



Automobile Injury Compensation Appeal Commission

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

PANEL: Ms. Yvonne Tavares, Chairperson
Ms. Laura Diamond
Ms. Deborah Stewart

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

HEARING DATE: October 18, 2004

ISSUE(S): 1. Determination of Employment as a Car Salesperson; and
2. Termination of Income Replacement Indemnity benefits
pursuant to ss. 110(1)(e) of The MPIC Act

RELEVANT SECTIONS: Sections 107, 109, 110(1)(e) of The Manitoba Public
Insurance Corporation Act (the 'MPIC Act')

**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, L.V., was involved in a motor vehicle accident on April 5, 1994. As a result of the injuries which the Appellant sustained in that accident, he became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act. The Appellant is appealing from the Internal Review decision dated May 12, 2003, with regards to the following issues:

1. Determination of Employment as a Car Salesperson; and
2. Termination of Income Replacement Indemnity benefits pursuant to ss. 110(1)(e) of the MPIC Act.

1. **Determination of Employment as a Car Salesperson**

At the time of the motor vehicle accident, the Appellant was employed as a long haul truck driver. As a result of the injuries which he sustained in the motor vehicle accident, the Appellant was unable to resume his pre-accident employment as a long haul truck driver. Accordingly, MPIC completed a two-year determination of employment for the Appellant pursuant to Section 107 of the MPIC Act. Section 107 of the MPIC Act provides that:

New determination after second anniversary of accident

107 From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

In a decision dated December 4, 1996, MPIC's case manager advised the Appellant as follows:

Under the Two Year Determination, following your recent work experience with the [text deleted] and in accordance with Schedule "C" of The Manitoba Public Insurance Regulations, we have determined you are capable of performing the occupation of a Cook with a potential annual 1996 Gross Income of \$[text deleted]. This salary has a net biweekly income of \$[text deleted]. This will be your residual earning capacity effective November 26th, 1997, which will be the end of the one year grace period. Therefore, at that date, the IRI of \$[text deleted] will be reduced by \$[text deleted], for a continuing IRI benefit of \$[text deleted].

During the one year grace period and thereafter, you are obligated to report to The Corporation any income from whatever source in order that we may apply it against the IRI benefit at that time. In accordance with Section 116 of The Manitoba Public Insurance Corporation Act, any income earned during the one year grace period will be applied against the current IRI at a rate of 75% of the income earned. Following the expiry of the grace period, Section 115 will apply, which stipulates a 100% reduction of income earned above the residual IRI of \$[text deleted] against the continuing IRI of \$[text deleted].

IRI benefits will cease when your level of income meets or exceeds the benefit level at any time. Failure to report income could be construed as an attempt to defraud The Corporation and will be dealt with by suspension and/or termination of benefits. As discussed, you will maintain contact with the writer on at least a quarterly basis.

In or around May 1998, the Appellant began working as a car salesperson at a dealership in [text deleted], Ontario. In a decision dated April 15, 2002, MPIC's case manager advised the Appellant as follows:

Information supplied by yourself indicates that you have been able to work as a car salesman for the past number of years. You have only very briefly held the employment that was previously determined for you on **December 4, 1996** as a cook. The Revenue Canada documents you provided clearly indicate that you earned on average *\$(text deleted)* per year during the **2000** and **2001** tax years. Manitoba Public Insurance in accordance with Section 107 and Sections 109(1) & 109(2) of the Manitoba Public Insurance Act has re-determined you as a car salesman with a yearly income of *\$(text deleted)*. This determination has taken into account your post accident physical and intellectual capabilities, as well as your well-documented employment history in automotive sales.

The decision concerning the re-determination of employment was also re-affirmed to the Appellant in a subsequent letter dated February 5, 2003 from MPIC's case manager.

The Appellant disagreed with his re-determination of employment and sought an Internal Review of the case manager's decision. In his decision dated May 12, 2003, the Internal Review Officer concluded the following with respect to the Appellant's re-determination of employment:

The Corporation's two-year re-determination of April 15, 2002 (and reaffirmed by way of the decision dated February 5, 2003) was appropriate, in my view, to assess the extent of your residual earning ability. In that regard the Corporation's right to determine to provide a new determination of employment after the second anniversary of the accident is provided for in Section 107 of The Manitoba Public Insurance Corporation Act which states:

New determination after second anniversary of accident

107 From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

The considerations to be taken into account in completing the two-year determination are set out in Section 109(1) and (2) of the Act which states:

Consideration under section 107 or 108

109(1) In determining an employment under section 107 or 108, the corporation shall consider the following:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved under this Part;
- (c) the regulations.

Type of employment

109(2) An employment determined by the corporation must be:

- (a) normally available in the region in which the victim resides; and
- (b) employment that the victim is able to hold on a regular and full-time basis or, where that is not possible, on a part-time basis.

Based upon the above provisions, it was not appropriate for you to be determined as a car salesman based upon your average earnings in that position for 2000 and 2001. Instead you should have been determined into the position of Sales Clerks and Sales Persons under Section 9 Sales Occupations - Level 2 (Schedule C) which has an approximate earning a potential income of approximately \$25,000.00 for the PIPP year 2002.

The Appellant has now appealed from the Internal Review decision to this Commission. He submits that his re-determination of employment as a car salesperson was inappropriate. He insists that he does not have the required skills to qualify as a new car salesperson. He is not able to read or write fluent English and therefore he cannot meet the ongoing educational requirements to sell new cars. The Appellant maintains that he has been fortunate to find his current position, which allows him to sell only used cars, on an “as is” basis and therefore bypass the ongoing educational upgrading he would be required to undertake as a regular automotive salesperson – selling both new and used vehicles. He submits that he cannot hold employment as a regular car salesperson and therefore the re-determination of employment was not appropriate.

Counsel for MPIC submits that the re-determination of the Appellant's employment was appropriate in the circumstances of this case. Further, he submits that the Appellant has established that he can hold the re-determined employment – he had been selling cars for approximately five years before the case manager undertook the re-determination of employment. Accordingly, counsel for MPIC maintains that the Appellant's appeal should be dismissed and the Internal Review decision dated May 12, 2003 confirmed.

Upon a careful review of all of the evidence, both oral and documentary, the Commission finds that the re-determination of employment for the Appellant as a car salesperson was appropriate. The Commission finds that the Appellant has demonstrated the ability to hold the re-determined employment, as he has held employment as a car salesperson, on and off, since approximately May 1998. Accordingly, the Appellant's appeal with respect to this issue is dismissed and the Internal Review decision dated May 12, 2003, is confirmed.

2. Termination of Income Replacement Indemnity benefits pursuant to ss. 110(1)(e) of The MPIC Act

The case manager in his decision of February 5, 2003 advised the Appellant that:

The Record of Employment that you submitted for the period of January 2, 2002 to May 16, 2002 has been reviewed. Your entitlement to IRI Top Up is completed as of the date of this letter. I will explain the details of this for you below.

The information you supplied in your Record of Employment from Evans Lincoln Mercury for the period of January 1, 2002 to May 16, 2002 was annualized. MPI was informed that you voluntarily left your sales position with [text deleted] on May 16, 2002, to return to [text deleted] for personal reasons. Your annualized 2002 Gross Employment Income has been calculated at \$[text deleted].

$$\$[text\ deleted] \div 136\ Days \times 365 = \$[text\ deleted]$$

Your Gross Income including indexation as of April 5, 2002 was determined at \$[text deleted].

\$(text deleted) x 1.027 = \$(text deleted)

Your annualized 2002 earnings exceed your April 5, 2002 indexed Gross Yearly Employment Income. Your entitlement to Income Replacement Indemnity has ended as of the date of this letter.

The end to your entitlement to Income Replacement Indemnity is determined under Section 110(1)(e) of the Manitoba Public Insurance Corporation Act, which we have attached for your review.

The Appellant disagreed with the termination of his Income Replacement Indemnity ('IRI') benefits and sought an Internal Review of the case manager's decision. In his decision dated May 12, 2003, the Internal Review Officer upheld the case manager's decision, noting the following:

According to Mr. Seddon's decision of February 5, 2003 your IRI entitlement was terminated in accordance with Section 110(1)(e) based upon the fact that you held employment "...from which the gross income is equal to or greater than the gross income" upon which your income replacement indemnity is determined. Given the length of time you have been selling cars, it was not unreasonable for the Case Manager to use an annualized income from the period January 2, 2002 to May 16, 2002. The measurement of your earning potential, is in my view, adequately reflected by the use of a five month period of time.

The Appellant has now appealed from the Internal Review decision to this Commission. The Appellant submits that he shouldn't be penalized for working hard and trying to increase his income. He argues that his commission earnings are not stable, he has no job security and he is being penalized by MPIC for his initiative in finding a better job. He maintains that rather than working as a car salesperson, he could have continued working as a cook, and collecting top-up IRI benefits. The Appellant maintains that he should be able to collect top-up IRI benefits when his earnings are below his IRI entitlement, and if he has a particularly good year, he would receive no top-up IRI benefits. However, he insists that the IRI benefits should not cease altogether.

Counsel for MPIC submits that, although there is no specific provision in the MPIC Act to allow MPIC to annualize an individual's income in these circumstances, the intent of the legislation requires a victim's income to be annualized. He maintains that the intent of the legislation is to protect claimants who are unable to work. In this case, the Appellant has established that he can hold the re-determined employment and, had he worked a full year in 2002, the provisions of ss. 110(1)(e) would have been triggered. Therefore, counsel for MPIC submits that the appeal should be dismissed and the Internal Review decision dated May 12, 2003 confirmed.

The relevant sections of the MPIC Act is subsection 110(1)(e) which provides as follows:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

.....

(e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined.

In this case, MPIC terminated the Appellant's IRI benefits pursuant to ss. 110(1)(e) based upon his earnings as a car salesperson from January 1, 2002 to May 16, 2002, which were \$[text deleted]. By annualizing this figure, MPIC determined that the Appellant could have earned \$[text deleted] for the year. Since his annualized earnings exceeded the 2002 indexed gross yearly employment income of \$[text deleted], his entitlement to IRI benefits was terminated in accordance with ss. 110(1)(e).

The Appellant's gross income from his employment as a car salesperson was as follows:

2000 - \$[text deleted]
 2001 - \$[text deleted]
 2002 - \$[text deleted]

His 2002 indexed gross yearly employment income was \$[text deleted]. The Commission finds that, pursuant to ss. 110(1)(e), there is no provision to annualize the Appellant's actual earnings. As a result, the Commission finds that the Appellant's IRI benefits were improperly terminated as of February 5, 2003. The Appellant shall be entitled to reinstatement of his IRI benefits as of February 5, 2003, and such entitlement shall continue until such time as it is terminated or suspended in accordance with the provisions of the MPIC Act. In accordance with Section 163 of the MPIC Act, the Appellant shall be entitled to interest upon the monies due to him by reason of the foregoing decision.

Dated at Winnipeg this 10th day of December, 2004.

YVONNE TAVARES

LAURA DIAMOND

DEBORAH STEWART