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Indexed as:
M.E.K. (Re)

IN THE MATTER OF an appeal by M.E.K.
AICAC File No.: AC-98-32

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[1999] M.A.I.C.A.C.D. No. 9

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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 23, 1999.
Decision: April 7, 1999.
(30 paras.)

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Issue(s):

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

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993,
c. 36, ss. 85(1), 86(1), 106 and 136(1).
Regulation 40/94, s. 5.

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Appearances:

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

The appellant, M.E.K., was represented by Mark Schulman, Q.C.

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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] The Appellant, M.E.K., [text deleted] years of
age at the time, was involved in a motor vehicle accident on
August 18th, 1995.

[para2] Prior to her retirement from the workforce in
early 1990, M.E.K. had worked from 1961 to 1985 as an

administrator and accountant, with responsibilities for human resources as well, for a heating company, a land developer and a vending corporation successively. From January 1986 until early 1990, she had worked for two different law firms as an office accountant with related duties. In March of 1990, M.E.K. developed infectious pneumonia for which she was hospitalized. After her pneumonia resolved she was apparently left with general aches, pains and headaches which became worse over the ensuing eighteen months, leaving her feeling generally chronically fatigued. At the request of her general practitioner, Dr. Barry Gorski, she was seen on October 2nd, 1991 by Dr. Glen Thomson, a specialist in rheumatology and other inflammatory and arthritic diseases. Dr. Thomson diagnosed fibromyalgia/fibrositis syndrome, noting that "She has evidence of multi-fibrositic tender points above and below the waistline on both sides of the body".

[para3] In a later report to Dr. Gorski of March 24th, 1993, Dr. Thomson said of M.E.K. that "She has continued to have continued general body aches and pains including irritable bowel, headaches and dizziness over the past two years. She is not sleeping well at night. She is not doing any aerobic exercise. She is attending the River East Physiotherapy Clinic for what sounds like range of movement exercises and a local therapy to her tender points....She has all fourteen out of fourteen fibrositic tender points." In outlining for Dr. Gorski his "long and frank discussion" with M.E.K., Dr. Thomson said, in part

Fibrositis is a non-crippling disorder that reflects a lowering of one's pain threshold. Poor sleep and poor aerobic condition underlie this disorder. In my experience and that of other physicians, the only individuals who improve long term are those individuals who are motivated to make themselves well and do so by becoming aerobically fit....All of the other measures, including physiotherapy, pharmacotherapy, relaxation therapy, et cetera are helpful only in the context that they allow the person to begin an aerobic exercise program.

....Persons with fibrositis who ultimately improve and are able to lead healthy, happy, productive lives are those people motivated to begin and stay with an aerobic exercise program.

I told [M.E.K.] that the only way that she will ever improve is to motivate herself to take control of her life and become well.I asked her whether or not she is more interested in the insurance settlement or becoming well. She states that she would like to become healthy and productive again but she feels she may not be able to afford the cost of an aquacise program.

It is my impression that [M.E.K.] continues to look for a "magic bullet" cure which can be given for her fibrositis. She appears to want to play a very passive role in the treatment of her disease and seems unwilling to take an active role in controlling her symptoms by entering and maintaining an aerobic fitness program. I don't think that there is anything further that I can offer her because I think the motivation must come from within to begin and continue a program which will ultimately result in improvement of her symptoms.

[para4] Dr. Thomson's reference above to an "insurance settlement" apparently relates to litigation in which M.E.K. was involved with the [text deleted], concerning her fibromyalgia. That litigation was apparently settled toward the end of 1994 and is only relevant to this appeal in the context that M.E.K. has been on long term disability under the Canada Pension Plan as well as under a health insurance plan whereby she was covered by the [text deleted].

[para5] From March of 1993 until December of 1997 M.E.K. was apparently caring for a teenaged foster child although, as appeared from the testimony adduced at the hearing of her appeal, a major part of that care was actually provided by M.E.K.'s adult daughter, A.

[para6] M.E.K., who lives at [text deleted] in Winnipeg with A., testified that, shortly before her motor vehicle accident in 1995, a house at [text deleted] was purchased by A., with the assistance of M.E.K.'s covenant on the mortgage. The intent of M.E.K. and A. had been that, having renovated the house, A. would be able to operate it as a four-bed foster home, with M.E.K. doing "all of the administration and, as well, working Saturdays and Sundays twice each month and two or three hours every Thursday evening". M.E.K. testified that she was to have been paid \$[text deleted] for each weekend and \$[text deleted] per hour for the two or three hours that she would have put in every Thursday. The home at [text deleted] was approved, and A. received her licence as a foster home operator, in August of 1996. M.E.K. claims that the disability resulting from her motor vehicle accident rendered her unable to fulfill the duties that she had undertaken to perform for A., and that she is therefore entitled to income replacement calculated upon the basis of the income that, absent the motor vehicle accident, she would have been able to earn. She also seeks reimbursement for the cost of ongoing physiotherapy.

[para7] M.E.K.'s claim for IRI was not made until December 17th, 1996, some sixteen months after her motor vehicle accident. In her letter to her Adjuster at MPIC embodying that claim, M.E.K. said, in part:

Since around mid-August I have been pushing myself to do most of the administration but have not done any shifts due to the tiredness and the flare-up of the fibromyalgia and extreme neck and back pain from the accident.

....Previous to the accident the fibromyalgia was in a tolerable state, however since August 1995 (accident) it has been terrible and has me incapacitated again. In July 1996 I thought with therapy and pushing myself....I would be able to carry out the above, but this is not so.

THE ISSUE:

[para8] The primary issue before us, therefore, is whether M.E.K.'s 1995 motor vehicle accident gave rise to a condition that prevented her participation in the running of the foster home and, thus, deprived her of income that she would otherwise have earned.

[para9] As is not unusual in cases of this kind, we are confronted with conflicting medical testimony. In support of M.E.K.'s contentions, we have a brief letter from M.E.K.'s family physician, Dr. Nicole Allegro, of January 15th, 1997, wherein she confirms that M.E.K. was referred to the Wellness Institute Sports Injury Clinic for a reconditioning fitness program, to recover from her MVA-related injuries. "She is also considered disabled from her gainful occupation as a foster home attendant/administrator due to the evolution of her injuries sustained in the August 1995 motor vehicle accident." In a subsequent letter of May 28th, 1997, addressed to M.E.K.'s Case Manager at MPIC, Dr. Allegro encloses copies of notes made by Dr. Gorski (her predecessor as M.E.K.'s family physician) which reflect "muscle squelettal (sic)" complaints from January 3rd, 1991 until July 6th, 1993, with other visits that seem to have been related only to gastrointestinal, respiratory and psychiatric problems. Dr. Allegro makes the point that "This seems to support M.E.K.'s argument that her muscular symptoms were not very active until her motor vehicle accident of August 1995". Dr. Allegro recommended a progressive reconditioning program in order to decrease M.E.K.'s dependence on physiotherapy treatments. For that reason she had suggested the Wellness Institute "as it has a complete team of rehabilitation professionals".

[para10] Dr. Gorski, who saw M.E.K. on the day of her accident, diagnosed cervico-thoracic myalgia with right thoraco-lumbar strain, and prescribed analgesics, muscle relaxants and physiotherapy. In a later report of May 5th, 1996, Dr. Gorski stated, in part "The above accident has caused severe musculotendinous injury with subsequent fibromyalgia and cephalgia". He confirmed the prescription of analgesics, anti-inflammatories and anti-depressants, expressing the view that M.E.K. was "improving and medication

use is slowly retarding". Dr. Gorski ruled out the presence of any whiplash associated disorder.

[para11] Counsel for M.E.K. also refers us to a report from Mr. Bill Wozney, a physiotherapist with the Doug Christie Physiotherapy Services and Sports Injury Clinic, bearing date December 4th, 1996. Mr. Wozney reports that he had initially set up a treatment program involving two treatment sessions and three reconditioning sessions per week, but that M.E.K. had only attended five out of a possible thirteen sessions. The reasons she gave Mr. Wozney for her non-attendance included flare-up of her fibromyalgia, migraines and irritable bowel syndrome. The reason that she gave on the hearing of her appeal was that, as she put it, "I didn't attend physio because I was too tired and I couldn't afford taxis". Mr. Wozney's report goes on to comment that M.E.K. felt that five times per week would only aggravate her current condition and would interfere with her ability to manage her daily activities and take care of "her" foster children. "She has stated that the recent flare-up of fibromyalgia has left her with no energy and further activity seems only to worsen her condition. Objectively, [M.E.K.] continues to have focal areas of irritability including C3-4, L5-S1 as well as myofascial pain syndrome associated with fibromyalgia. She is deconditioned in all areas including flexibility, endurance and strength." Mr. Wozney advised M.E.K. that the reconditioning process might well cause increased discomfort to start with but that would subside in time. Unfortunately, said Mr. Wozney, M.E.K.'s current condition and level of motivation to a five-day-per-week program prohibited further progress. He suggested reducing the number of days of treatments per week to two or three, with gradual increase thereafter.

[para12] M.E.K.'s chiropractor, Dr. Pelissier, in a report to MPIC of February 28th, 1997, noted that M.E.K. had been diagnosed with fibromyalgia in 1990 and had sustained a rear-end collision in 1993 - the first and only reference to a 1993 motor vehicle accident that appears in the records made available to us. Dr. Pelissier also noted that M.E.K. had complained that, after her accident, she had been suffering from severe headaches, specific neck and shoulder pain and stiffness, with pain across her lower back and right flank, whereas prior to August 18th, 1995 her pain had apparently been localized to the sacral area. She had not seen M.E.K. since January 14th or 17th, 1996.

[para13] It is not clear to us what forms of therapy, if any, M.E.K. had been receiving between March of 1993 and August 1995. It seems apparent that the symptoms of her fibromyalgia syndrome were in remission during much of that time, but this is explained by Dr. Neil Craton, Medical Director of MPIC's Claims Services Department, in a memorandum

of April 21st, 1997 wherein he notes that

Fibromyalgia is a condition of unknown cause. A recent publication in The Journal of Rheumatology in 1996, Volume 23, (at page) 3, stated that the majority of patients with fibromyalgia have chronic symptoms of varying severity that wax and wane. This document also stated that when therapies and therapeutic programs are ordered, the duration should be specified and treatment should not be continuous or indefinite. The goal of therapy is to make the patient independent.

[para14] M.E.K.'s own evidence did not suggest that she was symptom-free in the year or so prior to her accident. Rather, it was her position that, in the months leading up to her accident, her fibromyalgia syndrome had been "tolerable".

[para15] Dr. Christa Mason, a colleague of Dr. Allegro at the Transcona Medical Clinic, reports that on June 22nd, 1995 M.E.K. had been to see her, complaining of fatigue. As Dr. Mason puts it "No underlying cause for the fatigue was found. She had a past history of fibromyalgia and this was thought to be accounting for the fatigue." On the three other occasions in 1995 when Dr. Mason had seen M.E.K., the Appellant had not complained of any fibromyalgia-related problems.

[para16] Dr. Glen Thomson, whose earlier reports to Dr. Gorski are referred to above, saw M.E.K. again on February 14th, 1997 upon referral from Dr. Allegro. Having taken an up-to-date history from M.E.K., he made note of the mechanics of the motor vehicle accident:

She was turning left through an intersection at 5 to 10 kilometers per hour. A pickup truck was leaving a parking lot and struck the right front (passenger) side of her car in front of the right wheel. This was a low impact crash and turned her vehicle. She did not strike her head. She was not rendered unconscious. She did not develop immediate pain in the neck or back.

Dr. Thomson also noted that, while M.E.K. had attended her chiropractor for ten months following her accident, she had told him that "She never revived (sic) any improvement from this therapy". M.E.K. told Dr. Thomson that she had had a CT Scan of her neck and back performed at St. Boniface Hospital shortly prior to her meeting with him in February of 1997. She apparently told him that the CT Scan had revealed some spinal stenosis and osteoporosis. Dr. Thomson's examination of M.E.K. seems to have been largely unremarkable, save only that she had "a restricted range of movement on internal rotation of the right hip" and that "thoracic rotation was to 35 degrees and stopped because of

discomfort". Dr. Thomson reports that M.E.K. had full cervical range of movement, no evidence of radiculopathy, but eighteen out of eighteen fibrositic tender points.

[para17] Dr. Thomson again diagnosed fibromyalgia. He noted that degenerative changes of the cervical and lumbar spine are common in individuals in their sixth decade, but that M.E.K.'s pain was being amplified by extremely poor, non-restorative sleep and poor aerobic condition. He felt that M.E.K.'s sleep disorder was mostly a manifestation of depression of which, he felt, she was exhibiting signs. He recommended a psychiatric assessment so that the treatment of her depressive illness could be optimized. Her sleep disorder would only improve after her depression and other psychologic concerns had been dealt with and that, in turn, was a pre-requisite for the treatment of her general fibromyalgia complaints.

[para18] With the exception of the depression, which was a newly emerging factor in early 1997, all of the signs and symptoms described by Dr. Thomson on February 14th, 1997 were practically identical to those described in his earlier reports of October 1991, January 1992 and March 1993. Counsel for M.E.K. makes the point that the fact that the Appellant was suffering from the same pains in 1997 that she had in 1993 was not really relevant. He points to a statement contained in a memorandum from Dr. Neil Craton to M.E.K.'s Case Manager of June 10th, 1997, wherein Dr. Craton says

Given the fact that this woman was diagnosed with a pre-accident condition such as fibromyalgia, which is known to have a poor prognosis, as well as a natural history that waxes and wanes, there needs to be relatively striking evidence of quiescence, and then a significant exacerbation of symptoms closely linked to whatever stimulus is considered to be the exacerbating factor.

[para19] Mr. Schulman submits that this is exactly what we are facing in M.E.K.'s case. There was, in fact, he says a "relatively striking evidence of quiescence" in 1994 and 1995 up until the date of M.E.K.'s accident and that was followed by an exacerbation of symptoms closely linked to the stimulus created by that accident. The accident affected M.E.K., Mr. Schulman argues, in a more intense way than would have been the case had she been of good health.

[para20] Dr. Thomson, in a report to M.E.K.'s Case Manager at MPIC on February 19th, 1997, found (as is usual in cases of fibromyalgia syndrome) no obvious objective physical abnormalities which would have prevented M.E.K. from returning to her former employment. That report of Dr. Thomson goes on to say that

I cannot conclude that the medication is indicated and required as a result of the motor vehicle accident injuries....I cannot conclude that there are any additional physical impairments related to the accident of August 18th, 1995.

[para21] Dr. Thomson also expressed the view that further reconditioning would be of value only after M.E.K.'s depression and psychiatric concerns had been reviewed and more successfully treated.

[para22] M.E.K. testified that she had started helping her daughter, A., to run the long term foster parent home in July or August, 1996, but her letter to MPIC on December 17th of that year indicates that she had limited her efforts to administrative duties. She says, quite clearly, that she "Have not done any shifts due to the tiredness and the flare-up of the fibromyalgia and extreme neck and back pain from the accident."

[para23] If it is a fact that any fibromyalgia symptoms rendered M.E.K. unable to assist her daughter in the running of that group home, a review of all of the evidence persuades us that this would have been the case even had the motor vehicle accident not occurred. While taking note of M.E.K.'s evidence that she had improved materially between March 1993 and August 1995, and that she was managing very well during that period, we must also take into account the following factors:

[para24] (a) at some point during that same period, M.E.K. successfully applied for long term disability benefits under the Canada Pension Plan, as a direct result of Dr. Thomson's diagnosis of her fibromyalgia syndrome;

[para25] (b) also, at some point during the latter part of 1994, an action that she had commenced against the [text deleted] for long term disability benefits, arising out of the same fibromyalgia syndrome diagnosis, was successfully concluded;

[para26] (c) Dr. Thomson reported, on February 19th, 1997, "When I discharged her from my care in 1993 her general pain complaints had shown no signs of improvement". This indicates to us that, for at least some period after her discharge from Dr. Thomson's care on March 24th, 1993, M.E.K.'s condition is unlikely to have shown any material improvement. Dr. Thomson, in each of his earlier reports to Dr. Gorski in 1991 through 1993, recommends a program of exercise to improve the Appellant's aerobic fitness. Indeed, his letter to Dr. Gorski of March 24th, 1993 makes that point with increased urgency, yet M.E.K. does not appear ever to

have attempted it;

[para27] (d) it may well be that M.E.K.'s symptoms had eased off somewhat in the months immediately preceding her accident, but this is explained by the fact, noted by Dr. Craton, that the symptoms of fibromyalgia syndrome do "wax and wane"; we are not persuaded that the remission of her symptoms was so adversely affected by her motor vehicle accident as to rule out her ability, sixteen months after that accident, to assist her daughter in accordance with the plan that they both described to us;

[para28] (e) in any event, by M.E.K.'s own testimony she does not appear ever to have attempted to follow that plan. Rather, she only undertook what she called some "administrative" tasks, which we infer to mean bookkeeping; it was not made clear to us what duties would have been required of her that she was unable to perform for two or three hours each Thursday evening. M.E.K. is a small, slender lady who would have been about [text deleted] years of age when her daughter started her group home; even in the total absence of fibromyalgia syndrome, it can hardly be suggested that someone of her size and stature could cope in any physical way with a quartet of feisty, highly demanding, obstreperous teenagers; her history of fibromyalgia syndrome, even in the absence of a motor vehicle accident, makes her ability to cope with such a situation even less likely. The fact is that M.E.K. was not as free from problems prior to her accident as her testimony might indicate: we note the February 28th, 1997 report of her chiropractor, Dr. Pelissier, who says in part: "Complaints prior to the accident of August 18th, 1995: headaches, multiple and variable muscle aches and pains, bowel complaints, poor sleep, poor circulation and depression. She was on several prescribed medications for the above symptoms". As noted earlier in these Reasons, Dr. Pelissier also reports that M.E.K. sustained a rear-end collision in 1993. We had concluded, at first blush, that this was merely a typographic error, but that could not be the case since the Appellant's motor vehicle accident of August 1995 involved the right front quarter of her vehicle, rather than the rear. Dr. Pelissier's report was not disputed by the Appellant.

[para29] The cumulative effect of all of the evidence summarized above is to persuade us that M.E.K. has not been prevented from earning income as a result of her motor vehicle accident of August 18th, 1995, and we so find.

[para30] By the same token, we are not of the view that her motor vehicle accident makes necessary further physical therapy of any kind. Indeed, if she is ever likely to benefit from further physiotherapy or chiropractic treatment, not only are we of the view that such need does not arise from her motor vehicle accident but, as well, we adopt the view of Dr.

Thomson that M.E.K. must first be referred by her physician for either psychiatric treatment or psychological counselling to enable her to overcome her depression, to manage her continuing pain and, thus, equip herself to handle a program aimed at improving her aerobic capacity. The extent of her deconditioning seems to be such that those programs may take quite some time to accomplish their objectives. They do not, in our respectful view, form part of the responsibilities of Manitoba Public Insurance Corporation.

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