

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-06-45**

PANEL: Mr. Mel Myers, Chairperson
Ms Leona Barrett
Dr. Patrick Doyle

APPEARANCES: The Appellant, [text deleted] was represented by Ms Virginia Hnytka of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.

HEARING DATE: July 24, 2009

ISSUE(S): Entitlement to Income Replacement Indemnity Benefits from July 13, 2005 to October 24, 2005

RELEVANT SECTIONS: Section 160(b) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. ALL REFERENCES TO THE APPELLANT'S INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

On July 28, 1994 [the Appellant] was a passenger in a motor vehicle which was involved in an accident. At the time of the accident the Appellant was [text deleted] years of age and was working as a [text deleted]. As a result of the injuries the Appellant sustained in the motor vehicle accident he was unable to return to his pre-accident employment and was deemed capable by MPIC of performing the duties of his determined employment as a community service worker.

The Appellant was entitled to income replacement indemnity (“IRI”) benefits as a result of the injuries he sustained in the motor vehicle accident. The Appellant’s IRI benefits were reduced by the gross yearly employment income (“GYEI”) of his determined employment.

The case manager wrote to the Appellant on June 3, 2005 advising him:

“This letter serves as a follow up to our previous correspondence of March 21, 2005, in which we requested copies of your 2004 Income Tax Return and Summaries from Revenue Canada by June 30, 2005. In that letter, we indicated that if we did not have these forms by June 30, your benefits may be suspended.

Please be advised that if we do not have a copy of your 2004 tax return and summaries by June 30, 2005, we will have no alternative but to suspend your IRI benefits until you have provided MPI with a copy of these summaries.”

On July 13, 2005 the case manager wrote again to the Appellant:

“Further to our letters of March 21, 2005 and June 3, 2005, you failed to submit the tax summaries from Revenue Canada and a copy of your business financial statements. As we have advised, you are required to submit the tax summaries and financial statements every year by June 30th.

Until such time as we receive the above mentioned documents we have to suspend your benefits under Section 160 of the Manitoba Public Insurance Act for non-compliance.”

(The Commission notes that the letters referred to as dated March 21, 2005 in the case manager’s correspondence to the Appellant in fact were dated April 6, 2005.)

In a note to file dated July 20, 2005, the case manager received a voicemail from the Appellant stating that he would be meeting with his accountant to complete his tax documentation and would submit them to the case manager once completed.

In a note to file dated August 23, 2005 the case manager reported that:

1. She had attempted to call the Appellant but was unable to reach him.

2. She received information that the Appellant had moved to [text deleted] three weeks prior as the Appellant's daughter would be attending the [text deleted] University in September.
3. The Appellant had been working in [text deleted] for a company called [text deleted], hauling gravel for the past two weeks.
4. The Appellant had not yet submitted his 2004 income tax returns and that his IRI benefits remained temporarily suspended.

Suspension of IRI Benefits:

On August 24, 2005 the case manager wrote to the Appellant:

“We have attempted to contact you by telephone with no success. Further to our letters of March 21, 2005, June 3, 2005 and July 13, 2005 you have failed to submit your 2004 Income Tax Return from Revenue Canada and a copy of your Business Financial Statements. As we have advised, you are required to submit the tax returns and financial statements every year by June 30th.

Your failure to submit the required Income Tax Return and Business Financial Statement is considered as non-compliance. Based on the decision of July 13, 2005 we have suspended your benefits for failure to submit this requested documentation.
(underlining added)

We have discussed at length the need to submit your Income Tax return and Business Statement every year by June 30th and have in fact suspended your benefits in the years 2002 and 2003 for failure to submit tax information.

Should you not submit your Income Tax Return and Business Statement by September 23, 2005; this will be considered continued non-compliance. We will have no alternative but to terminate Personal Injury Protection Plan benefits as per Section 160 of the Manitoba Public Insurance Act.”

In a note to file dated October 24, 2005 the case manager reported to the senior case manager that the Appellant had provided his 2004 income tax returns and business financial statements and requested that these be reviewed and to be advised of any changes required to his top-up IRI benefits.

In a note to file dated October 27, 2005 it is reported that after a review of the Appellant's 2004 income tax returns it was determined that there would be no change to the Appellant's IRI benefits.

On November 2, 2005 the case manager wrote to the Appellant and stated:

“Further to our letter of August 25, 2005, your benefits were suspended due to your non-compliance in providing updated Income Tax information and Business Financial Statements.

Your mother attended [text deleted] claims office and provided copies of the requested tax information. I have been trying on numerous occasions to contact you to discuss the status of your claim but have been unsuccessful, and your home telephone number is out of service. I now understand that you may have relocated to [text deleted] as of September 2005.

While a review of your submitted tax information confirms there is no change to your IRI calculation, I remain unable to reinstate benefits. This is due to your continued non-compliance with Manitoba Public Insurance, by not contacting me after numerous requests and letters, and not advising us of your relocation to [text deleted]. Your benefits will remain suspended until you contact us with your new address, and confirm your current employment situation.

If I do not hear from you by November 30, 2005, I will have no alternative but to conclude you are remaining non-compliant and terminate your Personal Injury Protection Plan benefits under Section 1690 of the Manitoba Public Insurance Corporation Act.”

Reinstatement of IRI Benefits:

On November 2, 2005, the case manager wrote to the Appellant at his new address in [text deleted], Manitoba and stated:

“Thank you for contacting our office on November 7, 2005 to provide your updated status, new contact information and confirmation of your employment situation.

As discussed, your IRI benefits will be reinstated as of November 7, 2005; however you are not entitled to retroactive IRI benefits from July 13, 2005, the date of your suspension until your November 7, 2005 contact.”

The Appellant made application for review of the case manager's decision on December 15, 2005.

Internal Review Officer's Decision:

On March 8, 2006 the Internal Review Officer issued her decision confirming the case manager's decision that the Appellant was not entitled to reinstatement of IRI benefits from July 13, 2005 until he provided the information that had been requested from him in writing. However the Internal Review Officer indicated in her decision that the correct reinstatement date of IRI benefits was not November 7, 2005, but rather October 24, 2005 since this was the date the Appellant provided MPIC with the requested information with respect to his 2004 income tax returns.

In her decision, the Internal Review Officer indicated that after listening to the Appellant's explanation for lateness in filing the requested tax information, she could not find that there was a reasonable excuse for non-compliance with the case manager's request to provide the income tax returns. The Internal Review Officer noted that the Appellant was provided with two warning letters by the case manager that if he failed to submit his tax summaries and a copy of his business financial statements by June 30, 2005 his Personal Injury Protection Plan ("PIPP") benefits would be suspended under Section 160 of the MPIC Act for non-compliance. The case manager confirmed that the letter of July 13, 2005 suspended these benefits.

The Internal Review Officer further noted that the Appellant's benefits had been previously suspended in 2002 and 2003 for failure to submit tax information to MPIC.

"A further letter of August 24, 2005 from [text deleted] requested that you continue to request (sic) that you submit your Income Tax Return and business statement by September 23, 2005 or they will terminate your PIPP benefits for non-compliance.

This letter also states that the need for the tax information had been discussed with you at length and in fact your benefits had been suspended in the years 2002, and 2003 for failure to submit tax information.

Because your benefits had been previously suspended in two other years, it cannot be said that you were not aware of the consequences of not submitting your tax information on time. This should have increased your diligence in providing this tax information, however, you were still four months late in providing this information. The explanations that you provided at your hearing, were not sufficient explanations for your non-compliance.”

The Appellant filed a notice of appeal dated April 7, 2006.

Appeal

In this appeal the relevant provision of the MPIC Act is Section 160(b):

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(b) refuses or neglects to produce information, or to provide authorization to obtain the information, when requested by the corporation in writing;

On July 23, 2009, Ms Virginia Hnytka of the Claimant Adviser Office representing the Appellant faxed a letter to the Commission which stated:

“I had been unable to reach [the Appellant] who lives in [text deleted] until late last night. He informed me that he will be unable to attend the hearing set for tomorrow either in person or by phone. He explained that he is working from 4am until dark and is not able to take time off. This explains why I couldn’t reach him.

[The Appellant] advised me that he wishes me to proceed with the hearing in his absence. I am prepared to do this and am therefore notifying the parties that [the Appellant] will not be testifying at the hearing tomorrow.”

Appeal Hearing:

On July 24, 2009 Ms Hnytka, of the Claimant Adviser Office, attended at the appeal hearing on behalf of the Appellant and Ms Nunrha represented MPIC. Ms Hnytka indicated to the

Commission that the Appellant was unable to attend the hearing and that she would not be calling witnesses in this appeal. Ms Nunrha also indicated that she would not be calling any witnesses.

Submissions:

The Claimant Adviser submitted that MPIC's letter to the Appellant dated July 13, 2005 notifying the Appellant that his PIPP benefits under Section 160 of the MPIC Act were suspended for non-compliance was a defective notice to the Appellant. As a result the Claimant Adviser further submitted that the decision of the Internal Review Officer to suspend the Appellant's IRI benefits should be rescinded and that the Appellant was entitled to receive his IRI benefits retroactively for the period of suspension.

The Claimant Adviser argued that:

1. The Appellant's benefits had been suspended in the years 2002 and 2003 for failure to submit tax information.
2. After the Appellant had complied, in each of these years, by providing MPIC with the tax information, the suspensions were rescinded by MPIC and the Appellant received his IRI benefits retroactively for these periods of suspension.
3. The Appellant was entitled to rely on MPIC's practice of retroactively receiving IRI benefits after complying with MPIC's request for tax information.
4. It was only reasonable for the Appellant to assume that after receiving a notice of suspension on July 13, 2005, that once he complied by providing the tax information to MPIC, his suspension would be rescinded and he would retroactively receive his IRI benefits.

5. Since MPIC had established the practice in 2002 and 2003 of rescinding the suspension and retroactively providing the IRI benefits to the Appellant, the Appellant would reasonably expect after receipt of the letter of July 13, 2005 that this practice would continue once he had complied with providing the tax information to MPIC.
6. It was unfair and unreasonable for MPIC to have suspended the Appellant's IRI benefits on July 13, 2005 without further notice that the past practice of rescinding the suspension and retroactively providing IRI benefits to him would not occur at that time.
7. The Appellant was therefore prejudiced by the failure of MPIC to provide a proper notice to the Appellant rescinding its past practice.

The Claimant Adviser therefore submitted that:

1. MPIC was estopped from suspending the Appellant's IRI benefits because MPIC failed to advise the Appellant that this previous practice would not continue in 2005.
2. MPIC was required to provide the Appellant with the IRI benefits the Appellant did not receive during the period of suspension.

In support of her position, the Claimant Adviser provided the Commission with the Commission's decision in [text deleted], AICAC File No. AC-97-131 [1999] M.A.I.C.A.C.D. No. 41. In this appeal, MPIC failed to provide prior written notice to the Appellant that his IRI benefits would be terminated. Some weeks after the termination occurred the Appellant was advised of this termination. The Commission concluded:

"We are of the view that if any PIP benefit is to be terminated then the Insured is to be given written notice in advance of when MPIC intends to do so. If there were any evidence of fraud or similar impropriety on the part of the Appellant we might adopt a

different view, but there is no such suggestion in the present case. [Text deleted] was not treated fairly when he was provided with his after-the-fact notice and to compensate him for this we are extending his IRI benefit from August 26th, 1996 to the date he was provided written notice informing him of the termination of his IRI benefits namely November 26th, 1996. [Text deleted] is also entitled to interest on this sum as set out in the Act.

The Claimant Adviser therefore submitted that due to MPIC's defective notice of suspension the Appellant's appeal should be allowed and that the decision of the Internal Review Officer should be rescinded.

MPIC's legal counsel, in her submission, reviewed the Internal Review Officer's decision which indicated that the Appellant was provided with two warning letters which stated that if he failed to submit his tax summaries and a copy of his business financial statements by June 30, 2005 his PIPP benefits would be suspended under Section 160 of the Act for non-compliance. She further noted that the Internal Review Officer had stated in her decision that the Appellant's benefits had previously been suspended in two other years and therefore it cannot be said that he was not aware of the consequences of not submitting the tax information on time.

MPIC's legal counsel therefore argued that based on this information the Appellant was not entitled to IRI benefits from June 13, 2005 to October 24, 2005 in accordance with Section 160(b) of the MPIC Act. MPIC's legal counsel therefore requested that the decision of the Internal Review Officer dated March 8, 2006 should be confirmed and the Appellant's appeal be dismissed.

Discussion:

The Claimant Adviser submitted that the case manager's notice of suspension dated July 13, 2005 was defective because MPIC did not warn the Appellant that notwithstanding his future

compliance in providing tax information to MPIC, his suspension would not be rescinded and he would not receive IRI benefits retroactively for the period of the suspension.

The Commission rejects this submission on the following grounds:

1. There was no factual foundation to support this submission. There was no evidence submitted by the Claimant Adviser that the Appellant, upon receipt of the July 13, 2005 suspension letter, believed when he complied with providing MPIC with tax information the suspension would be rescinded and he would retroactively receive IRI benefits which he lost during the period of suspension.
2. Since the Appellant did not testify at the hearing, the Commission was unable to determine the Appellant's intention in failing to comply in a timely fashion to provide the tax information to MPIC.
3. The Claimant Adviser, in her submission, did not argue that the request by MPIC for tax information from the Appellant was either unfair or not justified. Clearly, MPIC was entitled to receive, on a timely basis, copies of the Appellant's tax summaries from Revenue Canada for the year 2004 and a copy of his business financial statement in order to ensure that his ongoing IRI benefits were calculated accurately and that he would be receiving the benefits he would be entitled to.
4. Upon reasonable notice Section 160(b) of the MPIC Act permits MPIC, without any conditions, to suspend the Appellant's IRI benefits if the Appellant refuses or neglects to provide relevant information requested by MPIC in writing.
5. The suspension letter of July 13, 2005 clearly indicates that the Appellant had received two warning letters apprising him that his failure to provide tax information would result in a suspension of his benefits under Section 160 of the Act.

6. MPIC had ample justification to suspend the Appellant's IRI benefits for refusing to provide the relevant tax information.
7. The purpose of Section 160(b) is to enable MPIC to carry out its responsibilities under the Act in a timely fashion in order to provide correct PIPP benefits to the Appellant. As a result MPIC needed to examine the 2004 tax returns along with the notice of assessment and business financial statements in order to determine the correct payment that MPIC was required to make to the Appellant.
8. There is no provision in Section 160(b) of the MPIC Act which requires MPIC, when suspending the Appellant, to advise him that notwithstanding his failure to comply with MPIC's request for tax information, his period of suspension would be rescinded if he complied with the request for this information. The Commission finds that to accept the Claimant Adviser's submission in this report would constitute an amendment to Section 160(b) of the MPIC Act which is beyond the jurisdiction of this Commission.

The Claimant Adviser submitted, having regard to MPIC's past practice in rescinding the Appellant's suspensions and retroactively reinstating his IRI benefits, that MPIC was estopped from suspending the Appellant on July 13, 2005. The Commission notes that MPIC had, on previous occasions in the years 2002 and 2003, rescinded the Appellant's suspensions for failure to comply with providing tax information. MPIC is entitled, on a case by case basis to determine whether it is appropriate to rescind a suspension of IRI benefits and retroactively provide these benefits to a claimant. MPIC, operating under a statutory regime of the MPIC Act, is not bound by any previous past practice when applying the provisions of Section 160(b) of the Act.

Under this statutory regime the doctrine of estoppel does not apply to MPIC. To accept the doctrine of estoppel as submitted by the Claimant Adviser would be tantamount to the Commission sanctioning the contracting out of Section 160(b) of the MPIC Act and any decision by the Commission in this respect would be beyond its jurisdiction.

In *The Queen v. Discount Broadloom Centre Ltd.* [1976] O.J. No. 2428, 31 C.P.R. (2d) 110 (Ontario County Court), the Court discussed the application of estoppel and statutory rights and stated at paragraph 15:

“Estoppel against statute. The doctrine of estoppel cannot be evoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted shall be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the statutory jurisdiction of the court under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of this duty cannot by estoppel be prevented from exercising his statutory powers. A petitioner in a divorce suit cannot get relief simply because the respondent is estopped from denying the charges, as the court has a statutory duty to inquire into the truth of a petition.”

In respect of these comments, the Court referred to a series of decisions including: *Solle v. Butcher*, [1950] 1 K.B. 671, C.A.; [1949] 2 All E.R. 1107; *Klinck v. Greer* (1910), 14 W.L.R. 282 (Sask.); and *Hulowski v. Hulowski*, [1945] 3 W.W.R. 140, *affd.* [1945] 3 W.W.R. 753 (Sask.).

At paragraph 16 the Court further stated:

“Estoppel. Estoppel cannot operate to prevent or hinder the performance of a positive statutory duty, or the exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public. *Southend-on-Sea Corpn. V. Hodgson (Wickford). Ltd.*, [1961] 2 All E.R. 46, D.C.”

In Brown and Beattie, *Canadian Labour Arbitration* (4th Edition) Volume I, the authors discuss estoppel and statutory rights at page 2-80.4 and refer to the decisions of Sysco Food Services of

Ontario (2002), 111, L.A.C. (4th) 425 and Algonquin College (1985), 19 L.A.C. (3d) 81, affd (unreported, April 16, 1987, Ont. Div. Ct.).

The Commission also finds its decision in [text deleted] cited by the Claimant Adviser has no application in this appeal. In that case MPIC failed to provide a prior written notice to the Appellant that his IRI benefits would be terminated. In the present appeal MPIC did provide ample prior written notice that the Appellant's IRI benefits would be suspended if he failed to provide the tax information in a timely fashion. The notice of suspension to the Appellant dated July 13, 2005 was not provided retroactively to the Appellant but was provided after he received two warnings by MPIC, on April 6, 2005 and July 3, 2005. The Commission therefore finds that the decision of [text deleted] cited by the Claimant Adviser does not support the Appellant's position.

The Claimant Adviser also submitted that having regard to the personal circumstances the Appellant found himself in during the months of April, May, June, July and August 2005, he was overwhelmed and unable to comply on a timely basis with providing the tax information to MPIC and therefore the appeal should be allowed.

The Commission finds there was no factual foundation for this submission. Unfortunately, the Appellant was unable to testify at the hearing. As a result, the Commission did not hear the Appellant testify under oath in examination-in-chief and cross-examination and therefore was unable to learn directly from the Appellant why he was unable, on a timely basis, to provide the tax information to MPIC after being warned on several occasions. As well, the Commission was unable to assess the credibility of the Appellant in respect of the personal circumstances that may have prevented him from providing the tax information on a timely basis to MPIC.

It should also be noted that there was no medical information filed in these proceedings by the Claimant Adviser to corroborate its submission that the Appellant was psychologically and/or mentally challenged during the months of April, May, June, July and August 2005 and as a result the Appellant's ability to provide the tax information requested by MPIC in a timely fashion was adversely affected.

For these reasons, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that MPIC incorrectly applied Section 160(b) of the MPIC Act when they suspended payments of his IRI benefits from July 13, 2005 to October 24, 2005. The Commission therefore dismisses the Appellant's appeal and confirms the decision of the Internal Review Officer dated March 8, 2006.

Dated at Winnipeg this 5th day of August, 2009.

MEL MYERS, Q.C.

LEONA BARRETT

DR. PATRICK DOYLE