

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]

AICAC File No.: AC-00-47

PANEL: Mr. J. F. Reeh Taylor, Q.C., Chairman
Ms. Yvonne Tavares
Mr. Colon C. Settle, Q.C.

APPEARANCES: The Appellant, [text deleted], was represented by [Appellant's representative]; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Joan McKelvey.

HEARING DATE: September 11th, 2000

ISSUE(S): Causation – whether disabling pain in neck and shoulders attributable to motor vehicle accident.

RELEVANT SECTIONS: Sections 81(1)(a), 83(1)(a), 84(1), and 136(1)(a) of the MPIC Act and Section 5 of Manitoba Regulation 40/94

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, [text deleted], seeks payment for physiotherapy - past and future - and income replacement indemnity for the period of her unemployment, under the circumstances described below.

In February of 1995 [text deleted], the Appellant, was in Grade 12 studying to be a Cosmetologist, and also working in the evenings and on weekends at [text deleted], a fast food

outlet. She testified that, until the event giving rise to the present claim, she had no health problems of any consequence and, in particular, no pain in the region of her neck and shoulders.

On February 28, 1995 she was the passenger in the front seat of a [text deleted] vehicle. The car was being driven by [driver #1]; there was another passenger in the back seat. They were being followed by another [text deleted] vehicle, driven by [driver #2]; the entire group was going bowling.

Upon entering a parking lot off [text deleted] in order to turn his car around, [driver #1] accelerated, causing the front wheels of his car to hit the curb of a boulevard or median strip that he had apparently not noticed within the parking area. [The Appellant] testified that, in consequence, the right side of her face hit the dashboard of the car and then hit the window on her side, and that “as the car slammed down on the ground the top of my head hit the roof”. She testified that, although she was wearing a seat belt, it was of little use in that it was broken before she ever entered the car and was too loose to prevent forward movement.

[Driver #1] stopped his car to inspect it but, finding no damage, continued on to the bowling alley. Neither he nor the other passenger in the back seat was injured. [The Appellant] said that, while at the bowling alley, she merely kept score; she elected not to bowl because “my body was too tensed up”.

[The Appellant’s] evidence was that she woke up the following morning with a severe headache and burning sensation in her neck; she was extremely tense. She told neither of her parents about the event in question, because she had been forbidden to see [driver #1] and she did not wish to make them aware of her disobedience. She simply took Tylenol.

[The Appellant] testified that she only worked a couple of shifts at [text deleted] after the motor vehicle accident, before quitting by reason of her headaches and pain in her neck and upper shoulders. She did not tell her employer about the accident. She continued with her Grade 12 studies through February and March of 1995 but dropped out of school in April without graduating, because her pain and headaches had caused her to miss a lot of classes.

For the next three months, said [the Appellant], she had done nothing; she had slept in until about noon on most days and had continual headache problems. Her parents were becoming frustrated with this pattern of conduct, and so [the Appellant] obtained part-time work at [text deleted] where, she testified, she worked from about 2:00 p.m. until about 6:00 or 8:00 p.m. She appeared to have worked an average of 20 hours per week there, as a waitress and helping with food preparation and dishwashing. On July 26th, 19, [the Appellant], having consulted her family physician, [Appellant's doctor #1], for low back pain, was advised to take a week or 10 days off work and, so far as we can tell, never did return to work at that restaurant. [Appellant's doctor #1] attributes that to her low back problems, but [the Appellant] says she also quit because of her neck and shoulder pains – problems not mentioned by [Appellant's doctor #1] in his report of November 21st, 1996, dealing with that particular event.

[The Appellant], although prevented by her pain from completing her school year, apparently sought no medical or chiropractic help until August 14th of 1995 when she first saw her chiropractor, [text deleted], whose initial report only makes mention of a temporomandibular joint (TMJ) disorder. [Appellant's chiropractor] assessed [the Appellant] as having chronic strain of the right temporomandibular joint.

It is of significance that [the Appellant] consulted [Appellant's doctor #1], her family physician, on September 20th and September 29th of 1995 for unrelated matters, and appears to have made no mention at all of any discomfort in her neck, shoulders or jaw. She had also been seen by a different physician in the emergency room on June 5th, 1995, for abdominal pain but, again, no problems in the cervical, shoulder or temporomandibular regions were even mentioned. It was not until December 15th, 1995, that [the Appellant] attended upon [Appellant's doctor #1] complaining of TMJ pain, which she related to her motor vehicle accident and for which [Appellant's doctor #1] referred her to [Appellant's doctor #2]. [The Appellant] was assessed for her TMJ dysfunction by [Appellant's doctor #2], who referred her to [text deleted], a TMJ specialist; she has also been examined and assessed by [text deleted], an oral and maxillofacial surgeon. She has been provided with a splint for her TMJ dysfunction, and all of the work related to that particular problem has been performed at the expense of MPIC.

[The Appellant] testified that she returned to school in 1996 and did, in fact, finish her Grade 12.

She started babysitting in August or September of 1996 and worked in that capacity, part-time, until November or December, when she started a part-time job at a local flower shop, where she worked until April of 1997. On April 14th, 1997, she applied for and obtained a job at [text deleted], where, at least initially, she worked on an edge-bending machine, lifting finished woodwork off the machine and stacking it in piles. She was there until December 22nd, 1997, when she quit. She testified that, from the very beginning of that job, she had neck and shoulder problems but continued to work because she needed a job; she simply took Tylenol to get through the working day. She testified that it was on the advice of [Appellant's doctor #1] that she quit work on December 22nd, 1997, and stayed off work until mid-February 1998. During that time, she was attending for physiotherapy.

She received a letter from the plant manager at [text deleted], dated February 3rd, 1998, noting that they had left numerous messages for her but had had no response, nor any notification from [the Appellant] or her doctor to indicate the need for time away from work after January 26th, 1998. She was asked to report to the plant manager on February 6th. By further letter of February 24th, despite having advised Workers Compensation Board that there were light duties available for [the Appellant], [text deleted] had still heard nothing further from her and therefore wrote to terminate her employment. Meanwhile, the Workers Compensation Board field worker recorded that [the Appellant] had returned to work on February 23rd, 1998, with a different employer and had quit [text deleted].

It is of further significance that, on or about January 8th, 1998 (some weeks before [text deleted] became aware of her intent), [the Appellant] had filed a claim with the Workers Compensation Board, reporting that she had been obliged to quit work for [text deleted] on December 22nd, 1997, due to injury “caused by continuous heavy lifting (which) gradually got worse as time went on”. She described her work as including “sorting batches of wood. Fifty percent of what I lift is above my head, lifting 25 to 50 pounds at a time. My neck and shoulder muscle are very tight and knotted up. I find it very painful to try and do my work without painkillers, because my muscles are so tight”. Her employer was, apparently, never made aware of the discomfort that [the Appellant] was experiencing in the course of her work, and she reported to Workers Compensation Board that she had not told anybody about that problem prior to December 30th, 1997. The Board denied her claim.

[Appellant's TMJ specialist] had referred [the Appellant] to physiotherapy; [Appellant's doctor #1] had also suggested it. She therefore commenced a three-month course of physiotherapy, starting in January of 1998, at the expense of her parents.

On February 23rd, 1998, [the Appellant] obtained new employment at [text deleted], filling paper bags with poultry giblets, making them ready to be reinserted back into the poultry before packaging. There is substantial discrepancy between the job description provided to MPIC by [text deleted] and the job as described by [the Appellant]. Without analyzing those two job descriptions in detail, it is sufficient to note [the Appellant's] testimony that, although much of the work is performed at a table, slightly below waist level, and that none of the individual packages is at all heavy, the packages are dropped into a pail, and once the pail is full it has to be lifted by two employees and placed elsewhere. Contrary to the employer's description, [the Appellant] says that the job requires the use of both hands when running the machine in question, and entails the frequent lifting of heavy pails in co-operation with her co-worker. She testified that her shoulder pain and headaches returned soon after the commencement of her work at [text deleted]. There is a necessary implication that the pains had been absent for at least some while, since nothing can return unless it has been away. [Appellant's doctor #1] had apparently prescribed non-steroid anti-inflammatory medication and, upon the basis of the history given him by [the Appellant], now recommended that she file a claim with MPIC, based upon her 1995 motor vehicle accident. She did so on January 8th, 1998.

It was [the Appellant's] further testimony that, since quitting her job at [text deleted], she has not been able to find employment other than a modicum of babysitting. On cross-examination, she acknowledged that she had not tried to find work in the period between May 1998 and January 2000 – “I was just at home with my mom; I helped my mom around the house”.

[The Appellant] could not remember being offered light work at [text deleted] and agreed that she had quit there without notice, because she did not think she could handle the work. [The Appellant] also agreed that she had not consulted any doctor about her MVA-related problems until December of 1995, but could not recall why she had not told [Appellant's doctor #1] about those problems when seeing him about other aspects of her health before December.

Evidence of [Appellant's teacher]

[Appellant's teacher], who now lives in [text deleted], taught beauty culture at [text deleted] where [the Appellant] was one of her students. There were about 24 students in that class and [Appellant's teacher] had taught [the Appellant] for some three years. [Appellant's teacher] testified that [the Appellant] was one of her brighter and more capable students but that, in April of 1995, she had apparently felt obliged to quit school due to her poor attendance. [Appellant's teacher] explained that the students had to put in 1400 hours of practical work, plus theory, and were to miss no more than 20% of classes if they were going to be allowed to graduate. [The Appellant] had missed a lot of classes, complaining of headaches. She also sat out parts of those classes that required "hands on" work by the students; she would sit in a chair near the doorway to [Appellant's teacher's] office so that she could audit those parts of the class in which she was not actively participating. [Appellant's teacher] had not referred [the Appellant] to the school nurse because [the Appellant] was already seeing a doctor when she first told [Appellant's teacher] about her motor vehicle accident and, in any event, would not normally refer a student to the nurse unless there appeared to be serious illness or injury. That, from [the Appellant's] own evidence, would place [Appellant's teacher's] first knowledge of that accident and the resultant TMJ dysfunction at about mid-December of 1995, some 10 months after the accident.

[Appellant's teacher] testified that it was out of character for [the Appellant] to miss her classes to the extent that had started to occur at the end of 1995 and into the following year, since she had always found [the Appellant] to be a keen student.

Evidence of [driver #2]

[Driver #2] testified that she lived near [text deleted] and had worked with [the Appellant] at [text deleted]. They were close friends and had been so for some years. [The Appellant] had never complained to her before her motor vehicle accident of any physical problems. She had been driving the car following that of [driver #1] and had followed him into the parking lot in order to reverse direction on [text deleted] rather than attempting a U-turn on the street. The [text deleted] that she was driving was 30 to 40 feet behind that of the [driver #1] vehicle and, when [driver #1's] car hit the curb, she estimated that it must have risen at least five feet into the air because, she said, she could see, in the space between the ground and the bottom of the [driver #1] car, the entire height of a set of gas pumps that were some 40 to 50 feet beyond [driver #1's] vehicle. [Driver #2] testified that [the Appellant] had been complaining of problems with headaches and pain in her neck and shoulders since shortly after that incident, although she did not think that [the Appellant] had seen a doctor until some five or six months thereafter. She recalled that [the Appellant's] problems seemed to worsen after she had started working at [text deleted]. She had noticed that the [driver #1] car struck sparks when its undercarriage hit the curb.

We are constrained to note that, unless an accumulation of ice and snow in the gutter had formed a kind of ramp, it is highly unlikely that [driver #1's] car could have risen to the height recalled by [driver #2], but we are nonetheless prepared to find that [the Appellant's] TMJ dysfunction

was, on a balance of probabilities, caused by that incident. Whether the TMJ dysfunction, in turn, caused her loss of functional capacity at work is a separate question.

Evidence of [Appellant's classmate]

[Appellant's classmate] has known [the Appellant] for about seven years. They were at school together and both attended [Appellant's teacher's] classes. They have remained social friends to this day. [The Appellant] told [Appellant's classmate] of the headaches and the pain in her shoulders, jaw and neck at some point in the Spring of 1995, she said, when they were having coffee together at [text deleted]. [The Appellant] had said that she could not handle her school work and had also had to quit working at [text deleted] due to her discomfort. [Appellant's classmate] did not recall any discussion wherein [the Appellant] spoke of not wanting her parents to know about the accident.

On cross-examination, [Appellant's classmate] acknowledged that she could not really recall when [the Appellant] had told her about her motor vehicle accident, nor did she remember whether or when [the Appellant] had started seeing a doctor. She expressed the view, however, that [the Appellant's] current complaints were, if anything, worse than had originally been the case, although of the same basic nature. She and [the Appellant] see each other about once every two weeks. When [the Appellant] had obtained work at [text deleted], the same complaints had arisen.

Submissions by [Appellant's representative]

On behalf of [the Appellant], [Appellant's representative] submits that the issue before this Commission is essentially one of credibility. He points out that [the Appellant's] position is supported by her three friends and that her condition has been largely unaltered throughout, from

almost immediately after her motor vehicle accident up to the present date. He asks, rhetorically, “if the pain in her neck and shoulders was not caused by that motor vehicle accident, then by what was it caused? “

[The Appellant] was a first-class student, always at or near the top of her class, and yet she failed to graduate with all of her friends – hardly the conduct of someone who has not, in fact, been seriously hurt by that accident. Again, [the Appellant] had quit work after only one or two shifts back at [text deleted] and later, when employed at [text deleted], had been in pain from the very first day. Her pain had persisted to the point at which, with help from her parents and her current boyfriend, she had paid for physiotherapy herself.

MPIC had accepted responsibility for the treatment of [the Appellant’s] TMJ problems; it was logical to conclude that the pain in her neck and upper shoulders was also related to the same accident and to the resultant TMJ dysfunction. [Appellant’s representative] suggests that Manitoba Public Insurance Corporation was only willing to accept responsibility until it became apparent that [the Appellant’s] claim was going to be significant, at which point the insurer started back-peddalling vigourously.

Referring to an opinion offered by [text deleted], MPIC’s medical consultant, that any trauma sustained by [the Appellant’s] neck and shoulders in that motor vehicle accident was minor, [Appellant’s representative] submits that [MPIC’s doctor] knew very little indeed about the dynamics and mechanics of that accident and was not justified in drawing the conclusion that he did.

[Appellant's representative] points to the comment of [Appellant's doctor #1] in referring [the Appellant] to [Appellant's doctor #2] in December of 1995, wherein he speaks of "increasing pain and locking in her jaw, especially on the right side.... she has bilateral crepitus, worse on the right side. She is tender over her temporalis muscle and over the TMJ itself. My impression is that this is likely due to trauma....".

[Appellant's representative] also refers to a report addressed to [Appellant's doctor #2] by [Appellant's TMJ specialist], dated August 28th, 1996. In particular, [Appellant's representative] emphasizes the following comments of [Appellant's TMJ specialist]:

MVA February/95. Noticed pain-free clicking of jaw in March/95, by December/95 jaw locks and clicking is painful and more frequent. Is now aware of parafunction condition. On a daily basis [the Appellant] is experiencing pain with jaw movements (opening, biting and talking).

Muscles:

Taut palpable bands: trapezius – neck (burning sensation in right with severe pain in left), sternocleidomastoid at right mastoid process shoots pain to top of head, left masseter of sternocleidomastoid moderate pain, severe pain in both right and left posterior cervical, medial pytergoid - severe pain in right, with moderate pain in left, severe pain in left masseter at angle of mandible, with moderate pain in right angle of mandible, right masseter of zygomatic arch shoots severe pain to right temple, right anterior temporalis (severe pain right , moderate pain left), middle temporalis (mild pain both right and left), posterior temporalis mild pain in right.

[Appellant's representative] submits, therefore, that the Appellant is entitled to reimbursement for any physiotherapy that she has undertaken and for any further treatment, whether by way of physiotherapy or otherwise, that she may still need in order to address her continuing problem; he also submits that the Appellant is entitled to Income Replacement Indemnity for the periods since her motor vehicle accident in which she has been unable to continue with or obtain employment by reason of the injuries sustained in that accident.

Submissions on behalf of MPIC

Ms. McKelvey, in summarizing the position of the insurer, points to the fact that, although the force of the impact of the [driver #1] vehicle with the curb in the parking lot may well have caused that vehicle to leave the ground, and although the Appellant may have hit the dashboard, the window and the roof, the only outward and visible sign of that impact was a small bump on or near the crown of [the Appellant's] head; there was no bruising on her face despite the alleged contact with the dashboard and the window. Ms. McKelvey also notes that the accident was not reported to MPIC until December of 1995, 10 months after the event, and treatment had not even been sought until August of that year. Even then, [Appellant's chiropractor] makes no mention of a motor vehicle accident until a much later report in January of 1996, the clear implication being that [the Appellant] had not mentioned the motor vehicle accident to him at their earlier meetings.

Referring to [Appellant's doctor #1's] clinical notes, Ms. McKelvey points out that, although his notes of February 6th and 24th of 1995, prior to the accident, make mention of stress and back pain, neither [Appellant's doctor #1's] letter to [Appellant's doctor #2] of December 19th, 1995, nor his report to MPIC of December 21st, 1995, make mention of any physical problems other than TMJ dysfunction. That latter report opines that [the Appellant] was capable of resuming her main occupation as a waitress.

While the TMJ dysfunction was diagnosed within a year following the accident, it was apparently not deemed sufficient to warrant [the Appellant's] absence from the workplace. Indeed, [the Appellant] herself appears to have shared that view, says Ms. McKelvey, since she had not sought medical attention for the first six months after the accident.

The evidence of [driver #2] also supported the conclusion that [the Appellant] was not undergoing significant pain for five or six months following her accident.

While it is understandable that [the Appellant] would not have wished to let her parents know that she had been consorting with a forbidden boyfriend, that same constraint did not apply to her relationship with [Appellant's doctor #1], in light of doctor-patient confidentiality. There was no reason why, if her later problems were actually related to her motor vehicle accident, she could not have told [Appellant's doctor #1] when she first saw him in September.

Referring to [Appellant's TMJ specialist's] report of August 28th, 1996, upon which [Appellant's representative] placed some reliance, Ms. McKelvey points out that [Appellant's TMJ specialist's] diagnosis makes no mention of any neck or shoulder problems but speaks only of "myofascial pain/dysfunction of the masticatory and associated muscles. Disc displacement with reduction." He prescribed a home exercise program and the use of an appliance or splint.

[Appellant's doctor #1's] report to MPIC on November 21st, 1996, in referring to a visit from [the Appellant] on July 26th of that year, speaks only of "low back pain".

[The Appellant], in filing her original claim with the Workers Compensation Board with the support of [Appellant's doctor #1], asserted that problems with her neck and shoulders had started on or about September 2nd, 1997.

There is also a case history apparently prepared for [Appellant's chiropractor] by [the Appellant], in which she lists her principal health problems for which she came to see him as "shoulder and jaw" but answers "yes" to the question "Have you ever had this problem before?". When asked

whether she believed that the problem was related to a fall or accident, [the Appellant] wrote “don’t know”. [Appellant’s chiropractor’s] handwritten note, apparently made at the time of that first interview with [the Appellant], only records “right jaw snapping since February – no trauma. No dental work. Hit head on side of window December 1994.” (We recognize that this latter date may well be an inadvertent error on the part of either [Appellant’s chiropractor] or [the Appellant].)

Finally, Ms. McKelvey comments that even [Appellant’s doctor #1] obviously did not think that [the Appellant’s] problems were MVA related since it was he who had recommended an application for Workers Compensation benefits. By the same token, in all of the documentation related to the Workers Compensation Board claim, [the Appellant] does not indicate that she had encountered any problems involving her neck and shoulders prior to starting her work at [text deleted]. [Appellant’s TMJ specialist], in a report of December 15th, 1997, notes that [the Appellant’s] joints were “unstable” and that pressure from the earplugs that she was required to wear at work had resulted in pain and headaches.

Disposition

After a careful review of all of the evidence, both oral and documentary, we are unable to conclude that the problems currently being encountered by [the Appellant] in the regions of her neck and shoulders have their origins in her motor vehicle accident of February 28th, 1995. By the same token, in the unlikely event that that incident, five years ago, was the cause of her ongoing complaints, we find it unusual that she would have sought employment requiring such a high level of physical activity – in particular, activity which required constant use of the very upper-body areas that seemed to be the basis of her pain.

We are concerned, also, by the discrepancies between the statements given to the Workers Compensation Board and those given to MPIC and to this Commission. Her initial claim filed with MPIC and dated November 5th, 1996, in describing the injuries sustained at the time of the accident, speaks only of “injury to jaw”. In a formal declaration made on March 13th, 1998, to the Workers Compensation Board, [the Appellant] states, in part:

“I feel the problems I was experiencing with my neck, the top of my shoulders and the area between my shoulder blades was from the lifting I had to perform over the period I worked at [text deleted] since starting there in April/97 until December 22/97 (last day worked). I was on holidays the rest of that week as the plant was closed.

On December 29/97 I was sick with the flu and phoned in sick I attended [Appellant’s doctor #1] and he told me to be off work for two weeks. He gave me a note to this effect and I gave it to the receptionist I started working at [text deleted] on February 23/98 FT on the 11:00 a.m. – 7:30 p.m. shift Mon – Fri. and I work at the jib machine which involves throwing in one neck and one gizzard at a time. There is no lifting in this job.

([The Appellant] goes on to describe, in some detail, the heavy, physical nature of her work at [text deleted].)

After about the first week of working at [text deleted] in April/97, I was sore and this was the case all the way thru. By around late Aug/97 I was taking Tylenol and Advils daily. I know that I had seen [Appellant’s doctor #1] about this in early Sep/97 and he gave me some prescribed muscle relaxants. I know that I had also seen him for the same thing even before that but I do not know when but it was sometime after I had started at [text deleted] as stated already I started to notice soreness after the first week which was from lifting the boards.....

In Feb/95 I was a passenger in a car which bottomed so I hit my head on the roof and ended up with Temp Mandibular Joint disorder in my jaw. I saw [Appellant’s doctor #1] about this once only [Appellant’s doctor #1] told me that I should file this as a WCB claim and not Autopac.” *(Emphasis added.)*

We note, also, that [Appellant’s doctor #1’s] report of his examination of [the Appellant] on July 26th, 1996, speaks only of low back pain.

Despite the forceful arguments of counsel for [the Appellant] and the testimony of the Appellant and her witnesses, for the foregoing reasons we accept the position advanced on behalf of the insurer and must dismiss this appeal.

Dated at Winnipeg this 15th day of January, 2001.

J. F. REEH TAYLOR, Q.C.

YVONNE TAVARES

COLON C. SETTLE, Q.C.