Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-95-23

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Ms Joan McKelvey** **[Text deleted], the Appellant, appeared in person**
HEARING DATE:	**February 12th, 1996**
ISSUE:	**Full-time, part-time or temporary earner? Appropriateness of determined employment.**
RELEVANT SECTIONS:	**Sections 70(1), 81(2)(a)(ii) and 171(2) of the Manitoba Public Insurance Corporation Act ('the Act'); Regulation 37/94, Section 4, and Regulation 39/94, Section 8(a) and Schedule C.**

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 FACTS:

[The Appellant] was involved in a serious motor vehicle accident on June 7th, 1994. The nature and extent of her injuries are not in dispute. She received some income replacement indemnity ('I.R.I.'), effectively commencing 7 days after the accident, and the quantum of those payments is also, apparently, not disputed by [the Appellant]. M.P.I.C. decided

that [the Appellant] was a part-time earner and that her I.R.I. should, therefore, be reviewed after 180 days, pursuant to Section 84(1) of the Act. As a result, M.P.I.C. decided that the most appropriate occupation for [the Appellant] was in the category of "Coaches, Trainers and Instructors" and that, since she had been engaged in that occupation for less than 36 months, her income replacement would be based upon Level 1, or a gross yearly employment income of $19,960.00. It is from that decision that she now appeals.

[The Appellant's] career prior to her accident marked her as an energetic self-starter, not inclined to work for anyone else except as part of a learning process and not hesitant to face new challenges, although arguably a little short on financial management skills. After a variety of jobs, including a spell as management trainee at [text deleted], she started as a junior partner with [text deleted], a manufacturer's agent involved in the sales of electrical equipment. In 1987 she bought out the other partner and carried on business as sole proprietor until 1992. During the period of her sole ownership, her annual, net income averaged between $60,000.00 and $80,000.00 and, for the year 1991, she reported net, taxable income in excess of $150,000.00.

However, in 1991 or early 1992 she was apparently persuaded to take in a partner and, for reasons and in a manner not made clear to us, the business that had previously been so profitable became a source of problems, including diverging business philosophies of the partners and, in 1992, she sold out to her partner for just about enough cash to pay off her line of credit.

In the interim, [the Appellant] had become engaged to a restaurateur and had invested in his restaurant, the [text deleted]. Therefore, upon leaving the manufacturer's agency she decided to concentrate her energies full-time upon the restaurant business, where she appears to have acted as assistant manager. Once again, and in a manner to which we were not made privy, [the Appellant's] partner allegedly, "ripped her off" (to use her phrase), with the result that she made a personal assignment in bankruptcy in the fall of 1992. She was discharged about a year later. She continued her involvement in the restaurant, part of that time under the watchful eye of her trustee in bankruptcy, until January of 1994, when she and her former fiance sold it. As [the Appellant] relates it, "The restaurant had been under my fiance's name and he walked away with the net proceeds of sale".

It is not for us to comment upon the financial relationships between [the Appellant] and her former partners. It is enough to note our understanding that her investments in the [text deleted] and in the [text deleted] had been made through a personal holding company, [text deleted].

At the threshold of 1994, and of yet another turning point in her life, [the Appellant] had to make a new career decision while determined to remain the mistress of her own fate. She elected to start working upon what, for her at least, was a new concept from three closely related angles simultaneously:

(a) she would sell exercise equipment, not as an employee but as an independent consultant, for [text deleted], a company having premises, including a showroom, on [text deleted]. Her services for that company would include follow- up with each purchaser, to see the

equipment suitably installed and the customer given proper advice as to its use. For this, [the Appellant] or her holding company (the payee was not made clear to us) was paid a fee of $1,000.00 per month. She was paid as an independent contractor with no deductions being made at source;

(b) she would concentrate her initial efforts upon developing a clientele as a personal fitness consultant, thus giving the other two aspects of her project a reasonably broad base upon which to build. This she had already started, achieving reasonable success in a comparatively short time. She was averaging between $200.00 and $300.00 per week, with a few clients on a sporadic basis at $45.00 per hour and one client four times per week at $30.00 per hour;

(c) it was this latter client with whom, and with whose financial and other assistance, [the Appellant] was developing plans for the third facet of her project, namely the establishment of a [text deleted], offering a variety of services to women, not limited to the sale or use of exercise equipment but including nutrition, resistance training, general physical education and other forms of counselling. That facet of her project was still in the developmental stage, but her evidence was that the requisite funds were available and that she and her intended partner were actively looking for appropriate premises at the time of her accident.

[The Appellant's] evidence was that she worked in excess of 30 hours per week for [text deleted], plus a minimum of 6 hours per week with individual clients.

THE LAW:

There are two issues to be determined in this appeal:

> Was [the Appellant] a part-time earner, as submitted by M.P.I.C., was she a full-time, self-employed earner as she claims, or was she a temporary earner as defined in the Regulations?
>
> Was the employment determined for [the Appellant] by M.P.I.C. the most appropriate one?

The sections of the Act and the Regulations that are relevant to the present appeal are annexed to and form part of these Reasons.

We are confronted at the outset with two separate and potentially conflicting definitions of a full-time earner. Section 70(1) of the Act defines 'employment' as:

> 'any remunerative occupation';

it then goes on to define a 'full-time earner' as:

> 'a victim who, at the time of the accident, holds a regular employment on a full-time basis' (excluding a student and a minor).

On the other hand, Section 4 of Regulation 37/94 provides that 'a person holds regular employment on a full-time basis' if he/she is employed at one employment for at least 28 hours per week (excluding overtime), either in each week of the year preceding the accident or, in each of the preceding two years, for successive or intermittent periods of at least eight months and with intervals of not more than four months.

However, Section 2 of that same Regulation 37/94 limits the application of the foregoing provision to "the *interpretation of a regulation* enacted under Part 2 of the Act, unless a contrary intention appears in the regulation." It follows, therefore, that Regulation 37/94 does not apply to an interpretation of the Act itself; we are at liberty to interpret the statute without reference to any definition set out in the regulation, save only when the Act specifically requires us to adopt the language of a regulation or the regulation is, by its own language, made applicable to a particular section of the Act.

We find that, at the time of the accident, [the Appellant] was a self-employed, full-time earner within the meaning of Section 70(1) of the Act, working at least 35 to 40 hours per week in her efforts to establish and build her business.

That being so, sub-Sections 81(2)(a)(ii) and (iii) of the Act require us to determine her I.R.I. on the basis of the gross income, determined in accordance with the regulations, for an employment of the same class, or the gross income that she actually earned from her total employment, whichever is the greater.

Since [the Appellant's] business at the time of the accident had only been in operation for about five months, the gross income that she earned from her employment can only be annualized by taking her weekly income from private clients (by her testimony, an average of about $250.00 per week or $13,000.00 per year) and adding to it the $1,000.00 monthly fee that she was paid by [text deleted], for an annual total of $25,000.00.

In order to compare that income with gross income for an employment of the same class, we must look to Regulation 39/94, Section 8(a) and Schedule C.

Having in mind that [the Appellant] had operated a highly successful manufacturer's agency alone from 1987 to 1992, that she clearly had an investment in, and at least a hand in the management of, the restaurant, and that the new business that she had started as an independent operator in January of 1994 involved sales, installations, working on an individual basis with some of her equipment customers and planning for the imminent establishment of a [text deleted], we are of the view that the field of "Coaches, Trainers and Instructors" assigned to her by M.P.I.C. is altogether too narrow. In the vernacular, [the Appellant] would most appropriately be described as an entrepreneur but, since for obvious reasons no such category exists, we find that the class of employment most appropriate to [the Appellant's] education, training, work experience and abilities immediately prior to the accident is that of "Other Managers and Administrators, not elsewhere classified".

Since [the Appellant] was not apparently the owner of an equity in the restaurant where she worked during 1992 and 1993 and since the actual extent of her involvement in its management is unclear, we find that she was engaged for more than three but less than five years in an occupation analogous to that of 'Other Managers and Administrators, not elsewhere classified' and, therefore, would qualify for Level 2, with a deemed, gross, yearly employment income of $37,991.00. The decision of the Internal Review Officer is, therefore, varied accordingly and the matter referred back to M.P.I.C. for the calculation of a new, bi-monthly I.R.I. to have retroactive effect from the 181st day following [the Appellant's] accident. Had her I.R.I.

from the 7th day following the accident been the subject of her appeal, we would have made our decision retroactive to that date.

There is one other matter that needs to be dealt with. [The Appellant] had originally been told by her Adjuster that her I.R.I. would be based upon her highest recorded earnings during the five years immediately preceding her accident. The Adjuster, in giving her that advice, was acting in perfectly good faith and upon the basis of an early interpretation given to the Regulations by M.P.I.C.'s Administration. However, shortly thereafter but before any final decision had been given to her in writing by the Corporation, M.P.I.C.'s Administration changed its interpretation. [The Appellant] felt that the Corporation had made an agreement with her and should be required to live up to that agreement. There was, however, no agreement that the law would recognize as being an enforceable one; no valuable consideration passed from [the Appellant] to the Corporation in exchange for that particular interpretation which, after all, was just that - a unilateral interpretation and not something upon which [the Appellant] acted to her detriment. The Corporation could, in any event and by virtue of Section 171(2), have corrected any error thus made by its adjuster or by its Claims Coverage Committee, as appears to have been the case.

Dated at Winnipeg this 21st day of February 1996.

CHARLES T. BIRT, Q.C. **J. F. REEH TAYLOR, Q.C.** **LILA GOODSPEED**