

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-11**

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, [text deleted], was not present at the appeal hearing;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: February 26, 2008

ISSUE(S): Entitlement to Income Replacement Indemnity for time taken off work to attend treatment appointments

RELEVANT SECTIONS: Section 81(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94

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

Preliminary Matters

On January 15, 2004, the Appellant filed an appeal from an Internal Review decision of MPIC, dated December 31, 2003. The hearing into his appeal was scheduled for February 26, 2008. The Appellant indicated by e-mail and telephone communication, that he did not wish to appear at the hearing, either in person, or by teleconference, and that he wished for the hearing to proceed without him.

Accordingly, the Commission proceeded to hear the Appellant's appeal, in his absence, on February 26, 2008. Mr. Scaletta appeared for MPIC.

The Appellant was injured in a motor vehicle accident on July 18, 2003. The Appellant worked as a [text deleted] in the local Film and TV Industry at the time of the motor vehicle accident. At his Internal Review hearing, the Appellant indicated that his job was not a regular "9 to 5" type of employment and that he worked twelve (12) to seventeen (17) hour days, which left no time before or after work for him to attend at appointments.

As a result of the accident, the Appellant attended at a chiropractor two (2) to three (3) times per week between the dates of July 21st to September 21st, 2003. As he was unable to take time off work to go to his chiropractic appointments, he was required to make these hours up in addition to his regular workday. Accordingly, he told the Internal Review Officer that the accident cost him time and money and a lot of overtime at work.

In his Application for Review and Notice of Appeal, the Appellant has asserted that he was entitled to compensation, at the rate of \$24.50 per hour, for twenty (20) hours of time missed from work.

The Appellant's case manager wrote to him on October 3, 2003 indicating that he did not meet the criteria to establish entitlement to an Income Replacement Indemnity ('IRI') for the hours missed to attend medical appointments.

An Internal Review Officer reviewed the Appellant's file and provided an Internal Review decision dated December 31, 2003. The Internal Review Officer assumed that since the Appellant indicated that the hours he took to attend treatment appointments were made up during the day, he was paid for the hours which he worked and concluded that she was unclear as to where the loss of income occurred. She also concluded that as the Appellant's file did not indicate that he suffered from a functional impairment preventing him from performing his work functions, he was not entitled to an IRI.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Submission of the Appellant

The Appellant filed a Notice of Appeal on January 15, 2004. He indicated:

I have missed 3 hours each week during July 21/03 – September 12/03. Due to the nature of my work, I was unable to go at a time when I was not working. I was required to make these hours up. The act states that I will be compensated for my loss, and I have lost 20+ hours @ \$24.50 per hour. Being an employee in the Film Industry, I am unable to take time off work or I will violate my contract, and therefore not have a job. I was therefore unable to take time off work.

Submission for MPIC

Counsel for MPIC reviewed the evidence on the Appellant's file. He noted that the material did not contain any particulars of the alleged time missed, such as actual dates, or any confirmation of the hourly rate being claimed. There was no copy of the Appellant's employment contract on the file. Further, although the Appellant asserted that he would have violated his contract and lost his job if he had not, by working "overtime" made up the hours he took off to attend chiropractic treatment, there was no documentary evidence provided to the Internal Review Officer, or on the file, to support these assertions.

Counsel submitted that there was no evidence that the Appellant actually “lost” any income as a result of the accident. Although he may in fact be claiming compensation for the inconvenience of having to attend chiropractic treatments and then make up for lost hours by encroaching on what might otherwise be free or leisure time, there was no evidence that he had suffered any loss of income. As well, there was no evidence on the file that the Appellant was, at any time following the accident, disabled from performing the essential duties of his occupation.

Counsel submitted that, pursuant to Section 81(1)(a) of the MPIC Act and Section 8 of Manitoba Regulation P215-37/94, an individual who is able to return to full time work but, for whatever reason, needs or chooses to schedule medical or treatment appointments during his working hours, is simply not entitled to IRI for the time missed from work. Counsel relied upon the decision of the Manitoba Court of Appeal in *Re: Pelchat*, 2007 MBCA 52 to support this interpretation.

Counsel for MPIC submitted that the Appellant has not provided the Commission with any evidence that he was at any time unable to perform the essential duties of his pre-accident employment and in fact, the limited evidence which has been provided leads to the opposite conclusion. He submitted that the Appellant’s appeal should, therefore, be dismissed.

Discussion

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.

Manitoba Regulation 37/94:

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The Commission has reviewed the material on the file as well as the Notice of Appeal filed by the Appellant and the submission of counsel for MPIC. We agree with counsel for MPIC that the Appellant has failed to provide any evidence to establish that he lost any income as a result of the accident which would entitle him to IRI benefits, and has not provided the Commission with any evidence that he was unable to perform the essential duties of his pre-accident employment.

Accordingly, the Commission finds that the Appellant's appeal should be dismissed and the decision of the Internal Review Officer dated December 31, 2003 confirmed.

Dated at Winnipeg this 26th day of March, 2008.

LAURA DIAMOND