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Indexed as:
M.L.B. (Re)

IN THE MATTER OF an appeal by M.L.B.
AICAC File No.: AC-99-36

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[2000] M.A.I.C.A.C.D. No. 28

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), Y. Tavares,
and D. Stewart
Heard: July 26, 2000.
Decision: August 21, 2000.
(14 paras.)

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Issues(s) :

- (a) Whether Appellant full-time, part-time or temporary earner;
- (b) Whether Income Replacement Indemnity ('I.R.I.') terminated prematurely.

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Relevant Sections:

Sections 84(1), 107, 109(1) and (2), 110(1)(d), 110(2)(d) and 111(2)(a) of the MPIC Act, and Section 4 of Manitoba Regulation No. 37/94.

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Appearances:

Manitoba Public Insurance Corporation ('MPIC') was represented by Joan McKelvey.

The appellant, M.L.B., was represented by Norman Rosenbaum.

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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] The motor vehicle accident in which the Appellant, M.L.B., was involved on January 25th, 1997, would, for many people in comparatively sedentary occupations, have constituted a small bump on the road of life. For M.L.B., who is a professional musician and who broke the ring finger on his left hand in the course of that accident, the collision

proved disastrous.

[para2] M.L.B.'s evidence was that he is a high school graduate, [text deleted] years of age, who has been a professional musician since 1981. He studied piano for some six years, reaching Royal Academy Grade VI in both theory and practice. After working with a number of different bands, he started a band called "[text deleted]" toward the end of 1996. He plays electric, acoustic and slide guitar-he is a lead guitarist-as well as ukulele and keyboard.

[para3] As a result of his accident of January 1997, M.L.B. has undergone no less than seven surgical procedures on his left hand, the first one involving the insertion of a plate and screw under general anesthetic. He lost his position with "[text deleted]", being totally unable to play any of his instruments for more than two years. He returned to work as a guitarist full-time in May 1999 and is currently playing lead guitar with a band called "[text deleted]".

[para4] M.L.B.'s last surgery took place on October 16th, 1998, but, in the meantime, MPIC had made several decisions giving rise to the present appeal:

- (i) Initially, MPIC had paid M.L.B. Income Replacement Indemnity benefits upon the basis that he was engaged in an "occupation related to music and musical entertainment not elsewhere classified" and, after applying the Consumer Price Index, fixed his deemed net yearly income at \$28,253. We note, in parenthesis, our surprise that MPIC's claims personnel did not find that M.L.B. fell within the category of "musicians and singers", which would have increased his deemed income quite substantially. That is not part of the subject matter of this current appeal, but there is no doubt, in the view of this Commission, that M.L.B. was at all material times a musician. The fact that his gross, reported income for the years 1993 through 1996 varied from a maximum of \$[text deleted] to a minimum of \$[text deleted] may underscore the difficulties of earning a decent living as a professional, 'pop' musician, but does not alter the nature of his occupation.
- (ii) On September 16th, 1998, MPIC's adjuster in charge of M.L.B.'s claim, Ms. Lynne Nixon, wrote to him to tell him that she had now classified him as a 'temporary earner' rather than as a full-time musician. She had therefore completed a 180-day determination pursuant to Section 84(1) of the MPIC Act and found that he should be assigned an entry-level occupation such as a service station

attendant, coatroom attendant, elevator operator, shoe shiner, and the like. It is ironic that included in the entry-level occupations listed by Ms. Nixon as appropriate for M.L.B. was that of 'musician'. Based upon that finding, Ms. Nixon advised M.L.B. that his revised, deemed, gross annual income would now be reduced to \$[text deleted].

- (iii) This letter of September 16th purported to confirm a discussion that had taken place on August 25th, 1998, when M.L.B. had been given "responsible notice of termination of your Income Replacement Indemnity benefits" whereby a final payment, representing the two-week period from August 30th to September 12th, 1998, had been issued to him.

[para5] M.L.B. obtained an internal review of Ms. Nixon's decision. The Internal Review Officer, Mr. Terry B. Kumka, rendered his decision on January 29th, 1999. Mr. Kumka disagreed in part with Ms. Nixon, in that he found M.L.B. to have been a part-time earner rather than a temporary one, although the monetary result was the same. Mr. Kumka did, however, find that further I.R.I. benefits would be payable to M.L.B. during the normal convalescent period for the surgery that he had undergone on October 16th, 1998. Mr. Kumka's decision also found, at least implicitly, that Ms. Nixon's decision to discontinue I.R.I. for M.L.B. on September 12th was a proper decision, and that any Income Replacement Indemnity to which M.L.B. might have been entitled after the first 180 days following his accident should be at any entry-level position.

[para6] After further correspondence between Ms. Nixon, Mr. Kumka, M.L.B. and Dr. Robert Turner (M.L.B.'s surgeon), Mr. Kumka also decided that M.L.B.'s I.R.I. benefits should be resumed from October 16th, 1998, to January 27th, 1999.

[para7] The issues that we have to decide are these:

- * Was M.L.B. a full-time, part-time or temporary earner?
- * Corollary to that first question, was the 180-day determination, under Section 84(1) of the MPIC Act, appropriate?
- * If not, would a two-year determination under Section 107 have been appropriate and, if so, what employment should have been determined for Mr. Brandt as of January 25th, 1999?

- * Was M.L.B. entitled to I.R.I. beyond January 29th, 1999, and, if so, at what level and to what date?

[para8] We have no hesitation in finding that M.L.B. was a full-time musician immediately prior to his accident. Section 4 of Manitoba Regulation No. 37/94 reads as follows:

Meaning of Full-time Employment

4. A person holds regular employment on a full-time basis in the following circumstances:
 - (a) The person is employed at one employment for not less than 28 hours, not including overtime hours, in each week of the year preceding the day of the accident; or
 - (b) The person is employed at one employment
 - (i) for at least 28 hours per week, not including overtime hours, and
 - (ii) for not less than two years, for successive or intermittent periods of not less than eight months and with intervals of not more than four months.

[para9] The work of a professional musician does not consist merely of standing on a stage and entertaining an audience. That, indeed, is the smallest part of the job in terms of the time involved. In M.L.B.'s case, in particular, as leader of his band, his work as a professional musician included the gathering of material, composition, solo practice of two hours daily as a bare minimum, rehearsals with the other members of his band, marketing and publicity, arranging dates and places for performances, travelling from one performance location to the next—all of the factors that, in effect, add up to the career of a professional musician whose group was, at the time, at the lower end of the popular music market. M.L.B. testified that he not only played lead guitar but did many of the vocals and quite a lot of the writing or arranging of the music. He had no other source of income and, as we have noted earlier in these Reasons, the extremely modest income reported by M.L.B. is not necessarily indicative, in his case, of anything less than a full-time occupation. Angela Cheng, Yo-Yo Ma and Oscar Peterson probably spend no more than three to five hours per week performing before audiences, but no one would suggest that they are anything other than full-time musicians. Why should it be any less for M.L.B., merely because he is at the other end of the earnings scale?

[para10] It follows that a 180-day determination under Section 84(1) was not appropriate, since that only applies when the claimant is a part-time or temporary earner.

[para11] M.L.B.'s I.R.I. was reinstated on October 16th, 1999, as a result of the surgery that he underwent on that date, although it was reinstated at the lower rate applicable to the entry-level occupation that MPIC had determined for him under Section 84(1). The very fact that M.L.B. was still unable to function properly as a musician, and needed further surgery for the excision of a pulmar fasciitis that had developed in his left hand as a result of his motor vehicle accident, persuades us that his I.R.I. had been discontinued prematurely on September 12th, 1998. In consequence, we find him entitled to the reinstatement of his I.R.I. from September 12th, 1998, until January 25th, 1999, the second anniversary of his accident. Since we have found that the 180-day determination was inappropriate, it follows that any reduction in the quantum of his Income Replacement Indemnity that flowed from that 180-day determination was also inappropriate, and that his I.R.I. should be reinstated at the original level, commencing September 13th, 1998, and continuing until January 25th, 1999, the second anniversary of his accident.

[para12] As of January 25th, 1999, a new employment should be determined under Section 107 of the MPIC Act for M.L.B. who, to use the language of that section, was "able to work but unable because of the accident to hold the employment referred to in Section 81" (that is, his original, full-time employment).

[para13] We are prepared to agree that, at that second anniversary date, since M.L.B. had no training or experience in any other field of endeavour of which we were made aware, the proper occupation to be determined for him then was at an entry level, at which point Section 111(2) of the MPIC Act comes into play. It reads as follows:

Minimum I.R.I. based on Employment Standards Code

111(2) Subject to sections 115 (I.R.I. for reduced income from determined employment) and 116 (I.R.I. reduction if victim earns reduced income), the income replacement indemnity of a full-time earner or of a victim for whom the corporation determines an employment under section 106 shall not be less than the amount of an income replacement indemnity computed on the basis of a gross yearly employment income determined on the basis of

(a) the minimum wage established under The Employment Standards Code; and

(b) except in the case of a part-time employment,

the standard hours of work set out in Division 2 (hours of work) of Part 2 of that Code, as they are on the day on which they are applied.

[para14] Under Section 110(2)(d) of the MPIC Act, M.L.B. would have been entitled to the continuance of his income replacement at the lower rate for a further year after becoming able to hold an entry-level employment. However, the evidence indicates that he returned to work as a guitarist on a full-time basis on May 20th, 1999. We therefore find that his I.R.I. (reinstated as noted above from September 13th, 1998, to January 25th, 1999, both inclusive, at the original rate) should be continued from January 26th to May 19th, 1999, both inclusive but, for this latter period, at the reduced rate based upon a gross yearly employment income determined on the basis of minimum wage. Interest will, of course, be payable thereon at the statutory rate.

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