

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by B.S.
AICAC File No.: AC-02-07**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Yvonne Tavares
Mr. Antoine Fréchette

APPEARANCES: The Appellant, B.S., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Mark O'Neill.

HEARING DATE: May 29, 2002

ISSUE(S): Entitlement to Personal Injury Protection Plan ('PIPP')
benefits, including Income Replacement Indemnity ('IRI')
benefits.

RELEVANT SECTIONS: Sections 83(1), 84(1), 84(3), 112(2), 163 and 197.1 of The
Manitoba Public Insurance Corporation Act (the 'MPIC
Act') and Sections 2, 5 and 6 of Manitoba Regulation 39/94

**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

On October 25, 2000, the Appellant, B.S., was cycling to work when he was involved in a motor vehicle accident. At approximately 6:40 a.m., the Appellant was stopped at a Stop sign at [Text deleted] when his bicycle was struck by a motor vehicle. As a result of the accident, the Appellant suffered injuries to his cervical and thoracic spine, was bruised all over and injured his right knee.

The Appellant has complained to this Commission that MPIC unjustifiably and unreasonably:

1. consistently ignored the Appellant's legitimate complaints that the motor vehicle accident caused the injuries which prevented him from returning to work on November 29, 2000;
2. ignored several medical reports from the Appellant's treating physician and from a medical specialist that, on the balance of probabilities, there was a causal connection between the motor vehicle accident and the pneumonia that prevented the Appellant from returning to work. The Appellant asserted that MPIC unconscionably delayed recognizing the claim for a period of approximately 17 months before they reversed their position and accepted his claim that the motor vehicle accident caused the pneumonia and provided him with IRI benefits for the period November 29, 2000, to December 22, 2000. The Appellant asserts that the manner in which MPIC dealt with his claim caused him undue stress and adversely affected his emotional well-being.

The Appellant missed work from November 29, 2000, to December 22, 2000, due to bronchial pneumonia and applied to MPIC to receive IRI benefits for this period of time. On July 10, 2001, the case manager rejected the Appellant's request for IRI on the advice of Dr. Fougere, MPIC's medical consultant. Dr. Fougere, in two reports to MPIC, dated May 15, 2001, and June 29, 2001, concluded there was no causal connection between the motor vehicle accident and the bronchial pneumonia.

In arriving at her opinion, Dr. Fougere considered the following medical reports:

1. Dr. Toth, the Appellant's treating chiropractor, provided an Initial Health Care Report to MPIC, dated October 27, 2000, which indicated the Appellant's symptoms of "mid back dull constant ache with reduced movement"; objective signs of "numerous bruising on torso" and diagnosis of bruising. [underlining added] This report was received by MPIC on November 8, 2000.

2. On November 27, 2000, Dr. Toth provided a Treatment Plan Report to MPIC which indicates Signs as “bruises resolving well” and Risk factor for chronic pain or delayed recovery lists “pneumonia.” [*underlining added*] This report was received by MPIC on January 10, 2001.
3. Dr. Roy W. Smith, the Appellant’s treating physician, provided a report to MPIC dated January 4, 2001, in respect of the examination of the Appellant dated October 31, 2000. In this report, Dr. Smith’s diagnosis was “mild strains cervical, thoracic and lumbar spine.” This report was received by MPIC on January 16, 2001.
4. In a report dated February 3, 2001, Dr. Toth’s report notes under *objective signs* “bruising has resolved.” This report was received by MPIC on March 6, 2001.
5. On February 13, 2001, Dr. Smith provided a report to MPIC in response to its request as to whether the Appellant’s loss of time from work was related to the motor vehicle accident. Dr. Smith states that the Appellant attended his office on November 21, 2000, complaining of a bad cough since the time of the motor vehicle accident and was diagnosed with bronchitis. Dr. Smith stated that it was quite possible that the injuries the Appellant sustained in the accident caused the bronchitis.
6. Dr. Smith’s report dated February 27, 2001, was provided by the Appellant’s legal counsel to MPIC on April 23, 2001, and stated:

October 25, 2000 B.S. was in a motor vehicle accident. While he was cycling he was hit by a car. With the impact he did sustain injuries to his cervical and thoracic spine and was bruised all over and he also injured his right knee. Within a few days of the accident he developed a cough. When I saw the patient November 21, 2000 regarding his cough he stated that his first onset of fever was 1 week after the accident and that since November 7, 200 he had had hemoptysis. He was initially treated with Erythromycin but when this failed to clear his chest infection, he was then treated with Moxifloxacin. He missed work November 21, 2000 till December 17, 200 due to his broncho-pneumonia.

I am writing this letter because it is my opinion that the chest infection occurred as a result of the motor vehicle accident. It is well known that

people who are injured and are not breathing deeply are at significantly higher risk of developing chest infections and this seemed to have been the case with B.S.. Because of this I feel his absence from work from October 25, 2000, the date of the accident, until December 17, 2000 is all due to the motor vehicle accident. [*underlining added*]

The case manager referred this medical report to Dr. G. Fougere, MPIC's medical consultant, who received this report on April 26, 2001.

On May 15, 2001, Dr. Fougere advised MPIC that, in her view, there is no documentation on file that indicates the claimant was in a respiratory distress as a result of the motor vehicle accident and concluded there was no causal relationship established between the Appellant's broncho-pneumonia and the bicycle-motor vehicle accident.

Additional documentation was further provided by the Appellant to the case manager at MPIC who forwarded this information to Dr. Fougere on or about June 12, 2001. In an interdepartmental memorandum from Dr. Fougere to the case manger, dated June 29, 2001, Dr. Fougere indicated that the attending physician had not documented any reported chest pain and that absent from this report were any respiratory complaints, such as shortness of breath, painful breathing, cough. In addition, Dr. Fougere reported that the emergency room report does not support that there was respiratory system injuries as a result of the motor vehicle accident.

Dr. Fougere, therefore, confirmed her initial opinion that, in her view, there was not a causal relationship existing in the bicycle-motor vehicle accident and the onset of a respiratory infection approximately one week later.

On July 10, 2001, the case manager wrote to the Appellant, advising him that he had now had an opportunity to review the Appellant's request for a reassessment of his claim as a result of correspondence from the Appellant's legal counsel. The case manager informed the Appellant that the medical information on file was reviewed by the Health Care Services Team and, based on this information, a causal relationship between the onset of broncho-pneumonia and the bicycle-motor vehicle accident in which the Appellant was involved could not be established. As a result, the Appellant's request for IRI was denied.

The Appellant made application for review of the case manager's decision dated July 10, 2001, to deny IRI.

At the request of Dr. Smith, the Appellant was seen by Dr. Vincent Taraska, a specialist who is a member of the Winnipeg Clinic Respiratory Medicine and Bronchoscopy Department. On October 4, 2001, Dr. Taraska wrote to Dr. Smith and stated as follows:

I think that this is a case in which there is some benefit of a doubt. Given that he had injuries to the back, neck and shoulder as well as the knee, and this was duly noted by the chiropractor, I shall be writing the Manitoba Public Insurance Commission to suggest that they reconsider the matter given the close proximity of the pulmonary infection to the motor vehicle accident and the fact that there were chest, neck and shoulder injuries as one would suspect from the type of accident which had occurred, and there was a close temporal proximity to the respiratory infection to the motor vehicle accident. He is otherwise a very healthy gentleman and has not been prone to any pulmonary infections. [*underlining added*]

On October 26, 2001, Dr. Taraska's report was provided by the Internal Review Officer to Dr. Fougere, MPIC's medical consultant, with a request that she review Dr. Taraska's medical report and advise whether or not the report warrants a change of position by MPIC on the issue of IRI. On November 6, 2001, the Internal Review Officer provided a memorandum to Dr. Fougere

wherein he indicated that he had met with the Appellant on November 5, 2001, and was provided by the Appellant with an extensive narrative report of the manner in which the Appellant was injured in the motor vehicle accident and the medical complaints that he had shortly after the accident took place.

On November 5, 2001, Dr. Fougere provided an inter-departmental memorandum to the Internal Review Officer. In her report to the Internal Review Officer, Dr. Fougere stated that the Appellant's complaints in respect of coughing and trouble breathing within two days following the motor vehicle accident were not documented by Dr. Smith when the Appellant visited Dr. Smith on October 31, 2001. Accordingly, Dr. Fougere rejected Dr. Taraska's medical opinion and confirmed her original opinion that there was no causal connection between the onset of broncho-pneumonia and the bicycle-motor vehicle accident.

On November 16, 2001, the Internal Review Officer, based on Dr. Fougere's medical opinion, rejected the Application for Review and confirmed the case manager's decision to deny IRI benefits.

On or about December 10, 2001, the case manager received a report from Dr. John Toth, who was the Appellant's chiropractor subsequent to the motor vehicle accident. In addition, MPIC received a further medical report from Dr. Taraska dated December 10, 2001.

The report from the chiropractor, Dr. Toth, had attached to it a standard checklist of symptoms entitled "Nature of Complaints and Past History." This latter report was completed and signed by the Appellant and is dated October 27, 2000 (two days after the motor vehicle accident

occurred). Under “chest symptoms”, the Appellant indicated that he was experiencing deep chest pain, pain around the ribs, and shortness of breath.

Dr. Taraska, in his report dated December 10, 2001, stated:

He now feels well but was seeking some compensation for the lost wages due to the pneumonia which he attributes to the motor vehicle accident . He is generally in good health. His only underlying problem is exercise induced asthma. However, this was mild and he was not on any bronchodilators or inhaled corticosteroids for some period of time. The close temporal relationship of the pneumonia to the accident in an otherwise healthy person suggests a causal relationship although it is difficult to be absolute about this and therefore I think some consideration should be given to this request.

The Appellant filed a Notice of Appeal on February 11, 2002, appealing the decision of the Internal Review Officer dated November 16, 2001.

Unfortunately, the case manager did not refer Dr. Toth’s December 10, 2001, narrative report and Dr. Taraska’s report dated December 7, 2001, to Dr. Fougere until March 21, 2002. MPIC did not provide any explanation as to why the case manager delayed providing Dr. Fougere with these two important reports.

Upon receipt of these reports, Dr. Fougere immediately provided an inter-departmental memorandum to the case manager and stated:

This report has not been seen previously by this writer, and apparently was not included with the chiropractor’s submissions to file immediately following the episode of October 25, 2000. This recent submission alters my opinion with regards to whether the claimant’s onset of bronchopneumonia could be causally related to the bicycle-motor vehicle collision. When initially asked to address the question of causality, in my May 15, 2001 report, I indicated that in order to consider that a causal relationship existed, evidence was required indicating respiratory distress such as chest pain, cough or shortness of breath. This comment is contained on page 3 of my May 15, 2001 report. I concluded my report by requesting further documentation that might indicate that the claimant

demonstrated respiratory system dysfunction immediately following the October 25, 2000 episode. In the recently submitted narrative report of the same day (December 10, 2001), the chiropractor provided an expanded list of symptom complaints that I did not previously note in his initial Health Care Report of October 27, 2000. These symptoms included pain around the ribs and shortness of breath. [*underlining added*]

Dr. Fougere concluded her report by stating:

OPINION

Based on the documentation submitted by Dr. Toth dated December 10, 2001 which included the October 27, 2000 symptom complaint sheet, this writer's opinion is altered with regards to whether a causal relationship exists between the claimant's onset of bronchopneumonia and the motor vehicle collision. It would be reasonable to presume, on the balance of probabilities, that the claimant's onset of pneumonia was a result of injuries sustained to the chest/thoracic region on October 25, 2001.

On receipt of this report, the case manager wrote to the Appellant and advised him that as a result of a medical review which was conducted by Dr. Fougere on March 21, 2002, MPIC has determined that based on the balance of probabilities, the Appellant's onset of pneumonia was a result of the injuries sustained in the chest thoracic region as a result of the October 25, 2000, motor vehicle accident. As a result of the medical reconsideration, MPIC agreed to provide IRI to the Appellant for all loss of work that the Appellant has sustained between November 29, 2000, and December 22, 2000, as a result of the motor vehicle accident.

It should be noted that MPIC did not accept that there was a causal connection between the motor vehicle accident and the Appellant's onset of pneumonia until March 21, 2002, which was a period of 17 months after the motor vehicle accident had occurred.

Dr. Fougere, in her report dated May 15, 2001, indicates that in order to consider that a causal relationship existed, evidence is required indicating respiratory distress. However, Dr. Toth, in

his report dated October 27, 2000, did list pneumonia as a risk factor to recovery. He also lists a dull mid-back ache which is in an area where the Appellant's lungs are located.

On November 6, 2001, the Internal Review Officer provided an inter-departmental memorandum to Dr. Fougere and stated:

I met with B.S. for his Internal Review Hearing on November 5, 2001. He outlined the following circumstances, none of which I have any particular reason to doubt. It is possible some of them may have an effect on the assessment I requested and so I thought I should bring them to your attention.

B.S. was a cyclist. An automobile travelling at some speed collided with his left side and the left side of his bike. He went over his handlebars and landed with his left side and back on the hood of the car. His head made contact with the windshield. (Fortunately, he was wearing a helmet.) The accident happened on October 25, 2000. He attended an Emergency Room which he describes as being full of people suffering from respiratory infections such as the flu. He suffered bruising to his upper body. By October 27th (i.e. two days following the accident), he had the symptoms of a bad cold with coughing and trouble breathing. By October 31st, he was having trouble sleeping. He was cold all the time, dizzy, and weak. He had a cough producing thick, yellow mucous. He had what he describes as an "olive-coloured" bowel movement on that day and was sufficiently worried to go to his doctor on October 31st. Curiously, the M.D. did not make any notes regarding the "cold" symptoms. Evidently, he was more concerned about the after-effects of the trauma that B.S. had suffered in the automobile accident. You will have noticed, however, that the chiropractor was referring to pneumonia in his treatment plan report based on his examination of October 27, 2000. In November, B.S. was coughing up blood and his condition was becoming progressively worse. He mentioned to his chiropractor that it hurt when he coughed, and the chiropractor suggested he go to his M.D. It was at that point that pneumonia was confirmed.

B.S. insists that he had no symptoms of a cold or flu immediately before this automobile accident. Furthermore, he insists that he was in peak physical condition. As an example, he competed in the Muddy Waters 100 on August 13, 2000, riding 164.3 kilometres in 4 hours and 49 minutes. [*underlining added*]

The Appellant had written a letter to MPIC dated August 30, 2001, setting out his comments, in a diary form, in respect of the events that occurred relating to his motor vehicle accident, including the following statements:

It is my understanding that a “causal relationship” between the onset of broncho-pneumonia and the accident could not be established because I had not made it known that I had a problem....

October 25, 2000. Concordia Hospital – Emergency Report Form. Please note that the time of treatment is 07:46, this is approximately one hour post accident. It is widely known that **not** all symptoms of injuries would be apparent in such a short time. For example, no staff at the hospital noted any bruising on my body anywhere. The bruising appeared within a few days of the accident. A Urinalysis was done due to the sudden frequent urination that I experienced while I was at the hospital.

October 27, 2000. Claim #8401503 (my statement). Please note that I indicate: “Symptoms started of bad cold”. This includes coughing and some trouble breathing due to back pain and a heavy or restrictive feeling in the chest.

October 27, 2000. River Park South Chiropractic – Initial Health Care Report. Please note that among the varied injuries, **bruising** is noted. Given the force of the accident, if external bruising is evident, then internal bruising is possible. Dr. Toth noted pneumonia as one of the Risk Factors for Chronic Pain or delayed Recovery. This was due to the cough that I had developed post accident.

In an inter-departmental memorandum dated November 9, 2001, the Internal Review Officer provided Dr. Fougere with the Appellant’s entire diary of events, dated August 30, 2001.

In her medical report dated November 9, 2001, Dr. Fougere notes that the Appellant’s symptoms two days following the motor vehicle accident were consistent with a respiratory tract infection. However, despite the Appellant’s symptoms of coughing and troubled breathing, Dr. Fougere concludes that there was no causal relationship because there is no note of these symptoms in Dr. Smith’s reports. In arriving at this conclusion, Dr. Fougere discounts:

1. the consistent complaints of the Appellant;
2. the medical opinions of the treating physician, Dr. Smith, in his reports dated February 13, 2001, and February 27, 2001, where he indicates that there is a probable connection between the motor vehicle accident and the onset of pneumonia; and

3. the medical report dated October 4, 2000, from Dr. Taraska, a specialist in respiratory medicine and bronchoscopy, who states that on the balance of probabilities there is a causal connection between pneumonia and the motor vehicle accident.

Dr. Fougere finally altered her opinion as to the causal connection between the motor vehicle accident and the Appellant's pneumonia based on Dr. Toth's symptom complaint sheet dated October 27, 2000, which was included in the documentation dated December 10, 2001, which was provided to her by MPIC on March 21, 2002. However, it should be noted that the only piece of information that was not available to Dr. Fougere prior to her receipt of Dr. Toth's symptom complaint sheet on March 21, 2002, was the reference of the symptom of "shortness of breath" as noted by Dr. Toth in his report of December 10, 2001.

Therefore, it appears that there was sufficient information for MPIC to have determined that, on the balance of probabilities, there was a causal connection between the motor vehicle accident and the onset of the Appellant's pneumonia at a time much earlier than March 21, 2002.

In addition, MPIC has provided no explanation of why Dr. Toth's report dated December 10, 2001, which included the October 27, 2000, symptom complaint sheet, and which was received by MPIC's case manager on December 14, 2001, was not provided to Dr. Fougere, together with Dr. Taraska's report dated December 10, 2001, until March 21, 2002 – a delay of more than three months.

The Commission determines that MPIC did not deal in a timely fashion in recognizing the legitimacy of the Appellant's claim that, as a result of the motor vehicle accident, he sustained

injuries which caused him to suffer from pneumonia and prevented him from returning to work on November 29, 2000.

Notwithstanding MPIC's reconsideration which resulted in the payment of IRI benefits to the Appellant for the period November 29, 2000, to December 22, 2000, the Appellant had a number of other issues relating to IRI benefits which were not resolved by the reconsideration, and the Appellant appealed these issues to the Commission.

Appeal Hearing

The appeal hearing in this matter took place on May 29, 2002. The Appellant appeared on his own behalf. Legal counsel represented MPIC. The issues under appeal were:

1. Entitlement to IRI benefits for December 27, 28 and 29, 2000.
2. Was the calculation of IRI benefits correct?
3. Entitlement to interest for the IRI received for the period from November 29, 2000, to December 22, 2000.

Decision

1. Denial of IRI for December 27, 28 and 29, 2000

The Appellant asserted that had it not been for the injuries sustained in the motor vehicle accident, he would have been able to bank time by working overtime if it had been offered to him by his employer. The Appellant further submitted that, as a result of the injuries he sustained in the motor vehicle accident, he was unable to accumulate banked time which would have enabled him to receive pay for December 27, 28 and 29, 2000, when the employer's premises were closed for Christmas vacation. The Internal Review Officer rejected this claim on the following grounds:

In determining the amount of your gross yearly employment income, the amount of your salary was annualized over a 12 month period. However, the amount of an individual's overtime, while it is included in the gross yearly employer income, is not annualized in accordance with Section 2(d)(iii) of Manitoba Regulation 39/94 which states:

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:

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

(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.

In arriving at your revised GYEI Ms. Pearson took into account the overtime taken in the previous 52 weeks which was \$2,855.25. The legislation does not permit the overtime to be annualized as you have suggested.

As Mr. Koroscil points out in his memo of April 11, 2002:

“The claimant's GYEI is based on a full year's salary. The fact that the claimant could have worked one day and taken another off does not affect the annual GYEI. The claimant was capable of returning to work on December 22, 2000. Therefore, entitlements end on that day.”

In my view Mr. Koroscil has adequately addressed the issue surrounding your claim for the three days of bank time in his memo of April 11, 2002. Therefore I am upholding Ms. Pearson's decision that you are not entitled to IRI for these three days.

Prior to the hearing, pursuant to Subsection 183(4) of the MPIC Act, the Commission staff contacted [Text deleted], the Appellant's employer at the time of the motor vehicle accident and obtained the following information from [Text deleted], which information was communicated to both the Appellant and to Mr. O'Neill:

Staff could accumulate time in 2 ways: they could bank overtime worked during the year (overtime is calculated as time and one half of hours worked); they could also work some Saturdays in November and December to accumulate time (straight time not overtime) to use during the closure dates. B.S. was eligible for both. Some Saturdays in November and December are usually designated for staff to allow them to accumulate straight time (not overtime). [Text deleted] stated that for the year 2000, the following dates would have been designated: November 18, 25, December 2, 9.

In addition to this, in the year 2000, Remembrance Day fell on a weekend. Instead of taking the Friday or Monday off, this day was “banked” at regular hours for use during the closure.

Note: employees are not eligible to work overtime for the first 90 days of employment however they are given the opportunity to work extra days at straight time to bank time for the closure period.

This information established that the employer permitted employees, including the Appellant, to work additional eight-hour shifts on three of the following four days—November 18, 25, December 2 and 9, 2000—on a voluntary basis. The employees who volunteered to work these three extra eight-hours shifts were paid at their regular rate of pay, and not at the overtime rate of pay.

The Appellant has appealed a denial by MPIC to provide him with IRI benefits in the total amount of 24 hours in respect of three eight-hour shifts that he was unable to work. At the appeal hearing, information was received by the Commission that the Appellant worked 3.5 hours on November 18 and was unable to work the balance of that shift in the total amount of 4.5 hours. In addition, the Appellant did not work on either November 25, December 2 or December 9, 2000.

The Commission finds that the Appellant was unable to work on the balance of the shift on November 18 in the amount of 4.5 hours and, as well, was unable to work two further eight-hour shifts on either November 25, December 2 or 9, 2000, due to the injuries he sustained in the motor vehicle accident in question. If the Appellant was able to work on the balance of his shift on November 18, as well as two out of the other three days (November 25, December 2, or December 9, 2000), he would have received his regular rate of pay for all hours he could have worked, and he would not have received pay at the overtime rate. The Commission concludes

that the loss of pay in question is not a loss of pay for overtime work for which the Appellant would have received overtime pay, and therefore, his entitlement to IRI is not excluded by Section 2(d)(iii) of Manitoba Regulation 39/94.

The Commission, therefore, determines that the Appellant is entitled to IRI benefits in the total amount of 20.5 hours, computed as follows:

i) the balance of the shift of November 18, 2000:	4.5 hours
ii) two eight-hour shifts on either November 25, December 2 or 9, 2000:	<u>16.0</u> hours
Total	20.5 hours

2. Revised calculation of IRI entitlement of April 12, 2002.

The case manager was requested by the Appellant to reconsider the amount of IRI paid to him for the first 180 days after the motor vehicle accident. As a result of the reconsideration, the Appellant's bi-weekly IRI payment of \$1,083.69 was reduced to \$1,042.89. The reason for the revised calculation was two-fold.

(i) Overtime Pay

The original calculation had annualized the overtime benefit in the amount of \$3,485.51. Section 2(d)(iii) of Manitoba Regulation 39/94 does not provide for annualized overtime and, as a result, MPIC correctly reduced the overtime benefits payable to the Appellant. Accordingly, the Commission dismisses the Appellant's appeal in respect of this matter and confirms the decision of the Internal Review Officer.

(ii) Vacation Pay

The initial calculation in respect of IRI also included the 4% vacation pay of \$1,497.60 annually. Section 2 of Manitoba Regulation 39/94 does not provide for the inclusion of vacation pay in determining the Gross Yearly Employment Income ('GYEI') of an employee upon which the IRI benefits are determined. The Internal Review Officer, in his decision, stated: "*Eliminating the*

4% vacation pay from your GYEI as it was confirmed by your employer that “the vacation credit is an accrual basis”.”

The Commission, therefore, determines that the revised calculation by MPIC in respect of eliminating the 4% vacation pay from the Appellant’s GYEI was correct and, as a result, rejects the Appellant’s appeal in respect of this issue and confirms the decision of the Internal Review Officer.

3. IRI calculations based on the 1999 tax year.

The Appellant complained that the revised IRI calculations were based on the 1999 tax year. The Internal Review Officer found that the calculation of the GYEI was based on the income the Appellant was earning at the time of the accident. The Commission has determined that the IRI for the first 180-day calculation was based on the Appellant’s hourly rate, together with his actual overtime pay. As well, all deductions were based on the previous tax year (1999) as prescribed in Section 112 of the MPIC Act which states:

Date applicable for computation

112(2) The Acts mentioned in subsection (1) apply as they are on December 31 of the year before the year for which the corporation determines the net income under this Division.

The Commission is satisfied that the revised IRI calculations and deductions were properly made by MPIC and, as a result, dismisses the appeal in this respect and confirms the decision of the Internal Review Officer.

In respect of the case manager’s decisions (March 12, 2002, and April 15, 2002) relating to whether overtime was included in the calculation, the Internal Review Officer stated that the calculation of IRI (\$1,203.93 bi-weekly) was based upon the highest earning of the last five

years ([Text deleted] , between January 1, 1999, to November 24, 1999). The resulting GYEI of \$47,838.43 would have included both the overtime worked in that time as well as an indexation factor for the year 2000.

The Commission finds that MPIC has correctly included all overtime in accordance with subsections 5(2) and 6 of Manitoba Regulation 39/94. As a result, the Commission confirms the decision of the Internal Review Officer and dismisses the appeal of the Appellant in respect of this matter.

4. Pension plan contribution loss

Employment Period Prior to December 28, 2000

The case manager, in her decision dated March 12, 2002, in dealing with the 180-day determination, rejected the Appellant's request that there was a loss to the Appellant's pension plan in his employment with [Text deleted] prior to December 28, 2000. The Appellant submitted that, as a result of his failure to work, he was unable to make a contribution to the pension plan and, therefore, there was a loss of the employer's contribution at the same time. Pursuant to Section 183(4) of the Act, a Commission staff officer obtained the following information from [Text deleted] of [Text deleted], which information was provided to both the Appellant and legal counsel for MPIC, in a letter dated May 28, 2002.

[Text deleted] was interviewed by a Commission staff officer in respect to the pension plan, and a summary of the information she provided is as follows:

Is there a company pension plan?

Yes, there is. The employer contributes 2% of regular earnings per pay period provided that the employee contributes a minimum of 2%. Employees become eligible for the pension plan after one year of service. It is a voluntary plan. The Appellant became a member of the plan starting in the pay period ending December 29, 2000. The Employer's Verification of Earnings form was

completed on December 21, 2000. The form shows that no pension contribution was lost because the Appellant was not a member at the time it was completed. Contributions were made by the employee through automatic payroll deduction. The employer matched the employee's contribution for all regular earnings from the time the employee joined the plan.

Since the Appellant became a member of the pension plan, starting with the pay period ending December 29, 2000, the employer was not required to make any pension contributions on behalf of the Appellant prior to that date. As a result, for the period that the Appellant was not working, due to the injuries sustained in the motor vehicle accident, he was never a member of the employee pension plan, and the employer was never required, during that period of time, to make a contribution to the pension plan on behalf of the Appellant. As a result, the Appellant has not established that he suffered a loss in respect of his employer's contribution to the pension plan. The Commission confirms the decision of the Internal Review Officer and dismisses the appeal of the Appellant in respect of this matter.

Employment Period post-September 5, 2001

The Appellant also submitted that the case manager erred in her decision dated April 15, 2002, in failing to include the value of the employer's contribution to the Appellant's pension plan, which the Appellant lost because of the accident, in the calculation of the GYEI of the Appellant from September 5, 2001.

Section 2(d)(vi) of Manitoba Regulation 39/94 states:

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:

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

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

An examination of the decisions of the Internal Review Officer indicates that the Appellant's submission in this respect was not addressed by the Internal Review Officer. The Commission is of the view that MPIC should be given the opportunity to address this issue.

The Commission, therefore, refers this matter to the case manager for a determination of whether the value of the employer's contribution to the Appellant's pension plan should be included in the GYEI of the Appellant for the period commencing September 5, 2001.

The Commission further requests that, having regard to the substantial delays that have occurred in the manner in which MPIC has dealt with the Appellant's requests in the past, MPIC undertake to expedite the above-mentioned calculation as quickly as this can reasonably be done.

5. Entitlement to interest for IRI received for the period November 29, 2000, to December 22, 2000.

The Appellant has requested payment of interest for IRI for the period November 29, 2000, to December 22, 2000. The Internal Review Officer, in his decision dated May 17, 2002, states:

The decision to pay you IRI for these days was made by Ms. Pearson in a new decision on March 22, 2002 which was one day after the medical review of your file was completed by the MPI Medical Services Department. Strictly speaking there would be no interest payable on this sum as this decision was made by the Case Manager based upon new information just received. Sections 163 and 197.1 of the Act provide for the payment of interest in the following limited circumstances, neither of which are applicable to your claim for interest;

Successful applicant is entitled to interest

163 Where a person's application for a review or appeal is successful, the corporation shall pay interest to the person on any indemnity or expense to which the person is found to have been entitled before the review or appeal, at the prejudgment rate of interest determined under section 79 of The Court of Queen's

Bench Act, computed from the day on which the person was entitled to the indemnity or expense.

Interest where benefit not paid within 30 days after entitlement established

197.1 Where the corporation fails to pay an indemnity, a retirement income or an expense to a person entitled to compensation under this Part within 30 days after the day on which the person's entitlement to the benefit is determined, the corporation shall pay to the person interest on the amount of the indemnity or expense at the prejudgement rate of interest prescribed under section 79 of *The Court of Queen's Bench Act*, computed from the day on which the person became entitled to the benefit.

The decision by MPIC to pay the Appellant IRI is based on a new decision by the case manager on March 22, 2002. MPIC received additional medical information from Dr. Taraska and Dr. Toth, and after reviewing these reports, the case manager rendered a new decision on March 22, 2002. The Appellant's success in obtaining a reconsideration of the case manager's decision which resulted in the payment of IRI benefits was not the result of a successful Application for Review before an Internal Review Officer or a successful appeal before this Commission. Accordingly, under Section 163 of the Act, the Appellant is not entitled to interest.

In addition, the evidence before the Commission was that the Appellant received his IRI payment within 30 days from March 22, 2002, being the date it was determined he was entitled to such a benefit and, as a result, Section 197.1 of the Act has no application.

In conclusion, the Commission finds:

1. that the Appellant is entitled to receive IRI benefits for the total amount of 20.5 hours, together with interest to the date of payment;

2. that the calculation of the Appellant's GYEI for the period commencing September 5, 2001, be referred to the case manager for a determination of whether the value of the employer's contribution to the Appellant's pension plan should be included in the GYEI of the Appellant.

The Commission retains jurisdiction in this matter, and if the parties are unable to agree as to the amount of Income Replacement Indemnity benefits, then either party may refer this dispute back to this Commission for final determination.

In addition, if there is undue delay by MPIC in dealing with this matter, the Appellant may request the Commission, on reasonable notice, to reconvene the hearing to hear and determine this issue.

3. the other issues raised in this appeal by the Appellant are hereby dismissed; and
4. the decision of MPIC's Internal Review Officer, bearing date May 17, 2002, as amended by paragraphs 1 and 2 hereof, is hereby confirmed.

Dated at Winnipeg this 16th day of August, 2002.

MEL MYERS, Q.C.

YVONNE TAVARES

ANTOINE FRÉCHETTE

[Ed. note: The note "[Text deleted]" indicates the removal of information which may identify individuals.]