

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF: An appeal by [the Appellant]
AICAC File No.: AC-97-102

PANEL: **Mr. J.F. Reeh Taylor, Q.C. (Chairperson)**
 Mr. Charles T. Birt, Q.C.
 Mrs. Lila Goodspeed

APPEARANCES: **Manitoba Public Insurance Corporation (MPIC) represented by**
 Mr. Addison,
 The Appellant, [text deleted], appeared on her own behalf.

HEARING DATE: **April 22, 1998**

ISSUE(S): **Entitlement to IRI from the 180th day post-accident, for a non-**
 earner.

RELEVANT
SECTIONS: **Sections 86 (1) and 106 of the MPIC Act, and Section 7 of**
 Regulation 39/94 .

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons for Decision

THE FACTS

The Appellant was involved in an automobile accident on December 12, 1995 in which she sustained a number of injuries. The key one for the purpose of this Appeal is the injury to her right shoulder.

[The Appellant's] occupation at the time of the accident was that of a bookkeeper/administrative assistant, in which capacity she had worked for a number of years. Approximately 2 ½ years before the accident the Appellant and her family moved from [text deleted], Manitoba to [text deleted] Manitoba. She had been working up to the time of her move but decided not to work in her new home but, rather, to stay at home to look after their new son. At the time of the accident she was contemplating returning to work as her son was going to start school. During the period she was absent from the workplace she upgraded her skills by taking a number of professional courses, mastering computer accounting programmes and trying to keep on top of the latest developments in the accounting field. In addition, she testified that she is completely bi-lingual and had used this skill in her job.

There is no dispute that [the Appellant] was not employed at the time of the accident and therefore was considered a non-earner at the time of the accident. That being so, and in the absence of evidence that, had it not been for her accident, she would have held employment during the first 180 days immediately following that accident, she is not entitled to any Income Replacement Indemnity (I.R.I.) during that first 180 days.

[The Appellant] injured her right shoulder which prevented her from doing her normal household and daily living activities. This disability led MPIC to provide her with an indemnity to cover the cost of a homemaker. She was under the care of her family physician and received physiotherapy for several months. The problem with her shoulder was ultimately diagnosed as a torn rotator cuff for which she received cortisone shots. The cortisone helped for a while but there was no

lasting improvement in the function of her shoulder and she was referred to [Appellant's doctor] of the [text deleted].

[Appellant's doctor's] investigations led him to report that she had full function of her shoulder but she had some symptoms and he recommended a re-conditioning program at the [text deleted] Clinic. This treatment program required [the Appellant] to travel to [text deleted] three times a week and each trip took about 2/3rds of a day. Unfortunately this program met with limited success and she was referred to an orthopaedic specialist, [text deleted]. He diagnosed her as having a refractory rotator cuff tendinitis which could only be treated by arthroscopic surgery. He also advised that her period of recovery from the surgery would be anywhere from four to six months and she would require rehabilitation during this period as well as home exercises.

The surgery was performed on December 27th, 1996. Contrary to [Appellant's orthopaedic specialist] opinion, [Appellant's doctor] advised MPIC that the Appellant would only need a recovery period of two to four weeks. Having determined that [the Appellant] was a non-earner, MPIC paid her I.R.I. for the period from December 27th, 1996 to January 30th, 1997 as a bookkeeper/accounting clerk at the rate of \$8.00 per hour.

THE ISSUE:

[The Appellant] wants to be paid I.R.I. for the period of July 4th, 1996 to December 27, 1996 the period during while she was looking for work but, because of her pending shoulder surgery, was

not able to find employment . [The Appellant] choose not to appeal her job classification nor the hourly rate of compensation that MPIC established for her in determining the amount of I.R.I. she should receive.

In the summer of 1996 [the Appellant] decided to return to work as her son would be entering school in the fall. She advised that there were not many job opportunities in that part of rural Manitoba but she did manage to send out a number of her resumes in answer to job postings or advertisements; they all involved accounting positions. She did have a number of job interviews but did not receive a job offer. She felt obliged, in good conscience, to advise each potential employer that she was waiting for surgery on her shoulder and that she would have to be off work for a few weeks. We have no evidence to determine if it was the potential loss of time due to surgery, or her qualifications, or both, that prevented [the Appellant] from receiving a job offer.

The possible loss of a new employee for a few weeks would certainly not be a positive factor in trying to decide whether or not to hire someone. [The Appellant] is a highly qualified employee in her chosen field and, from our perspective, would interview well; we believe she would in the normal course have been able to find regular employment without too much difficulty. Therefore, on a balance of probabilities, we find that it was the waiting for the surgery to correct her automobile injury that prevented [the Appellant] from obtaining a new job. Therefore pursuant to section 86(1) of the Act she is entitled to I.R.I. from July 4th, 1996 to December 27th, 1996 at the rate previously determined by MPIC.

Unfortunately the surgery did not correct or resolve the problem in her right shoulder. She advised that her fingers would become numb after using a computer keyboard for more than a half hour and she would lose the feeling and function in her hand. She would try and shake her hand but often the feeling would not come back into her fingers or hand. This continuing limitation has caused her to look outside her chosen profession for a different type of work. She advised that when she was being interviewed for a job after the shoulder surgery she would have to reverse the interview process and ask what the job components were and what was involved in each step or function of the job. She would turn down any that required her to sit and work at a keyboard full time or at any job that required the use of her hands on a full time basis.

In March of 1998 she found employment outside her profession, at a local art gallery, involving a variety of activities other than the use of a keyboard, her hands or accounting skills on a fulltime basis.

It may be, therefore, that [the Appellant] has a further claim for I.R.I. for the period from January 30th, 1997 until March 1st, 1998, less any monies she may have earned from a short-term, part-time job that she obtained with the [text deleted] of her local municipality. However, that is not a matter that has been the subject of a decision by MPIC's Internal Review Officer and we are, therefore, without jurisdiction to deal with it. We note, merely, its possibility, without any attempt to decide its merit.

Similarly, while we understand that [the Appellant] has a claim pending for the permanent disability of her shoulder or hand, that also is not a matter that is properly before us since, as we understand it, that claim is still under consideration at some level within MPIC.

DISPOSITION:

For the reasons noted above, the decision of MPIC's Internal Review Office is rescinded and the Appellant's Income Replacement Indemnity is reinstated for the period from July 4th to December 27th, 1996, with interest thereon at the prescribed rate to the date of actual payment.

Dated at Winnipeg this 7th day of July, 1998.

J.F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA J. GOODSPEED