Manitoba

Automobile Injury Compensation Appeal Commission

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

PANEL:	**Ms Yvonne Tavares, Chairperson** **Mr. Les Marks** **Mr. R. Malazdrewich**
APPEARANCES:	**The Appellant, S. R. T., was represented by Ms Karen Burwash;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.**
HEARING DATE:	**July 25, 2007**
ISSUE(S):	**1. Whether the Appellant is entitled to further Income Replacement Indemnity benefits.** **2. Whether the Appellant has been overpaid Income Replacement Indemnity benefits in the amount of $**[text deleted]**.** **3. And if so, whether Manitoba Public Insurance may apply any cash benefit to which the Appellant is entitled, or may become entitled to any determined overpayment.**
RELEVANT SECTIONS:	**Sections 70(1), 81(1), 88(1) & (2), 89(1) and 190 of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Section 4 of Manitoba Regulation 37/94**

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, S. R. T., was involved in a motor vehicle accident on July 29, 2004. Due to the bodily injuries which the Appellant sustained in this accident, he became entitled to Personal Injury Protection Plan ('PIPP') benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was [text deleted] years of age. He was employed with [text deleted] ("[text deleted]") in [text deleted], Manitoba as an industrial mechanic on a full-time basis. Since May 7, 2004, the Appellant had been off work, on stress leave. The Appellant was also planning on upgrading his education. As of April 30, 2004, he had been accepted for enrollment at [text deleted] for the fall 2004 session as a mature student. Due to the injuries which the Appellant sustained in the motor vehicle accident, he was unable to return to his full-time employment when his stress leave ended and he was unable to enroll in classes and commence his studies at [text deleted] in the fall of 2004.

In a letter dated December 15, 2004, MPIC's case manager issued a decision respecting the Appellant's entitlement to Income Replacement Indemnity ('IRI') benefits. The case manager determined the following:

> I have had an opportunity to review your file contents, as they relate to your employment at [text deleted]. As you know, I also visited with your employer and reviewed the medical information on file.
>
> At the time of the accident, you were off work due to a condition not related to injuries sustained in the accident. Section 105 of the MPI Act provides that any individual incapable of holding employment prior to the accident is not entitled to an income replacement. Because you were off work prior to the accident, you are not immediately entitled to an income replacement, however, you are considered to be a full time earner, as [text deleted] considered you to be on sick leave.
>
> You also supplied information indicating you were accepted for the fall 2004 session at the [text deleted]. While you were accepted, you had not enrolled in specific courses or paid the tuition. As such, you do not fit into our definition of a student.
>
> The information developed through your care givers and your employer indicate that, in all likelihood, you would have been fit to return to work following the September long weekend, 2004. Accordingly, you will be entitled to an income replacement indemnity beginning September 7, 2004.

The Appellant sought an Internal Review of the case manager's decision with respect to his loss of the school year at [text deleted]. In a decision dated March 29, 2005, the Internal Review Officer found that the Appellant did qualify for a student indemnity pursuant to ss. 88(2) of the MPIC Act, because the motor vehicle accident prevented him from attending [text deleted] in the fall of 2004. Specifically, the Internal Review Officer concluded that:

> ***REASONS FOR REVIEW DECISION***
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> . . . when you were hurt, you had done everything to perfect your status as a "student" except register formally and pay your tuition. Even though you *could* have registered and paid your tuition before the date of the accident, I am not satisfied that that necessarily disqualifies you for a Student Indemnity. The other circumstances are important and changing any of them might change the result. I might well have concluded you had no such entitlement if, for instance, the motor vehicle accident had followed a failure to register by September 2, 2004, or at least by September 8, 2004, or if you had not completed pre-testing, selected a field of studies and specific courses sufficient to make you a full-time student, as well as making arrangements with your employer allowing you to attend.
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> It does not seem reasonable that formal registration, and payment of fees, should be the definitive determining factors in every case. After all, the legislation talks of a student being "admitted," not of a student being "registered." Also, reading the word "admitted" in this very restrictive way has some practical consequences. I would guess that few students register and pay fees well before the date on which they must do so. It would likely follow then that most of the graduating Grade 12 students, who will assuredly go on to university next fall, would have compromised Personal Injury Protection Plan ("PIPP") coverage if, for instance, they had the bad luck to have a car accident in June instead of September. (For that matter, does it also follow that the student who has successfully completed first or second year of university would also have reduced PIPP coverage until he has formally registered in, and paid for, the next year of studies? That result seems clearly contrary to the spirit of Section 87(2) and likely to its letter as well.)
>
> . . .
>
> On the particular, and perhaps rather special, facts of your claim, I do think you qualify for the Student Indemnity. This Review will direct your case manager to pay it to you, in accordance with Section 88(2) of the Act.

Subsequently, MPIC's case manager conducted further investigations into the Appellant's employment status. The Appellant also enrolled in the Faculty of [text deleted] at the [text deleted] for the 2005 – 2006 regular session. He voluntarily withdrew from his courses due to memory problems. As a result, the Appellant claimed a student indemnity for the loss of the 2005 - 2006 school year.

The case manager issued a decision on July 25, 2006 respecting the Appellant's IRI entitlement/classification for IRI purposes and lump sum indemnity for loss of school year. In that decision, the case manager determined the following:

> On January 19, 2006, you advised me that you had been forced to drop out of your courses at the [text deleted] because of memory problems that you relate to your July 29, 2004 motor vehicle accident. You asked me when you would be paid a student indemnity for the loss of your school year. You were advised that I would investigate both your medical situation and any entitlements that you may have, after which, I would be providing you with a decision.
>
> As you and I discussed at your home on June 7, 2006, the legislation that governs the Personal Injury Protection Plan provides for classification of an individual in terms of their status at the time of a motor vehicle accident, in accordance with the statutory definitions of the various classifications. I noted to you that, despite your being classified as a Student and awarded a Student Indemnity in March 2005 following your Internal Review hearing, you have continued to receive income replacement indemnity based on full-time employment earnings.
>
> Your Internal Review identified you as a student at the time of your accident. You were awarded a student indemnity for the loss of the 2005-05 school year. As such, your Internal Review defined you as a student for the purposes of income replacement indemnity (IRI) as well. This means that you must demonstrate that you held or would have held employment and that you were unable to work as a result of your accident.
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> You have indicated that it was your intention to work at [text deleted] while attending school and that you have been guaranteed a particular shift assignment that would have allowed you to do so. You provided the Internal Review Officer with a fax copy of a letter signed by [R.W.], a supervisor at [text deleted] in 2004, in support of this contention. [R.W.] stated in that letter that he had provided you with a shift assignment that would allow you to attend school while working.

The manager at [text deleted], [D.T.], has stated that you could not have been assigned a guaranteed shift as all shifts are rotational and all employees must be available to work all shifts. He has further stated that [R.W.], who is no longer employed at [text deleted], did not have the authority to grant or guarantee a particular shift to you.

Given these factors, you have not demonstrated that you would have held employment at [text deleted], or any other employment while attending school. As a result, you have not demonstrated an entitlement to any other employment while attending school. As a result, you have not demonstrated an entitlement to the income replacement indemnity that you have been receiving since September 7, 2004 and you have in fact been overpaid in the amount of $[text deleted], which is the dollar amount that has been paid to you in income replacement indemnity to date.

You resumed your studies in September 2005, enrolling in the Bachelor of [text deleted] program at [text deleted]. You indicated when we met November 7, 2005 that you were experiencing some memory difficulties that you had been told related to your use of pain medications. You notified me on January 19, 2006 that you had dropped out of school as a result of your memory problems and advised me that I should "get working" on your Student Indemnity for the loss of your school year. I advised you that I would require medical support that documented your memory issues and related them to your motor vehicle accident. Information subsequently received from Dr. D. Gill indicates that some subtle memory deficits were demonstrated in your neuron-psychological testing and that while Dr. Gill does not attribute these to any brain injury resulting from your accident, he does suggest that they may relate to sequelae of the physical injuries that you sustained.

Based on the medical information currently available, it appears that you would qualify for a student indemnity for the 2005-2006 school year. Because you have already been overpaid by receiving income replacement that you have not been entitled to receive, the indemnity will be applied to your overpayment. As well, because you have not demonstrated that you would have held employment, you are not entitled to receive income replacement indemnity and those payments will end with the current payment for July 17 to 30, 2006 unless and until you can provide information that would support a continuing entitlement as a student who would have held employment.

The Appellant sought an Internal Review of that decision. In a decision dated December 11, 2006, MPIC's Internal Review Officer dismissed the Appellant's Application for Review and upheld the case manager's decision. The Internal Review Officer determined that:

> **REVIEW DECISION**
>
> Having reviewed the entire file, I am confirming the case manager's decisions. I agree with the case manager that an overpayment occurred. I agree with your submission that MPI is not entitled to request reimbursement of the amount overpaid but I find that there is no prohibition against deducting amounts from the Lump Sum Student Indemnity your client is owed for the 2005-2006 school year (or from any future benefit your client may be owed) and applying that amount to the overpayment.
>
> Further, I am confirming the case manager's decision that your client is not entitled to IRI in relation the to (sic) motor vehicle accident in question.

The Appellant has now appealed from that decision to this Commission. The issues which require determination in this appeal are:

1. Whether the Appellant is entitled to further Income Replacement Indemnity benefits.
2. Whether the Appellant has been overpaid Income Replacement Indemnity benefits in the amount of $[text deleted].
3. And if so, whether Manitoba Public Insurance may apply any cash benefit to which the Appellant is entitled, or may become entitled to any determined overpayment.

Whether the Appellant is entitled to further Income Replacement Indemnity benefits &Whether the Appellant has been overpaid Income Replacement Indemnity benefits in the amount of $[text deleted]

Jurisdiction of the Commission

In order to determine whether the Appellant is entitled to further IRI benefits and whether the Appellant has been overpaid IRI benefits, the Commission finds that it is required to review the Appellant's classification for IRI purposes (i.e. whether the Appellant was a full-time earner or a student).

At the hearing of the appeal, counsel for MPIC argued that the Commission lacked the jurisdiction to review the Appellant's IRI classification. She submits that the case manager's decision of July 25, 2006 was not a reconsideration of the Appellant's classification for IRI purposes. She maintains that the reclassification had already been made by the Internal Review Officer in his decision of March 29, 2005. Counsel for MPIC submits that the case manager relied on the Internal Review Officer's reclassification of the Appellant as a student, and was merely applying Section 89(1) of the MPIC Act to determine his entitlement to IRI benefits. As a result, she argues that the Commission lacks the jurisdiction to review the Appellant's classification for IRI purposes, since that was not the subject of the Internal Review decision dated December 11, 2006, which is the decision under appeal.

The Commission finds that a review of the Appellant's entitlement to IRI benefits necessarily involves a review of his IRI classification. The Appellant's entitlement to IRI depends upon, and is tied to, his classification for IRI purposes. If the classification is incorrect, then the Appellant's entitlement cannot be properly determined.

The case manager's decision of July 25, 2006 reconsidered the Appellant's entitlement to IRI on the basis of his classification as a student. The Appellant's classification as a student flowed from the Internal Review decision of March 29, 2005. However, the Internal Review Officer in that decision did not review the Appellant's entitlement to IRI; he merely determined that the Appellant was entitled to the lump sum student indemnity under subsections 88(1) & (2) of the MPIC Act. The Internal Review Officer did not amend or review the case manager's decision of December 15, 2004 respecting the Appellant's classification as a full-time earner. In fact, the Appellant continued to receive IRI benefits on the basis of his classification as a full-time earner after this Internal Review decision for over a year, until the case manager's decision of July 25, 2006. As a result, we conclude that the case manager's decision of July 25, 2006, which is titled "Decision on IRI Entitlement/Classification for IRI Purposes and Lump Sum Indemnity for Loss of School Year", amounted to a reconsideration of the previous case manager's decision of December 15, 2004, since that is the only decision that had been made respecting IRI benefits.

Furthermore, although counsel for MPIC argues that the Internal Review Officer's decision to award the Appellant a lump sum student indemnity had the effect of reclassifying him as a student for IRI purposes, this result had never been communicated to the Appellant, until the decision letter of July 25, 2006. As a result, the Appellant never had the opportunity to challenge his reclassification for IRI purposes as a student, until that decision letter was provided to him.

Lastly, we note that the Internal Review Officer in her decision of December 11, 2006 (at page 5) found that the case manager's decision of July 25, 2006 constituted a reconsideration of a previous decision regarding the Appellant's entitlement to IRI benefits.

Accordingly, we find that the issue of the Appellant's classification for IRI purposes and his entitlement to IRI benefits must both be examined arising from the case manager's decision of July 25, 2006 and the Internal Review decision of December 11, 2006.

Appellant's IRI Classification

Upon hearing the testimony of the Appellant, and after a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that:

1. at the time of the motor vehicle accident (July 29, 2004), the Appellant was a full-time earner in accordance with subsection 70(1) of the MPIC Act, which provides that:

   Definitions
   70(1) In this Part,
   "full-time earner" means a victim who, at the time of the accident, holds a regular employment on a full-time basis, but does not include a minor or student;

2. the Appellant was entitled to IRI benefits pursuant to subsection 81(1)(a) of the MPIC Act, which provides that:

   Entitlement to I.R.I.
   81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
   (a) he or she is unable to continue the full-time employment.

It is clear from all of the information provided to the Commission and from the Appellant's own testimony that, at the time of the motor vehicle accident, the Appellant was a full-time earner holding a regular employment on a full-time basis. Section 4 of Manitoba Regulation 37/94 sets out the meaning of full-time employment as follows:

Meaning of full-time employment
4 A person holds regular employment on a full-time basis in the following circumstances:
(a) the person is employed at one employment for not less than 28 hours, not including overtime hours, in each week of the year preceding the day of the accident.

According to the Appellant's Application for Compensation, he had been employed with [text deleted] in [text deleted] since January 20, 2003 and worked 40 hours per week. Although he was temporarily absent from work on sick leave, his position continued to be held for him and he maintained his employment status. The Appellant would have returned to his maintenance work at [text deleted]on September 7, 2004, were it not for the motor vehicle accident of July 29, 2004. As such, he became entitled to IRI benefits as of September 7, 2004, when he was unable to continue the full-time employment as a result of the accident.

The case manager's decision of July 25, 2006 incorrectly classified the Appellant as a student for IRI purposes. In this regard, we note that by virtue of the application of the definition of full-time earner, the Appellant could not also have been a student (within the meaning of ss. 70(1) of the MPIC Act) at the time of the accident. Moreover, and in any event, we find that the Appellant did not establish, on a balance of probabilities that he would qualify as a student pursuant to subsection 70(1) of the MPIC Act which provides that:

Definitions
70(1) In this Part,
"student" means a victim who is 16 years of age or older and attending a secondary or post-secondary educational institution on a full-time basis at the time of the accident;

At the time of the accident, the Appellant had not yet declared whether he intended on attending [text deleted] on a full-time or part-time basis in addition to his full-time employment with [text deleted]. At the hearing, the Appellant testified that his priority was his full-time employment

with [text deleted]. He required the income from that employment in order to support himself. He could not have attended [text deleted] University if he was unable to continue his full-time employment and maintain his source of income.

At the time of the accident, the Appellant had completed the pre-testing necessary to decide which courses he should enroll in and had selected some specific courses. He had not formally registered for the courses that he had tentatively chosen. At the hearing, the Appellant testified that he would have enrolled in the number of courses that he could have handled in addition to his full-time employment. Additionally, he would have juggled his course load around his commitment to his employer. Taking into consideration all of the uncertainty surrounding his course selection, we find that at the time of the accident, the Appellant was still undecided as to his course load for the fall session at Brandon University. Therefore we find that the Appellant did not establish, on a balance of probabilities that he would have enrolled in courses on a full-time basis, in addition to his full-time employment.

By virtue of the foregoing determinations, we therefore find that:

1. the Appellant was properly entitled to the IRI benefits paid to him from September 7, 2004 until July 30, 2006 on the basis of his classification as a full-time earner and he was not overpaid IRI benefits in the amount of $[text deleted];
2. the Appellant's IRI benefits shall be reinstated effective July 31, 2006, on the basis of his full-time employment with [text deleted]and shall continue until such time as his benefits may be terminated in accordance with the provisions of the MPIC Act; and
3. the Appellant shall be entitled to interest on the sum awarded by virtue of this decision in accordance with Section 163 of the MPIC Act.

Whether Manitoba Public Insurance may apply any cash benefit to which the Appellant is entitled, or may become entitled, to any determined overpayment

Although we have determined that the Appellant was not overpaid IRI benefits, our finding that the Appellant was not a student within the meaning of ss. 70(1) of the MPIC Act, means that the Appellant has been overpaid benefits pursuant to ss. 88(1) & (2) of the MPIC Act, since he was not entitled to the lump sum student indemnity payments which he received. As a result, we have considered the issue of whether MPIC may apply any cash benefit to which the Appellant is entitled, or may become entitled, to offset this overpayment.

Section 190 of the MPIC Act provides as follows:

> **No reimbursement of amount paid before review or appeal**
> **190** If, on an application for review or appeal, the corporation or the commission cancels an indemnity or expense or reduces the amount of an indemnity or expense that has been paid to a person, the corporation is not entitled to reimbursement of any amount paid to the person before the review decision or the commission's decision, unless the payment was obtained by fraud.

As noted above, the Commission has on this appeal cancelled the lump sum student indemnity paid to the Appellant pursuant to subsection 88(1) & (2) of the MPIC Act.

In her decision of December 11, 2006, the Internal Review Officer noted the following with respect to the application of Section 191 to the Appellant's case:

> You pointed out Section 191 of the *Act,* which provides that if a decision is reconsidered and changed by the Corporation, under Subsection 171(1) or 171(2)(a), the Corporation is not entitled to reimbursement of any amount paid to a person as a result of a decision, unless the amount was obtained by fraud. You pointed out that there is no indication or documentation in the case manager's decision letter that the Corporation believes your client engaged in fraudulent activities to obtain his IRI benefits.
>
> You argued that the situation falls within Section 191 of the *Act* since a decision regarding the entitlement to IRI was made, but reconsidered as set out in the case manager's decision of July 25, 2006 given new information.

> Given Section 191 of the *Act*, I agree with your submission that the case manager's decision of July 25, 2006, constitutes a reconsideration of a previous decision, wherein it was determined your client was entitled to IRI. As such, I agree with your submission that the Corporation is therefore not entitled to reimbursement of the $[text deleted] since there is no indication or allegation in the case manager's decision letter that this benefit was obtained through fraud.
>
> However, there is no prohibition against <u>deducting</u> the amount owed to MPI from benefits that your client is currently entitled to or those he may be entitled to in the future. This deduction is not limited to cases of fraud. Therefore, I must uphold the case manager's decision applying the lump sum indemnity for the 2005-2006 school year against the amount that your client wrongfully received.

Although, the Internal Review Officer was dealing with Section 191 of the MPIC Act and an overpayment of IRI benefits, the principles set out in her decision are equally applicable to Section 190 of the MPIC Act and an overpayment of a student indemnity. Clearly, as indicated above, MPIC recognizes that it is not entitled to reimbursement of the student indemnity paid to the Appellant since that amount was paid to the Appellant prior to the Commission's decision (or the review decision, as the case may be). Furthermore, the Commission finds that MPIC is not entitled to deduct any such overpayment from benefits to which the Appellant is currently entitled or those to which the Appellant may become entitled in the future.

The Manitoba Court of Appeal recently reviewed the general principles of statutory interpretation in its decision *Pelchat v. Manitoba Public Insurance Corporation, 2007 MBCA 52,* as follows (at paragraph 36):

> Before proceeding to answer the questions raised on this appeal it is useful to quickly review the general principles of statutory interpretation. The principle was set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, as follows (at para. 21):
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> > Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of*

> *Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
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> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> In this context it is also useful to recollect what Freedman J.A. said of the Act in *Menzies* (at para. 36):
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> > Words in a statute are to be given "the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction" (**R. v. D.A.Z**., [1992] 2 S.C.R. 1025 … at p. 1042 [S.C.R.]). The **Act** is intended to provide compensation based on "real economic loss" (Bill 37, **The Manitoba Public Insurance Corporation Amendments and Consequential Amendments Act**, Manitoba, 1993), and see **McMillan v. Thompson (Rural Municipality)** (1997), 115 Man.R. (2d) 2 …(C.A.), where Helper, J.A., said the legislature in the **Act**: "created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile" (at para. 54).

The Concise Oxford Dictionary provides the following definition for the term **reimburse** – repay (a person who has spent or lost money); repay (a sum of money that has been spent or lost). Black's Law Dictionary provides the following definition – **reimbursement,** 1. repayment, 2. indemnification. Webster's New World College Dictionary provides the following definition of the term **reimburse** – 1. to pay back (monies spent), 2. to repay or compensate (a person) for expenses, damages, losses, etc.

The plain language of Section 190 of the MPIC Act is sufficiently clear and precise on its face. The Commission finds that the intent of this section is that an individual should not have to compensate or repay MPIC for any indemnity or expense which is later cancelled or reduced on review or appeal. We find that deducting any such overpayment from future benefits amounts to

a repayment of those benefits, contrary to the intent of Section 190 of the MPIC Act. The effect of deducting an overpayment from future benefits is the same as requiring an Appellant to reimburse or directly pay those funds back to MPIC. Section 190 specifically bars the recovery of any such overpayment, whether through direct reimbursement or payment by an individual or by deducting or offsetting the overpayment against future benefits owed to an individual. We find that there is no distinction to be made between the two, since both amount to repayment of funds contrary to the intent of Section 190 of the MPIC Act.

Accordingly, the Commission finds that MPIC is not entitled to reimbursement of any student indemnity paid to the Appellant prior to this decision and MPIC is not entitled to deduct that overpayment from benefits to which the Appellant is currently entitled or those to which the Appellant may become entitled in the future.

Dated at Winnipeg this 19th day of September, 2007.

YVONNE TAVARES

LES MARKS

R. MALAZDREWICH