Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-61

PANEL:	**Ms. Laura Diamond, Chairperson** **Mr. Paul Johnston** **Mr. Neil Cohen**
APPEARANCES:	**The Appellant, [text deleted], was represented by his wife, [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**January 13, 2005**
ISSUE(S):	**1. Whether Income Replacement Indemnity benefits were correctly calculated;** **2. Whether the Appellant is entitled to personal care assistance.**
RELEVANT SECTIONS:	**Sections 111, 112, 131 and 202 of The Manitoba Public Insurance Corporation Act ('MPIC Act), Section 10 of Manitoba Regulation 39/94 and Section 2 of Manitoba Regulation 40/94**

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 injured in a motor vehicle accident on November 28, 2003. As a result of injuries sustained in that accident, he became entitled to Personal Injury Protection Plan benefits, including Income Replacement Indemnity ('IRI') benefits. He was classified as a temporary

earner, and MPIC calculated a gross yearly employment income ('GYEI') upon which to base his IRI entitlement.

This appeal concerns the method of calculating the final IRI payments, as well as the Appellant's entitlement to personal care assistance benefits.

Internal Review Decision

Calculation of IRI payments

The GYEI which was calculated for the Appellant was $64,193. As the maximum GYEI for the year in question (2003) was $64,000, the IRI calculation unit made deductions for income tax, CPP and EI in order to calculate a bi-weekly payment based on ninety percent (90%) of the net GYEI.

In a decision letter dated July 23, 2004, an Internal Review Officer for MPIC found that the IRI calculation unit had correctly calculated these deductions in accordance with the legislation, and in particular, with Regulation 39/94, which sets out that deductions are calculated in accordance with the *Income Tax Act*. The Internal Review Officer rejected the Appellant's argument that the deductions should be based on actual figures from his previous earnings.

Personal Assistance Benefits

In an Internal Review decision dated March 26, 2004, an Internal Review Officer denied the Appellant's claim for personal assistance benefits under Section 2 of Regulation 40/94. The Internal Review Officer concluded that, based on the personal assistance expenses worksheet

completed, and the evidence, the Appellant had not done much housecleaning, laundry, or meal preparation prior to the accident, and thus, the scores regarding home assistance did not apply.

It is from these two decisions of the Internal Review Officer that the Appellant now appeals.

Appellant's Submission

Calculation of IRI payments

The Appellant submits that the income tax deductions made by MPIC have been made at the wrong rate. The Appellant submits that the deduction rate used by MPIC falls at an average of twenty-nine percent (29%). However, when the Appellant's actual earnings for the previous year are examined, an actual deduction rate of twenty percent (20%) was used, on average.

The Appellant submits that MPIC was not using the same tax table as the Appellant's employer was using and should not have used a different deduction rate than that used by his employer.

Personal Care Assistance

On behalf of the Appellant, it was submitted that, although prior to the accident he did work out of town, in [text deleted], approximately eighty-four percent (84%) of the time (or 15 out of 18 weeks), he did almost all of the housework for his family when he was home in [text deleted]. As well, he was responsible for taking care of himself, including doing laundry, grocery shopping, and some meal preparation, while he was out-of-town at work. Sometimes he stayed in hotels or motels, and sometimes he stayed in work camps, so the amount of these duties varied, but he was always responsible for caring for himself to some extent.

After the accident, particularly at the beginning, the Appellant was not able to help at all around the house, or even to care for himself. As his condition improved slightly, he was able to help around the house a little bit, and to care for himself a bit more, although he still required assistance with some personal needs, such as getting dressed. He also remained limited in the amount of housework he could assist with. There were some tasks he could assist with partially, and others he could not help with at all, such as grocery shopping or doing laundry.

It was submitted on behalf of the Appellant that as he had been able to help somewhat with housekeeping before the accident and had been able to care for himself, both while away and at home, the family was now in a worse position because of the accident, since the Appellant's ability to help in both of these ways was diminished.

MPIC's Submission

IRI calculation

Counsel for MPIC submitted that the tax rates used to calculate the Appellant's earned income for the previous year were not appropriate to apply to the GYEI attributed to the Appellant for the year 2003. The rates utilized by the employer to calculate income tax were based upon the amounts actually earned by the Appellant for the six month period prior to the accident. However, when calculating IRI, MPIC was obligated by the statute and regulations to calculate and take deductions from the total amounts payable on an annual basis. The Appellant could not take advantage of having his income annualized, yet still maintain the tax rate calculated on his lower income from the previous year. For the purposes of IRI calculation, the Appellant's income was annualized for his benefit, and the appropriate income tax rate was applied to that amount.

Personal Care Assistance

Counsel for MPIC submitted that in order to be entitled to reimbursement for an expense, the Appellant must have incurred that expense. There is no evidence that the Appellant has incurred any such expense in regard to his personal care assistance needs.

Further, counsel for MPIC submitted that the Appellant is not in a very different position, as regards personal care and housework, after the accident, as he was in before the accident. Both he and his family did some of the work before the accident, although the evidence was that he only worked at it sixteen percent (16%) of the time.

Counsel for MPIC also submitted that there is no evidence that the Appellant could not assist with these tasks. While he may have been afraid that such tasks might cause him pain, there are no objective reports that established he lacked the functional ability to perform such tasks. The only medical evidence consists of subjective reports by the Appellant regarding his pain and inability to function.

Finally, counsel for MPIC submitted that the Appellant was doing very little of the housework before the accident and is generally in the same position now as he was before the accident. He did some tasks before the accident and did some tasks after the accident. His family did the bulk of the housekeeping before the accident and did so after as well. His position had not changed, and there was nothing to reimburse in terms of personal assistance benefits.

Discussion

IRI calculation

Section 111(1) of the MPIC Act sets out Income Replacement Indemnity as:

I.R.I. is 90% of net income
111(1) The income replacement indemnity of a victim under this Division is equal to 90% of his or her net income computed on a yearly basis.

The determination of a victim's net income is calculated in accordance with Section 112(1) of the MPIC Act:

Determination of net income
112(1) A victim's net income is his or her gross yearly employment income, to a maximum of the maximum yearly insurable earnings established under section 114, less an amount determined, in accordance with the regulations, for income tax under *The Income Tax Act* and the *Income Tax Act* (Canada), premiums under the *Unemployment Insurance Act* (Canada) and contributions under the Canada Pension Plan.

Section 202(h) of the MPIC Act provides that the corporation may make regulation for the purpose of this part:

Regulations
202 Subject to the approval of the Lieutenant Governor in Council, the corporation may make regulations for the purpose of this Part
. . . .
(h) determining gross incomes for the purpose of sections 81 (income replacement indemnity for full-time earner), 82 (more remunerative employment), 83 (indemnity for temporary earner or part-time earner), 84 (determination of employment for temporary earner or part-time earner), 85 (indemnity for non-earner) and 89 (indemnity for student);

Regulation 39/94 sets out the computation of net income in Section 10:

Net income is GYEI less certain deductions
10(1) For the purpose of this regulation, the net income of a victim is the gross yearly employment income of the victim determined under this regulation, less the following:

(a) the income tax payable by the victim, as determined under subsection (3);
(b) the premiums payable by the victim in respect of unemployment insurance, as determined under subsection (5);
(c) the contributions payable by the victim in respect of the Canada Pension Plan, as determined under subsection (6);

except in the case of a victim who is claiming a loss of unemployment insurance benefits, where the only deduction shall be the income tax payable as determined under subsection (3).

Taxable income is GYEI less deductions

10(2) For the purpose of this regulation, a victim's taxable income is the gross yearly employment income of the victim determined under this regulation less the following:

(a) any amount allowable to the victim under clauses 60(b), (c) and (c.2) (maintenance) of the *Income Tax Act* (Canada), in the calendar year before the year for which the taxable income is calculated; and
(b) any amount of the gross yearly employment income that would have been exempt from the victim's income tax under clause 81(1)(a) (statutory exemptions) of the *Income Tax Act* (Canada) as that clause was at the time of the accident.

Income tax is tax on taxable income less credits
10(3) For the purpose of this regulation, the income tax payable by a victim is the tax payable upon the taxable income of the victim calculated in accordance with the *Income Tax Act* (Canada) and *The Income Tax Act* of Manitoba, and allowing only the following credits:

(a) the credit allowed under section 118.7 of the *Income Tax Act* (Canada), where "B" in the formula set out in that section is the total of
  (i) the premiums payable for unemployment insurance, as determined under subsection (5) of this section, and
  (ii) the contributions payable in respect of the Canada Pension Plan, as determined under subsection (6) of this section;
(b) the credits allowed in subsections 118(1) (personal credits) and (2) (age credit) of the *Income Tax Act* (Canada), without any reduction in the credits in respect of the income of a dependant referred to in section 113 of *The Manitoba Public Insurance Corporation Act;*
(c) any credit or deduction from tax allowed under *The Income Tax Act* of Manitoba, except under subsection 5(5) (deductions for property taxes) of that Act, without any reduction in the credit or deduction in respect of the income of a dependant referred to in section 113 of *The Manitoba Public Insurance Corporation Act.*

The Commission, having reviewed the evidence and the submission of the parties, finds that the IRI benefits of the Appellant were properly calculated in accordance with the legislation and regulations. As counsel for MPIC points out, the deductions must be made on the GYEI which has been attributed to the Appellant for the year.

The argument made on behalf of the Appellant that the rate of deductions and credits which should be applied is the same rate applied by the Appellant's employer for the previous six (6) months, is not convincing. We do not agree with the Appellant's position, which in essence

advocates applying a tax rate which is applicable on income earned over a six month period to the GYEI which is attributed over a full year.

We are satisfied with the explanation for the calculations provided by MPIC. MPIC is obligated by the statute and regulations to apply deductions and credits at a particular rate, based upon the attributed income of the GYEI for that year, and the Appellant has failed to satisfy the Commission that MPIC has not done so correctly.

Personal Care Assistance

The entitlement to reimbursement for personal assistance expenses is set out in Section 131 of the MPIC Act:

> **Reimbursement of personal assistance expenses**
> **131** Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than $3,000. per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

Section 40/94 of the Regulations deals with the reimbursement of personal home assistance under Schedule A in Section 2:

> **Reimbursement of personal home assistance under Schedule A**
> **2** Subject to the maximum amount set under section 131 of the Act, where a victim incurs an expense for personal home assistance that is not covered under *The Health Services Insurance Act* or any other Act, the corporation shall reimburse the victim for the expense in accordance with Schedule A.

Schedule A to the Regulations is an evaluation grid of personal care assistance requirements. Schedule B is an evaluation grid for home assistance requirements.

These schedules were completed with the Appellant by [text deleted], a Rehabilitation Consultant with [text deleted]. When the grids were completed, the Appellant scored 0 out of 24

on Grid A for personal care assistance needs, and 9 out of 27 on Grid B for home assistance requirements. Further, for all of the items under the home assistance requirement schedule (preparation of breakfast, preparation of lunch, preparation of dinner, light housekeeping, housecleaning, laundry, purchase of supplies) [Appellant's rehabilitation consultant] indicated that the category "does not apply for (e) other reason".

The "other reason" provided by [Appellant's rehabilitation consultant] in his accompanying report dated January 16, 2004, was:

> As a result [text deleted] scores 9 out of 27 on Grid B with each categorized as "e" under does not apply – other reason – homemaking tasks are not his normal routine as he works away from the family home approximately 84% of the time.

With regard to Grid A dealing with personal care assistance, [Appellant's rehabilitation consultant] indicated a score of 0 out of 24. His report dated January 16, 2004 sets out some of the difficulties which the Appellant had reported under those personal care categories, and then went on to describe the equipment provided to the Appellant:

> . . . He was provided the equipment and acknowledged his ability to utilize them accordingly. . . .

The Commission rejects the argument of the Appellant that the personal care assessment calculated in Grid A regarding personal care assistance needs was in error. The report of the Rehabilitation Consultant clearly addressed any personal care assistance which the Appellant might have required and the Commission finds that the Appellant has not established that a calculation of Schedule A was in error and/or that the Appellant requires assistance in these areas.

With regard to homemaking activities, the Commission finds that the Appellant is in the same

position now as he was in before the accident. The evidence before the Commission was that the Appellant did some homemaking work on his own, both in [text deleted] and at home, before the accident and that his wife and children did most of these chores at home. After the accident, the Appellant still did some homemaking chores and his wife and children did more than he did.

The Commission finds that the Appellant has not met the onus of establishing on the evidence, that there was a material or measurable difference in the amount of homemaking activities which the Appellant did before and after the accident. Therefore, the Commission finds that the Appellant did not establish the necessity for homemaking assistance and no compensable expense arose for homecare assistance as a result of the accident.

As a result, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decisions of MPIC's Internal Review Officer, bearing date March 26, 2004 and July 23, 2004.

Dated at Winnipeg this 9th day of February, 2005.

LAURA DIAMOND

PAUL JOHNSTON

NEIL COHEN