

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-95-9**

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], the Appellant, appeared in person

HEARING DATE: October 18th, 1995

ISSUE: Unearned, potential, commission income - entitlement to its inclusion in calculation of Appellant's Income Replacement Indemnity.

RELEVANT SECTIONS: Section 111(1), 81(1)(a) and 81(2)(a)(i) of the MPIC Act.

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] was employed as a full time sales representative with [text deleted] at the time she suffered injuries in an automobile accident that occurred on July 19th, 1994. Just prior to the accident [the Appellant] had started to work for [text deleted] on a part-time basis, for

three days per week at four hours per day starting at 4:30 P.M.; after only one week of part-time work, she was hired on a full-time basis to work 12 hours per day, three days a week. The accident occurred after [the Appellant's] first full day of work and, due to her injuries, she was not able to return to her job. The position was ultimately filled by another employee.

The evidence adduced at the hearing indicates that [the Appellant] sold 4 to 5 memberships per shift while working part-time and 5 or 6 memberships on her first full day of work. The former manager of [text deleted], testified that [the Appellant], when merely an active member and before becoming an employee of [text deleted], had referred about 60 new members to her. [Appellant's former manager] also testified that [the Appellant] had been hired on the strength of her sales and marketing knowledge and, in particular, of her ability to sell.

The cost of a membership to [text deleted] was \$299.99 per year; the new member could pay that in full with her application (in which case the salesperson would be credited with the full \$299.00 towards her monthly sales total, or, as many new members did, spread the payment over a period of months in two or three instalments. In the latter event, if the member's contract allowed more than 30 days between the first and last payments, the salesperson would only be credited with \$209.30 towards her total monthly sales.

Part-time sales personnel were paid a basic hourly wage plus \$5.00 for each membership sold; full-time employees were paid a basic monthly salary of \$1,000.00, plus a commission. That commission was calculated as follows:

on the first \$7,500.00 of credited sales - nil

on sales between \$7,500.00 and \$12,499 - 3%

on the next \$5,000.00 of credited sales - 4%

and so on, with one extra percentage point being added to each additional \$5,000.00 of credited sales.

[Appellant's former manager] has been associated with [text deleted] for approximately 2 1/2 years, mostly as the manager and, since May of 1995, has returned to full-time sales, receiving the same basis of remuneration as [the Appellant]. She testified that a good sales person should be able to sell at least a minimum of \$11,000.00 to \$12,000.00 worth of memberships per month and that she, herself, has sold up to \$30,000.00 per month on occasion. The busiest period for the sale of memberships is in the fall of each year, with July and December being the slowest months for sales. [Appellant's former manager] also indicated that there is a high turn-over in staff with the average term of employment for full-time staff being approximately six months.

[Appellant's former manager] tendered her pay stubs for each of the months from June 11th, 1995 to October 11th, 1995; the 11th is when the commissions are paid to the employees for the previous month's sales. [Appellant's former manager] earned \$222.81 for May, \$286.64 for June, \$226.09 for July, \$339.96 for August and \$571.04 for September. [Appellant's former manager] could not tell the hearing what other full-time employees had made by way of commission as this was confidential information; she could only 'guesstimate' from personal observation.

Neither [the Appellant] nor [Appellant's former manager] could tell the hearing with any certainty what she would have earned nor what other employees in similar circumstances would have earned. We note that for the five month period [Appellant's former manager] averaged \$329.31 per month and she had more than two and one-half years of selling experience with [text deleted].

[The Appellant] had sales experience, although, as outlined on her Application for Compensation, her length of employment at each job was only for a few months. We accept [the Appellant's] evidence that during this period she was going through marital difficulties necessitating several changes of residence and that this was the reason for her short length of stay at each job and for the number of changes. Despite those changes, she appears to have had successful sales careers at each place and it is noteworthy that she returned to one location to become its manager at the owner's request.

M.P.I.C., in a decision confirmed by its Internal Review Officer, [text deleted], found that the Appellant's income would have been limited to \$1,000.00 had her employment not been curtailed by her accident, and computed her Income Replacement Indemnity accordingly.

DISPOSITION:

[The Appellant's] past sales experience, the number of new memberships that she referred to [text deleted] while merely a member, and the number of memberships that she was

able to sell during her comparatively brief part-time and full-time employment just prior to the accident all combine to persuade us that she would have earned commission income had she been able to remain on her job.

With no other hard evidence as to the amount of [the Appellant's] probable earnings, we find that, had she not been injured by her accident, she would have earned at least the minimum, monthly commission of 3% on \$ 7,500.00, or \$225.00 per month throughout the period during which she received her Income Replacement Indemnity, which terminated April 6th, 1995.

Therefore we amend [MPIC's Internal Review Officer's] decision of May 23rd, 1995 by adding \$225.00 to [the Appellant's] monthly income of \$1,000.00 for the period of July 27th, 1994 to April 6th, 1995, bringing up to \$1,225.00 the gross monthly income upon which her Income Replacement Indemnity should be calculated. We refer this matter back to M.P.I.C. to recalculate [the Appellant's] I.R.I., and to pay her the difference.

Dated at Winnipeg this 25th day of October, 1995.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED