Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-10

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., Chairman** **Ms. Yvonne Tavares** **Mr. Colon C. Settle, Q.C.**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Joan McKelvey.**
HEARING DATE:	**September 5, 2000**
ISSUE(S):	**(a) 'topping-up' of income replacement—whether properly calculated;** **(b) whether, but for accident, Appellant would have been full-time earner.**
RELEVANT SECTIONS:	**Sections 83(1) and 111(1) of the MPIC Act**

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 Appellant], a taxi driver at all relevant times, was involved in three motor vehicle accidents in 1999: on January 12th, April 30th, and May 24th. The two issues before us are these:

(a) the amount of Income Replacement Indemnity ('IRI') to which he was entitled from February 22nd to March 31st, both inclusive, of 1999; and

(b) whether, had it not been for his accident of April 30th, 1999, [the Appellant] would have been employed on a full-time basis.

This file raises some concerns for us on several levels. Firstly, [the Appellant's] case manager at MPIC, [text deleted], records in his notes of September 13th and September 20th, as well as in his formal letter of decision to the Appellant on December 17th, 1999, his apparent belief that a claimant has the duty to prove "beyond a reasonable doubt" that the Appellant had been promised full-time employment as of May 1st, 1999. It should not be necessary for this Commission to point out, six and one-half years after the proclamation of the relevant portions of the MPIC Act—indeed, against the entire background of Canadian jurisprudence in the context of insurance law—that claimant is only required to establish the validity of his claim upon a reasonable balance of probabilities. His onus of proof is no heavier than that.

On the other hand, there are inconsistencies in the Appellant's evidence that raise questions of credibility, as will appear later in these reasons.

Calculation of 'Top-up' IRI

All of the dates referred to in these Reasons occurred in 1999 unless otherwise specified.

At the time of his January 12th accident, [the Appellant] was quite properly classified as a temporary earner within the meaning of Section 70 of the MPIC Act. He held regular employment driving a cab, but on a temporary basis since the owner-driver of that cab was away in [text deleted] on extended vacation and was due to return on March 31st, when [the Appellant's] employment would end.

Following [the Appellant's] accident of January 12th, in which he sustained soft-tissue sprain/strain types of injury to his cervical and lumbo-sacral areas with a resultant inability to

drive his cab for several weeks, MPIC paid [the Appellant] IRI at a rate of $552.37 biweekly from January 20th to February 21st, both inclusive.

On the recommendation of his family physician, [text deleted], [the Appellant] was referred for physiotherapy to the [physiotherapy clinic], where his therapist was [text deleted]. By February 15th, [Appellant's doctor] and [Appellant's physiotherapist] were in agreement that [the Appellant] should be able to start a graduated return-to-work plan, working four hours per day from February 22nd to the 28th, and then increasing by two hours per day in each of the following three weeks in the expectation that, by March 22nd, he would have been able to return to working a full 12-hour shift—the norm in the taxicab industry.

However, [Appellant's physiotherapist] was obliged to report on March 16th that [the Appellant's] attendance had been poor. He had started going to the Clinic on January 14th but had only shown up once or twice a week rather than three times weekly as had been recommended and agreed upon. [Appellant's physiotherapist's] report of March 16th noted that [the Appellant's] cervical range of motion had improved and that he had voiced few complaints during the previous two weeks related to his neck. He had had more complaints of low back pain but, by March 15th, both symptoms and signs in that area had also shown improvement. [The Appellant] had been able to work six to seven hours and [Appellant's physiotherapist] had encouraged him to continue with his six-hour shifts and progress to eight hours during the following week. She advised MPIC that [the Appellant] should continue with his physiotherapy until he had reached 10- to 12-hour shifts; she had instituted an extension program.

During a conversation with [Appellant's MPIC case manager] on March 15th, 1999, [Appellant's physiotherapist] expressed the view that, had [the Appellant] attended for all of his scheduled

physiotherapy treatments, it was likely that he would have been back to work on a full-time basis by March 22nd.

Since [the Appellant] had returned to work on February 22nd, albeit at fewer hours than were normal for him, MPIC topped up his income by paying him the difference between his original IRI ($552.37 biweekly or $276.19 per week) and the amount of his actual earnings. The amount paid to him on that basis was calculated as follows:

			Actual Earnings	**IRI Top-up**
February 22nd to February 28th	$276.19	-	128.40 =	$147.79
March 1st to March 7th	$276.19	-	175.17 =	$101.02
March 8th to March 14th	$276.19	-	197.03 =	$79.16
March 15th to March 21st	$276.19	-	197.03 =	$79.16
March 22nd to March 28th	$276.19	-	218.91 =	$57.28
March 29th to March 31st	(three-sevenths of $276.19)	-	128.40 =	nil
			Total	**$464.41**

In his testimony, [the Appellant] expressed the view that the figures noted above represented an unfair application of the statute, in that it was not possible for him to obtain employment as a taxi driver under conditions requiring less than a full, 12-hour shift. He pointed out that, if he obtains the use of a cab for 12 hours and is only able to work six or eight hours of that shift, he still has to pay the owner of the cab $50 out of his own pocket.

It is, perhaps, worth noting that [the Appellant] does not take issue with the basic IRI computation of $552.37 biweekly, nor, when discussing his graduated return to work with

[Appellant's physiotherapist] and [Appellant's MPIC case manager], does he appear to have made any mention until May 31st of difficulty he would encounter in working short shifts.

What is even more troubling for the Commission is that, in his July 28th Application for an Internal Review of the Case Manager's decision, [the Appellant] says:

> ……..I went to work Feb-14-99. After that I couldn't work because my back pain was really bad and I didn't get back to work until end of March……

In his testimony before this Commission, [the Appellant] stated that the only day he had been able to work after his first accident and before the end of March was February 15th, yet his physiotherapist, [text deleted], is able to tell the Case Manager on March 15th that he was working fewer hours daily than had been projected for his graduated return-to-work plan, and [the Appellant] was, himself, able to tell [Appellant's MPIC case manager] on March 17th that he was almost back at full-time hours and would likely be back at 12-hours shifts by March 22nd. There is no credible evidence before us upon which we could base an award of additional IRI for the period February 22nd to March 31st.

Part-time or Full-time Earner?

[The Appellant] started working full, 12-hour shifts on Saturdays and Sundays, commencing April 17th, for [text deleted], an owner-driver with [text deleted]. He testified, supported by [text deleted], that he had been promised full-time employment on the basis of a five- or six-day week, to commence May 1st, but that he was robbed of that promised employment by his motor vehicle accident of April 30th. This second accident seems to have exacerbated his earlier injuries and set back his recovery.

It is common ground between [the Appellant] and MPIC that, as of April 17th, he was driving for [text deleted] for 24 hours—that is to say, two full shifts—per week. [Appellant's MPIC case manager's] notes of May 18th and May 26th reflect discussions that he had with [the Appellant], when [the Appellant] confirmed that he was still driving for [text deleted] on weekends and had been doing so since he had lost his job upon the return to Canada of his former employer. Between those two conversations, [the Appellant] had been involved in his third accident on May 24th, apparently giving rise to the need for further physiotherapy. On neither of those occasions was any mention recorded of the alleged job offer that was to have started on May 1st. [The Appellant] testified that, in the discussion he had with [Appellant's MPIC case manager] on May 18th, he told [Appellant's MPIC case manager] that he had been promised full-time employment as of May 1st, but this is such a vital factor in the determination of IRI that, had it been mentioned, it is difficult to believe that the case manager would not have made any note of it.

[Appellant's MPIC case manager's] notes of May 18th also reflect a statement by [the Appellant] that he was "already getting better and has begun working partial days". [Appellant's MPIC case manager's] note of May 26th records, in part,

> I asked him if he will be able to return to work at reduced hours, something he should have done shortly after the April 30/99 accident…..see (*[Appellant's MPIC case manager's] note*) of May 18/99 which confirms that he started reduced hours already. Claimant advised that he started working half days on May 18/99…..I asked if he can work 4 hours per day starting on May 31/99. He said that he could. I told him I would increase by 2 hours each week until he was back to his 12 hour days, twice a week. He agreed…..

[The Appellant] testified that the conversations recorded in [Appellant's MPIC case manager's] notes of May 18th and 26th never took place. We are thus left with two choices: we must either accept [the Appellant's] hypothesis that [Appellant's MPIC case manager], acting out of a spirit of racism or at least a desire to save money for MPIC, concocted deceptive notes, or we must

believe that [the Appellant's] memory is not serving him well in this particular context; we adopt the latter.

Again, in a memorandum of May 31st, 1999, [Appellant's MPIC case manager] reports an extensive conversation that he had with [the Appellant] on that date, wherein he says, in part,

> The claimant advised several times during this conversation that he is not yet returned to any part-time even though he admitted to me when I met with him on May 26, 1999 that he started working half days on May 18, 1999. He advised that he would have been paid Income Replacement Indemnity based on the part-time work from May 8-17, 1999 at full Income Replacement Indemnity followed by a top-up from May 18-31, 1999. This payment would cover the 7-day waiting period on the May 24, 1999 loss (waiting period May 25-31, 1999). Obviously [the Appellant] is confused about what hours he actually worked following the April 30, 1999 accident.
> (*The foregoing is a literal transcript of parts of [Appellant's MPIC case manager's] note which, itself, is not easy to follow.*

[Appellant's MPIC case manager's] notes also record a meeting with [the Appellant] on July 8th when, says [Appellant's MPIC case manager], [the Appellant] explained that he would not go for any further physiotherapy appointments because it hurt him too much; [the Appellant] denies ever saying that.

It was not until June 17th, by way of an Employer's Verification of Earnings, that [the Appellant's] file discloses any mention of an intent by [text deleted] to increase his hours of work to 60 hours per week, commencing May 1st. We find this puzzling, particularly since [the Appellant] had already been through the claims process as a result of his January accident and may be presumed to have known the basis upon which IRI would be calculated.

We find that [the Appellant] has not established by credible evidence that, upon a reasonable balance of probabilities, had it not been for his accident of April 30th he would have been

employed on a full-time, 60-hour-week basis, commencing on May 1st, 1999. It follows that this aspect of his appeal must also fail.

Dated at Winnipeg this 13th day of September, 2000.

J. F. REEH TAYLOR, Q.C.

YVONNE TAVARES

COLON C. SETTLE, Q.C.