Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-6

PANEL:	**Mr. Charles T. Birt, Q.C. (Chairperson)** **Mrs. Lila Goodspeed** **Mr. F. Les Cox**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Ms Joan McKelvey** **[Text deleted], the Appellant, appeared in person**
HEARING DATE:	**May 24th, 1996**
ISSUE: **on**	**Can Income Replacement Indemnity be calculated based only one month's gross earnings?**
RELEVANT SECTIONS:	**Sections 81, 111(1), 112(1) of the M.P.I.C. Act and Regulation 39/94**

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 is a [text deleted] year old self-employed contractor providing drywalling services to contractors on a sub-contract basis. Generally he works in remote areas where he puts in ten to twelve hour shifts per day, for six or seven days per week. His

contractual rate is generally $22.00 per hour and he would often earn in excess of $6,000.00 per month. The Appellant advised that he would only work on the average of six to eight months a year. From his annual gross income he would pay his own business, travel and personal expenses while living on the job site and declare only his annual net income on his income tax return.

The Income Tax returns filed by the Appellant show his gross and net incomes for the following years: 1990 gross - $32,879.87 net - $12,143.94, 1991 gross - $48,131.67 net - $25,978.75, 1992 gross - $ 42,031.94 net - $14,578.21, 1993 gross - $55,014.05 net - $27,321.56. His average net income for the last three years was $23,224.28 and for the past two years was $21,849.89 according to the calculations of M.P.I.C.

The Appellant had just returned from a remote construction site a day or two before the auto accident, due to a back injury suffered on the job. He would not normally have returned until close to Christmas and he advised he would often find work over the holiday season in [text deleted] before returning to the job site. The Appellant advises that this was his intention in December 1994 and argued that he would have earned at least $6,000.00 (gross earnings) during the month of December. He produced his time sheets for the months before and after December to support this claim.

The Appellant was driving his automobile on December 6th, 1994 when it was struck from behind and he suffered injuries that prevented him from doing any work until late

January 1995 when he returned to the construction site. He was paid Income Replacement Indemnity (IRI) for the period of December 15th, 1994 to January 2nd, 1995.

The Appellant is entitled to have his IRI calculated on the average of his net income or the equivalent job classification contained in Schedule C of Regulation 39/94 whichever gives him the greatest income.

After the initial interview with the Appellant the Adjuster decided he was a general labourer and put him in the category known as "Other Construction Trades" in Section 10 - "Construction Trades Occupations" and because he had more than five years of work experience he qualified for level 3 annual income of $34,939.00. During the hearing the Appellant advised that he was more than just a labourer as he was primarily a drywaller. Although not licensed he installed metal studs, applied drywall and taping of same.

THE ISSUE:

The Appellant believed he would have earned approximately $6,000.00 (gross earnings) during the month of December if he had not been injured and he wanted his IRI based on this one month's income.

THE LAW:

The Appellant was a self-employed full-time earner, as defined in Section 81(2)(a)(ii)of the Act, at the time of the accident and due to his injuries was entitled to IRI. The period of payment of the IRI is not in dispute but how the sum was calculated is.

On the facts of this appeal the Appellant is entitled to IRI based on his gross income as determined by the regulations for employment of the same class or the Appellant's gross income, whichever is the greater. Regulation 39/94, Section 1, defines "gross yearly employment income (GYEI)" with the same definition as "gross income" in the Act.

Section 3(1) of the regulations states that GYEI is calculated by taking the self-employed's business income and deducting all expenses that relates to the production of the income as permitted under the Income Tax Act of Canada but excludes certain deductions such as depreciation, etc. This determines the individual's GYEI. The Regulation then requires that you take the greatest GYEI earned in one of the following ways:

(a) business income of 52 weeks preceding the accident;

(b) business income for the 52 weeks before fiscal year end prior to the accident;

(c) average of last 2 fiscal years prior to the accident;

(d) average of last 3 fiscal years prior to the accident;

(e) employment of similar class in schedule C.

And then using the victim's highest "gross yearly employment income" you determine his net income by deducting from this GYEI: income tax, CPP contributions and UI premiums (Section

10(1) of Regulation 39/94). The Victim's IRI is equal to 90 % of this net income computed on a yearly basis (Section 111(1) of the Act).

For the Appellant to succeed in his argument he must find support for his position within the Act and its regulation. He could not direct us to or advise us of any section that supports his argument. In fact as we have set out above, the only basis for calculating one's IRI is that it must be based on one's annual income.

In this case M.P.I.C. had to choose the higher of two incomes, namely his highest earned income in any period up to three years before the accident or the income paid to an individual in a similar class as per Schedule C. In this case his highest annual income came from the similar classification in Schedule C namely $34,34.939. M.P.I.C. chose the highest annual income level for the Appellant and they properly calculated his IRI on the annual income basis and not the monthly basis.

During the course of appeal the Appellant advised that he was more than a general labourer and after hearing his evidence we are of the opinion that due to the nature of his work, as set out above, he should be classified in the category of "Carpenters and Related Occupations" and due to his length of employment qualifies for a level 3 income of $37,268.00. M.P.I.C. should therefore recalculate his IRI entitlement, based on the income figure of $37,268.00 and not $34,939.00, and pay him the difference.

Section 10(1) of Regulation 39/94 states that in calculating IRI one must deduct, amongst other things, premiums for Unemployment Insurance. The Appellant was self-employed and therefore did not pay these UI premiums. Therefore M.P.I.C., when recalculating his IRI as set out above, should not make any deductions for UI premiums.

DISPOSITION:

We therefore confirm the Appeal's Officer's method of calculating the Appellant's IRI based on an annual income and not a monthly one. We modify his decision to the extent that the IRI must now be calculated upon the basis of the new annual income of $37,268.00, without any deductions for UI.

Dated at Winnipeg this 28th day of June, 1996.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED

F. LES COX