

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]

AICAC File No.: AC-97-140

PANEL: Mr. J. F. Reeh Taylor, Q.C., Chairman
Mr. Charles T. Birt, Q.C.
Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC')
represented by Ms Joan McKelvey
the Appellant, [text deleted], appeared on her own behalf by
long distance telephone, assisted by [text deleted]

HEARING DATE: December 10th, 1999

ISSUE(S): Whether Appellant's benefits terminated prematurely.

RELEVANT SECTIONS: Sections 85, 86, 110(1)(c), 127 and 129(1) of the MPIC Act
and Schedule A to Manitoba Regulation No. 41/94

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 Appellant] was the victim of a motor vehicle accident on April 5th, 1994 when, as a pedestrian, she was struck by a motor vehicle while she was attempting to cross [text deleted]. She has no recollection of the accident itself but was taken to [hospital] where she was diagnosed with a fractured pelvis, and a fractured right upper arm. She had also sustained concussion,

lacerations requiring stitches to the back of her head, the loss of a lower front tooth, a broken denture, a sore back and numerous contusions.

[The Appellant] was initially under the care of her family physician, [text deleted], and of an orthopaedic specialist, [text deleted]. Fortunately, the fracture of her right acetabulum or hip socket, and the fracture of the head of her right humerus or upper arm both healed (albeit slowly) without the need for surgical intervention, although the healing was accompanied, predictably, by stiffness and discomfort which [Appellant's orthopedic specialist] forecast would probably develop into post-traumatic arthritis of the right hip and right shoulder.

The Appellant was a non-earner, within the meaning of the MPIC Act, at the time of her accident, but upon the expiry of the statutory six months was awarded income replacement indemnity ('IRI'), commencing October 3rd, 1994, in the amount of \$171.52 bi-weekly, upon the basis that, had the accident not occurred, she would have been capable of pursuing employment in the fabricating, assembling and repairing occupations. Her IRI was based upon the occupational income tables prescribed by Regulation; no exception was taken to the quantum of the IRI. [the Appellant] and her husband were then in receipt of Social Assistance from [text deleted], which benefits were reduced, dollar for dollar, by the amount she received from MPIC as income replacement. We note, in passing, that MPIC's file respecting [the Appellant] indicates a proud lady, given to understating her disability and a laudable desire to be independent of social assistance and to enter the workforce.

[The Appellant] was also provided with physiotherapy, Personal Assistance Expense Allowance and taxi service to facilitate her medical visits and shopping needs. When it became apparent in December of 1994, to the surprise of her adjuster and of [Appellant's doctor #1], that [the Appellant] had not been attending physiotherapy since July or August of that year, the insurer made arrangements for regular, twice-weekly visits from [Appellant's physiotherapist], of [text deleted]. [Appellant's physiotherapist's] reports reflect gradually increasing strength and range of motion of her right hip and right shoulder. By July 4th, 1995, [Appellant's physiotherapist] wrote that [the Appellant] had become able to walk longer distances without care and had reported a decrease in her symptoms of pain. The physiotherapist's plan was to discontinue treatment after reinforcing [the Appellant's] exercise program with a regimen of continued walking and swimming.

A report from her family physician, [text deleted], dated August 29th, 1995, says that, despite the mental and physical hardships that she had endured, [the Appellant] had improved considerably. Her right arm range of motion had improved overall 170 degrees with residual limitation in abduction and internal rotation. Function-related pain was minimal. X-rays of May 31st, 1995 showed healed fracture with slight deformity of the neck of the humerus, well seated in the glenoid fossa. There was no abnormality in the pelvis. [The Appellant] was doing her home exercise program, appeared to be in good spirits and looked forward to finding work.

[Appellant's doctor #1] further opined that the Appellant could start employment "which does not require heavy lifting or long walks et cetera, providing support with physiotherapy as needed. Her residual problem will resolve in time."

On January 12th, 1996, [the Appellant's] adjuster met with her. He reported that she had been looking for work as a typist and as a sewing machine operator, but without success because - 'she had some difficulties as she has never worked or done this type of work before.'

As a result of the reports from [Appellant's doctor #1] and from [the Appellant's] physiotherapist, MPIC decided to terminate her income replacement indemnity payments as of December 3rd, 1995. However, a further re-assessment of [the Appellant] was completed by [Appellant's physiotherapist] on February 2nd, 1996, in order to determine the Appellant's permanent restrictions and limitations related directly to her motor vehicle accident injuries. For some unaccountable reason, it seems to have taken MPIC from mid-February, 1996, when the corporation received [Appellant's physiotherapist's] report, until February 4th, 1997, to arrive at its decision to pay her \$8,490.00 for permanent impairments of her shoulder (\$4,990.00) and her hip (\$3,500.00), and another month-and-a-half before writing to her to confirm that decision. There does not seem to have been any communication between [the Appellant] and MPIC between February, 1996, and February of the following year. On May 6th, 1997, she applied for an internal review of the Permanent Impairment Award and the Internal Review Officer's decision, upholding that of the adjuster, was rendered on September 10th, 1997.

It is fair to say that, although [the Appellant's] application for an Internal Review only sought a review of the adjuster's February 4th decision, the Internal Review Officer treated the matter as being inclusive of the earlier decision to terminate her IRI, thus bringing both aspects of her claim within the mandate of this Commission.

Meanwhile, [the Appellant] had apparently decided to set up her own business, producing cushions and pillows, under the business name [text deleted]. She is reported by her adjuster to have agreed, on February 4th, that her inability to find work was not the result of her injuries but, rather, the simple fact that work suitable to her linguistic abilities and to her experience was not available. It is a matter of some doubt whether she fully understood the full ramifications of that discussion.

[The Appellant] attended the hearing of her appeal to this Commission by long distance telephone, since she and her children were moved to [text deleted], Ontario at the end of July, 1997, by her husband, who then seems to have deserted his family. Because her English still lacks fluency, she was assisted in the presentation of her appeal by [text deleted].

Since moving to [Ontario], [the Appellant] has been examined by her new family physician, [text deleted] and, on referral from [Appellant's doctor #2], by [text deleted], neurologist.

[Appellant's neurologist's] report of March 20th, 1998 says, in part

.....There is a distinct paucity of hard focal or lateralizing neurological signs on examination. This patient suffers from chronic pain mainly localizing to her right shoulder and right hip areas. There is rather marked sudden give weakness of right upper and lower extremity muscle groups which could be largely overcome by suggestion. There are no hard radicular signs and there is no evidence for more central neurological pathology.

[Appellant's neurologist] suggests that [the Appellant] would probably benefit from a referral to a Chronic Pain Clinic. That recommendation was followed and she was seen at the Pain Clinic on April 13th, 1999 by [Appellant's doctor #3]. [Appellant's doctor #3's] initial report of April 15th, after noting [the Appellant's] complaint that she was unable to work fast enough to get a remunerative job, was unable to carry with her right hand and was suffering from pain in her low back and over the top of her shoulder radiating down posteriorly between her shoulder blades,

goes on to describe the results of his examination. He said that [the Appellant] had about 50% of normal neck motion, was tender over her acromioclavicular and sternoclavicular joints. "She has global weakness in both arms but occasionally, with provocation, she can demonstrate good strength in both shoulders. I cannot elicit any objective sensory deficit." Her passive forward elevation of the right shoulder was to 150 degrees.

In a follow-up report of July 8th, 1999, [Appellant's doctor #3] says that [the Appellant] has good strength in her shoulder with free range of motion, though she still complains of pain. X-rays showed a healed fracture of the greater tuberosity. He had reassured the Appellant that she should try to use her arm for light to medium activities. He could not identify any nerve root compromise with reference to her back and leg, and he had suggested that she try and continue with activity as tolerated, understanding that complete resolution of all symptoms might take some time.

[The Appellant], when asked by this Commission what she was seeking by way of benefits, replied that she wanted a lump sum payment to enable her to start a business of her own. She wants to rent some small commercial space and to buy a good sewing machine with which to start that business.

We do not have sufficient evidence before us to enable us to find that she was entitled to further income replacement benefits after December 3rd, 1995. While the Appellant takes issue with the opinion of [Appellant's doctor #1] on August 29th, 1995 that she could return to employment not requiring heavy lifting or long walking, the fact is that we have no additional medical evidence

to contradict [Appellant's doctor #1's] opinion. It seems clear that [the Appellant] continues to experience pain and discomfort but those problems do not necessarily amount to disability of the kind that would entitle her to further income replacement. The comment of MPIC's Internal Review Officer, to the effect that [the Appellant's] difficulty in finding employment may be due to her lack of English language skills and job qualifications, is in our view probably valid. Indeed, the insurer offered to fund some courses in English as a second language, but [the Appellant] appears to have left Manitoba before that could be given effect. MPIC continued to pay her income replacement benefits for approximately four months after [Appellant's doctor #1] had rendered that opinion. It may well be that [the Appellant] needed, and perhaps continues to need, further physiotherapy ([Appellant's physiotherapist] recommended that in her assessment of February 2nd, 1996, - a recommendation that seems to have been ignored by MPIC), but that has not been dealt with at the claims level nor by an Internal Review Officer, and is therefore not within the perimeter of this appeal..

By the same token, this Commission has no power to award a lump sum payment for the purposes proposed by [the Appellant]. Our only mandate to award lump sums is in the context of a permanent impairment award, and [the Appellant] has already received that, as described above.

Therefore, and while we have every sympathy for [the Appellant's] plight - separated from her husband, she is the custodial parent of two teenaged children and still has some residual problems from her 1994 injuries - we are obliged to find that she does not qualify for further income replacement nor for any increased award for her permanent impairment. Her appeal must, therefore, be dismissed.

Dated at Winnipeg this 22nd day of December, 1999.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED
