



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-71**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms. Yvonne Tavares
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by [Appellant's representative]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

HEARING DATES: July 23, 2003, June 9, 2004, and December 14, 2004.

ISSUE(S):

1. Calculation of Income Replacement Indemnity benefits;
2. Whether Appellant's employment properly classified pursuant to Schedule C.

RELEVANT SECTIONS: Sections 81 and 82(1) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act') and Section 3 and Schedule C 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 Appellant was involved in a motor vehicle accident on April 25, 1997. As a result of the injuries which he sustained in that accident, the Appellant became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act. At the time of the accident, the Appellant was self-employed. His work consisted of three separate, seasonal, business activities – welding, combining, and small engine repair. The injuries which the Appellant sustained in the

motor vehicle accident prevented him from continuing with those employments after the accident. As a result he became entitled to Income Replacement Indemnity ('IRI') benefits. The Appellant is appealing two separate Internal Review decisions dealing with the following issues:

1. Calculation of Income Replacement Indemnity benefits; and
2. Whether the Appellant's employment was properly classified pursuant to Schedule C.

1. Calculation of Income Replacement Indemnity benefits

The Appellant is appealing the Internal Review decision dated February 16, 2000 which denied his claim for loss of profit or loss of prospective income to which he might have been entitled after the motor vehicle accident.

Counsel for the Appellant submits that the Appellant's IRI benefits were incorrectly calculated because the calculation did not include the loss of "prospective" income that he suffered as a result of the accident. At the time of the accident, the Appellant's welding business involved welding downspouts for [text deleted]. Counsel for the Appellant maintains that the volume of work which the Appellant did for [text deleted] in 1997, and the following years, would have grown dramatically if he had not been injured in the motor vehicle accident. Therefore, he claims that the Appellant has suffered a loss of prospective income which has not been compensated by the IRI he has received.

Alternatively, counsel for the Appellant submits that the Appellant should be awarded increased IRI benefits pursuant to ss. 82(1) of the MPIC Act. This subsection contemplates payment of greater IRI benefits to a full-time earner who would have held a more remunerative employment at the time of the accident, but for special circumstances. Counsel for the Appellant submits that at the time of the accident, the Appellant's welding operation and [text deleted] were in an

expansive mode, and but for the accident, the Appellant would have been entitled to receive increased income as a result of [text deleted] expansion. Therefore, he concludes that the Appellant should receive greater IRI benefits based on that increased income.

The Commission determined at the hearing of this matter that the Appellant's IRI benefits had been properly calculated. Subsection 3(2) of Manitoba Regulation 39/94 provides as follows:

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;
- (c) where the victim has operated the business for not less than two fiscal years before the date of the accident, for the 104 weeks before the fiscal year end immediately preceding the date of the accident divided by two;
- (d) where the victim has operated the business for not less than three fiscal years before the date of the accident, for the 156 weeks before the fiscal year end immediately preceding the date of the accident divided by three;

or according to Schedule C.

This subsection requires that the GYEI for a self-employed earner be calculated according to the greatest amount of business income that the Appellant received or to which the Appellant was entitled within certain prescribed periods of time – all of the prescribed periods of time reference periods that are prior to the accident. The Commission therefore determines that pursuant to ss. 3(2) of Manitoba Regulation 39/94, it is the historical performance of the business which determines the GYEI derived from self-employment (without reference to Schedule C). The amount of prospective income is not relevant to the calculation of GYEI and, therefore, IRI

benefits.

With regards to the Appellant's argument that he was entitled to an IRI on the basis of a gross income for a "more remunerative employment" as referred to in ss. 82(1) of the MPIC Act, the Commission finds that in order to qualify pursuant to ss. 82(1), he would have been required to hold a more remunerative employment at the time of the accident, but for special circumstances. As the Commission determined in the [text deleted] case (AC-97-128) the accident itself could not amount to special circumstances. In that case the Commission noted that "It is not within our power to increase [text deleted's] Income Replacement Indemnity ("IRI") retroactively, since the Act and Regulations make it very clear that the IRI has to be calculated on the basis of a claimant's earnings in effect at the date of the accident. Were it otherwise, it would not only be someone in [text deleted's] position who could claim additional benefits; anyone who could support the proposition that, in the foreseeable future, his earned income was likely to have increased had it not been for a motor vehicle accident would be entitled to additional benefits . . . the vital words of Section 82 are "at the time of the accident", and they prevent [text deleted] from qualifying for additional IRI".

In accordance with the Commission's reasoning in the [AC-97-128] case, we find that the Appellant has not established that he would have held a more remunerative employment at the time of the accident but for special circumstances. Accordingly, the decision of the Internal Review Officer dated February 16, 2000 is hereby confirmed and the Appellant's appeal with respect to this issue is dismissed.

2. Whether the Appellant's employment was properly classified pursuant to Schedule C.

The Appellant is appealing the Internal Review decision dated May 16, 2001 with regards to the

classification of his employment pursuant to Schedule C, for the purposes of calculating his IRI benefits.

The case manager determined the Appellant's IRI entitlement in accordance with ss. 81(2)(a)(ii) of the MPIC Act. He calculated the Appellant's IRI entitlement based upon his actual gross income, earned in his welding, combining and small engine repair ventures, and also calculated his gross income based upon Schedule C of Manitoba Regulation 39/94. The case manager determined that the Appellant's gross income based upon Schedule C was higher than the gross income based upon his actual earnings. In accordance with ss 81(2)(a)(ii) of the MPIC Act, the case manager determined that the Appellant was entitled to IRI benefits based upon the higher gross earnings provided for in Schedule C of Manitoba Regulation 39/94. The case manager's decision was upheld by the Internal Review Officer in his decision dated May 16, 2001.

At the appeal hearing, counsel for the Appellant submitted that the Appellant's IRI benefits should be based upon the GYEI provided for in the classification of "Other Managers and Administrators, not elsewhere classified" set out in Classification 1. Managerial, Administrative and Related Occupations in Schedule C of Manitoba Regulation 39/94. He argues that the Appellant's employment was entrepreneurial in nature. The Appellant performed various management and administrative functions as part of his day-to-day business, and as such his IRI should be based upon an appropriate classification. Counsel for the Appellant claims that determining the Appellant's IRI in accordance with three separate job classifications (i.e. welder, combiner and small engine repair) was not an appropriate method to classify his employment. Rather, counsel submits that the classification should take into account all of the Appellant's various job functions in order to correctly reflect the true nature of his employment. Counsel for the Appellant concludes that the most appropriate classification contained within Schedule C is

“Other Managers and Administrators, not elsewhere classified” set out in Classification 1. Managerial, Administrative and Related Occupations and that the Appellant should receive IRI benefits in accordance with the GYEI provided by Level 2 of that classification.

Counsel for MPIC acknowledges that MPIC improperly calculated the Appellant’s IRI entitlement. However, he maintains that had the calculation been properly done, the Appellant’s IRI entitlement would have been less than what he received. Counsel for MPIC confirmed that the Appellant’s GYEI was determined by using three different amounts from Schedule C and prorating them for each type of service the Appellant performed. Counsel for MPIC submits that this was an incorrect method of calculating the Appellant’s IRI. Rather, he submits that the Appellant was entitled to an indemnity based upon his actual business income earned, or an amount from Schedule C based upon a single employment.

Counsel for MPIC submits that the Appellant’s entitlement to IRI, as a full-time, self-employed claimant, should be determined pursuant to ss. 81(2)(a) of the MPIC Act. In his submission, counsel for MPIC maintains that ss. 81(2)(a)(iii) applies to the Appellant’s situation, since he held more than one employment. Therefore, he submits that the Appellant’s IRI entitlement should be determined in accordance with his actual income from all employments, as the basis for calculating GYEI. Pursuant to ss 81(2)(a)(iii), counsel for MPIC submits that there is no recourse to Schedule C when the claimant holds more than one employment.

Alternatively, counsel for MPIC maintains that for a self-employed claimant who holds a single employment, ss. 81(2)(a)(ii) of the MPIC Act applies. As such, the Appellant would be entitled to the greater of his actual business income (revenue less expenses) or an amount determined for his class of employment in accordance with Schedule C of Manitoba Regulation 39/94. Further,

counsel for MPIC submits that if the Appellant's employment is to be classified pursuant to Schedule C of Manitoba Regulation 39/94, the appropriate classification is Classification 23 – Occupations Not Elsewhere Classified. Counsel for MPIC maintains that the Appellant is not in “farm management occupations” as submitted by counsel for the Appellant, as he does not manage farms. He combines, welds and buys and sells [text deleted]. He may manage his business, but so does every other self-employed person. Counsel for MPIC argues that the Appellant is not in the business of providing management or administrative services and therefore he does not fit into Classification 1. Managerial, Administrative and Related Occupations.

Accordingly, counsel for MPIC submits that either the Appellant holds an employment – i.e. he is self-employed as a jack-of-all-trades – in which case ss. 81(2)(a)(ii) applies, or the Appellant holds more than one employment, in which case ss. 81(2)(a)(iii) applies.

Discussion:

Upon a review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant was a full-time earner, self-employed as a jack-of-all-trades. We find that the Appellant worked for himself and would perform any and all work functions that were required in order to maintain his business activities and maximize his earnings. His occupation did not primarily involve managerial and administrative functions and therefore did not come within Classification 1. Managerial, Administrative and Related Occupations. Accordingly, the Appellant's IRI entitlement should be determined pursuant to ss. 81(2)(a)(ii) of the MPIC Act.

In accordance with ss. 81(2)(a)(ii) of the MPIC Act, the Appellant's IRI benefits shall be based

upon the gross income determined in accordance with the regulations for an employment of the same class, or the gross income the Appellant earned from his employment, whichever is the greater.

Pursuant to ss. 3(1) of Manitoba Regulation 39/94, the Appellant's business income – revenue less expenses for all of his self-employed income – shall be calculated. That amount shall be compared with the GYEI for an employment of the same class set out in Schedule C. The Commission determines that the appropriate classification for the Appellant's self-employment pursuant to Schedule C is Level 3 of Classification 23 – Occupations Not Elsewhere Classified. The Appellant is entitled to IRI benefits based upon the greater of the GYEI determined pursuant to that classification or the gross income the Appellant earned from his self-employment.

As a result, the decision of MPIC's Internal Review Officer dated May 16, 2001, is therefore varied accordingly.

Dated at Winnipeg this 27th day of January, 2005.

MEL MYERS, Q.C.

YVONNE TAVARES

PAUL JOHNSTON