

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-11-010 and AC-11-077**

**PANEL:** Ms Laura Diamond, Chairperson  
Ms Linda Newton  
Ms Wendy Sol

**APPEARANCES:** The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

**HEARING DATE:** November 7, 2011

**ISSUE(S):**

- 1. Whether Income Replacement Indemnity benefits were correctly calculated for the period April 21, 2008 to April 15, 2009.**
- 2. Whether Income Replacement Indemnity benefits were correctly calculated for the period April 16, 2009 to September 30, 2010.**
- 3. Whether Income Replacement Indemnity benefits were correctly calculated pursuant to Section 84(1) of the MPIC Act.**

**RELEVANT SECTIONS:** Sections 84, 111, 112, 163 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 2, 5, 6 and 10 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 Appellant was injured in a motor vehicle accident on April 13, 2008. As a result of her injuries she was unable to work for a period of time and became entitled to Income Replacement Indemnity ("IRI") benefits. She also received reimbursement for some treatment benefits, such as chiropractic care.

The Appellant filed appeals with the Commission regarding several issues, which resulted in the following decisions of the Commission:

1. *AC-08-117*, dated June 25, 2009.

The Commission found that the Appellant's case manager and an Internal Review Officer had erred in finding that the Appellant was a "non-earner", who at the time of the accident was unemployed. The Commission found that at the time of the accident the Appellant was a temporary earner and that her entitlement to benefits for the first 180 days after the motor vehicle accident should be determined according to Section 83(1) of the MPIC Act.

2. *AC-09-111*, dated August 27, 2010.

The Commission found that MPIC had prematurely terminated the Appellant's IRI benefits as of April 15, 2009, when it concluded that she was able to return to work on a full-time basis. The Commission found that the Appellant was not able to hold her determined employment as of April 16, 2009 as a result of her motor vehicle accident related injuries. The Commission also found that the Appellant's post-concussion symptoms were related to the motor vehicle accident of April 13, 2008 and found that her IRI benefits should be reinstated effective April 16, 2009 and continue until such time as terminated in accordance with the MPIC Act.

3. *AC-09-148*, dated February 23, 2011.

The Commission dismissed the Appellant's appeal from a decision of the Internal Review Officer which upheld her case manager's decision concluding that the appropriate 180 day determination of the Appellant's employment to be "support occupations in motion pictures, broadcasting and the performing Arts". At that appeal hearing, the Appellant raised the issue of whether her IRI benefits had been correctly calculated in accordance with Section 84(1) of the MPIC Act, as she was concerned that the IRI from the

determined employment was less than the IRI she received during the first 180 days after the accident. The decision also dealt with chiropractic benefits.

The Commission concluded that that issue was not before it on the appeal, but referred that matter back to MPIC's case manager for a determination of whether the Appellant's IRI benefits were correctly calculated in accordance with Section 84(1) of the MPIC Act.

Subsequently, the Appellant was provided with two Internal Review Decisions which dealt with the question of the calculation of her IRI benefits between April 21, 2008 and April 15, 2009, as well as between April 16, 2009 and September 30, 2010. The Internal Review Officer looked at the calculation of the amounts owed to the Appellant for IRI, including the method of interest calculation.

**January 25, 2011 Internal Review Decision:**

The Appellant's case manager wrote to her on August 13, 2010, setting out her classification as a non-earner, and setting out the history of her IRI calculations based on employments she would have held between April 21, 2008 and October 10, 2008. A reconciliation dated July 19, 2010 set out \$57.52 in IRI benefits along with \$5.53 in interest. The Appellant sought an Internal Review of this decision, based upon Section 84(1) and 84(3) of the MPIC Act.

The Appellant was also provided with a decision dated October 20, 2010 setting out a reconciliation of her IRI benefits between April 16, 2009 and September 30, 2010. The decision concluded that she was owed \$34,994, with interest of \$167.01 calculated upon this amount. The Appellant sought an Internal Review of this decision, taking the position that the interest was incorrectly calculated.

An Internal Review Decision dated January 25, 2011 stated that the Appellant was classified as a “non-earner”. The Internal Review Officer stated:

“...You were not a temporary earner at the time of the accident; you were classified as a non-earner as defined by legislation.”

Then, after citing Section 70(1) of the MPIC Act defining a non-earner and Section 85 for determining the IRI for a non-earner, the Internal Review Officer concluded that:

“Based on my review of the file, the reconciliation of your IRI benefits for the period April 21, 2008 to April 15, 2009 inclusive was correctly assessed and calculated...”

The case manager’s decision was upheld in this regard.

In considering the reconciliation of the Appellant’s IRI benefits for the period between April 16, 2009 and September 30, 2010, the Internal Review Officer reviewed information received from the Income Replacement Indemnity Supervisor regarding the interest calculation. She indicated that interest rates were based on the Quarterly Court of Queen’s Bench Prejudgment Interest Rates, and had been correctly calculated.

**June 7, 2011 Internal Review Decision:**

Following the Commission’s decision in AC-09-148, MPIC provided the Appellant with a letter dated March 31, 2011, which dealt with the question of whether MPIC was deviating from Section 84 of the MPIC Act. The letter indicated:

“In regards to your statement that “MPIC is deviating from the legislation and the Commission’s opinion? In regards to section 84”. We are following the act and regulations. I will again kindly refer you to the Manitoba Regulations 39/94 which state:

**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:

- (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
- (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;”

The Appellant sought an Internal Review of this decision.

An Internal Review Decision of June 7, 2011 considered whether the Appellant’s IRI benefits from the 181<sup>st</sup> day following the accident were correctly calculated pursuant to Section 84(1) of the MPIC Act. This involved a review of the letter dated March 31, 2011. The Internal Review Officer stated:

“Section 84(1) creates an entitlement to an IRI for temporary earners and part-time earners during the first 180 days after the accident in circumstances where the claimant, but for the accident, would have held employment during that time (copy enclosed).

Your file was reviewed by Manitoba Public Insurance’s Income Replacement Indemnity Supervisor on May 26, 2011. In his memorandum, the following was noted:

“I have reviewed the calculation and it looks like the calculation is consistent to section 84(1) of the MPI Act. [The Appellant’s] earnings varied throughout the first 180 days. Some periods with very high income and some with very low income. But on average, the GYEI was \$41,379.03.

As you can see from the highlighted section below; IRI can’t be less than what the claimant was receiving during the first 180 days. What the claimant was receiving in the first 180 days was calculated as \$41,369.03. She did not make \$72,006.70 in the first 180 days. In the first 180 days, according to the calculation, she made \$41,379.03. It is based on what the claimant was receiving. Section 84(1) makes no references to GYEI, if it did, then she would be entitled to the \$72,006.70. But it just states that it can’t be less than what was paid in the first 180 days. The amount paid in the first 180 days is \$41,379.03, not \$72,006.70.”

The Internal Review Officer concluded that the IRI benefits were correctly calculated pursuant to Section 84(1) of the MPIC Act and upheld the letter of March 31, 2011.

It is from these decisions of the Internal Review Officer that the Appellant has now appealed.

**Permanent Impairment:**

Some permanent Impairment benefit issues have already been heard by the Commission and dealt with in its decision in *AC-09-148* and *AC-11-049*, dated September 15, 2011.

As well, the Commission notes that the Internal Review Decisions of January 25, 2011 and June 7, 2011 also dealt with issues of Permanent Impairment and the Appellant still has further Permanent Impairment benefit appeals before the Commission. These matters are still outstanding and were not before the panel at the appeal hearing of November 7, 2011.

It was agreed that the issues before the Commission in the current appeal hearing involved the method of calculating the Appellant's IRI benefits in the first 180 days following the motor vehicle accident, and following the 181<sup>st</sup> day after the motor vehicle accident.

**Evidence and Submission for the Appellant:**

The Appellant submitted that none of the calculations which MPIC had made in calculating her IRI benefits for the first 180 days following the accident and after the 181<sup>st</sup> day were correct. She noted that at the time of the motor vehicle accident she was a member of three union locals in her industry, yet MPIC had only contacted one of these locals to try and ascertain what she might have been making at the time.

She reviewed the assessments of her potential income which MPIC had made, and noted that MPIC had missed some things, such as amounts allocated for "kit rental". She noted that in some jobs for art departments, she was required to have a cell phone, printer, scanner and software and she would be paid a certain amount per week to compensate her for providing these items.

The Appellant also explained that when MPIC assessed amounts which should be attributed to the jobs she would have held, it failed to take into account her proper position on the seniority list with her union locals.

In reviewing MPIC's calculations for the period following the 181<sup>st</sup> day after the accident, the Appellant submitted that it should have been based upon the IRI attributed to her for the first 180 days. Because one of the employments she would have held for the first three months would have resulted in a GYEI of approximately \$72,000 (on an annual basis), the Appellant submitted that she should be paid IRI following the 181<sup>st</sup> day based on an annual income of \$72,000.

The Appellant submitted that because Section 84(1) of the MPIC Act provided that an earner was entitled, after the first 180 days, to an IRI which "shall be not less than any IRI the temporary earner or part-time earner was receiving during the first 180 days after the accident", she must receive IRI based upon the highest earning employment identified.

The Appellant also pointed out that both the case manager and the Internal Review Officer erroneously referred to her as a non-earner, instead of a temporary earner.

The Appellant questioned the interest calculations made by the IRI calculator upon her IRI benefits. She took the position that the interest attributed was too low, and that, since MPIC had made so many errors in calculation, this interest calculation must also be incorrect.

The Appellant also questioned the notional deductions that MPIC had made against her income benefits for Canada Pension Plan, Employment Insurance and Income Tax. She did not understand how these figures had been arrived at and submitted that MPIC had failed to respect

maximum caps set upon these deductions under the *Income Tax Act*. The deductions made by MPIC did not reflect the “real world” situation.

The Appellant also questioned the employments which the IRI calculator used for calculating her potential income, noting that the calculator and the case manager had missed employments that she regularly held and had considered some employments which she never held.

The Appellant also submitted that MPIC had over-inflated the amounts which she had earned, on a part-time basis, after the accident.

The Appellant submitted that Section 84(1) was the only relevant section to her IRI calculation. She stated that she had received IRI of \$72,000 in the first 180 days and therefore she must receive that after the 181<sup>st</sup> day. Regulation 39/94 was irrelevant and should not be taken into account.

**Evidence and Submission for MPIC:**

Counsel for MPIC acknowledged that the Internal Review Officer had erred in referring to the Appellant as a non-earner, and agreed that she should be classified as a temporary earner.

Counsel argued that Section 84(1) of the MPIC Act must be tempered by Section 84(3) of the MPIC Act and reviewed the requirements of that Section. She acknowledged that the IRI calculator had simply taken an average of the employments considered for the first 180 days, in order to arrive at appropriate IRI for the 181<sup>st</sup> day and following. However, this did not correctly follow the scheme set out in the MPIC Act. The case manager and IRI calculator had failed to take into consideration all of the factors set out in Section 84(3) of the MPIC Act. As such,



counsel recommended that these calculations be referred back to the IRI calculator for recalculation.

Counsel for MPIC reviewed the legislative scheme, and in particular Section 163 of the MPIC Act, noting that the IRI calculator had followed this scheme in attributing interest to the Appellant's IRI benefits, using the provisions of the Queen's Bench Act.

Counsel also submitted that MPIC had correctly applied the provisions of Section 111 and 112 of the Act as well as Regulation 39/94 (Section 10) in determining the appropriate notional deductions to be made regarding CPP, EI and Income Tax deductions. However, she acknowledged that these amounts would have to be recalculated once a new IRI calculation had been made. She also indicated that while MPIC was attending to the recalculation of the Appellant's IRI benefits, it was also prepared to investigate the questions of the kit rental amount to be attributed to her income, as well as the effect of her seniority. She was also prepared to have MPIC conduct an investigation with the three local unions the Appellant named, as well as obtain more information regarding the part-time employment held by the Appellant.

**Discussion:**

The onus is on the Appellant, to show, on a balance of probabilities, that the Internal Review Decisions of January 5, 2011 and June 7, 2011 were not correct.

Section 84 of the MPIC Act provides:

**Entitlement to I.R.I. after first 180 days**

[84\(1\)](#) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

### **Where victim held several employments**

[84\(2\)](#) If the temporary earner or part-time earner held more than one employment immediately before the accident, the corporation shall determine only one employment under section 106.

### **Determination of I.R.I.**

[84\(3\)](#) The corporation shall determine the income replacement indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment, considering

- (a) whether the victim could have held the employment on a full-time or part-time basis;
- (b) the work experience and earnings of the victim in the five years before the accident; and
- (c) the regulations.

Manitoba Regulation 39/94 provides:

#### **GYEI of a temporary or part-time earner for first 180 days**

5(1) The gross yearly employment income of a temporary earner or part-time earner for the first 180 days after the date of accident is the amount calculated under sections 2 and 3.

#### **GYEI of temporary earner or part-time earner after 180th day**

5(2) The gross yearly employment income for a temporary earner or part-time earner after the 180<sup>th</sup> day following the date of the accident is the greatest of the amounts determined under subsection (1) and sections 6 and 7.

#### **GYEI of victim holding employment corresponding to determined employment for five years and at time of accident**

6 The gross yearly employment income of a victim who, at the time of the accident, held employment corresponding to employment determined for him or her by the corporation and who, in the five calendar years preceding the date of the accident, held such employment, is the greatest gross yearly employment income earned by the victim from

the employment in any of those calendar years as determined under sections 2 and 3, indexed under Schedule B and then adjusted under Schedule A.

**Calculation of IRI:**

The Appellant takes the position that the language of Section 84(1) of the MPIC Act, through the use of the word “shall”, is mandatory. She notes that a portion of that section states that IRI after the first 180 days following a motor vehicle accident “*shall* be not less than any income replacement indemnity the temporary earner...” was receiving during the first 180 days after the accident.

The Appellant asserted that she made \$72,006.70 in the first 180 days following the motor vehicle accident.

The Appellant submitted that because the highest of the promised employments she would have held for a portion of the first 180 days following the motor vehicle accident (April 21, 2008 to June 2, 2008) resulted in a GYEI calculation of \$72,006.70 and a biweekly entitlement of \$1,731.67, this alone should be the basis of her entitlement to IRI benefits from the 181<sup>st</sup> day following the accident. She submits that the other sections of the MPIC Act (including 84(3) and the Regulations) are irrelevant and should be ignored by MPIC and the Commission.

Counsel for MPIC submitted that Section 84(1) must be tempered by Section 84(3) of the Act and by Manitoba Regulation 39/94, and in particular Sections 5 and 6 of that regulation. The effect of these sections of the Act and Regulations combine to require that MPIC perform specific calculations in order to arrive at the appropriate IRI benefits after 180 days.

Section 84(3) provides that MPIC shall determine IRI benefits under section 84(1) on the basis of the GYEI that the Appellant could have earned by considering:

1. Whether the claimant could have held employment on a full-time or part-time basis.
2. The work experience and earnings of the claimant in the five years before the accident.
3. The Regulations.

Section 5(1) of Regulation 39/94 operates to determine IRI benefits in the first 180 days, based on Section 2 of that Regulation. MPIC submits that Section 2(b)(ii) is applicable for this payment.

**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:

- (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
- (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;

Section 5(2) of the Regulation assists with the determination of GYEI after the 180<sup>th</sup> day. That section of the Regulation states that the GYEI after the 180<sup>th</sup> day is the greatest of the amount already determined under Section 5(1) or the amount resulting from the application of Section 6, which refers to income earned by a victim from employment in any of the 5 calendar years preceding the motor vehicle accident, on an indexed and adjusted basis.

Counsel for MPIC admitted that MPIC had failed to follow the procedure dictated by these sections of the Act and Regulations, when calculating the Appellant's 181 day entitlement to IRI benefits. What the IRI calculator should have done, she submits, was to go through and compile

information from the 5 years prior to the motor vehicle accident and take that into consideration in the calculations. It does not appear, she noted, that this had occurred.

Rather, the IRI calculator had simply taken an average of the IRI calculations from the first 180 days.

Counsel for MPIC also submitted that the Appellant's interpretation of the legislation leads to an illogical result. She submitted that if a claimant was to have held an unusually high paying job for a portion of the first 180 days following an accident, MPIC should not be required to base IRI benefits after 180 days on this amount alone, because it does not correctly reflect the earning potential the claimant has lost as a result of the motor vehicle accident.

The Commission has reviewed Section 84 of the Act and Regulation 39/94. The panel agrees with the submission of counsel for MPIC that all of these provisions must be considered together and applied when calculating IRI benefits pursuant to Section 84(1).

As MPIC has failed to apply all of the appropriate sections of the Act and Regulations referred to above, the Commission will uphold the Appellant's appeal in this regard, and overturn the decisions of the Internal Review Officer dated January 25, 2011 and June 7, 2011. The Commission will refer the calculation of the Appellant's IRI benefits for the period from the 181<sup>st</sup> day following the motor vehicle accident to date, back to the IRI calculator for recalculation.

**Temporary Earner:**

The Commission also notes that, as agreed by the Appellant and counsel for MPIC, the Internal Review Officer erred in her decision of January 25, 2011, when she referred to the Appellant as a non-earner, as clearly the Appellant had already been determined as a temporary earner in the Commission's prior decision dated June 25, 2009.

Accordingly, the Commission finds that the decision of the Internal Review Officer dated January 25, 2011 should be varied to reflect the Appellant's status as a temporary earner.

**Interest:**

The Appellant has challenged the calculations and formulas used by MPIC in arriving at the interest to be added to her IRI benefit payments. She submitted that MPIC has been wrong in every other calculation it has made, and therefore she wants a breakdown of the formulas and interest used.

Counsel for MPIC relied upon the legislative provisions of the MPIC Act and the Queen's Bench Act to submit that the method of interest calculation used by MPIC was correct. She explained that a computer tool used by the IRI calculator calculates interest based upon a quarterly rate for interest set out under Section 79 of the Queen's Bench Act. The reason the Queen's Bench Act rates are utilized, is found under Section 163 of the MPIC Act which provides:

**Successful applicant is entitled to interest**

[163](#) Where a person's application for a review or appeal is successful, the corporation shall pay interest to the person on any indemnity or expense to which the person is found to have been entitled before the review or appeal, at the prejudgment rate of interest determined under section 79 of *The Court of Queen's Bench Act*, computed from the day on which the person was entitled to the indemnity or expense.

Counsel for MPIC submitted that MPIC had properly followed this process in calculating interest upon the Appellant's benefit entitlement.

However, counsel for MPIC also acknowledged that if the IRI calculations referred to above had not been properly calculated, then interest payments would have to also be recalculated as a result.

The panel finds that the Appellant has failed to show, on a balance of probabilities, that the method used by MPIC for calculating interest was in error. The panel finds that the calculation formulas used complied with the MPIC Act and Regulations, utilizing the amounts set out in accordance with *The Court of Queen's Bench Act*.

However, we note that, in referring IRI calculations back to the IRI calculator, these interest calculations may also need to be recalculated as well. Accordingly, the Commission will refer the matter of interest calculation back to the IRI calculator.

**Deductions:**

The Appellant submits that MPIC failed to follow the maximum deduction limits allowed per calendar year for CPP, EI and Income Tax, in accordance with the *Income Tax Act*. She submitted that MPIC exceeded the maximum deductions allowed. The Appellant submitted that every single calculation that MPIC had done in regards to her claim was wrong.

The Appellant submitted that these deductions did not reflect what would happen and what the deductions would be and how the deductions would be made in the real world.

Counsel for MPIC submitted that for each potential employment used in calculating IRI, MPIC is required to make calculations for deductions for CPP, EI and Income Tax, on a separate basis for each employment.

She submitted that MPIC complied with Section 111 and 112 of the MPIC as well as Section 10 of Regulation 39/94 in making these calculations.

### **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.

### **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 *Employment Insurance Act* (Canada) and contributions under the Canada Pension Plan.

### **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*.

**GYEI is pensionable and insurable earnings**

10(4) For the purpose of subsections (5) and (6), the gross yearly employment income of a victim, as determined under this regulation, are the pensionable earnings of the victim for the purpose of the Canada Pension Plan, and the insurable earnings of the victim for the purpose of the Unemployment Insurance Act (Canada), not derived from self employment.

**Premiums payable under Unemployment Insurance Act**

10(5) For the purpose of this regulation, the premiums payable under the Unemployment Insurance Act (Canada) are the amounts payable by the victim as an employee's premium for the year under that Act in respect of the victim's insurable earnings, not exceeding the maximum amount payable by him or her for the year under that Act.

**Contributions payable under Canada Pension Plan**

10(6) For the purpose of this regulation, the contributions payable under the Canada Pension Plan are the amounts payable by the victim as an employee's contribution for the year under the Canada Pension Plan in respect of the victim's pensionable earnings, not exceeding the maximum amount by him or her for the year under the plan.

The panel finds that MPIC has properly applied the appropriate sections of the MPIC Act and Regulations in calculating deductions for CPP, EI and Income Tax from the Appellant's IRI benefit entitlement.

However, as noted above in regard to interest calculations, since the Appellant's IRI benefits will be recalculated, the notional deductions made in connection with these amounts will also have to be recalculated.

As a result, in order to resolve any confusion which may result in regard to the calculation of notional deductions for CPP, EI and Income Tax and of interest in these future determinations, the panel finds that MPIC should provide detailed calculations to the Appellant which will show and explain how MPIC arrived at the amounts.

**Other Issues:**

The Appellant also submitted that MPIC had failed to fully investigate the potential employment she might have held and the amounts she might have earned, as well as improperly calculated any amounts that she did earn following the motor vehicle accident.

The issues which she pointed to included:

1. Kit Rental

The Appellant indicated that part of any job included, on top of wages, an amount for "kit rental", which included the requirement for the Appellant to provide items such as a cell phone, laptop, camera, and software. She noted that MPIC's IRI calculator had failed to include such amounts when calculating GYEI for her promised employment with, for example, [text deleted].

Counsel for MPIC noted that it was not possible to determine from the material provided in the Appellant's indexed file whether or not this had been taken into account by the IRI calculator. She suggested that this question could also be referred back to the IRI calculator for consideration and determination.

The panel agrees with counsel for MPIC that there is insufficient evidence or information on the Appellant's indexed file to determine whether kit rental was properly considered in MPIC's calculations of IRI entitlement. This could impact IRI calculations for both the first 180 days, and the period from the 181<sup>st</sup> day. Accordingly, the panel will refer this issue back to the IRI calculator for investigation and consideration.

## 2. Seniority

The Appellant submitted that her IRI benefits were not properly calculated, as the amounts used for income calculation were based upon the amounts received by a casual worker who ultimately filled the positions. This casual worker did not hold the same high seniority that the Appellant held within her unions and as such was not entitled to as high a rate of payment for work performed.

Counsel for MPIC indicated that MPIC relied, in this regard, upon information received from the Appellant's business agent. However, she offered to ask the IRI calculator to investigate this issue in the recalculation process.

Accordingly, the panel will refer this issue back to the IRI calculator for investigation and consideration.

### 3. Part-time Earnings

The Appellant submitted that in calculating other income she received after the motor vehicle accident, MPIC had attributed inflated amounts to her earnings. She argued that deductions for these part-time amounts earned were, in many instances, higher than the IRI amounts attributed to her.

Counsel for MPIC indicated that this issue was another area which warranted further examination by MPIC, as the documentation provided on the Appellant's indexed file did not provide a clear explanation of how the figures regarding the part-time employments were determined.

Accordingly, the Commission will refer the issue of calculation of amounts earned by the Appellant from part-time employment back to the IRI calculator for investigation and consideration.

### 4. Prospective Employment

The Appellant submitted that MPIC failed to properly investigate and determine the prospective employment she would have held had the accident not occurred. The Appellant submitted that she had never worked at [text deleted] or at [text deleted]. She pointed to various employments, such as the [text deleted], which she would have more likely held, than the employments identified by the IRI calculator.

Counsel for MPIC submitted that the prospective employments considered by the IRI calculator were based upon information obtained from the Appellant's business agent and that the Appellant had failed to provide any further information to contradict this.

Counsel for the Appellant submitted that MPIC could not be responsible for what the business agent may have missed and that they simply take the information provided in order to make their determinations. If there were inaccuracies within the information, counsel for MPIC suggested that the onus was upon the Appellant to contact the business agent and arrange to have MPIC provided with the correct information.

The panel finds that the Appellant failed to provide any evidence to show that there was prospective employment, other than those already considered by the IRI calculator, which should have been considered. Accordingly, the panel finds the Appellant has failed to show, on a balance of probabilities, that MPIC did not consider the appropriate prospective employment when calculating her IRI benefit entitlement.

#### 5. Investigation with unions

The Appellant indicated that, at the time of the motor vehicle accident she was a member of three different unions which facilitated her access to employment in the field of motion pictures, broadcasting and performing arts. The Appellant submitted that MPIC had erred when it contacted only one of these unions to investigate the Appellant's employment and earnings potential.

Counsel for MPIC indicated that as the materials on the Appellant's indexed file did not indicate whether or not these additional unions were contacted, this would be an appropriate issue to be clarified at the case management and IRI calculation level.

Accordingly, the Commission will refer the issue of investigation of all three unions through which the Appellant arranged employment to the Appellant's case manager and IRI calculator for investigation and consideration.

**Summary:**

As a result, the calculation of the Appellant's IRI benefits as a temporary earner between April 21, 2008 and April 15, 2009 and between April 16, 2009 and September 30, 2010 will be referred back to the case manager and IRI calculator for recalculation, along with the issues of her "kit rental", seniority, part-time earnings, and investigation with the Appellant's unions. Recalculation of notional deductions for CPP, EI and Income Tax benefits, as well as interest calculations, will then be made regarding the new IRI benefit calculations.

The Appellant's appeals will be upheld in this regard and the Internal Review Decisions of January 25, 2011 and June 7, 2011 will be varied accordingly.

Dated at Winnipeg this 12<sup>th</sup> day of December, 2011.

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**LAURA DIAMOND**

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**LINDA NEWTON**

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**WENDY SOL**