

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-31**

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. Keith Addison
the Appellant, [text deleted], appeared in person

HEARING DATE: June 19th, 1997

ISSUE(S): Claim for reinstatement of income replacement indemnity
(‘IRI’)

RELEVANT SECTIONS: Sections 83(1), 84(1), 106 and 110 of the MPIC Act and Section
6 of Regulation 37/94

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], then a [text deleted] year old driver for a courier service, was involved in a motor vehicle accident on June 2nd, 1995, when the vehicle that she was driving was rear-ended. She had been employed by the courier service since mid-October of 1994. She appears to have suffered moderately severe musculoligamentous injuries in the areas of the

cervical spine and the lumbosacral spine. She also appears to have sustained a contusion to her left shoulder and what now appears to have been the most significant factor, a traumatic trochanteric bursitis. The trochanter is one of the two bony growths on the upper end of the thigh bone. A bursa is a sac filled with fluid and situated between moving surfaces that would otherwise rub against each other; the inflammation of a bursa, therefore, can cause substantial pain when the tissues surrounding it are in motion. A common site for a bursitis is at the top of the thigh, amongst other places.

Since [the Appellant's] injuries caused sufficient disability that she was unable to return to work for some time, MPIC commenced paying her income replacement indemnity from the eighth day following the date of her accident up to and including August 23rd of 1996 when, upon the basis of medical and paramedical reports, MPIC terminated her IRI.

It is from this latter decision that [the Appellant] now appeals.

We have been provided with full medical reports from [the Appellant's] original, general practitioner, [text deleted], from the orthopaedic specialist to whom [Appellant's doctor] referred her, [text deleted], and from the physiatrist, [text deleted], to whom she was, in turn, referred by [Appellant's orthopaedic specialist]. We have also had the benefit of full reports from [text deleted], the vocational rehabilitation consultants to whom MPIC referred [the Appellant], an eleven page report from [text deleted], physiotherapy consultant, to whom MPIC also referred her, MPIC's own consultant, [text deleted], and, indirectly through memoranda prepared by her adjuster, from the physiotherapist in [text deleted] who started treating [the Appellant] when she

moved from [text deleted] to [text deleted]. The medical and paramedical material presented to us is lengthy and detailed; with one exception, which will be referred to later in these reasons, that evidence is largely consistent and is supportive of MPIC's conclusion that, by the end of August of 1996 [the Appellant], while still requiring home exercises and a Functional Restoration Program, was physically capable of working, either in her former occupation of driver for a courier service or in some other, entry-level form of employment.

THE LAW:

Section 6 of Regulation 37/94 defines a person who holds a regular employment on a temporary basis as one who

- "(a) has held the employment for less than one year before the day of the accident;
- (b) during the course of the employment, has been employed for not less than 28 hours per week, not including overtime hours; and
- (c) is not covered by Clause 4(b)."

[The Appellant] falls within the foregoing definition and is therefore classified as a temporary earner within the meaning of Sections 83 and 84 of the MPIC Act.

Section 83(1) of the Act provides that a temporary earner is entitled to IRI for any time, during the first 180 days after an accident, that she is unable to continue her employment. Section 83 goes on to provide for the manner in which the amount of IRI is to be calculated, and

after certain adjustments [the Appellant's] IRI was fixed at \$356.88 bi-weekly. That amount is not under dispute.

Commencing on the 181st day following an accident, Section 84 of the Act requires MPIC to determine an employment for a temporary earner, consistent with her education, training, work experience and physical and intellectual abilities immediately before the accident, and if the temporary earner is still unable, because of the accident, to hold that 'deemed employment' she remains entitled to IRI which, in any event, shall not be less than the IRI that she was receiving during the first 180 days following the accident. Since it was not until August of 1996 that [the Appellant] was felt, by the majority of the medical team, to be able to return to work, her IRI was continued until August 23rd of 1996, as noted above.

We noted, earlier, that there was one exception to the view expressed by [the Appellant's] medical advisors, physiotherapists and rehabilitation consultants that she should have been able to return to work in August of 1996, albeit with occasional, recurring discomfort. The exception to which we refer appears in a lengthy and detailed letter from [Appellant's physiatrist], addressed to [the Appellant's] case manager at MPIC, and bearing date January 23rd, 1997. That letter does contain the following sentence:

"My clinical assessment has revealed that she has soft tissue pain syndrome with restriction of movements of the neck, right hip and straight leg raising with active trigger points of the right piniformis and gluteus maximus muscles. This is the main contributing factor for ongoing pain and reduced functional capabilities. I am hopeful that with the recommended treatment her symptomatology will resolve and will be able to restore her function with 4-6 weeks of conditioning and strengthening exercise program. At present

she cannot return to any of the minimum wage entry level occupations which you have mentioned in your letter of December 31, 1996, i.e. Cashier, gas station attendant, grocery store/stock clerk, parking lot attendant, sales clerk and occupation in the fast food industry, etc.."

[Appellant's physiatrist] is a highly regarded expert in his field and is associate professor in [text deleted]. However, a careful reading of his letter persuades us that the opinion he thus expressed was based, almost entirely, upon subjective complaints expressed by [the Appellant] which do not, for the most part, appear to be supported by other, objective evidence. As was noted by [text deleted], the physiotherapist, in his report of May 1st, 1996, "the perceived level of impairment is not consistent with objective findings".

Having said all that, it is also generally agreed by all of the experts, including those retained by MPIC, that [the Appellant] will benefit from a six week Functional Restoration Program at [rehab clinic], where she will attend for five days a week, five hours a day. During that time, of course, she will be unable to take gainful employment. She is to commence her Functional Restoration Program at the beginning of July, which will take her to about mid-August.

In addition, [the Appellant's] evidence was that she was offered a job that was to have commenced at the beginning of May of this year, at a dry cleaning establishment in [text deleted], that she had tentatively accepted that position but that she was then obliged to decline it because [Appellant's physiatrist] had told her that she was about to start this Functional Restoration Program. As things turned out, [rehab clinic] could not take her until the beginning of

July, apart from some preliminary meetings with staff at [rehab clinic] in June in order to get her started on a suitable program of home exercises.

DISPOSITION:

Since she has been effectively prevented from working since the beginning of May 1997, due to the need, caused by her motor vehicle accident, for the Functional Restoration Program to complete her treatment, we find that she is entitled to have her IRI reinstated, from May 1st of this year until the date when, given faithful attendance by [the Appellant] for her Functional Restoration Program, that program will have been completed.

Dated at Winnipeg this 27th day of June 1997.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED