



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by K.B.
AICAC File No.: AC-04-115**

PANEL: Mr. Mel Myers, Q.C., Chairman
Dr. Patrick Doyle
The Honourable Mr. Armand Dureault

APPEARANCES: The Appellant, K.B., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Terry Kumka.

HEARING DATE: January 6, 2006

ISSUE(S): Determination of the amount of Income Replacement
Indemnity payable to Mr. Boss for the period March 6, 2002
to June 18, 2004

**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, K.B., filed a Notice of Appeal in respect of a decision of an Internal Review Officer, dated June 18, 2004, wherein the Appellant's claim for Income Replacement Indemnity ('IRI') was dismissed and the decision of the case manager was confirmed. The Commission heard the appeal on March 17, 2005 and rendered a decision on May 10, 2005. In this decision the Commission ordered MPIC to pay IRI to the Appellant after March 6, 2002 until June 18, 2004 for the Appellant's absences from work which were a direct result of the injuries he sustained in a motor vehicle accident. The Commission referred this matter back to the case manager for the purpose of calculating the Appellant's IRI benefits after March 6, 2002 and upon

that determination to pay the Appellant the correct amount of his IRI entitlement, together with interest. The Commission retained jurisdiction in this appeal and directed that if the parties were unable to resolve the amount of IRI payable to the Appellant either party could refer the issue back to the Commission for final determination.

On September 19, 2005 the case manager issued a decision which provided the Appellant with IRI for thirty-six (36) days at a rate of \$[text deleted] per day, in the total amount of \$[text deleted] and rejected payment of IRI for the balance of the period of time between March 6, 2002 and June 18, 2004.

The Appellant advised the Commission that he was unable to resolve the issue with his case manager in respect of the amount of IRI payable to him and requested the Commission to reconvene for the purpose of determining the correct amount of IRI payable to the Appellant.

Appeal Hearing

The appeal hearing took place on January 6, 2006. The Appellant appeared on his own behalf and Mr. Terry Kumka appeared as legal counsel on behalf of MPIC.

In his submission to the Commission the Appellant requested the sum of \$[text deleted] plus interest. In support of his position the Appellant referred to a report received from his Union, the [text deleted], with respect to hours worked, and to the employee attendance records from his employer in respect of his absences from work. The Appellant excluded from his request for payment his absences from work due to a work related accident, an assault upon himself, pneumonia and flu illnesses and submitted that the balance of the days he was absent from work were due to the motor vehicle accident.

The Appellant testified that:

1. the employer records that he filed in the appeal proceedings for the period of time in question substantiated his absences from work due to injuries sustained in the motor vehicle accident.
2. an examination of these records indicates that on many occasions the Appellant reported to his employer that he was sick and an entry was made on the Appellant's employee attendance record indicating that he was absent from work due to sickness.
3. although he notified his employer that these absences were due to sickness, he was in fact absent because of the motor vehicle accident injuries.
4. he failed to attribute his absences due to the motor vehicle accident injuries for fear of losing his employment.

The Appellant further testified that:

1. in respect of being laid off from work due to slow periods his lay-offs were between three (3) to five (5) days each month during the slow period between mid-November and mid-May in each year.
2. these absences were not due to the motor vehicle accident injuries but he was unable to identify which days he was away, in whole or in part, due to the lay off.

The Appellant was cross-examined by MPIC's legal counsel and acknowledged that the union records provided details of the hours the Appellant worked on a month by month basis but did not indicate a daily break down of all the days the Appellant missed as a result of the motor vehicle accident injuries of August 27, 2001.

In cross-examination the Appellant further testified that:

1. prior to the motor vehicle accident his job function was not that solely of a Super-Spacer Application.
2. his primary job was that of a Warehouse Worker and Glass Installer and his duties included obtaining materials from various parts of the plant, delivering them to tradesmen, shipping and receiving from time to time and occasionally working as a Super-Spacer Applicator from time to time.
3. in respect of being a Super-Spacer Applicator he was required to lift heavy sheets of glass and use a Super-Spacer Gun to apply spacer tape along the edges of these sheets of glass.
4. these functions were not of a light duty nature.
5. he denied that the only job he had before and after the motor vehicle accident was that of a Super-Spacer Applicator, which required him to carry out light duties only.
6. as a result of the motor vehicle accident injuries he was unable to continue his full-time employment and was absent from work from time to time after March 6, 2002.
7. he was entitled to IRI for these absences from work due to the motor vehicle accident injuries.

P.S., the Appellant's foreman at the Appellant's place of employment, testified as to the nature of the Appellant's employment prior to and after the motor vehicle accident and stated that:

1. the Appellant, prior to and after the motor vehicle accident, worked solely as a Super-Spacer Applicator and that this was a job that involved light duties only.
2. the Appellant did not work as a Warehouseman, or doing any shipping and receiving, and was not required to lift any heavy sheets of glass in order to carry out his activities both before and after the motor vehicle accident.

P.S. further testified that he could not recall that the Appellant, on leaving work, ever informed him as to the reasons why he required to be absent from work.

Submissions

The Appellant submitted that there were certain absences from work which he had acknowledged were not due to the motor vehicle accident injuries he sustained. He further submitted that in respect of the balance of the absences that MPIC erred in only recognizing a portion of the absences due to the motor vehicle accident injuries. He further submitted that an examination of the union records and the employee records which were filed in the proceedings supported his position that he was entitled to IRI amounting to \$[text deleted].

In reply, MPIC's legal counsel submitted that the union records that the Appellant had relied upon to support his position did not provide sufficient information upon which the Appellant's IRI entitlement could be calculated for periodic absences from work. MPIC's legal counsel further submitted that the Appellant had acknowledged in his testimony these records were insufficient for establishing the Appellant's entitlement to IRI.

MPIC's legal counsel further stated that the employee attendance records which had been filed in the proceedings only supported in part the Appellant's entitlement to IRI. MPIC's legal counsel referred to the case manager's decision dated September 19, 2005 wherein the case manager had stated:

Employee attendance records were obtained from your employer for the years 2002, 2003 and 2004, a copy of which is attached. I have highlighted all dates which have been used to calculate your IRI entitlement for periodic absences from work since March 6, 2002. I have given you the benefit of the doubt on as many of the dates as possible, as many of the dates indicate the reason for your absence was due to sickness and do not clearly indicate that they are due to your accident of August 27, 2001.

MPIC's legal counsel further submitted that there was no evidence independent of the Appellant's testimony to support his entitlement to additional IRI beyond that granted by MPIC. In respect of the Appellant's testimony, MPIC's legal counsel submitted that the Appellant was not a credible witness for the following reasons:

1. the Appellant had demonstrated that his recollection of the material events was faulty;
2. that his explanation for reporting his absences due to sickness rather than due to motor vehicle accident injuries was not credible and was not supported by any independent evidence; and
3. the Appellant's testimony in respect of the nature of his employment before and after the accident was contradicted by the Appellant's foreman, P.S., and that the Commission should accept P.S.'s testimony in preference to the Appellant's.

Discussion

The Commission notes that the Appellant initially relied on information contained in the union records to support his entitlement to additional IRI, but acknowledged during the course of his testimony that the information contained in the union records was insufficient to support his claim. Central to the Appellant's claim was the substantial reliance he placed on the employer records to support his claim that he was absent from work. Unfortunately, the records on many instances do not indicate the Appellant was absent from work due to motor vehicle accident injuries but indicate the Appellant was absent due to sickness. The Appellant testified that the reason for reporting absences in this fashion was that he feared the loss of his employment if he reported that the absences were due to motor vehicle accident injuries.

The Appellant therefore acknowledged that he had misreported, on many occasions, the reasons for his absence from work but unfortunately the Appellant was unable to provide a satisfactory explanation for these actions. The Appellant was unable to explain to the Commission why reporting absences from work due to a motor vehicle accident injury placed him in a higher risk of termination of his employment than reporting absences due to sickness.

The Commission further notes that the Appellant did not provide any independent evidence from any other employee or from any employer records to support his position. The Appellant's foreman, P.S., was cross-examined by the Appellant but at no time did the Appellant seek to establish through the testimony of P.S. that the employer had a policy that reporting motor vehicle accident injuries would place the Appellant in a greater risk of losing his employment than reporting absences from work due to sickness. The Appellant had an opportunity through his foreman's testimony to establish the validity of his position on this central issue but he failed to do so.

Having regard to the failure of the Appellant to satisfactorily explain his misreporting of his absences from work and his failure to establish the employer's policy through the testimony of P.S., which would corroborate the Appellant's position in this respect, the Commission rejects the Appellant's explanation relating to the misreporting of his absences from work.

The Commission also finds that the Appellant had some difficulty in recalling specific facts relating to the dates and reasons why he was absent from work in respect of lay-offs, motor vehicle accident injuries or actual sickness. In support of his position the Appellant relied substantially on the employer records in relating to the Appellant's absences from work. Unfortunately, these records, according to the Appellant, contain a great deal of misinformation

as to the reasons why he was absent from work and therefore do not provide a reliable basis to support the Appellant's position.

The Commission also notes that there was a significant contradiction between the testimony of the Appellant's foreman, P.S., and the Appellant as to the nature of the Appellant's employment before and after the motor vehicle accident. P.S. testified in a straightforward and unequivocal fashion and was very clear as to the Appellant's employment duties at the Appellant's place of employment. Having regard to the Appellant's failure to accurately recall the material events in question, and his failure to satisfactorily explain the reasons for misreporting his absences from work, the Commission gives greater weight to the testimony of P.S. than it does to the testimony of the Appellant in respect of the nature of the Appellant's employment.

The Commission therefore determines that having regard to:

1. the Appellant's failure to accurately recall the material events in question;
2. the Appellant's failure to satisfactorily explain the reasons for misreporting his absences from work;
3. lack of any independent evidence to support the Appellant; and
4. the contradiction between the testimony of the Appellant and P.S. in respect of the Appellant's nature of employment;

the Appellant has failed to establish, on a balance of probabilities, that he was entitled to compensation beyond the sum of \$[text deleted] as determined by MPIC for the period March 6, 2002 and June 18, 2004. The Commission finds that MPIC correctly determined the amount of compensation the Appellant was entitled to is \$[text deleted] for the period March 6, 2002 to June 18, 2004. As a result, the Commission therefore confirms the decision of the case manager dated September 19, 2005 and dismisses the Appellant's request for an increase in IRI.

Dated at Winnipeg this 6th day of February, 2006.

MEL MYERS, Q.C.

DR. PATRICK DOYLE

HONOURABLE ARMAND DUREAULT