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Indexed as:
S.S.S.(Re)

IN THE MATTER OF an appeal by S.S.S.
AICAC File No.: AC-00-10

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[2000] M.A.I.C.A.C.D. No. 34

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), Y. Tavares, and
C.C. Settle, Q.C.

Heard: September 5, 2000.

Decision: September 13, 2000.
(20 paras.)

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Issues(s) :

- (a) 'topping-up' of income replacement - whether properly calculated;
- (b) whether, but for accident, Appellant would have been full-time earner.

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Relevant Sections:

Sections 83(1) and 111(1) of the MPIC Act.

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Appearances:

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

The appellant, S.S.S., appeared on his own behalf.

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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] S.S.S., a taxi driver at all relevant times, was involved in three motor vehicle accidents in 1999: on January 12th, April 30th, and May 24th. The two issues before us are these:

- (a) the amount of Income Replacement Indemnity ('IRI') to which he was entitled from February 22nd to March 31st, both inclusive, of 1999;

- (b) and whether, had it not been for his accident of April 30th, 1999, S.S.S. would have been employed on a full-time basis.

[para2] This file raises some concerns for us on several levels. Firstly, S.S.S.'s case manager at MPIC, Mr. John Moski, records in his notes of September 13th and September 20th, as well as in his formal letter of decision to the Appellant on December 17th, 1999, his apparent belief that a claimant has the duty to prove "beyond a reasonable doubt" that the Appellant had been promised full-time employment as of May 1st, 1999. It should not be necessary for this Commission to point out, six and one-half years after the proclamation of the relevant portions of the MPIC Act-indeed, against the entire background of Canadian jurisprudence in the context of insurance law-that claimant is only required to establish the validity of his claim upon a reasonable balance of probabilities. His onus of proof is no heavier than that.

[para3] On the other hand, there are inconsistencies in the Appellant's evidence that raise questions of credibility, as will appear later in these reasons.

Calculation of 'Top-up' IRI

[para4] All of the dates referred to in these Reasons occurred in 1999 unless otherwise specified.

[para5] At the time of his January 12th accident, S.S.S. was quite properly classified as a temporary earner within the meaning of Section 70 of the MPIC Act. He held regular employment driving a cab, but on a temporary basis since the owner-driver of that cab was away in [text deleted] on extended vacation and was due to return on March 31st, when S.S.S.'s employment would end.

[para6] Following S.S.S.'s accident of January 12th, in which he sustained soft-tissue sprain/strain types of injury to his cervical and lumbo-sacral areas with a resultant inability to drive his cab for several weeks, MPIC paid S.S.S. IRI at a rate of \$[text deleted] biweekly from January 20th to February 21st, both inclusive.

[para7] On the recommendation of his family physician, Dr. K. Hameed, S.S.S. was referred for physiotherapy to the D'Arcy Bain Physiotherapy Athletic and Rehabilitation Clinic, where his therapist was Joanne Gross. By February 15th, Dr. Hameed and Ms. Gross were in agreement that S.S.S. should be able to start a graduated return-to-work plan, working four hours per day from February 22nd to the 28th, and then increasing by two hours per day in each of the following three weeks in the expectation that, by March 22nd, he would have been able to

return to working a full 12-hour shift-the norm in the taxicab industry.

[para8] However, Ms. Gross was obliged to report on March 16th that S.S.S.'s attendance had been poor. He had started going to the Clinic on January 14th but had only shown up once or twice a week rather than three times weekly as had been recommended and agreed upon. Ms. Gross's report of March 16th noted that S.S.S.'s cervical range of motion had improved and that he had voiced few complaints during the previous two weeks related to his neck. He had had more complaints of low back pain but, by March 15th, both symptoms and signs in that area had also shown improvement. S.S.S. had been able to work six to seven hours and Ms. Gross had encouraged him to continue with his six-hour shifts and progress to eight hours during the following week. She advised MPIC that S.S.S. should continue with his physiotherapy until he had reached 10- to 12-hour shifts; she had instituted an extension program.

[para9] During a conversation with Mr. Moski on March 15th, 1999, Ms. Gross expressed the view that, had S.S.S. attended for all of his scheduled physiotherapy treatments, it was likely that he would have been back to work on a full-time basis by March 22nd.

[para10] Since S.S.S. had returned to work on February 22nd, albeit at fewer hours than were normal for him, MPIC topped up his income by paying him the difference between his original IRI (\$[text deleted] biweekly or \$[text deleted] per week) and the amount of his actual earnings. The amount paid to him on that basis was calculated as follows:

	Actual Earnings	IRI Top-up
February 22nd to February 28th	[\$[text deleted]]	
March 1st to March 7th	[\$[text deleted]]	
March 8th to March 14th	[\$[text deleted]]	
March 15th to March 21st	[\$[text deleted]]	
March 22nd to March 28th	[\$[text deleted]]	
March 29th to March 31st		
		(three-sevenths of \$[text deleted]) - [text deleted]
=	nil	
	Total	[\$[text deleted]]

[para11] In his testimony, S.S.S. expressed the view that the figures noted above represented an unfair application of the statute, in that it was not possible for him to obtain employment as a taxi driver under conditions requiring less than a full, 12-hour shift. He pointed out that, if he obtains the use of a cab for 12 hours and is only able to work

six or eight hours of that shift, he still has to pay the owner of the cab \$[text deleted] out of his own pocket.

[para12] It is, perhaps, worth noting that S.S.S. does not take issue with the basic IRI computation of \$[text deleted] biweekly, nor, when discussing his graduated return to work with Ms. Gross and Mr. Moski, does he appear to have made any mention until May 31st of difficulty he would encounter in working short shifts.

[para13] What is even more troubling for the Commission is that, in his July 28th Application for an Internal Review of the Case Manager's decision, S.S.S. says:

.....I went to work Feb-14-99. After that I couldn't work because my back pain was bad and I didn't get back to work until end of March.....

In his testimony before this Commission, S.S.S. stated that the only day he had been able to work after his first accident and before the end of March was February 15th, yet his physiotherapist, Ms. Gross, is able to tell the Case Manager on March 15th that he was working fewer hours daily than had been projected for his graduated return-to-work plan, and S.S.S. was, himself, able to tell Mr. Moski on March 17th that he was almost back at full-time hours and would likely be back at 12-hours shifts by March 22nd. There is no credible evidence before us upon which we could base an award of additional IRI for the period February 22nd to March 31st.

Part-time or Full-time Earner?

[para14] S.S.S. started working full, 12-hour shifts on Saturdays and Sundays, commencing April 17th, for J.C., an owner-driver with [text deleted]. He testified, supported by J.C., that he had been promised full-time employment on the basis of a five- or six-day week, to commence May 1st, but that he was robbed of that promised employment by his motor vehicle accident of April 30th. This second accident seems to have exacerbated his earlier injuries and set back his recovery.

[para15] It is common ground between S.S.S. and MPIC that, as of April 17th, he was driving for J.C. for 24 hours-that is to say, two full shifts-per week. Mr. Moski's notes of May 18th and May 26th reflect discussions that he had with S.S.S., when S.S.S. confirmed that he was still driving for J.C. on weekends and had been doing so since he had lost his job upon the return to Canada of his former employer. Between those two conversations, S.S.S. had been involved in his third accident on May 24th, apparently giving rise to the need for further physiotherapy. On neither of those occasions was any mention recorded of the alleged job offer that was to have

started on May 1st. S.S.S. testified that, in the discussion he had with Mr. Moski on May 18th, he told Mr. Moski that he had been promised full-time employment as of May 1st, but this is such a vital factor in the determination of IRI that, had it been mentioned, it is difficult to believe that the case manager would not have made any note of it.

[para16] Mr. Moski's notes of May 18th also reflect a statement by S.S.S. that he was "already getting better and has begun working partial days". Mr. Moski's note of May 26th records, in part,

I asked him if he will be able to return to work at reduced hours, something he should have done shortly after the April 30/99 accident.....see (Mr. Moski's note) of May 18/99 which confirms that he started reduced hours already. Claimant advised that he started working half days on May 18/99.....I asked if he can work 4 hours per day starting on May 31/99. He said that he could. I told him I would increase by 2 hours each week until he was back to his 12 hour days, twice a week. He agreed.....

S.S.S. testified that the conversations recorded in Mr. Moski's notes of May 18th and 26th never took place. We are thus left with two choices: we must either accept S.S.S.'s hypothesis that Mr. Moski, acting out of a spirit of racism or at least a desire to save money for MPIC, concocted deceptive notes, or we must believe that S.S.S.'s memory is not serving him well in this particular context; we adopt the latter.

[para17] Again, in a memorandum of May 31st, 1999, Mr. Moski reports an extensive conversation that he had with S.S.S. on that date, wherein he says, in part,

The claimant advised several times during this conversation that he is not yet returned to any part-time even though he admitted to me when I met with him on May 26, 1999 that he started working half days on May 18, 1999. He advised that he would have been paid Income Replacement Indemnity based on the part-time work from May 8-17, 1999 at full Income Replacement Indemnity followed by a top-up from May 18-31, 1999. This payment would cover the 7-day waiting period on the May 24, 1999 loss (waiting period May 25-31, 1999). Obviously [S.S.S.] is confused about what hours he actually worked following the April 30, 1999 accident.

(The foregoing is a literal transcript of parts of Mr. Moski's note which, itself, is not easy to follow.)

[para18] Mr. Moski's notes also record a meeting with S.S.S. on July 8th when, says Mr. Moski, S.S.S. explained that

he would not go for any further physiotherapy appointments because it hurt him too much; S.S.S. denies ever saying that.

[para19] It was not until June 17th, by way of an Employer's Verification of Earnings, that S.S.S.'s file discloses any mention of an intent by J.C. to increase his hours of work to 60 hours per week, commencing May 1st. We find this puzzling, particularly since S.S.S. had already been through the claims process as a result of his January accident and may be presumed to have known the basis upon which IRI would be calculated.

[para20] We find that S.S.S. has not established by credible evidence that, upon a reasonable balance of probabilities, had it not been for his accident of April 30th he would have been employed on a full-time, 60-hour-week basis, commencing on May 1st, 1999. It follows that this aspect of his appeal must also fail.

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