

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by D. L. D.
AICAC File No.: AC-02-86**

PANEL: Ms. Yvonne Tavares, Chairperson
Mr. Wilson MacLennan
Ms. Barbara Miller

APPEARANCES: The Appellant, D. L. D., appeared on her own behalf, assisted by her husband, B. D.; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

HEARING DATE: February 12, 2003

ISSUE(S): Calculation of Income Replacement Indemnity Benefits

RELEVANT SECTIONS: Sections 70(1) and 83 of The Manitoba Public Insurance Corporation Act (the 'MPIC Act'), Section 5 of Manitoba Regulation 37/94, Sections 3, 5 and Schedule C 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

The Appellant was involved in a motor vehicle accident on March 19, 2002. At the time of the accident, the Appellant was a self-employed esthetician. She was in receipt of ongoing income replacement indemnity ("IRI") benefits from MPIC arising from a previous motor vehicle accident on December 15, 1998. She was working to the extent she was able, and her wages were being supplemented with IRI benefits from MPIC. As a result of the injuries which the Appellant sustained in the motor vehicle accident of March 19, 2002, she has been unable to return to work in any capacity.

The motor vehicle accident of March 19, 2002, resulted in a new determination of the Appellant's entitlement to IRI benefits. In a letter dated May 8, 2002, the case manager wrote to the Appellant to advise her that:

As per Regulation 39/94, Schedule C, [D. L. D.], you are now classified as a Level 2 Esthetician within the "Barbers, Hairdressers, and Related Occupations". The prescribed 2002 annual income for a Level 2 Esthetician equals \$19,726.00. It is reasonable for Manitoba Public Insurance to assume that you would have been working full time if were not for the accident. Therefore, you would have been in an occupation for over 3 years on a full time basis if it were not for the first accident.

The Appellant sought an internal review of that decision. In a decision dated July 5, 2002, the Internal Review Officer determined that:

Unfortunately, an error was made when your Case Manager advised that you would be classified as a Level 2 Esthetician. To qualify for that classification you must have been working full-time in that occupation for 3 years. You were able to work full-time for 3 ½ months prior to your first accident but you have not worked full-time since December 15, 1998. The IRI Calculator said that in 1999 you worked 594 hours, in 2000, 304.5 hours and in 2001, 248.5 hours. As you have not been employed as an Esthetician for 3 years full-time prior to your second accident, you should still be classified as a Level 1 Esthetician.

The Appellant has now appealed to this Commission. The issue which arises on this appeal is whether or not the Appellant's IRI benefits have been correctly calculated.

At the hearing of the appeal, the Appellant submitted that her IRI benefits should not be based on Schedule C, since the average salaries represented in that Schedule did not accurately reflect her true earning potential as a self-employed esthetician, operating her own business. Rather, she argued that her IRI should be based on the average hourly revenue earned from her business.

In addition, the Appellant contends that she should be classified as a full-time earner, since if it were not for the motor vehicle accident of December 15, 1998, she would have been working

and operating her business on a full-time basis on March 19, 2002. She therefore submits that she has been prejudiced because of the numerous motor vehicle accidents in which she has been involved and the effect they have had on her employment capacity.

The evidence presented at the appeal hearing establishes that at the time of the motor vehicle accident on March 19, 2002, the Appellant was working less than 28 hours per week as a self-employed esthetician.

Section 70(1) of the MPIC Act provides that:

Definitions

70(1) In this Part,

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

Section 5 of Manitoba Regulation 37/94 provides that:

Meaning of part-time employment

5 A person holds regular employment on a part-time basis where the person is employed for less than 28 hours per week, not including overtime hours.

The definition of part-time earner provides that the relevant time for the determination of an earner's status is "at the time of the accident". Accordingly, since the Appellant was working less than 28 hours per week at the time of the accident, she should be classified as a part-time earner. We find that the Act does not allow us to make provision for the contingencies which the Appellant argued resulted in her reduced work schedule as at March 19, 2002.

The relevant sections of the MPIC Act and Regulations with respect to the determination of IRI benefits for a part-time earner are as follows:

Section 83 of the MPIC Act, which provides that:

Entitlement to I.R.I. for first 180 days

83(1) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:

- (a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;

Basis for determining I.R.I. for temporary earner or part-time earner

83(2) The corporation shall determine the income replacement indemnity for a temporary earner or part-time earner on the following basis:

- (a) under clause (1)(a), if at the time of the accident
 - (ii) the temporary earner or part-time earner is or would have been self-employed, the gross income determined in accordance with the regulations for an employment of the same class, or the gross income that he or she earned or would have earned from the employment, whichever is the greater.

Sections 3 and 5 of Manitoba Regulation 39/94, which provide that:

GYEI of a temporary or part-time earner for first 180 days

5(1) The gross yearly employment income of a temporary earner or part-time earner for the first 180 days after the date of accident is the amount calculated under sections 2 and 3.

GYEI derived from self-employment

3(1) In this section, “business income” means the income derived from self-employment, by way of a proprietorship or partnership interest, less any expense that relates to the income and is allowed under the *Income Tax Act* (Canada) and *The Income Tax Act* of Manitoba but not including the following:

- (a) any capital cost allowance or allowance on eligible capital property;
- (b) any capital gain or loss;
- (c) any loss deductible under section 111 (losses from other years) of the *Income Tax Act* (Canada).

GYEI from self-employment

3(2) Subject to section 5, a victim's gross yearly employment income derived from self-employment that was carried on at the time of the accident is the greatest amount of business income that the victim received or to which the victim was entitled within the following periods of time:

- (a) for the 52 weeks before the date of the accident;
- (b) for the 52 weeks before the fiscal year end immediately preceding the date of the accident;
- (c) where the victim has operated the business for not less than two fiscal years before the date of the accident, for the 104 weeks before the fiscal year end immediately preceding the date of the accident divided by two;
- (d) where the victim has operated the business for not less than three fiscal years before the date of the accident, for the 156 weeks before the fiscal year end immediately preceding the date of the accident divided by three;

or according to Schedule C.

In accordance with the Regulations, MPIC determined that the greatest GYEI applicable to the Appellant was in accordance with Schedule C.

Pursuant to Section 3(2) of Manitoba Regulation 39/94, it is the historical performance of the business which determines the GYEI derived from self-employment. Based on the information presented to the Commission at the appeal hearing, we are satisfied that Schedule C would provide the greatest GYEI for this Appellant. The Appellant did not provide detailed financial statements for her business for the fiscal years preceding the accident showing both her expenses and revenue. Nevertheless, the revenue statements which she did submit to MPIC, demonstrate that the revenue alone which she was earning was not greater than the amount provided under Schedule C. These revenue statements did not take into account the business expenses as required under Section 3(1). Accordingly, Schedule C would provide this Appellant with the greatest GYEI.

At the hearing of this appeal, counsel for MPIC agreed that, pursuant to Section 1 of Schedule C of Manitoba Regulation 39/94, the Appellant's IRI benefits should be determined based on the "Level 2" level of experience in the class of employment determined for the Appellant. The class of employment determined for the Appellant was within the occupation heading - Barbers, Hairdressers and Related Occupations, included in Category 10 of the Table of Classes of Employment.

Accordingly, this matter shall be referred back to MPIC's case manager for a determination of the Appellant's IRI benefits on the basis that she was a part-time, self-employed earner at the time of the accident and classified as a Level 2 Esthetician within the class of employment "Barbers, Hairdressers, and Related Occupations". Since it is now almost a year since the date of the motor vehicle accident, a 180 day determination of the Appellant's employment shall also be required in accordance with subsections 84(1) and 84(3) of the MPIC Act.

Lastly, since the Appellant was still entitled to ongoing IRI benefits arising from her accident of December 15, 1998, she shall be entitled to ongoing IRI benefits based on the greater of her determination as:

1. a full-time self-employed earner as a Level 1 Esthetician, arising from the accident of December 15, 1998; or
2. the IRI determined for the Appellant in accordance with subsection 84(1) of the MPIC Act, arising from the accident of March 19, 2002,

until such time as she ceases to be entitled to IRI benefits in accordance with the MPIC Act and Regulations.

For these reasons, the decision of MPIC's Internal Review Officer, dated July 5, 2002 is, therefore rescinded and the foregoing substituted for it.

Dated at Winnipeg this 17th day of February, 2003.

YVONNE TAVARES

WILSON MACLENNAN

BARBARA MILLER