

# **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by D.B.  
AICAC File No.: AC-02-108**

**PANEL:** Ms. Yvonne Tavares, Chairperson  
Ms. Deborah Stewart  
Ms. Barbara Miller

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

**HEARING DATE:** March 7, 2003

**ISSUE(S):**

- 1. Calculation of Income Replacement Indemnity ("IRI") Benefits**
- 2. Entitlement to Income Replacement Indemnity ("IRI") Benefits beyond July 14, 2002**
- 3. Entitlement to Reimbursement of Chiropractic Treatments beyond July 31, 2002**
- 4. Entitlement to Personal Assistance Benefits beyond August 31, 2002**
- 5. Entitlement to Child Care Weekly Indemnity Benefits**

**RELEVANT SECTIONS:** Subsections 70(1), 83(1), 83(2), 110(1)(a), 131, 134, 136(1) and 172(2) of The Manitoba Public Insurance Corporation Act (the "MPIC Act"); Section 6 of Manitoba Regulation 37/94; Section 5 of Manitoba Regulation 39/94; Section 5 of Manitoba Regulation 40/94; Section 2 and Schedule A of Manitoba Regulation 41/94.

**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 January 15, 2002, wherein her vehicle was rear-ended. As a result of the accident, the Appellant sustained a sore neck, a sore back and began experiencing severe migraine headaches. Due to the injuries which she

sustained in that accident, the Appellant became entitled to Personal Injury Protection Plan (“PIPP”) benefits pursuant to Part 2 of the MPIC Act. The issues which arise in this appeal are:

1. calculation of income replacement indemnity benefits;
2. entitlement to income replacement indemnity benefits beyond July 14, 2002;
3. entitlement to reimbursement of chiropractic treatments beyond July 31, 2002;
4. entitlement to personal assistance benefits beyond August 31, 2002; and
5. entitlement to child care weekly indemnity benefits.

### **1. Calculation of Income Replacement Indemnity (“IRI”) Benefits**

The Internal Review decision dated October 15, 2002 rejected the Appellant’s Application for Review of the claim's decision dated February 22, 2002, for failure to comply with Section 172 of the MPIC Act. The Appellant’s Application for Review was filed after the sixty-day time limit set out in ss. 172(1) had expired. The Internal Review Officer considered whether the Appellant had a reasonable excuse for failing to apply for a review of the decision within the time period provided. He found that the Appellant had not provided a reasonable excuse for failing to apply for a review of the decision within the time provided for filing and, accordingly, he rejected the Application for Review.

At the hearing of the appeal, the Appellant explained that she had not applied for a review of the February 22, 2002 claim's decision sooner because initially she felt that there was no use in applying for a review. Based upon discussions with her case manager, she was advised that since she was a temporary earner and self-employed, her IRI benefits would be calculated on the basis of Schedule C, which calculations she initially accepted. The Appellant advised that it was only upon further review of the PIPP guide that she questioned MPIC’s determination of her

self-employed duties as a Sales Representative and realized that this aspect of the February 22, 2002 decision may have merit for an appeal.

The Commission, having considered the testimony of the Appellant and her reasons for failing to file an Application for Review within the time period as set out in subsection 172(1) of the MPIC Act, finds that an extension of time for filing an Application for Review should have been granted.

It is apparent that the Appellant, although she was aware of her right to seek a review as set out in the case manager's decision, did not initially appreciate that there would be any merit to proceeding with such a review. It was only upon further consideration of the claim's decision and the PIPP guide that she assessed the merit of her claim. We accept that it took some time before the Appellant completely understood the basis upon which she could appropriately seek a review of the case manager's decision. As a lay person, unfamiliar with the intricacies of the PIPP and the MPIC Act, we understand that it can be a challenge to discern an appropriate basis upon which to seek a review. Accordingly, we find that she has provided a reasonable excuse for failing to apply in time for a review of the case manager's decision and would extend the time for filing her Application for Review. As such, we have considered the merits of the Appellant's claim.

The claim's decision, dated February 22, 2002, determined that:

According to the information on file, you were working as a Sales Representative/owner for [text deleted] as a Temporary Earner at the time of the above noted motor vehicle accident. Attached is a copy of the definition of a Temporary Earner under Section 70(1) of the Manitoba Public Insurance Corporation Act. As a Temporary Earner, your entitlement to IRI benefits is based on Sections 83(1) and 83(2) of the Manitoba Public Insurance Corporation Act (copies attached).

Based on the available information and in accordance with regulation 39/94 schedule C, your Gross Yearly Employment Income (GYEI) has been calculated to be \$11,686.00 providing a biweekly IRI entitlement of \$380.15. This decision is based on Section 111 (1) of the Manitoba Public Insurance Corporation Act (copy attached).

The Internal Review decision dated October 15, 2002 had also dismissed the Appellant's Application for Review on the merits of the claim and concluded that the Appellant's IRI had been properly assessed and calculated.

The Appellant submits that her job was much more involved than a "Sales Representative". She contends that as the president of [text deleted] she comprises the management of the company. Since she was in the start-up phase of her company, she was responsible for developing the business, establishing the presence of the company in the marketplace and directing the day-to-day operations of the business. She also provided the strategic leadership for the company, focusing on making decisions as the company evolved. Additionally, her responsibilities included supervision of all financial matters concerning the financial health of the company. On that basis, the Appellant submits that her duties were more managerial and as such she should be determined in a more appropriate occupational classification.

Counsel for MPIC submits that the determination of the Appellant as a Sales Representative was appropriate given the job duties that she was undertaking at the time of the motor vehicle accident. He maintains that she was establishing her business and marketing her company to the appropriate clientele. At this stage her focus was on selling the service to be provided by the company. Accordingly, counsel for MPIC maintains that the appeal should be dismissed and the decision of the Internal Review Officer dated October 15, 2002 should be upheld.

The Appellant was properly classified as a temporary earner pursuant to Section 70(1) of the MPIC Act. Section 70(1) provides the definition of a “temporary earner” as follows:

**Definitions**

**70(1)** In this Part,

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

Section 6 of Manitoba Regulation 37/94 provides that:

**Meaning of temporary employment**

**6** A person holds a regular employment on a temporary basis where the person

(a) has held the employment for less than one year before the day of the accident;

(b) during the course of the employment, has been employed for not less than 28 hours per week, not including overtime hours; and

(c) is not covered by clause 4(b).

As a temporary earner, the Appellant's entitlement to IRI benefits is determined in accordance with ss. 83(1) and 83(2) of the MPIC Act and Section 5 of Manitoba Regulation 39/94. Since the Appellant's company had been in existence for less than one year, we are satisfied that Schedule C would provide the greatest GYEI for this Appellant. The issue then becomes whether the Appellant's employment was appropriately classified in accordance with Schedule C.

At the time of the accident, the Appellant was in the start-up phase of her [text deleted] business. In the Application for Compensation, she described her job description and essential duties as “*office duties, meeting with programmers*”. At this stage of her business development she was focused on the technology development work, including web design, programming and data based development through contracted experts. Once the technology infrastructure had been established, to support the business, development objectives would then focus on marketing,

sales and revenue growth.

Subsection 83(2)(a)(ii) of the MPIC Act provides as follows:

**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.

Upon a careful review of Schedule C, the Commission is satisfied that the class of employment determined in accordance with Schedule C which most closely resembled the Appellant's job functions at the time of the motor vehicle accident was "Other Sales Occupations, n.e.c.". We find that the main business of the Appellant's company was the sales and marketing of a product/service. Her management/leadership function as president of the company had not yet developed to any extent. As set out in her business plan, she had various milestones to meet prior to her business actually beginning operation. She had no employees, no contractors, and according to her business plan, there were various steps to take prior to her business beginning operation. As a result, we find that she was properly classified pursuant to the class of employment "Other Sales Occupations, n.e.c.", as that class of employment most closely resembled her occupation at the time of the accident.

## **2. Entitlement to Income Replacement Indemnity Benefits beyond July 14, 2002**

The Internal Review decision, dated September 11, 2002, determined that:

With respect to IRI, Section 110(1)(a) of the *Act* (copy enclosed) stipulates that entitlement ends when the claimant is able to hold the employment she held at the time of the accident. The report from Dr. Benningem dated June 7, 2002 provides ample support for the conclusion of the case manager that you had, by that time, regained the ability to perform your pre-accident occupational duties.

The Appellant submits that her IRI benefits should not have been terminated as of July 14, 2002, because she has been unable to return to her pre-accident employment. She maintains that her pain and symptoms, including the debilitating headaches, have remained constant since the motor vehicle accident and this prevents her from returning to her pre-accident employment.

In support of her position, the Appellant advises that she continues to seek medical attention in regards to her pain complaints and headaches. She consulted Dr. Peter Nemeth in relation to her ongoing medical problems. He referred her to Dr. Chernish, a pain specialist. In support of her appeal, the Appellant submitted a report from Dr. Chernish, wherein he comments that:

[D.B.] described an irritable and somewhat depressed mood, as well as decreased memory, energy and concentration in addition to her pain symptoms. My feeling is that these were a direct result of the car accident. She had no pre-existing history of depression.

[D.B.] suffers from a chronic pain syndrome of headaches, neck, back and shoulder pain and reports that she has been unable to work due to her pain.

The Appellant relies on Dr. Chernish's report in support of her appeal and request for reinstatement of IRI benefits.

Counsel for MPIC submits that the medical evidence respecting the Appellant does not support her position. He relies on Dr. Benningem's reports and, particularly, the report dated June 7,

2002, wherein Dr. Benningem notes that:

I have been attending to the injury sustained by [D.B.] in the MVA of 15 Jan 02. I have seen her for this on 4 occasions. She has been noncompliant with her appointments, investigations, and treatment. I do not feel that I have anything left to offer her. Apart from her subjective symptoms there has been very little in the way of objective signs to support disability.

Counsel for MPIC also submits that Dr. Chernish's report is not determinative of the issues before the Commission. He contends that Dr. Chernish's diagnosis and assessment is based upon the Appellant's subjective account of the incidents related to the injury, and not based upon the totality of the objective evidence in the Appellant's file, including the many other stresses in her life. As such, counsel for MPIC submits that Dr. Chernish's conclusions are flawed in that he did not have all of the relevant information available to him when making his findings.

Additionally, counsel for MPIC notes that Dr. Chernish provides no opinion as to whether or not the Appellant is capable of working, even with the chronic pain syndrome. As a result, counsel for MPIC submits that the Appellant has not established, on the balance of probabilities, that her ongoing complaints, which prevent her from returning to work, are causally connected to the accident of January 15, 2002. Accordingly, counsel for MPIC submits that the appeal should be dismissed and the decision of the Internal Review Officer, dated September 11, 2002, should be confirmed.

In order to establish an entitlement to ongoing IRI benefits, the Appellant must demonstrate, on a balance of probabilities, a causal connection between the motor vehicle accident of January 15, 2002, and her ongoing medical problems; and must establish that these medical problems prevent her from being able to return to her pre-accident employment. In this case, we find that the Appellant has failed to establish such a connection.

The reports from Dr. Benningem indicate that as a result of the accident, D.B. developed symptoms in keeping with a cervical strain. There is no documentation of a bony and/or neurological injury occurring as a result of the accident in question. The medical evidence on the Appellant's file does not support the existence of a medical condition which would prevent the Appellant from performing her full-time occupational duties, duties which can be classified as sedentary to light. Additionally, the medical evidence does not support a causal connection to the motor vehicle accident of January 15, 2002. Although the Appellant maintains that she has only experienced these medical problems since the motor vehicle accident, it does not logically flow that the motor vehicle accident must be the cause of her difficulties.

While Dr. Chernish came to the conclusion that the Appellant's symptoms were connected to the motor vehicle accident, based upon her subjective account of the incidents related to the injury, we are unable to find such a connection based upon the totality of the objective evidence before us. As a result, we find that the Appellant has failed to establish, on a balance of probabilities, a connection between the motor vehicle accident and her ongoing inability to return to her pre-accident employment. Accordingly, we dismiss the appeal and confirm the decision of the Internal Review Officer, dated September 11, 2002.

### **3. Entitlement to Reimbursement of Chiropractic Treatments beyond July 31, 2002**

The decision of the Internal Review Officer dated September 11, 2002 determined that:

With respect to chiropractic coverage, there are two conditions which must be met before MPI becomes obligated to reimburse a claimant for expenses incurred for medical or paramedical care:

1. the expenses must have been incurred because of the accident (i.e. the treatments must have been directed towards an injury sustained in the accident) in accordance with Section 136(1)(a) of the *Act* (copy enclosed); and,

2. the treatment must have been “medically required” in accordance with Section 5 of Manitoba Regulation MR P215-40/94 (copy enclosed).

This aspect of the claim fails on both counts.

Given the conflicting medical information, however, it may be appropriate to arrange for an independent chiropractic examination. I will leave that to the case manager to determine. If such an examination is arranged, you will be required to attend and to cooperate fully with the independent examiner.

At the hearing of the appeal, the Appellant advised that she had not incurred any expenses for chiropractic treatment since coverage had been terminated by MPIC on July 31, 2002. She further advised that she had not followed up with her case manager to arrange an independent chiropractic examination as suggested by the Internal Review Officer.

Since the Appellant has not incurred any expenses in relation to chiropractic care since coverage was terminated, there is no claim for reimbursement. With regards to the requirement for ongoing chiropractic care, the Commission finds no reason to disturb the decision of the Internal Review Officer. As such, if the Appellant wishes to pursue ongoing chiropractic care, she should contact her case manager to determine whether MPIC will consider arranging an independent chiropractic examination to provide an independent assessment in accordance with the decision of the Internal Review Officer.

#### **4. Entitlement to Personal Assistance Benefits beyond August 31, 2002**

The Appellant is claiming assistance for house cleaning, shopping, laundry and meal preparation. She submits that the injuries which she sustained in the motor vehicle accident of January 15, 2002, have prevented her from being able to carry out those activities on her own.

Counsel for MPIC submits that the Appellant has not provided any objective medical evidence of her inability to perform these household tasks. Further, he notes that the medical evidence on the Appellant's file does not support her claim and he contends that the Appellant has failed to establish a causal connection between her ongoing complaints of pain and the motor vehicle accident of January 15, 2002. Accordingly, counsel for MPIC submits that the decision of the Internal Review Officer, dated September 11, 2002, should be upheld and the Appellant's appeal dismissed.

The relevant sections of the MPIC Act and Regulations are as follows:

Section 131 of the MPIC Act:

**Reimbursement of personal assistance expenses**

**131** Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than \$3,000. per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

Section 2 of Manitoba Regulation 40/94:

**Reimbursement of personal home assistance under Schedule A**

**2** Subject to the maximum amount set under section 131 of the Act, where a victim incurs an expense for personal home assistance that is not covered under *The Health Services Insurance Act* or any other Act, the corporation shall reimburse the victim for the expense in accordance with Schedule A.

Section 131 of the MPIC Act provides for reimbursement of personal assistance expenses, subject to the Regulations. Section 2 of Manitoba Regulation 40/94 provides that MPIC shall reimburse a victim for an expense of personal home assistance in accordance with Schedule A. Schedule A provides a method of evaluating the needs of the victim regarding personal and home care assistance. Points are assigned to areas of need on an evaluation grid. They are totaled to determine the qualifying percentage of expenses that is to be applied to the maximum provision under Section 131 of the MPIC Act.

The first set of personal care assistance grids which were completed for the Appellant on January 30, 2002 resulted in a score of 7/51. The nurse who completed the assessment noted that, "*only minimal assistance would be required for heavy meal prep, cleaning, laundry, and shopping.*"

A follow-up grid was performed on March 6, 2002 by an occupational therapist. At this assessment, the Appellant scored 17.5/51. In her report respecting this assessment, the occupational therapist noted that:

Claimant reports headache pain with ambulating up/down stairs, and attempting to use facilities outside her home.

...

[D.B.] reports having assistance with preparation of all meals due to her limited mobility. Claimant demonstrated a "guarded" position, with pain behaviors during the assessment. Claimant reports headaches/neck pain with walking (<10 min.). Claimant exhibited facial grimacing/pain behaviors with walking and changing of positions during the assessment. She indicates her headaches are aggravated by noise and bright light.

The Appellant failed to provide any objective medical evidence to explain the extreme deterioration in her condition, from January 30 to March 6, 2002, which would account for the increased requirement for assistance. One certainly would have expected that as more time elapsed, her injuries would have settled down, her function would have improved and the requirement for assistance would have decreased. However, the Appellant did not present any medical evidence whatsoever to explain her ongoing requirement for assistance and to relate her ongoing difficulties to the motor vehicle accident of January 15, 2002.

Accordingly, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that her ongoing requirement for personal assistance benefits is related to the motor vehicle accident of January 15, 2002. As a result, we are obliged to dismiss the Appellant's appeal with respect to this issue and confirm the Internal Review Officer's decision, dated September 11, 2002.

## **5. Entitlement to Child Care Weekly Indemnity Benefits**

The Appellant is appealing the Internal Review Decision dated September 11, 2002 which denied her entitlement to a Child Care Weekly Indemnity. The Internal Review Officer, in his decision dismissing the Appellant's Application for Review, determined that:

With respect to Child Care Weekly Indemnity, there is no documentation supporting your position that you are presently unable to care for your daughter. Once again, I am not convinced that you have established an ongoing entitlement to this benefit.

The Appellant advises that since the motor vehicle accident, her mother has taken on the duties associated with taking care of her daughter. Her mother has assumed responsibility for getting her daughter off to school in the morning, for picking her daughter up after school, for preparing her daughter's meals and for doing her daughter's laundry. The Appellant advised that she might interact with her daughter on days when she feels capable.

Counsel for MPIC submits that the Appellant has not provided any objective medical evidence of her inability to perform childcare tasks. He also contends that the Appellant has failed to establish a causal connection between any ongoing disability and the motor vehicle accident of January 15, 2002.

The relevant sections of the MPIC Act are as follows:

### **Reimbursement of expenses for care of other person**

**134(1)** A victim who becomes unable to care for a child under 16 years of age or for a person who is regularly unable, for any reason, to hold any employment is entitled to the reimbursement of expenses incurred because of the accident to pay the cost of the care, if on the day of the accident, the victim

(a) is a full-time earner or temporary earner;

(b) holds more than one regular part-time employment for a total of not less than 28 hours a week;

(c) is a student; or

(d) is a part-time earner or non-earner who, under subsection 133(1), elects the income replacement indemnity.

**Maximum amount of reimbursed expenses**

**134(2)** Subject to the regulations, the expenses shall be reimbursed on a weekly basis for such time as the victim is unable to provide care, and for not more than the following amounts:

(a) \$75. where one person is cared for;

(b) \$100. where two persons are cared for;

(c) \$125. where three persons are cared for;

(d) \$150. where four or more persons are cared for.

The Appellant failed to present any objective medical evidence to relate her inability to perform childcare tasks to the motor vehicle accident of January 15, 2002. Accordingly, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that her requirement for childcare assistance is related to the motor vehicle accident of January 15, 2002. As a result, the Appellant's appeal with respect to this issue is dismissed and the Internal Review decision dated September 11, 2002 is confirmed.

Dated at Winnipeg this 22<sup>nd</sup> day of April, 2003.

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**YVONNE TAVARES**

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**DEBORAH STEWART**

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**BARBARA MILLER**