschuk after her September MVA should have been taken of her shoulder as well as of her neck area. (In the event, the X-ray eventually taken of the Appellant's shoulder disclosed no abnormality in her bone structure.)

[para4] C.M.A.K. attended upon her family physician, Dr. Anna Rothova, on September 18, 1997. Dr. Rothova reported her symptoms as headache, stiff neck and sore lower back with objective signs of restricted range of motion (ROM) of the neck and decreased ROM of the lower back. Dr. Rothova referred to the May 13th MVA and expressed her opinion that C.M.A.K. was not at pre-accident level when she was re-injured on September 16th; as a result, she expected a slower recovery. On December 16th, 1997, C.M.A.K. was referred by Dr. Rothova for physiotherapy at the Seven Oaks Physiotherapy and Sports Injury Clinic, where she started receiving physiotherapy from Ms Debbie Grimes for an anticipated duration of three months.

[para5] Subsequent medical records outline C.M.A.K.'s condition and progress, as follows:

[para6] On November 14, 1997, Dr. Palaschuk agreed with C.M.A.K. upon a graduated return to work program for her at [text deleted] to commence the week of November 17th. C.M.A.K. was to work half of her normal hours, gradually adding hours at the [text deleted] until she reached her normal 15.5 hours as well as adding on her self-employed time. By the first week of December she was expected to have returned to her full pre-accident working schedule.

[para7] Ms Debbie Grimes, physiotherapist, reporting upon her initial examination of C.M.A.K. on December 16th, noted

the injuries sustained in the May 13th MVA and that these injuries were exacerbated in the September MVA. She classified C.M.A.K. with a WAD 2 injury, a less than full function and a work capacity of modified duties.

[para8] In a report dated January 16, 1998, Dr. Paluschuk altered his opinion about a graduated return to work plan after C.M.A.K. had attempted to return to work but found herself unable to resume her job. He discussed C.M.A.K.'s condition with Ms Grimes and they agreed that she should continue with her physiotherapy program of manipulation and electrotherapy and commence a work hardening program aimed at restoring normal muscle tone and function. They concluded that after a four week program C.M.A.K. should be able to commence a gradual return to work program.

[para9] Mr. Froese, C.M.A.K.'s adjuster, sent her to Mr. Wayne Singer, physiotherapist, in January of 1998 for an independent assessment. Mr. Singer reported on February 17, 1998 that C.M.A.K. had a resolving mechanical back and neck sprain/strain type injury. It was his opinion that, 4 1/2 months post-injury with no neurological findings, further inactivity would only contribute to her problems through further deconditioning, muscle weakness and progressive tightness. He stated that she should return to work, initially for 3 hours a day.

[para10] Dr. Palischuk examined C.M.A.K. on February 19th and outlined her treatment program with a frequency of twice per week for 8 weeks and once per week for four weeks, with an anticipated discharge date of May 14, 1998.

[para11] At some point in that same month of February, 1998, feeling that she was not getting any relief from her current chiropractic or physiotherapy treatments, C.M.A.K. changed her family physician to Dr. M.B. MacMillan and commenced chiropractic care with Dr. Henry Pops. Dr. MacMillan had instructed her in home exercises and told her to work through the pain, despite the discomfort. She continues to do the strengthening neck exercises prescribed by Dr. MacMillan and those provided by her physiotherapist. She explained that Dr. Pops had provided a thorough examination and she felt confident in the treatment he was providing that gave her instant relief to her back and shoulders. She believed that her treatment, prior to Dr. MacMillan and Dr. Pops, had been incorrect, causing a delay in her recovery and return to work.

[para12] On February 23, 1998 C.M.A.K. informed her adjuster that she had attended at Dr. MacMillan's office and Dr. MacMillan had advised her to remain off work for at least another month and a half, and therefore she was requesting receipt of IRI benefits. Her adjuster advised her that based

on the medical information before him there was no evidence to preclude her from working and therefore no further IRI benefits would be paid.

[para13] Ms Grimes reassessed C.M.A.K. on February 24th, finding that the low back physiotherapy treatments only appeared to give her patient temporary relief and, concluding that continued physiotherapy seemed to be of little benefit, recommended active home exercises and discharged C.M.A.K. from the program on March 11, 1998.

[para14] C.M.A.K. attended at Dr. Pops's office for an examination on February 23, 1998, and was diagnosed with a WAD 3 (a) and 4 (a) classification of Cervical Spine Disorder. Although Dr. Pops opinion diverges greatly from that of all of the other caregivers and, it must respectfully be added, the file does not reveal evidence of any neurological disorder that would justify a grade III classification, his course of treatments was nevertheless approved by MPIC until May 13, 1998 at the same frequency rate as had been established by Dr. Paluschuk. C.M.A.K. actually continued with a few treatments until May 31, 1998, and that program appears to have addressed and resolved her condition. Dr. Pops referred C.M.A.K. for an X-ray of her shoulder on April 25th, which disclosed an absence of abnormalities in C.M.A.K.'s shoulder, and no evidence of dislocation, separation, recent fracture or gross osseous pathology.

[para15] At the time of her accident, C.M.A.K. worked 20 hours a week - 15.5 hours per week at [text deleted] and the remaining hours as a self-employed hairdresser, providing services to senior clients in their homes. C.M.A.K. testified that, as a hairdresser, she was required to do vigorous hairwashing, cutting, curling, combing, coloring and hairdrying. Although she could adjust her position in her lower back and stance she required lifting her arms and working with them in an elevated position which aggravated her left shoulder. C.M.A.K. explained that she had attempted to return to her haircutting, completing six cuts in November and December 1997, with her personal clients. She had also attempted work at [text deleted] for three days, she said, but her hands began tingling and she was unable to operate the clippers in her left hand. She said it took her two hours to cut a customer's hair and that was unacceptable in a salon.

[para16] When C.M.A.K. was asked whether in fact she had been able to go back to work part-time and then full-time by February 18th, 1998, (the date when the IRI payments were cut off), she testified that she did try and gave it her best effort but found that she just could not cope. She could not raise her arm, as it would lock in position, causing sharp, excruciating pain in her shoulder and 'pins and needles' in her hand. She attempted a return to work again at the end of

January by cutting her father's hair but, again, it took two hours to complete the cut. She decided at that point that she could only manage with seniors, since this allowed her to take as many rests as needed. They did not mind the slow pace as they welcomed the opportunity to visit. By mid-April she was capable of returning to work part-time at [text deleted], only to learn that her job had been filled. At this time she returned to her private customers and believed that she had returned to pre-accident status by the end of May. She started full time work at [text deleted] in October along with her self-employed haircutting.

[para17] Mr. Froese, C.M.A.K.'s adjuster, told her on February 3, 1998 that, because all her long-term caregivers were of the opinion that she was able to return to work, she would no longer be entitled to IRI benefits after February 18th. C.M.A.K. responded that, because of her unsuccessful work attempts in December and late January and the direction of Dr. MacMillan to remain off work, she did not intend to commence the graduated return to work plan in February. However, she did not at that juncture have a medical report from Dr. MacMillan explaining her inability to work.

[para18] Mr. Froese requested a report from Dr. MacMillan for his opinion whether or not C.M.A.K. could resume working. On March 2, 1998, no response having been forthcoming, MPIC confirmed Mr. Froese's earlier, oral advice to C.M.A.K. that her IRI benefits were terminated as of February 18, 1998. C.M.A.K. appealed from that decision to MPIC's Internal Review Officer who, also in the absence of any response from Dr. MacMillan and in light of an opinion rendered by Dr. Michael MacKay (Medical Consultant to the corporation's Claims Department) supporting the adjuster's decision, felt obliged to uphold that decision.

[para19] A report from Dr. MacMillan, dated May 22, 1998 was finally provided to this Commission, but had not been available for the Internal Review hearing nor even by May 25, 1998, the date of the final decision of the Internal Review Officer.

[para20] C.M.A.K. is appealing from the decision of the Internal Review Officer that reads, in part, as follows:

Finally, you asked that the Corporation pay you IRI from February 19, 1998 to March 5, 1998. During that time you did not receive IRI at all, since it was your adjusters opinion that you were capable of returning to work. On reviewing the medical reports on file it appears that all of your caregiver were of the opinion you were capable of returning to work by mid February 1998. Although Dr. Pops appears to be of the opinion that you were incapable of working in March, 1998, I cannot attribute very much

weight to his report, since he only began treating you several months following the accident. As well, we do not have any medical reports from Dr. MacMillan to substantiate any ongoing disability, or any disability after February 18, 1998.

Accordingly, I agree with your adjuster that you were capable of returning to work full-time as of February 18th, 1998 and therefore were not entitled to any IRI after that point in time.

THE LAW:

[para21] Section 110, (1), (a) of the Act reads, in part, as follows:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;....

[para22] The question is whether C.M.A.K., at the date of termination of her IRI, was able to hold her former employment had it been available to her?

DISPOSITION

[para23] It is unfortunate, to say the least, that MPIC did not receive a report from Dr. MacMillan within a reasonable time after it had been requested, since that report might well have enabled the parties to resolve the problem without the delay, frustrations and expense of a further appeal. That report of May 22nd, 1998, stated that Dr. MacMillan had followed C.M.A.K.'s progress since February 9th of 1998 on a bi-weekly basis and he had found that she was not ready for a graduated return to work program by February 18, 1999.

[para24] We have concluded, upon a careful review of all the evidence including but, of course, not limited to, that of the Appellant whom we found to be a credible witness - that the injuries sustained by C.M.A.K. in her accident of May 13th, 1997, for which she made no claim, was more serious than was thought at the time, and that the September accident further exacerbated her condition resulting in a delay to her recovery and ability to return to work. The Commission is of the view that the varied chiropractic care of Dr. Pops and the exercise regime prescribed and monitored by Dr. MacMillan materially assisted C.M.A.K. in her ultimate recovery. The

file reflects recommendations by her adjuster, chiropractor and physiotherapist for a work hardening program and the recommendation of the independent examiner for acupuncture and counselling in pain management. We can not tell why none of those recommendations was ever followed; we are of the view that, had they been adopted, there is at least a strong likelihood that C.M.A.K. would have reached pre-accident condition sooner.

[para25] We find:

- (i) that C.M.A.K. was not able to resume her former employment as of February 18, 1998;
- (ii) that C.M.A.K. was able to commence a gradual return to work as of mid-April, 1998, when she could have returned to the salon on a part-time basis; finding that her former job was no longer available she worked with her senior customers, and had regained her pre-accident status by the end of April.

[para26] The Commission therefore directs MPIC to reinstate C.M.A.K.'s income replacement indemnity benefits from February 19th until April 30, 1998, after deducting her part-time earnings for that same period.

[para27] While, at the hearing of her appeal, C.M.A.K. raised the question of her entitlement to reimbursement of chiropractic fees subsequent to May 13th, 1998, that matter does not appear ever to have been the subject of an Internal Review decision and is therefore not properly before us; we are only empowered to hear appeals from decisions of MPIC's Internal Review Officers.

[para28] The only other issue before us was C.M.A.K.'s entitlement to be paid her prescription costs of \$62.41. That matter was resolved by agreement between C.M.A.K. and counsel for the corporation to the effect that those expenses would, in fact, be paid to her upon substantiation, by Dr. MacMillan, of the prescriptions being medically required and related to the accident. It is therefore so ordered.

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