Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-04

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Ms. Yvonne Tavares** **Mr. Wilson MacLennan**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Keith Addison.**
HEARING DATE:	**October 31, 2000**
ISSUE(S):	**(i) whether Appellant properly reimbursed for child care expenses;** **(ii) whether Appellant's Income Replacement Income('IRI') properly calculated.**
RELEVANT SECTIONS:	**Sections 83(1) and (2), 84(1) and (3), 106, 111(2),134(1), and 134(2)(b) and (c) of the MPIC Act, Section 6 of Manitoba Regulation 37/94, and Sections 3 and 5 of Manitoba Regulation 39/94.**

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:

On April 2, 1999 [the Appellant], a passenger in the front seat of the [text deleted] van driven by her husband, was injured when that van was broad-sided by a [text deleted] vehicle that went

through a stop sign at a high rate of speed. The nature and extent of her resultant injuries are not at issue in the present appeal.

[Appellant's husband] and [the Appellant] have three children: [text deleted]. All the children were living at home on the date of the motor vehicle accident.

Of relevance to [the Appellant's] appeal is her prior work experience, which may be summarized this way:

(i) From 1988 to 1995 [the Appellant] worked in a secretarial capacity at [text deleted], apart from maternity leave related to [text deleted] birth;

(ii) In September of 1995, [the Appellant] commenced a course in child care under the aegis of [text deleted] Child and Family Services, with particular emphasis on the skills required when caring for children with special needs;

(iii) She took in her first foster child on July 25, 1996 and three more on August 1st, September 27th and December 9th 1996, respectively;

(iv) Those four children left her at varying times, the last one on January 30, 1997, at or about which point (finding that looking after youngsters with special needs was too exhausting) she started caring for two neighbourhood youngsters. She did so until [text deleted] when [text deleted] was born and the [text deleted] family moved to their present address;

(v) From January 1st to April 2nd, [the Appellant] took time off from her active day care duties for maternity leave;

(vi) [The Appellant] had completed the orientation and all other qualifying courses such as cardiopulmonary resuscitation and first aid, with a view to becoming registered as a licensed Day Care Centre. The only step that remained was a one-day course that was scheduled for April 15, 1999, following which (subject to on-site inspection and approval

of her premises) she would have become fully licensed. As an unlicensed day care operator she is allowed to have a maximum of eight children under her care, including her own. At the time of her accident, there were five children whose parents had registered for day care at [the Appellant's] home, namely;

- [text deleted] – aged [text deleted] years, at $15.00 per day or $300.00 per month;
- [text deleted] – aged [text deleted] years, at $16.00 per day or $320.00 per month;
- [text deleted], aged [text deleted], and [text deleted], aged [text deleted], at an aggregate of $625.00 per month; and
- [text deleted]- aged [text deleted] years, at $15.00 per day or $300.00 per month.

(vii) [The Appellant] had registered her business name of [text deleted] and had started her business as of March 1, 1999 although, as noted above, the first children were scheduled to start attending the Day Care Centre on April 5th. She had also advertised in the neighbourhood and, having already registered five children by the date of her accident, she was in business as a self-employed day care operator, although revenue had not yet commenced.

THE LAW

Section 134 of the MPIC Act reads, in part, as follows: The relevant Sections of the MPIC Act and Regulations are annexed as a Schedule to these Reasons.

DISCUSSION:

The first issue that we need to address is whether [the Appellant] was properly reimbursed for monies she expended for the care of her children during the times when, because of her accident, she was unable to do so. It appears from the material on file that, initially, [the Appellant] had only claimed reimbursement with respect to her two younger children, since [text deleted] was attending school. By letter of September 23, 1999, [the Appellant's] case manager, [text deleted],

directed [the Appellant's] attention to Section 134(2) noted above, and agreed that she would be entitled to $100.00 per week indexed to $110.00 per week in 1999.

By further letter of January 31, 2000, [Appellant's MPIC case manager] said, in part:

> You asked if there would be a further consideration for Child Care Expense Reimbursement Indemnity given that your [text deleted] year old son (sic) was home during the summer months. He required care along with your other two children. Care was not required while he was attending school. Child Care Expense Reimbursement Indemnity was initially addressed in the Decision letter of September 23, 1999, however, you requested benefits based on two children.
>
> I have reviewed this matter and there is coverage provided under the Child Care Expense Reimbursement Indemnity based on three children for the summer months. You will be reimbursed for the outstanding expenses in the amount of $170.00 (you submitted expenses totally $1,020.00 for the months of July/ August; MPI previously paid $850.00). (*[Appellant's MPIC case manager] went on to quote the wording of Section 134(2) of the Act.)* The $125.00 referred to has been indexed to $138.00 (1999 limit).

From all of the information available from MPIC's file, and from the oral testimony given to us by [the Appellant] at the hearing of her appeal, we have been unable to conclude that there has been any time other than vacation periods during which [the Appellant] has had to pay someone else to look after all three of her children. Similarly, so far as we can tell, MPI has reimbursed her for expenditures made for the care of her three children during vacation periods when, by reason of her accident, she was unable to do so herself. [The Appellant] disputes the statement that appears in a number of places throughout her file, to the effect that she had two children. While it is unquestionable that she does, in fact, have three children, that is not really the issue: the question is whether she incurred expenses because of her accident to pay the cost of care for more than two children.

If, therefore, there were any periods for which [the Appellant] had to employ someone to look after all three of her children and for which she has not been reimbursed at the rate of $138.00

per week, she is certainly entitled to be reimbursed at that rate. It is only the number of children for whom she had to employ a caregiver that governs the weekly rate of reimbursement to which she was entitled.

The only other issue before us is whether the amount of income replacement indemnity ('IRI') that she was paid, both before and after the 180th day immediately following her accident, was properly calculated. We find that [the Appellant's] self-employment was properly classified by MPIC as 'temporary', by applying the provisions of Section 4 and 6 of Manitoba Regulation 37/94. [The Appellant's] evidence was that, between some date in December shortly before the birth of her youngest child, and the beginning of March of 1999, she had not been gainfully employed in any capacity and her home daycare business was not operating. She therefore does not fall within the language of Subsection 4(a) of Regulation 37/94. By the same token, she had not started her home daycare centre until some time in the month of February, 1997, and had only operated as an unregistered daycare centre until December of 1998. She therefore did not fall within the language of Subsection 4(b) of that Regulation. Although in normal parlance [the Appellant's] self-employment would be regarded as full-time and reasonably permanent, in fact she is a temporary earner within the meaning of Section 6 of Regulation 39/94.

This latter finding brings the provisions of Section 83 of the MPIC Act to bear upon [the Appellant's] claim. Specifically, Section 83(2)(a)(ii) applies. Under that subsection, [the Appellant] was entitled to IRI based upon a gross yearly employment income which was the greater of:

- the gross income determined in accordance with the regulations for an employment of the same class, or

- the gross income that she earned or would have earned from the employment.

In order to determine the 'gross income determined in accordance with the regulations for an employment of the same class', we must look to Section 8 and Schedule C of Regulation 39/94. Section 8 of that Regulation makes Schedule C applicable to a temporary earner, and classification number 6147 (child care occupations) of Schedule C provides a gross yearly employment income for a child care worker as $9,572.00 at Level 1 and $15,592.00 at Level ll. Level l covers persons who have worked in a given occupation for up to 36 months; Level ll covers those who have worked for more than 36 but less than 120 months. [The Appellant] submits that, if Schedule C of Regulation 39/94 is to be applied, then she should be placed at Level ll, taking into account the year of training that she received from Child and Family Services before starting as a foster parent in July of 1996. We are unable to make such a finding; a course of training for an occupation does not constitute employment in that occupation for the purposes of Schedule C.

[The Appellant's] evidence, which is supported by the report of [text deleted], dated December 23, 1999, tells us that, had her accident not occurred, she could have expected a monthly cash income from the operations of her daycare centre amounting to $1,545.00. However, in order to determine whether the gross income that she would have earned from her employment would have exceeded $9,572.00, one must apply Section 3(1) of Manitoba Regulation 39/94 – that is to say, one must deduct all of the expenses related to the earning of that cash income. Those expenses would include not only the cost of feeding the children under [the Appellant's] care but, as well, a proportionate share of the cost of operating her home, including mortgage interest, municipal taxes, insurance premiums, utility bills, general maintenance and repair (excluding capital costs) together with payroll costs, if any, and supplies. As well, there would have to be

deducted from any projected annual cash flow an amount to reflect those holiday periods when the children would be with their own parents rather than under [the Appellant's] care. We do not have sufficient evidence upon which to arrive at any conclusions in this context.

That same absence of evidence respecting the operating expenses of [the Appellant's] business makes it impossible for us to determine a gross yearly employment income for her under the provisions of Section 5(1) of Regulation 39/94 which provides that:

> 5(1) the gross yearly employment income of a temporary earner …….. for the first 180 days after the date of the accident is the amount calculated under Sections 2 and 3 and adjusted under Schedule A.

However, the basis of [the Appellant's] appeal is not that the gross income she earned or would have earned from her employment was greater than the gross income determined under the regulations for an employment of the same class but, rather, that she should have been placed at Level ll under Schedule C of the Regulation rather than at Level l. We have already determined that, unfortunately, this facet of her appeal must also fail.

Section 111(2) of the Act provides that the IRI for any victim for whom MPIC determines an employment under Section 106 may not be less than an amount computed on the basis of gross yearly income equal, at least, to the minimum wage established under the Employment Standards Code. MPIC determined an employment for [the Appellant] at the 181st day following her accident to be that of a childcare worker, and accordingly increased the basis of her IRI to minimum wage of $12,480.00. That determination increased her bi-weekly IRI from $317.89 to $412.11.

If [the Appellant] is of the view that an income replacement indemnity based upon the business income that, were it not for the accident, she would have earned during the first 180 days would be greater than the monies actually paid her by MPIC, she is still at liberty to present evidence of that to her adjuster. Section 84(1) does not allow MPIC to pay her any less IRI after the first 180 days than the amount she was entitled during the first 180 days.

We note, in passing, that MPIC's Internal Review Officer, in his decision of June 30, 2000, appears to have based his decision in part upon the provisions of Section 86(1), which relate to non-earners. [The Appellant], of course, had been classified as a temporary earner, rendering Section 86 inapplicable, although the provisions relating to temporary earners are similar.

DISPOSITION:

Subject to [the Appellant's] right to establish, upon additional evidence to be presented to her adjuster, that:

(a) she paid someone for the care of all three of her children, for any period for which she has not yet been reimbursed at the rate of $138.00 per week; and

(b) her gross yearly employment income derived from self-employment, within the meaning of Section 3(2) of Manitoba Regulation 39/94 was, or but for her accident would have been, greater than the amount actually used by MPIC as the basis of her IRI,

[The Appellant's] appeal is dismissed and the effects of MPIC's Internal Review Officer's decisions of December 20, 1999 and June 30, 2000 are confirmed.

Dated at Winnipeg this 6th day of November, 2000.

J. F. REEH TAYLOR, Q.C.	**YVONNE TAVARES**	**WILSON MCLENNAN**