Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-95-15

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Ms Joan McKelvey** **[Text deleted], Appellant, represented by [Appellant's representative]**
HEARING DATES:	**Friday, October 27th, 1995 and Monday, October 30th, 1995**
ISSUE:	**1. Determination of employment status: self-employed or full-time employee;** **2. Loss of unearned, potential, income;** **3. U.I.C. deductions.**
RELEVANT SECTIONS:	**Sections 81(1)(a) and 81(2)(a)(i) of the M.P.I.C. Act** **Regulation 37/94, Section 4** **Regulation 39/94, Sections 2(a), 2(d)(vi), 10(1)(b) and 10(5)**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

REASONS FOR DECISION

THE FACTS:

[The Appellant], the President and sole shareholder and employee of [text deleted], sustained injuries in an automobile accident on November 18th, 1994. Those injuries prevented her from working at all until January 16th, 1995, when she recommenced working for 2 hours per day. She was able to increase that output to about 4 hours per day from February 2nd until February 28th when, in harmony with a career change on the part of her husband, she moved to [Alberta].

[Text deleted], established by the Appellant in March of 1991, is in the business of providing consulting services to commercial clients with respect to their computer needs, creating or adapting programs, advising on the purchase of equipment and training staff in the use of that equipment. [The Appellant] managed the corporation so as to cause it to pay her a salary of $350.00 per week (cash flow permitting), leaving any surplus in the corporate treasury until, at the end of each fiscal year and after consultation with the corporation's accountant, she could decide, wearing her director's hat, how to allocate that surplus between the repayment of any existing shareholder's loan, the declaration and payment of a dividend, the payment to herself of a bonus, or the mere retention of funds by the corporation for working capital.

There is, in other words, no question that [the Appellant], as sole officer and director of the corporation, had the power to cause that corporation to disburse all or any part of its accumulated, post-tax surplus to her, doing so in the most efficient manner commensurate with good tax planning, her own needs and, of course, the funds available.

At the time of the accident, [text deleted] had contracts with three clients, each of whom had agreed to pay [text deleted] an hourly fee - one at $50.00 and each of the others at $25.00 per hour - for each hour worked by [the Appellant], plus an amount varying from 10% to 15% to cover travel costs and overhead. As a result of the accident, she was obliged to cause [text deleted] to hire someone else to complete some of her work in progress, at a cost of $430.00, thus enabling her company to earn its agreed fee.

[The Appellant] testified that work for one particular client, [text deleted], was increasing markedly at the time of the accident, while the volume of work for the other principal client seemed to be tapering off, being largely completed. Work for the third client seems also to have been substantially finished. She had negotiated an increase in [text deleted's] hourly rate to $40.00 as of January 1st, 1995, and [text deleted] now brings her back to [Manitoba] on a monthly basis at its expense.

[The Appellant] also gave evidence that, prior to the accident, she had been working about 60 hours per week (except in October of 1994 when she and her husband had been on vacation) and had actually worked some 142 hours during the first 18 days of November, 1994.

Currently, [the Appellant] is apparently only working about 8 days in every 6 weeks by reason of continuing problems stemming from the accident, although M.P.I.C. appears to have discontinued her income replacement indemnity ('I.R.I.') as of February 28th. We were not given any explanation for that discontinuance but, since it is not a subject of the current appeal,

not having been dealt with by the Internal Review Officer of M.P.I.C., we make no further comment beyond that which appears on page 9 of these Reasons.

M.P.I.C., in calculating the I.R.I. to which [the Appellant] became entitled as a result of the accident, determined that she was a salaried employee of [text deleted] earning $350.00 per week or $18,200.00 per annum.

[The Appellant], by her counsel, submits that either:

(a) because she was the sole, beneficial shareholder, officer, director and employee of [text deleted], we should treat that company as a mere conduit pipe and effectively ignore its existence by 'lifting the corporate veil', finding that [the Appellant] was self-employed and ascribing to her the gross income prescribed in Section 81(2)(a)(ii) of the M.P.I.C. Act and in Section 3 and Schedule C of Regulation 39/94; or

(b) should we find that her income was not derived from self-employment but, rather, from employment by [text deleted], then we should also find that her gross income under Section 2 of Regulation 39/94 must include, in essence, all of the money that she had the right, as the sole, controlling mind of [text deleted], to draw down from her company in 1994; that, says [the Appellant], should also include all of [text deleted's] accounts receivable at the date of the accident.

The sections of the Act and Regulations referred to herein are attached as an Appendix to these reasons.

On behalf of M.P.I.C., it was argued that:

(a) [the Appellant] was, at all material times, a full-time employee;

(b) any economic loss suffered as a result of the accident was suffered by [text deleted] rather than by [the Appellant];

(c) neither [the Appellant's] evidence as to the 60 hour weeks nor the potential, corporate income are borne out by the financial data tendered in evidence and that, therefore,

(d) M.P.I.C.'s original calculation of [the Appellant's] I.R.I. should be confirmed.

THE LAW:

The M.P.I.C. Act, of necessity, affords the self-employed different treatment from that applied to the salaried employee in the context of the calculation of I.R.I. Therefore, in order to decide what formula to apply, we must first determine [the Appellant's] employment status. The T4 slips filed with her income tax return show her as a employee of [text deleted]. Her T3 general tax returns reflect the same thing. It was the body corporate, rather than [the Appellant] personally, that was retained by the clients. On the face of it, and from her own records, therefore, [the Appellant] was an employee of her company. But, argues her counsel, we all recognize that the corporate structure was one of convenience only and was never intended, in an insurance context at least, to create an artificial barrier between [the Appellant] and her clientele; it was there to protect her to the extent possible against contractual and tortious liability, and to give her some flexibility in tax planning. The reality, it is argued, is that whichever way you slice it, the income

to which she was entitled was the entire, net income of [text deleted]. Therefore, she should be treated as self-employed.

Counsel for M.P.I.C. refers us to Kosmopoulos vs. Constitution Insurance Co. [1987] 1 S.C.R. 2, a case in which the Supreme Court of Canada addressed the question whether a sole shareholder and director had an insurable interest in the assets of the corporation. Madam Justice Wilson, in delivering the unanimous judgment of the Court (McIntyre J. concurring in the result but demurring with respect to one facet of the majority's reasoning) said, in part, at pages 10 and 11:

> "As a general rule a corporation is a legal entity distinct from its shareholders: Salomon v. Salomon & Co. [1987] A.C. 22 (H.L.) The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, Modern Company Law (4th ed. 1979), at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in American Indemnity Co. v. Southern Missionary College, supra, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.
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> There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interest of third parties who would otherwise suffer as a result of that choice": Gower, supra, at p. 138. Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to "blow hot and cold" at the same time."

Wilson J. went on to say, in part,

> "If the corporate veil were to be lifted in this case, then a very arbitrary and, in my view, indefensible distinction might emerge between companies with more than one shareholder

and companies with only one shareholder."

For the foregoing reasons, we cannot find this to be an appropriate case for piercing the corporate veil. [The Appellant] must be viewed as an employee of [text deleted] and her I.R.I. calculated accordingly.

What, then, is the employment income upon which the Appellant's I.R.I. should be based? The governing legislation is to be found in Sections 81(1)(a) and 81(2)(a)(i) of the Act and in Subsections (a) and (d) of Section 2 of Regulation 39/94, attached as part of the appendix hereto.

Counsel for [the Appellant] submits that the entire, net income of [text deleted] was receivable by [the Appellant], in light of her total control of the company and of its funds.

While we accept that position, we are bound by the language of the Regulations which speak of salary received or receivable for *the pay period in which the accident occurred*, of a bonus received or earned *in the 52 weeks before the date of the accident*, and of the cash value of any other benefit received or that the victim was entitled to receive *in the 52 weeks prior to the date of the accident.*

[The Appellant's] basic income from employment for the pay period in which the accident occurred was $700.00, since it appears that she caused the corporation to pay her on a

bi-weekly basis. But counsel for [the Appellant] argues that M.P.I.C. should have calculated her gross income from employment by taking the aggregate of the following, three factors:

(a)	basic weekly draw	$350.00
(b)	the amount billed during the relevant, 2-week pay period and, therefore, 'receivable' of $3,193.50, divided by 2, for a further weekly sum of	1,596.75

and

(c)	the unbilled remainder of the incomplete contracts with two clients ([text deleted]) which, when ultimately billed, would have added $16,455.28 to the annual income of [text deleted], or a weekly increment of	316.45
Gross weekly income from employment		$2,263.20

However, the following points must be noted:

the item of $3,193.50 does not become payable to [the Appellant] until it has actually been received by [text deleted]. In fact, that amount does not appear to have been received by [text deleted] until after the end of the then current fiscal year but, in any event, it was not in the company's hands during the subject pay period and, therefore, cannot be taken into account;

the financial statements of [text deleted] for the fiscal year ended December 31st, 1994 reflect gross consulting fees of $23,806.00 (which must have included the receivables of $3,193.50 referred to above), wages and benefits disbursed of $16,792.00, and an operating loss of $246.00. It is, therefore, not feasible that the company could have paid [the Appellant] more money during the subject pay period without increasing the operating loss and the existing, corporate deficit;

[The Appellant's] personal income tax return and T4 Supplementary form for the year ended December 31st, 1994 reflect employment income of $15,222.33. That, of course, was for 46 weeks, since she was unable to work from November 18th to December 31st. That amounts to $330.92 per week, whereas M.P.I.C. has based its computation upon $350.00 per week, her normal draw. Presumably, the difference between the wages and benefits shown in the corporate tax return and the salary of $15,222.33 shown on the Appellant's tax return represents wages or fees paid to one or more third parties, such as the $430.00 noted earlier;

none of the unbilled $16,455.28 falls into the category of a benefit that 'the victim...was

> entitled to receive in the 52 weeks before the date of the accident' and none of it can, therefore, be taken into account.

Before proceeding to the formal disposition of this appeal, there are three matters upon which we feel constrained to comment despite the fact that none of them is, properly speaking, before us. The first we have already touched upon, and that is the discontinuance of [the Appellant's] I.R.I. at the end of February of 1995 despite the fact that, at least from the evidence that was before us, it seemed fairly clear that she had not recovered from her injuries sufficiently to enable her to work on a full-time basis. [The Appellant] expressed the belief that her I.R.I. had been discontinued because she had become a non-resident as at the end of February. At the hearing, we expressed the view - a view that we reiterate here - that there is nothing in the Act or Regulations that would preclude the continued payment of I.R.I. benefits to someone merely because they have moved out of the province. [The Appellant's] return to work on a part-time basis, while it would almost undoubtedly call for a reduced I.R.I., would not of itself be grounds for terminating it. Counsel for M.P.I.C. undertook to follow that up with the Claims Department and to advise [the Appellant] of the rationale underlying that discontinuance.

Secondly, and although we do not suggest any purposeful misleading of [the Appellant] by M.P.I.C. personnel, she was obviously left with the clear impression that no purpose would be served by her retaining counsel. This Commission wishes to emphasize that, although we have no power to award costs in these matters, counsel are nonetheless welcome and it is up to the Appellant to weigh whether the potential benefits of a successful appeal against the potential cost of an unsuccessful one when determining whether to retain capable counsel.

Thirdly, and finally, it also seems to have been made clear to [the Appellant] by MPIC personnel that it would be fruitless to launch an appeal in any event, because M.P.I.C.'s Internal Review Officer is by far the most knowledgeable person available in this area and that, if he says something, he is bound to be right. (We paraphrase, but that was clearly the impression left with this Appellant.) With the greatest of respect to M.P.I.C.'s Internal Review Officer, we can only repeat the view that we have expressed on earlier occasions, that every person is entitled to appeal to this Commission from what appears to be a final decision of M.P.I.C., even when the likelihood of success may seem to be slender or even non-existent. As the record of this Commission will already indicate, our agreement with M.P.I.C.'s decisions is far from inevitable and no one should be discouraged from appealing from those decisions if they wish to do so.

DISPOSITION:

We find that M.P.I.C.'s use of a $350.00 weekly salary, or an annual income of $18,200.00 was proper. Indeed, on the basis of the Appellant's tax return M.P.I.C. may have erred slightly on the side of benevolence.

There is one adjustment that needs to be made. M.P.I.C. deducted not only the income tax and Canada Pension Plan contributions deemed to be payable on income of $18,200.00 per year but, also, deducted unemployment insurance premiums. Those premiums are not payable by [the Appellant] and, therefore, should not have been deducted. The amount of [the Appellant's] I.R.I. must be recalculated and increased accordingly.

Dated at Winnipeg this 11th day of November 1995.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED