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Indexed as:
P.W.H. (Re)

IN THE MATTER OF an appeal by P.W.H.
AICAC File No.: AC-98-67

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[1998] M.A.I.C.A.C.D. No. 32

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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: October 19, 1998.
Decision: October 19, 1998.
(8 paras.)

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Issues(s) :

- (i) Whether victim entitled to reimbursement for transportation by private vehicle;
- (ii) calculation of IRI - whether potential business income should be included.

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Relevant Sections:

Section 23(1)(a) of Manitoba Regulation 40/94, Section 81(2)(a)(iii) of the MPIC Act and Sections 2(a) and 3(2) of Manitoba Regulation 39/94.

[Ed. note: Please see paper copy for 7 page appendix containing the relevant sections of the Manitoba Public Insurance Commission Act and Regulation 39/94.]

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Appearances:

Manitoba Public Insurance Corporation ('MPIC') represented by
Terry Kumka.

The appellant, P.W.H., appeared in person.

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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] There are two aspects of P.W.H.'s appeal that are before us. They were dealt with separately by MPIC's Internal Review Officer and we shall follow the same pattern.

Travel Expenses

[para2] Section 22 of Manitoba Regulation 40/94 requires the Corporation to pay an expense incurred by a victim for transportation by bus or train. Where such public transportation is available but a victim elects to travel by private vehicle, the victim receives 11 per kilometer - a figure which does not, of course, come close to covering the victim's actual transportation costs and which seems to this Commission to be lower than is necessary to discourage the use of private vehicles. Where transportation on a common carrier is not reasonably possible because of the state of health of the victim, then the victim is entitled to reimbursement for travel expenses at the rate of 29.1 per kilometer by virtue of Schedule B to that Regulation. We note that the travel allowance for provincial civil servants has recently been increased to 30.4 and for those who, like P.W.H., live north of the 53rd parallel, to 34.0 per kilometer for the first 10,000 km. per year. Those figures will be increased again as of January 1st, 1999, to 31.3 and 35.0 respectively. It is not clear to us whether the allowance provided by Schedule B to Regulation 40/94 are similarly indexed. If they are, then the original 29.1 per km. allowance should now be closer to 30.4, at least; if they are not, we respectfully suggest to the Corporation that it consider recommending to the Lieutenant-Governor in Council an updating of the figures in that Regulation. That said, however, we must apply the law as we find it.

[para3] P.W.H., the Appellant, gave evidence that, within two to three weeks immediately following his motor vehicle accident of July 28th, 1994 he developed an abnormal sensitivity to light and, as well, a greatly enhanced olfactory sensitivity, both of which created a disabling series of headaches. His photophobia was confirmed by his optometrist, Dr. Joanne Bisson, who prescribed one pair of dark lenses for outdoor use and a second pair of medium tinted lenses for indoor use; these were obtained for him at the expense of MPIC. With respect to his sensitivity to perfumes and other strong odours, MPIC declined to apply the exemption contained in Section 23(1)(a) of Regulation 40/94 in the absence of medical evidence supporting his claim. A copy of that section, and of all other sections referred to in these reasons, is annexed hereto.

[para4] At the hearing of P.W.H.'s appeal, his own evidence in this context was supported by a letter from Dr. Colin T. Noel which, while falling short in terms of objective evidence, does contain the blanket statement that, as a result of a variant of fibromyalgia syndrome from which Dr. Noel found P.W.H. to be suffering, "He has significant problems with sensory input including those of smell and he is unable

to ride on public transport because of this". In the absence of any medical evidence to the contrary adduced on behalf of the Corporation, and while we may have some serious question as to the connection between fibromyalgia syndrome and the Appellant's problem with his olfactory system, we do not feel that we are in a position to second guess Dr. Noel and we therefore accept his opinion that "This will necessitate him [(P.W.H.)] using his own personal vehicle when travelling to Winnipeg for MPIC reviews".

[para5] We therefore find that the Appellant is entitled to be paid the difference between 11 per kilometer and 29.1 per kilometer for his numerous journeys from [text deleted] to Winnipeg and return. This aspect of his claim will therefore be referred back to P.W.H.'s Adjuster for recalculation of his travel expenses. He will be entitled to interest at the statutory rate on the resultant figure and this, unfortunately, will require a large number of separate calculations, since interest will run on the payment for each of his journeys from the date when that journey was made to the date of actual payment.

Calculation of IRI

[para6] P.W.H. disputes the quantum of income replacement indemnity that he has been paid by MPIC, which was based solely upon his earned income as a [text deleted] at the [text deleted] at [text deleted], Manitoba. He claims that he was also in the businesses of cutting timber, operating a sawmill, completing a subdivision and constructing houses on it. He submits that, although his income tax returns for the years 1994 and 1995 show substantial, net, business losses of approximately \$[text deleted] in each of those years, his injury deprived him of potential profits and he believes that his income replacement indemnity should have been based upon maximum allowable annual insurable earnings, namely \$[text deleted] plus the increase in that amount provided by the indexing provisions of the Act.

[para7] In this context we can do no better than to adopt the reasoning of MPIC's Internal Review Officer bearing date April 14th, 1997, of which a copy is annexed to these reasons. In particular, but without limiting the entirety of the Internal Review Officer's decision, there is no coverage under the MPIC Act for potential losses of profit which a business enterprise might have enjoyed in some period following a motor vehicle accident. Other forms of insurance are available to cover such losses, but the MPIC Act does not extend into that area.

[para8] This facet of P.W.H.'s appeal must, therefore, be dismissed and the decision of the Internal Review Officer confirmed.

* * * * *

T.R. Strutt - 96-162
Telephone No. 985-7102

REGISTERED MAIL

April 14, 1997

Paul Hlady

Dear P.W.H.:

RE: APPLICATION FOR REVIEW
OF INJURY CLAIM DECISION

This letter is further to the Internal Review hearing we conducted by telephone on April 3, 1997. At the time of your motor vehicle accident you were employed full time as a jail guard in The Pas and were also operating a sawmill business. You have been receiving Income Replacement Indemnity ("IRI") based on the income from your employment as a jail guard. The sole issue under review is whether you are entitled to a higher level of IRI by reason of your operation of the sawmill business.

Your injury occurred on July 28, 1994. Your 1994 income tax return shows net business losses of \$33,066.00. Your 1995 return shows net business losses of \$33,698.00. Your position is that the sawmill business was just getting under way, that it had great potential for profit, that this potential was destroyed by your injury, and that you therefore deserve compensation for this loss. In support of these arguments you have provided a set of projections dated February 1, 1996 which apparently come from Farm Business Consultants Inc. in Winnipeg. These show a projected annual profitability of between \$200,000.00 and \$2,000,000.00. In my view these projections could not be given much weight even if coverage for this sort of projected loss were available under the Personal Injury Protection Plan. These projections are extremely speculative. There is no indication as to what research (if any) Farm Business Consultants did on enterprises of this kind or whether anything was done to verify the assumptions used in the projections.

More to the point, however, I believe such projections have nothing to do with the coverage available under Section 81(2) of The Manitoba Public Insurance Corporation Act (a copy of which is attached). Subsection (2)(a)(iii) is the one applicable to you since, at the date of the accident, you were employed full time as a jail guard in The Pas and were also

operating the business. Your IRI benefits have been paid, and continue to be paid, in an amount based on your earnings from your employment as a jail guard. This is the only basis on which IRI benefits could have been paid since you were not, in fact, earning any income from your sawmill business at the time of the accident or at any material time before the accident. Sections 2(a) and 3(2) of Regulation 39/94 are also relevant. Copies of those are attached. You will see from these provisions that the gross yearly employment income on which Income Replacement Indemnity benefits is calculated is always based on income being earned at the time of the accident or, in the case of self-employment income, earned in one of a number of specific periods occurring before the accident. There is no coverage for potential losses of profit which a business enterprise might have enjoyed in some period following an automobile accident even if it can be demonstrated that such losses would most probably have occurred (and I do think, with respect, that there is a lack of any such demonstration in your claim).

There is, therefore, no reason to reverse or alter the decision made by the adjuster concerning your IRI benefits in his letter of May 27, 1996.

You also suggested during the hearing that you were entitled to reimbursement for certain expenses which the Corporation has not covered. I pointed out to you that this issue had not been raised in your Application for Review and that it would be very difficult to deal with this issue, particularly over the telephone. I suggest that you provide Mr. Woods, your Case Manager, with a detailed written statement of the expenses you are claiming. He can then make a determination on that issue and provide you with a decision letter on it. If you are still unsatisfied with the handling of your expense claim at that point you could file another Application for Review and it would be possible for a Review Officer to deal with that matter at that time.

If you are unsatisfied with this decision, you have ninety days within which to appeal to the Automobile Injury Compensation Appeal Commission, which Commission can be reached at:

Room 106
167 Lombard Avenue
Winnipeg, Manitoba
R3B 0T6

Telephone Number: 945-4155

Please note that the Commission operates independently from The Manitoba Public Insurance Corporation and its decisions are binding on MPIC subject to the appeal provisions of

Section 187 of The Manitoba Public Insurance Corporation Act.

Yours truly,

T.R. Strutt
Acting Review Officer

TRS/bh
Attachments

cc: J. Woods, Adjuster, Thompson Claims
Claim File No. E0415634

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