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Case Name:
A.F. (Re)

IN THE MATTER OF an Appeal by A.F.
AICAC File No.: 00-144

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[2002] M.A.I.C.A.C.D. No. 10

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Manitoba Automobile Injury Compensation Appeal Commission
M. Myers, Chairman; Y. Tavares and W. MacLennan
Heard: January 22, 2002.
Decision: April 24, 2002.
(30 paras.)

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Issues(s):

Determination of the amount of Income Replacement
Indemnity benefits.

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Relevant Sections:

Section 70(1); Section 81(1)(a); Section 81(2)(a)(i) of
The Manitoba Public Insurance Corporation Act (the
'Act'); Manitoba Regulation 37/94, Section 8;
Manitoba Regulation 39/94, Sections 1 and 2 of the
"Act".

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Appearances:

The appellant, A.F., was represented by her husband, E.F.
Manitoba Public Insurance Corporation ('MPIC') was represented
by Keith Addison.

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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] On July 26, 2001, the Commission issued a Decision
in respect of the above-mentioned appeal and concluded that
the Appellant, although in receipt of long-term disability
benefits (hereinafter referred to as 'LTD benefits') from her
employer as a result of a disability commencing in January
1998, was nevertheless a "full-time earner" at the time of her
motor vehicle accident on November 27, 1999. In this
Decision, the Commission determined:

37 The Commission interprets that the words 'a regular employment on a full-time basis' contained in the definition of a full-time earner under Section 70(1) of the Act defines the nature and status of the Appellant's employment at [text deleted]. The Commission further determines that this definition does not require the Appellant to have been actively at work at [text deleted] at the time of the accident in order to come within this definition.

38 The Commission therefore finds that the Appellant was a victim within the meaning of the above mentioned definition because she was a person who suffered bodily injury as a result of a motor vehicle accident. The Appellant, at the time she took a leave of absence due to her disability, was employed by [text deleted] on a full-time basis and was not either a minor or a student. As a result, the Appellant comes within the four corners of the definition of a full-time earner pursuant to Section 70(1) of the Act.

39 The Commission further determines that as a full-time earner the Appellant was entitled to IRI benefits under Section 81(1) of the Act because as a result of the motor vehicle accident she was unable to continue her full-time employment for the period of January 15, 2000, to May 23, 2000.

CONCLUSION

40 The Commission therefore:

- (a) directs that MPIC pay to the Appellant IRI benefits for the period from January 15, 2000, to May 23, 2000, together with interest thereon at the prescribed rate;
- (b) the Commission retains jurisdiction in this matter and if the parties are unable to agree as to the amount of the IRI benefits then either party may refer this dispute back to this Commission for final determination; and
- (c) the decision of the MPIC's Internal Review Officer dated November 27, 2000, is therefore rescinded.

[para2] The parties were unable to agree as to the amount of the Income Replacement Indemnity benefits (hereinafter referred to as 'IRI benefits') and, as a result, MPIC referred this dispute back to the Commission for final determination.

[para3] Attached hereto (marked as Exhibit A) is a copy of

a letter from legal counsel for MPIC to the Commission dated November 28, 2001, wherein MPIC takes the position that the Appellant is not entitled to IRI pursuant to provisions of subsections 2(a) and 2(d)(vii) of Manitoba Regulation 39/94. The relevant legislative provisions relating to these issues are set out in Exhibit B (attached hereto).

[para4] The Commission finds that, in the circumstances, it was unfair and unreasonable for the Appellant to be denied IRI. At the time of the accident on November 27, 1999, the Appellant was an employee of [text deleted] and was receiving LTD benefits from the employer's insurer. Approximately six weeks later, on January 14, 2000, the Appellant's LTD benefits were terminated. At that time, the Appellant would have been capable of returning to active employment but for the accident.

[para5] As a result of the accident, the Appellant lost income since she was unable to hold employment between January 14, 2000 (the date the LTD benefits terminated), and May 23, 2000 (the date she was medically approved to return to work). MPIC determined that the Appellant was not entitled to IRI. However, if the Appellant had been able to return to work one day prior to the accident, i.e., on November 26, 1999, MPIC would have paid the Appellant IRI, and the Appellant would not have lost any income as a result of the accident.

Application of Sections 81(1)(2) of the Act

[para6] In its initial decision dated July 26, 2001 (referred to on pages one and two herein), the Commission determined that a full-time earner entitled to IRI included:

- (a) an active employee who, at the time of the accident, was employed and earning salary or wages;
- (b) an inactive employee who, at the time of the accident was on leave of absence and receiving LTD benefits and was not receiving salary or wages.

[para7] MPIC correctly interpreted subsection 2(a) of Manitoba Regulation 39/94 by determining that the Appellant is not entitled to IRI on the basis that she was not receiving salary or wages at the time of accident and, therefore, under the provisions of subsection 2(a) of Manitoba Regulation 39/94, the GYEI of the Applicant was \$0.00.

[para8] Subsection 2(a) of Manitoba Regulation 39/94 applies only to an active employee who is a full-time earner within the meaning of the Act but has no application to an inactive employee who is also a full-time earner within the meaning of the Act.

[para9] Since subsection 2(a) of Manitoba Regulation 39/94

has no application to the calculation of gross income, the Commission is of the view that the Appellant's entitlement to IRI is governed only by Sections 81(1)(2) of the Act.

[para10] Section 81(1)(a) of the Act provides:

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment.

Determination of I.R.I. for full-time earner

81(2) The corporation shall determine the income replacement indemnity for a full-time earner on the following basis:

(a) under clauses (1)(a) and (b), if at the time of the accident

the full-time earner holds an employment as a salaried worker, on the basis of the gross income the full-time earner earned from the employment.

[para11] These provisions entitle the Appellant to IRI if she is unable to continue full-time employment due to the motor vehicle accident. These provisions further provide that MPIC shall determine the IRI on the basis of the gross income that the Appellant earned from the employment.

[para12] In the initial decision regarding the above matter, the Commission stated:

35 In R. v. Meek (1996) 115 Man.R. (2d) 11, Madame Justice Helper states at page 12,

Ultimately, however, the interpretation of s. 70(1) depends upon the words chosen by the legislators in the context of the enactment as a whole.

36 Section 12 of The Interpretation Act, R.S.M. 1987, c.180, states:

Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects.

[para13] These comments apply equally well to Sections 81(1)(2) of the Act as referred to above.

[para14] In its earlier decision, the Commission determined that the Appellant was a full-time earner within the meaning of Section 70(1) of the Act as of the date of the accident. However, in determining the Appellant's gross income for the purpose of calculating IRI, the critical date for determination is not the date of the accident but the date when the Appellant was earning wages as an active employee of [text deleted] immediately prior to the Appellant taking a leave of absence in order to receive LTD benefits.

[para15] Pursuant to Section 81(2)(a) of the Act, MPIC is required to determine the IRI payable to the Appellant on the basis of the gross income the Appellant earned as an employee of [text deleted] prior to being placed on a leave of absence, as an inactive employee, in order to receive long-term disability benefits on January 15, 1998. Once MPIC has determined the amount of the IRI on this basis, then these benefits are to be paid to the Appellant for the period January 15, 2000, to May 23, 2000, together with interest thereon at the prescribed rate.

Application of Subsection 2(d)(vii) of Manitoba
Regulation 39/94

[para16] If the Commission is incorrect in its interpretation that Sections 81(1)(a) and (2)(a) of the Act determines the amount of IRI payable to the applicant, the Commission is of the view that the Appellant is entitled to IRI pursuant to the provisions of subsection 2(d)(vii) of Manitoba Regulation 39/94.

[para17] Legal counsel for MPIC, in his letter to the Commission dated November 28, 2001 (copy attached hereto as Exhibit A), asserts that subsection 2(d)(vii) only includes those benefits which were received by an employee prior to the accident but which, as a result of the accident, the employee is no longer able to receive. As a result, MPIC regards LTD benefits which the Appellant was receiving prior to the accident, and which the accident did not preclude her from collecting or that she did not lose due to the accident, as benefits not coming within the provisions of subsection 2(d)(vii) of the Regulation.

[para18] The term "benefit" is defined in The Dictionary of Canadian Law, Second Edition as:

3. Compensation or an indemnity paid in money, financial assistance or services.

[para19] Webster's New World College Dictionary, Fourth Edition defines "benefit":

3. Fringe benefit.
4. [often pl.] payments made by an insurance company,

public agency, welfare society, etc. as during sickness, retirement, unemployment, etc. or for death.

[para20] As set out in Exhibit A (attached hereto), MPIC has determined upon an application of subsections 2(a) and 2(d)(vii) that the GYEI payable to the Appellant is \$0.00. Subsection 2(d)(vii) of Manitoba Regulation 39/94 provides for inclusion in GYEI of:

(d) Any of the following benefits, to the extent that the benefit is not received as a result of the accident...

(vii) the cash value of any other benefit that the victim received or was entitled to receive, in the 52 weeks before the date of the accident...

[para21] The Appellant was an employee of [text deleted] at the time of the accident and had not been receiving any salary or wages from that employer for quite some time. Instead, for almost two years the Appellant had been a recipient of monthly LTD benefits from [text deleted]. As a result, MPIC determined that subsection 2(d)(vii) has no application to the Appellant's claim for compensation because the Appellant did not lose her LTD benefits due to the accident. These benefits were scheduled for termination on January 14, 2000, approximately six weeks after the accident had occurred.

[para22] As set out in Schedule B (attached hereto), subsection 2(d) provides for the inclusion of certain benefits into the GYEI, such as bonuses, tips, overtime pay, cash value from profit sharing, value of the personal use of a motor vehicle by an employer, the value of the employer's contribution to the pension plan, and commissions.

[para23] As set out in Exhibit A (attached hereto), MPIC has asserted that subsection 2(d)(vii) does not apply because "[A.F.] did not lose her long-term disability benefits due to the accident." Subsection 2(d) does specify that a person is entitled to include in the GYEI any benefit in the above-mentioned list, as long as "the benefit is not received as a result of the accident." It appears that MPIC has determined that benefits covered by subsection 2(d) are employee benefits that an employee would likely receive in the period following the motor vehicle accident, but will not receive due to that accident. MPIC, however, regards the LTD benefits which A.F. was receiving, and which the accident did not preclude her from collecting or that she did not lose due to the accident, as not being a benefit that comes within the provisions of subsection 2(d)(vii) of Manitoba Regulation 39/94.

[para24] The Commission rejects MPIC's interpretation of

subsection 2(d)(vii) for the following reasons:

1. The plain wording of subsection 2(d)(vii) includes LTD benefits. This provision states "the cash value of any other benefit that the victim received or was entitled to receive in the 52 weeks before the accident..." The disability benefits that the Appellant had been receiving are benefits that she received in the 52 weeks before the accident and, therefore, come within the provisions of subsection 2(d)(vii). As well, subsequent to the accident, the Appellant continued to receive the LTD benefits, and this was not a benefit that the Appellant had as a result of the accident. Therefore, in the Commission's view, the LTD benefits come within the plain language of subsection 2(d)(vii) of Manitoba Regulation 39/94.
2. The benefits set out in subsections 2(d)(i) to 2(d)(vi) and subsection 2(d)(viii) are a class of income generally considered to be regular income for an employee which the employee can not collect as a result of a motor vehicle accident. These are employment benefits which an active employee would be receiving prior to the accident such as, for example, bonuses, tips, overtime pay, commissions, etc., but who, as a result of the accident, is not able to work and therefore would lose these benefits.
3. By contrast, the benefits set out in subsection 2(d)(vii) do not provide for specific employment benefits. This provision is non-specific in nature and refers only to the cash value of any other benefit the victim received or was entitled to receive in the 52 weeks before the accident. This provision, therefore, would include a benefit arising out of the employment relationship which an inactive employee was receiving in the 52-week period prior to the accident and which the employee did not lose because of an accident.
4. The Appellant, at the time of the accident, was an inactive employee on a leave of absence who was receiving LTD benefits from the employer's insurer. In the Commission's view, subsection 2(d)(vii) is wide enough to cover the LTD benefits that an inactive employee such as the Appellant:
 - (a) was receiving or was entitled to receive in the 52 weeks before the accident; and
 - (b) was a benefit that the Appellant continued to receive after the accident and did not lose as

a result of the accident.

5. In the Commission's view, subsection 2(d) of Manitoba Regulation 39/94 includes benefits not received by the employee as a result of a motor vehicle accident, as well as those benefits that might be received by an employee due to an accident.

[para25] In *Pineda v. Cooperators Group Ltd.* (1985), 51 O.R. (2d) 787, one of the issues in that case was whether the exclusion clause, providing that the insurer was not liable for the payment of insurance disability benefits when the victim was in receipt of workers' compensation benefits, came into operation. In that case, the victim suffered a disability due to an injury at work from which she had not recovered when she was in a motor vehicle accident and sustained further injuries. At the date of the motor vehicle accident, she was still off work and in receipt of workers' compensation benefits which had been paid for some months.

[para26] Cromarty J. examined the wording of the exclusion clause which excluded a person "who was entitled to receive the benefits of any workers' compensation law or plan" from entitlement to insurance. The court concluded that this section of the exclusion clause meant that insurance benefits were payable if the workers' compensation benefits had been received not as a result of the motor vehicle accident in question, but as a result of some other work related injury.

[para27] Subsection 2(d) of Manitoba Regulation 39/94 is consistent with the reasoning of the Court in *Pineda*, insofar as it provides that one must include in the GYEI, benefits not received as a result of the motor vehicle accident, as distinct from those that might be received due to that accident.

[para28] In conclusion, the Commission determines that MPIC was required to include the cash value of the LTD benefits the Appellant was receiving in the 52 weeks prior to the date of the accident in order to determine the GYEI and to calculate the IRI benefits for the Appellant for the period January 15, 2000, to May 23, 2000, together with interest thereon at the prescribed rate.

Conclusion

[para29] As set out on page six hereof, the Commission has determined that:

[para30] Pursuant to Section 81(2)(a) of the Act, MPIC is required to determine the IRI payable to the Appellant on the basis of the gross income the Appellant earned as an employee of [text deleted] prior to being placed on a leave of absence, as an inactive employee, in order to receive long-term

disability benefits on January 15, 1998. Once MPIC has determined the amount of the IRI on this basis, then these benefits are to be paid to the Appellant for the period January 15, 2000, to May 23, 2000, together with interest thereon at the prescribed rate.

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Exhibit A

Automobile Injury Compensation
Appeal Commission
1720 - 330 Portage Avenue
Winnipeg, MB R3C 0C4

Dear Sirs:

RE: The Appeal of A.F.
MPIC File No. 00-290
Your File No. AC-00-144-FF

We write to advise the Commission of the difficulty we encounter in calculating an IRI for A.F..

The Commission ruled that A.F. was a "full-time earner" at the time of her 27 November 1999 accident because notwithstanding she was receiving long-term disability benefits from [text deleted] she nevertheless remained an employee of [text deleted].

The Commission accordingly directed MPIC to calculate and pay an IRI to A.F. from 15 January to 23 May 2000, plus accrued interest.

To determine the level of IRI, MPIC must first calculate the appropriate GYEI in accordance with Manitoba Regulation 39/94.

Section 2 sets out what sums apply to calculate GYEI for A.F. Of that, Subsections 2(a) and 2(d)(vii) are relevant.

Subsection 2(a) is zero. Though the Commission ruled that A.F. was an employee of [text deleted] at the time of the accident, she was not receiving any salary or wages from that employer and had not for quite some time. Instead, for almost two years she had been the recipient of monthly long-term disability benefits from [text deleted]. Subsection 2(d)(vii) does not apply either because A.F. did not lose her long-term disability benefits due to the accident; those benefits were scheduled for termination in any event.

Having said this, the problem is now obvious. Without a GYEI we are unable to calculate any IRI for A.F.. At this juncture, we are left to conclude that A.F. has a zero

IRI.

We thought it best for all concerned that this result be communicated to the Commission as it did retain jurisdiction over the final resolution of the IRI issue. Having now set out the problem, it is hoped that the Commission can provide its thoughts and direction for the conclusion of this matter.

* * * * *

Exhibit B

Section 81(1) of the Act states:

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment.

Determination of I.R.I. for full-time earner

81(2) The corporation shall determine the income replacement indemnity for a full-time earner on the following basis:

(a) under clauses (1)(a) and (b), if at the time of the accident

(i) the full-time earner holds an employment as a salaried worker, on the basis of the gross income the full-time earner earned from the employment.

Section 70 of the Act states inter alia:

Definitions

70(1) In this Part,

"full-time earner" means a victim who, at the time of the accident, holds a regular employment on a full-time basis, but does not include a minor or student;

"employment" means any remunerative occupation;

Section 8 of Manitoba Regulation 37/94 states:

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the

victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Manitoba Regulation 39/94 provides the following definition of GYEI:

Definition of GYEI

1 In this regulation, "gross yearly employment income" has the same meaning that "gross income" has in Part 2 of the Act.

GYEI not derived from self-employment

2 Subject to this regulation, a victim's gross yearly employment income not derived from self-employment at the time of the accident is the sum of the following amounts:

(a) in the case of a full-time earner, the salary or wages received or receivable for the pay period in which the accident occurred, divided by the number of weeks in the pay period and then multiplied by 52;

(d) any of the following benefits, to the extent that the benefit is not received as a result of the accident:

(i) a bonus received or earned in the 52 weeks before the date of the accident

(ii) tips, in the amount that is the greater of

(A) the amount reported in the victim's personal income tax return for the calendar year before the year in which the accident occurred, and

(B) the amount reported in the victim's personal income tax return for the calendar year in which the accident occurred;

(iii) remuneration for overtime hours that is not included in clause (a) and that is received or earned in the 52 weeks before the date of the accident,

(iv) the cash value from a profit-sharing plan allocation received or earned in the 52 weeks before the date of accident,

(v) the value of the personal use of a motor vehicle provided by an employer at the time of the accident, in the amount reported in the victim's personal income tax return for the calendar year

before the year in which the accident occurred or, where no such amount was reported, in an amount calculated under clause 6(1)(a) (income from employment) of the Income Tax Act (Canada) as an annualized benefit,

(vi) the value of the employer's contribution to the victim's pension plan, if lost because of the accident,

(vii) the cash value of any other benefit that the victim received, or was entitled receive, in the 52 weeks before the date of the accident;

(e) the commissions that the victim had earned, or to which he or she was entitled,

(i) in the 52 weeks before the date of the accident.

(ii) in the calendar year before the date of the accident, or

(iii) in the three calendar years before the date of the accident, divided by three, whichever amount is the greatest.

(underlining added)

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