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Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellants]
AICAC File No.: AC-05-193**

PANEL: Ms Yvonne Tavares, Chairperson
Dr. Patrick Doyle
Mr. Paul Johnston

APPEARANCES: The Appellants, [text deleted], were represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: October 1, 2007

ISSUE(S): Calculation of Gross Yearly Employment Income

RELEVANT SECTIONS: Sections 81, 120, 122 and 163 of The Manitoba Public Insurance Corporation Act (the 'MPIC Act') and section 2 of Manitoba Regulation 39/94

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellants, [text deleted], are appealing the Internal Review decision dated September 8, 2005, with respect to the calculation of the death benefit payable as a result of the death of their father, [the Deceased], in a June 27, 2001 motor vehicle accident.

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

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;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

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, and
 - (iii) the full-time earner holds more than one employment, on the basis of the gross income earned from all employment that he or she is unable to continue because of the accident;
- (b) under clause (1)(c), the benefit that would have been paid to the full-time earner.

Benefit under clause (1)(c) is part of gross income

81(3) For the purpose of section 112 (determination of net income), the gross income of a full-time earner includes any benefit under clause (1)(c) to which the full-time earner would have been entitled at the time of the accident.

Computing indemnity under schedules

120(1) The spouse or common-law partner of a deceased victim is entitled to a lump sum indemnity equal to the product obtained by multiplying the gross income that would have been used as the basis for computing the income replacement indemnity to which the victim would have been entitled if, on the day of his or her death, the victim had survived but had been unable to hold employment because of the accident, by the factor appearing opposite the victim's age in Schedule 1 or, where the spouse or common-law partner is disabled on that day, Schedule 2.

Dependant child of deceased victim with no spouse or common-law partner

122 If on the day he or she dies the deceased victim has no spouse or common-law partner but has a child who is a dependant, the child is entitled, in addition to a lump sum indemnity under section 121, to a lump sum indemnity under section 120 and, where there is more than one child, the lump sum indemnity shall be divided equally among them.

Manitoba Regulation 39/94:
GYEI not derived from self-employment

2 Subject to this regulation, a victim's gross yearly employment income not derived from self-employment at the time of the accident is the sum of the following amounts:

- (a) in the case of a full-time earner, the salary or wages received or receivable for the pay period in which the accident occurred, divided by the number of weeks in the pay period and then multiplied by 52;
- (b) in the case of a temporary earner or part-time earner, the salary or wages that are received or receivable with respect to employment that the temporary earner or part-time earner held or would have held, if the accident had not occurred, and that are the greater of
 - (i) the salary or wages received or receivable for the pay period in which the accident occurred, divided by the number of weeks in the pay period and then multiplied by 52, and
 - (ii) the salary or wages receivable during the first 180 days following the date of the accident divided by 180 and then multiplied by 365;
- (c) in the case of a non-earner, the salary or wages from an employment that the non-earner would have held, if the accident had not occurred, during the first 180 days following the date of the accident divided by the number of days the employment would have been held, and then multiplied by 365;
- (d) any of the following benefits, to the extent that the benefit is not received as a result of the accident
 - (i) a bonus received or earned in the 52 weeks before the date of the accident,
 - (ii) tips, in the amount that is the greater of
 - (A) the amount reported in the victim's personal income tax return for the calendar year before the year in which the accident occurred, and
 - (B) the amount reported in the victim's personal income tax return for the calendar year in which the accident occurred;
 - (iii) remuneration for overtime hours that is not included in clause (a) and that is received or earned in the 52 weeks before the date of the accident,
 - (iv) the cash value from a profit sharing plan allocation received or earned in the 52 weeks before the date of accident,
 - (v) the value of the personal use of a motor vehicle provided by an employer at the time of the accident, in the amount reported in the victim's personal income tax return for the calendar year before the year in which the accident occurred or, where no such amount was reported, in an amount calculated under clause 6(1)(a) (income from employment) of the *Income Tax Act* (Canada) as an annualized benefit,
 - (vi) the value of the employer's contribution to the victim's pension plan, if lost because of the accident,
 - (vii) the cash value of any other benefit that the victim received, or was entitled to receive, in the 52 weeks before the date of the accident;
- (e) the commissions that the victim had earned, or to which he or she was entitled,
 - (i) in the 52 weeks before the date of the accident,
 - (ii) in the calendar year before the date of the accident, or
 - (iii) in the three calendar years before the date of the accident, divided by three, whichever amount is the greatest.

Appellants' Submission:

Counsel for the Appellants submits that the Gross Yearly Employment Income ('GYEI') calculated by the case manager was incorrect as it failed to take into account certain benefits to be received by [the Deceased] in the year of his death. He contends that these benefits should have been factored into the calculation of [the Deceased's] income replacement indemnity at the date of his death, which would have increased [the Deceased's] GYEI and subsequently the death benefit payable to the Appellants pursuant to s. 122 of the MPIC Act.

Counsel for the Appellants argues that pursuant to ss. 2(a) of Manitoba Regulation 39/94, when calculating the GYEI, there is to be taken into account the salary received or receivable for the pay period in which the accident occurred. Counsel maintains that pursuant to ss. 2(d) of Manitoba Regulation 39/94 the following benefits are also to be taken into account:

- (i) a bonus received or earned in the 52 weeks before the date of the accident;
- (vii) the cash value of any other benefit that the victim received, or was entitled to receive, in the 52 weeks before the date of the accident;

Counsel for the Appellant submits that the expressed intention, prior to the motor vehicle accident, was that [the Deceased] would increase his salary draw from the business [text deleted] by twenty-five thousand (\$25,000) dollars per year as soon as sales reached or exceeded \$1,000,000 annually. Counsel for the Appellants also submits that [the Deceased] was, at that point, entitled to have half of the shares of the company transferred to him. Relying on the oral testimony of [Deceased's Father], who was at the time of the accident, the sole shareholder of [text deleted], counsel for the Appellants argues that this agreement was in place and the Commission should accept the sworn testimony of [Deceased's Father] as evidence of the terms

and the existence of the agreement. Counsel for the Appellants notes that in the year ended January 31, 2001, sales of the business did exceed \$1,000,000 and only the preparation of financial statements was required before the salary adjustment for [the Deceased] was to be made and shares of the company transferred to him. He notes that subsequently the relevant financial statements were prepared and it is evident from those financial statements that there was sufficient cash flow for [the Deceased] to draw this additional salary.

Counsel for the Appellants therefore submits that whether this increase in salary is seen as additional salary receivable or as a bonus earned, the effect is the same – [the Deceased's] GYEI increases by \$25,000.

In addition, counsel for the Appellants maintains that [the Deceased] was entitled to a transfer of fifty (50%) percent of the shares of [text deleted] at the time of his death and accordingly, the value of the shares in the corporation as a going concern and [the Deceased's] ownership interest in the corporation should further be taken into account in determining [the Deceased's] GYEI at the time of his death.

MPIC's Submission:

Counsel for MPIC submits that the Appellants have not met the onus of establishing [the Deceased's] entitlement to the bonus in the year of his death or the entitlement to fifty (50%) percent of the shares of [text deleted] and therefore the appeal should be dismissed. Counsel for MPIC maintains that there is no written documentation evidencing the agreement set out by the Appellants. He argues that the Appellants or the Estate's representatives had more than six (6) months to bring that information forward to the case manager, yet failed to do so. Therefore, counsel for MPIC submits that there is a lack of evidence, or that the evidence is unsatisfactory,

to establish that [the Deceased] was entitled to either a bonus or to an ownership interest in the company at the time of his death so as to increase his GYEI. Accordingly, counsel for MPIC submits that the Internal Review decision should be confirmed and the appeal dismissed.

Discussion:

Upon hearing the testimony of [Deceased's Father], and after a careful review of all of the documentary evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellants and of counsel for MPIC, the Commission finds that:

1. at the date of the motor vehicle accident, [the Deceased] was entitled to receive a bonus in the amount of twenty-five thousand (\$25,000) dollars, since that bonus had been earned in the fifty-two (52) weeks before the date of the accident;
2. at the date of the motor vehicle accident, [the Deceased] was entitled to the transfer of fifty (50%) percent of the shares of [text deleted].

The Commission finds that the Internal Review Officer erred in her conclusion that because there was no documentation available to confirm the submissions made by the Appellants, she had no alternative but to confirm the case manager's decision. Rather, the Internal Review Officer should have considered the totality of the evidence before her, including [Deceased's Father's] evidence, in reaching her decision.

The Commission has considered the totality of the evidence before it, including [Deceased's Father's] sworn testimony that he had an oral agreement with his son, [the Deceased] to increase his salary once the company's sales reached \$1,000,000. We accept [Deceased's Father's] sworn testimony as to the existence of such an agreement with his son and find that his evidence is satisfactory and convincing. The Commission found that [Deceased's Father] was a credible

individual and that he testified in a truthful and forthright manner. Although his evidence was not exceedingly detailed, it was neither contradictory nor inconsistent. We find that his evidence does meet the standard of proof, that is, the balance of probabilities, required in these circumstances. The fact that the Appellants did not have documentation to substantiate the oral agreement, does not prevent the Commission from evaluating the credibility of the sworn testimony which it heard and determining whether that evidence alone satisfies the burden of proof required in the circumstances.

In this case, the Commission is satisfied, on a balance of probabilities, that [Deceased's Father] had an oral agreement with his son as submitted. Therefore, for the purposes of determining [the Deceased's] GYEI at the date of death, the Commission finds that [the Deceased] had earned a bonus in the amount of twenty-five thousand (\$25,000) dollars as of the date of his death and that amount should be included in [the Deceased's] income replacement indemnity at the date of his death. Additionally, the Commission finds that, at the date of his death, [the Deceased] had a beneficial ownership interest in fifty (50%) percent of the shares of [text deleted]. We find that [Deceased's Father] held those shares in trust for his son. All that remained to be done was transfer of legal ownership of those shares. Accordingly, [the Deceased's] GYEI shall be adjusted to reflect that ownership interest. This matter shall be referred back to MPIC's case manager for a redetermination of [the Deceased's] GYEI at the date of his death in accordance with the foregoing findings.

In accordance with the previous decisions of this Commission in *The Appeal by [text deleted]*, AC-99-139 and in *The Appeal by [text deleted]*, AC- 01-17, the entitlement to the lump sum indemnity under s. 120(1) of the MPIC Act arose at the date of the motor vehicle accident. As a result, interest shall be added to the sum awarded to the Appellants by virtue of the foregoing

decision in accordance with Section 163 of the MPIC Act from June 27, 2001, the date of [the Deceased's] death, to the date of payment.

As a result, the Appellant's appeal is allowed and the Internal Review decision dated September 8, 2005 is therefore rescinded.

Dated at Winnipeg this 21st day of November, 2007.

YVONNE TAVARES

DR. PATRICK DOYLE

PAUL JOHNSTON