

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]

AICAC File No.: AC-00-96

PANEL: Mr. Mel Myers, Q.C., Chairman
Mr. Guy Joubert
Mr. Bill Joyce

APPEARANCES: The Appellant, [text deleted],
was represented by [Appellant's father-in-law];
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Jim Shaw.

HEARING DATE: November 14, 2002

ISSUE(S): Determination of Appellant's Income Replacement
Indemnity benefits

RELEVANT SECTIONS: Sections 70(1), 81(1) and (2), 84(1), 106(1) and (2) of the
Manitoba Public Insurance Corporation Act ("MPIC Act")
and Manitoba Regulations 39/94 3(1) and 3(2).

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 Appellant], was a passenger in a motor vehicle which was involved in a motor vehicle accident on July 17, 1999. As a result of this accident, the Appellant suffered soft tissue injuries to his neck, upper and lower back. Unfortunately, the injuries that the Appellant sustained in the motor vehicle accident had a traumatic effect on the Appellant emotionally and physically. Due to the injuries sustained in the motor vehicle accident, the Appellant experienced back pain and

became extremely stressed due to conflict with MPIC in resolving a dispute in respect of income replacement indemnity benefits.

Prior to the motor vehicle accident, the Appellant was a resident in [text deleted], married with children, and had been employed for a period of four years with a firm which manufactured [text deleted]. The Appellant was laid off from this employment in June 1998 and was unable to find other employment and as a result received employment insurance until these benefits terminated in the month of May 1999.

In order to assist the Appellant financially, the Appellant's father-in-law, [text deleted], occasionally employed the Appellant in his business. [Appellant's father-in-law] was self-employed, operating under the firm name and style of [text deleted] in the Province of [text deleted]. [Appellant's father-in-law] would purchase [text deleted] wholesale from the [text deleted] and then sell this [text deleted] from the [text deleted].

[Appellant's father-in-law] determined that [text deleted] would provide a good market for the sale of [text deleted] and he employed the Appellant and provided him with a truck and [text deleted]. Together with the Appellant, he would travel to [text deleted] and sell the [text deleted]. The Appellant made 6 trips to [text deleted] pursuant to this employment arrangement on May 28, June 4, June 11, June 18, June 25, and July 2, 1999, and on each occasion [Appellant's father-in-law] paid the Appellant \$1,000.00.

During the course of these trips to [text deleted], the Appellant and [Appellant's father-in-law] came into contact with [Appellant's friend] who was an old friend of the Appellant's. The Appellant and [Appellant's friend] entered into a partnership to operate a retail [text deleted] on

[text deleted] in [text deleted]. [Appellant's friend] was to provide the capital, a store would be rented and refurbished, and would be operated by the Appellant who would receive 49% of the profits of the business. The last trip that the Appellant made to [text deleted] was on July 2, 1999, and it was the intent of the Appellant and [Appellant's friend] to open the retail [text deleted] store on or about August 1, 1999. Unfortunately, the motor vehicle accident occurred on July 17, 1999, and due to the injuries that the Appellant sustained in the motor vehicle accident, he was incapable of working and therefore, could not continue with this business venture. Since the motor vehicle accident, the Appellant has been unable to work and earn an income.

The dispute between the parties relates to the Income Replacement Indemnity (IRI) benefits that MPIC has determined that the Appellant is entitled to. The Appellant asserts that at the time of the accident on July 17, 1999, he was earning \$1,000.00 a week and as a result, he was entitled to receive IRI benefits in the amount of \$1,000.00 weekly until he is able to return to work.

MPIC on the other hand has determined that prior to the accident, the Appellant had been temporarily employed by his father-in-law in the sale of [text deleted] in [text deleted] and that the employment relationship had ceased prior to the motor vehicle accident on July 17, 1999. MPIC determined that as of the date of the accident, the Appellant had changed his status from a person employed by his father-in-law to a person who is self-employed and in the process of establishing a retail [text deleted]. Having regard to the relevant Legislative Provisions and Regulations under "the Act", MPIC determined that since the store had not been established and there was no record of business income, as a self-employed person the Appellant was not entitled to any IRI benefits. However, the MPIC case manager made a 180 day determination on March 8, 2000, and in applying the relevant Regulations, determined the Appellant should be classified

as an assembly and inspection worker and calculated the IRI benefits to be based on a gross yearly employment income of \$29,858.00.

The Appellant rejected the determination made by the case manager and made application to have the case manager's decision reviewed by an Internal Review Officer.

INTERNAL REVIEW DECISION DATED JUNE 26, 2000

The relevant provisions of the MPIC Act and Regulations are as follows:

MPIC Act

Definitions

70(1) In this Part,

"temporary earner" means a victim who, at the time of the accident hold a regular employment on a temporary basis, but does not include a minor or a student.

"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.

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;

Determination of I.R.I. for full-time earner

81(2) The corporation shall determine the income replacement indemnity for a full-time earner on the following basis:

- (a) under clauses (1)(a) and (b), if at the time of the accident
 - (i) the full-time earner holds an employment as a salaried worker, on the basis of the gross income the full-time earner earned from the employment.
 - (ii) the full-time earner is self-employed, on the basis of the gross income determined in accordance with the regulations for an employment of the same class, or the gross income the full-time earner earned from his or her employment, whichever is the greater,

Entitlement to I.R.I. after first 180 days

84(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

Factors for determining an employment

106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

Type of employment

106(2) An employment determined by the corporation must be an employment that the victim could have held on a regular and full-time basis or, where that would not have been possible, on a part-time basis immediately before the accident.

M. R. 39/94**GYEI from self-employment**

3(1) In this section, "**business income**" means the income derived from self-employment, by way of a proprietorship or partnership interest, less any expense that relates to the income and is allowed under the *Income Tax Act* (Canada) and *The Income Tax Act* of Manitoba but not including the following:

- (a) any capital cost allowance or allowance on eligible capital property;
- (b) any capital gain or loss;
- (c) any loss deductible under section 111 (losses from other years) of the *Income Tax Act* (Canada).

GYEI from self-employment

3(2) Subject to section 5, a victim's gross yearly employment income derived from self-employment that was carried on at the time of the accident is the greatest amount of business income that the victim received or to which the victim was entitled within the following periods of time:

- (a) for the 52 weeks before the date of the accident;

(b) for the 52 weeks before the fiscal year end immediately preceding the date of the accident;

or according to Schedule C.

The Internal Review Officer adjusted the gross yearly income upon which the IRI benefits is based to \$36,081.08 rather than \$29,858.00, and in all other respects affirmed the decision of the Internal Review Officer. As a result, the Internal Review Officer rejected the Appellant's claim for IRI benefits of \$52,000.00 annually.

In arriving at his decision, the Internal Review Officer stated:

"You have asked for a review of [text deleted's] decision of March 8th, 2000. This decision deals with your entitlement to Income Replacement Indemnity ("IRI") benefits. It is worth summarizing very briefly what [text deleted] decided, which was as follows:

- 1) You were an employee of your father-in-law, [text deleted] from March 19th, 1999 to July 31st, 1999. Your employment consisted of selling [text deleted] in [text deleted].
- 2) Your injury occurred on July 17th, 1999, that is to say within the period of employment by your father-in-law.
- 3) [Text deleted] calculated that you had earned \$6,000.00 from this employment in four months. That would amount to total income of \$18,000.00 over a year. This "gross yearly employment income" was the figure on which your IRI benefits were based while you continued to be an employee.
- 4) You were involved in plans to open a retail [text deleted] at a fixed location in Winnipeg. The [text deleted] was to open during the first week of August 1999. Various steps had been taken to realize this objective, as referred to in [text deleted's] decision and in the other documentation on the file.
- 5) Therefore, as of August 1st, 1999, you were to be considered self-employed in the retail [text deleted] venture.
- 6) Since you had never previously been employed managing a retail [text deleted], the only way of setting your IRI after August 1st, 1999, was to apply Schedule C of Regulation 39/94. [Text deleted] used Schedule C to set a gross yearly employment income for your period of self-employment. For most of the first six months after your accident, your IRI benefits were based on this gross yearly employment income.
- 7) On the date of your accident, you were a temporary employee, as defined by *The Manitoba Public Insurance Corporation Act* ("the Act"). Accordingly, you were

entitled to a 180-day determination. This determination adjusts your IRI on the basis of your employment history in the five years before the accident.

- 8) [Text deleted] determined you as an assembly and inspection worker in machinery related occupations. Although you objected to this classification in passing at the hearing, you did not suggest a more suitable one. It is not an unreasonable classification given the four years you spent working in a [text deleted] concern in [text deleted]. The determination resulted, as of the 181st day following your accident, in an increase of more than \$10,000.00 in the gross yearly employment income on which your IRI had previously been based. [Text deleted] applied Sections 84(3) and 106 of the Act in a fair and reasonable manner. Nevertheless, an adjustment is called for. Because you had been doing the determined employment within the five years preceding the accident, but not at the time of the accident, you are entitled to the benefit of Section 7(1) of Regulation 39/94. The \$34,278.00 you earned at the determined employment in 1997 exceeds the gross yearly employment income of \$29,858.00 shown in Schedule C. The gross yearly employment income on which your IRI was based should have been \$34,278.00, subject to the adjustments called for in Schedules A and B of Regulation 39/94. The indexing called for in Schedule B raises the gross yearly employment income to \$36,081.08. Section 6 of Schedule A provides that this amount is not subject to adjustment since you had not been unemployed for more than 12 months before your accident. Therefore, your IRI should have been \$955.32 biweekly starting on January 14, 2000, rather than the \$836.95 you were paid."

The Appellant, on receipt of the decision of the Internal Review Officer dated June 26, 2000, appealed the decision to the Commission.

APPEAL

The Appeal Hearing took place on November 14, 2002, and the Appellant was represented by [Appellant's father-in-law] and legal counsel represented MPIC. The Appellant was not physically present in [text deleted] but remained in [text deleted] during the course of the Appeal Hearing. However, the Appellant participated in a teleconference throughout the entire Appeal Hearing and testified and made submissions during the course of the Hearing, as did [Appellant's father-in-law] and legal counsel for MPIC. At the conclusion of the Hearing, the Commission adjourned the proceedings in order to consider its decision.

DISCUSSION

The Internal Review Officer correctly rejected the Appellant's assertion that between March 1999, and the date of the accident on July 17, 1999, the Appellant was employed by [Appellant's father-in-law] and was to receive pay of \$1,000.00 per week. The Commission notes that the statements provided by both the Appellant and [Appellant's father-in-law] to MPIC clearly indicates that the Appellant was to receive \$1,000.00 for every [text deleted] sold and not \$1,000.00 per week as submitted by the Appellant.

The Appellant in his statement to MPIC dated August 30, 1999, stated:

..."For this arrangement, [Appellant's father-in-law] would provide the [text deleted] and would pay me \$1,000.00 to sell a truckload..."

[Appellant's father-in-law] in his statement to MPIC dated September 10, 1999, stated:

..."We took [text deleted]to [text deleted] between February and March of 1999 and June of 1999. On the last trip I left the truck there along with [the Appellant]. The plan was to send the [text deleted] to him by air or [text deleted] from [text deleted]and he would sell it in [text deleted]. I would pay him \$1,000.00 a load to sell the [text deleted]. I paid him in cash..."

The Internal Review Officer also correctly determined that the employment arrangement between the Appellant and [Appellant's father-in-law] was temporary in nature and was terminated on or about August 1, 1999, when the Appellant was to establish a [text deleted]. The Internal Review Officer concluded that the Appellant and [Appellant's father-in-law] never intended that their arrangement was anything but temporary only and it came to an end as soon as the Appellant had committed himself to the retail [text deleted] venture which the Internal Review Officer determined occurred before the accident of July 17, 1999. Accordingly, the

Internal Review Officer correctly found that at the time of the accident on July 17, 1999, the Appellant was no longer employed by [Appellant's father-in-law] and was no longer involved in an employment arrangement where the Appellant was receiving \$1,000.00 for every [text deleted] that was sold.

The Commission notes that the statements provided by the Appellant and [Appellant's father-in-law] confirm the findings of the Internal Review Officer. The Appellant states:

"...The last time before the accident that a [text deleted] had been sold by me and him was about a little more than one month, maybe five to six weeks. Because of the accident then I lost out on the \$1,000.00 that I would have made selling the last load of [text deleted] before the store opened. There wouldn't be any more loads planned because by the time my customers would need the [text deleted] again I was planning on having the store opened. We were planning on having the store opened for business in the first week of August 1999..."

[Appellant's father-in-law] in his statement to MPIC dated September 10, 1999 states:

"...I also arranged with a friend of mine, [Appellant's friend] for [the Appellant] to go into partnership together. The original deal was offered to me but I knew [the Appellant] needed the opportunity and I had other work anyway so I lined the two of them together. It was my understanding that [the Appellant] would have 49% of the company for running the business, which included renovating the store premises on [text deleted] street, and [Appellant's friend] would get 51% for putting up the money to do this. It was further agreed that the business would pay [the Appellant] \$800 per week to run the business. If the business made enough to show a profit then [the Appellant] would get 49% of the profit as well. This deal was in effect at the time that [the Appellant] had his accident in July 1999 in [text deleted]..."

The Commission finds that the last [text deleted] for which the Appellant received \$1,000.00 was on July 2, 1999, and subsequent thereto, the Appellant was in the process of attempting to establish a [text deleted] as a partner of [Appellant's friend].

The Internal Review Officer noted that in July, the Appellant was receiving \$800.00 a month from [Appellant's father-in-law], of which he was required to repay, which constituted a loan

from [Appellant's father-in-law] to the Appellant. The Internal Review Officer correctly concluded that the legislation made it very clear that IRI benefits of a self-employed individual can only be established in one of two ways:

"first, on the basis of his actual earning history in the self-employed business prior to his injury, or, secondly, on the basis of scheduled earnings as stipulated by the appropriate class of employment under Schedule C. You have no track record at all in operating a [text deleted]. The only option available to [text deleted] was the one he adopted - the application of Schedule C."

DECISION

The Commission, after a careful review of all of the documentary evidence and the testimony of [Appellant's father-in-law] and the Appellant, rejects the Appellant's appeal in this matter and confirms the decision of the Internal Review Officer on the following grounds:

1. The Appellant was employed in the spring of 1999 by [Appellant's father-in-law] and received payment of \$1,000.00 for each [text deleted] he sold in [text deleted]. The Commission rejects the Appellant's assertion that he was to be paid \$1,000.00 per week pursuant to his employment contract with the Appellant.
2. At the time of the accident on July 17, 1999, the Appellant was no longer an employee of [Appellant's father-in-law] but was self-employed and had committed himself to a [text deleted] venture which he and his partner intended to open on or about August 1, 1999. As a self-employed person at the time of the accident, the Appellant did not have the status of employee at the time of the accident and therefore pursuant to section 81(1) of the Act and 3(1) and (2) of M. R. 39/94 was not entitled to claim IRI on the basis of being an employee but only on the basis of a self-employed person.
3. However, the Internal Review Officer concluded that as a self-employed person the Appellant was in the process of establishing a business at the time of the accident and therefore, there was no track record upon which MPIC could calculate IRI benefits.
4. The Internal Review Officer correctly concluded that the only option available to provide IRI benefits to the Appellant is to treat the Appellant as a person who had been employed in a factory in [text deleted] in the previous five years prior to the motor vehicle accident and provide IRI benefits based on the highest annual income the Appellant had earned during the course of that period of time.

5. The Internal Review Officer was correct in confirming the decision of the case manager that in order to entitle the Appellant to receive IRI benefits, the Appellant should be treated as a person who was employed prior to the motor vehicle accident as an [text deleted] in the [text deleted] and on that basis determine that the IRI benefits payable to the Appellant were \$36,081.08 annually.

The Commission therefore concludes that:

- A The decision of the Internal Review Officer was correct in determining that the yearly employment income on which IRI was based was \$36,081.08.
- B The Commission also finds that the Internal Review Officer was correct in rejecting the Appellant's claim for IRI benefits in respect of the [text deleted] Operation.

The Commission, therefore, dismisses the appeal of the Appellant and confirms the decision of MPIC's Internal Review Officer bearing date June 26, 2000.

Dated at Winnipeg this 10th day of December, 2002.

MEL MYERS, Q.C.

GUY JOUBERT

BILL JOYCE