Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-144

PANEL:	**Mel Myers, Q.C., Chairman** **Yvonne Tavares** **Wilson MacLennan**
APPEARANCES:	**The Appellant, [text deleted], was represented by her husband, [text deleted]** **Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Keith Addison**
HEARING DATE:	**June 5th, 2001**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity Benefits**
RELEVANT SECTIONS:	**Section 70(1) (definition full-time earner and definition non-earner) and Section 81(1)(a) and 85(1)(a) of the Manitoba Public Insurance Corporation Act (the "*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

1 The Appellant, [text deleted], has appealed a decision of the Internal Review Officer dated November 27, 2000, which denied her income replacement indemnity benefits (hereinafter referred to as IRI benefits) for the period January 15, 2000, to May 23, 2000.

2 The Appellant had been employed as a *health care aide* at [text deleted] and as a result of a disability was on a leave of absence from her employment and receiving monthly long-term disability benefits (hereinafter referred to as LTD benefits) from [Appellant's employer's insurer] from January 15, 1998.

3 At the request of [Appellant's employer's insurer], the Appellant was examined by [text deleted], a physiatrist on November 25, 1998. [Appellant's physiatrist] in his medical report to [Appellant's employer's insurer] on December 9, 1998, indicated that the Appellant had the capacity to do sedentary or light work.

4 On January 14, 2000, the LTD benefits were terminated by [Appellant's employer's insurer] on the grounds that the Appellant no longer satisfied the policy definition of disability.

5 Previously on November 27, 1999, the Appellant was involved in a motor vehicle accident and sustained several injuries. [Text deleted], an orthopedic specialist, examined the Appellant on December 6, 1999, and in a medical report to the Manitoba Public Insurance Corporation (hereinafter referred to as MPIC) dated February 23, 2000, he indicated that the Appellant sustained crush fractures of L2 and L4 and a strain to the right wrist with no fracture or dislocation. In this report, [Appellant's orthopedic specialist] confirms that as of January 18, 2000, the Appellant was likely to still feel the disabling effects of the motor vehicle accident. On May 23, 2000, [Appellant's

orthopedic specialist] again examined the Appellant and at that time was of the view that the Appellant was capable of performing sedentary duties.

6 The Appellant made an application to the MPIC for IRI benefits for the period of January 15, 2000, being the date when [Appellant's employer's insurer] discontinued her LTD benefits until May 23, 2000, being the date when [Appellant's orthopedic specialist] determined that the Appellant was capable of returning to work to perform light duties after the motor vehicle accident.

7 The Internal Review Officer rejected the Appellant's claim for IRI benefits for the period of January 15, 2000, to May 23, 2000, because in his view the Appellant was not a full time earner but a non-earner within the meaning of Section 70(1) of the *Act* and therefore under Section 85(1)(a) of the *Act* was not entitled to receive IRI benefits for the following reasons:

> "In deciding this issue, it is necessary to consider whether you effectively held employment at the time of the accident given that you were in receipt of long term disability benefits. In that regard, Section 85(1)(a) of the MPIC Act provides:
>
> **Entitlement to I.R.I. for first 180 days**
> 85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:
> (a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;
>
> I am unable to conclude that your ongoing receipt of long term disability benefits from January 15, 1998, to November 27, 1999 constitutes the holding of employment as contemplated by Section 85(1)(a) of the Act or

by the definition of "full-time earner" under Section 70(1) of the Act which is:

> **"full-time earner"** means a victim who, at the time of the accident, holds a regular employment on a full-time basis, but does not include a minor or student.

Having arrived at this conclusion, I am of the view that you are a non-earner which is defined as:

> **"non-earner"** means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or a student.

Under Section 85(1)(a) you would not be entitled to receive IRI benefits in the first 180 days following the accident unless it can be established that you were "unable to hold an employment" that you would have held during the period in question. Notwithstanding your suggestion that you were still technically employed at [text deleted] in the period in question, despite the Case Manager's statement to the contrary, it seems clear that you had no intention of either resuming your previous employment or seeking any other alternate employment between January 15, 2000 and May 23, 2000. On that basis I am unable to accept that you have established that you would have held any employment in the period if the accident had not occurred.

Therefore, I am dismissing your Application for Review and upholding the decision of your Case Manager dated July 5, 2000."

8 The decision of the Internal Review Officer that the Appellant was not an employee at the time of the motor vehicle accident or at the time the LTD benefits were discontinued is inconsistent with the decisions of labour arbitrators and the courts who have dealt with these issues in the past.

ARBITRABLE AUTHORITIES

9 The issue as to whether a leave of absence of an employee due to illness or injury constitutes a severance of the employer-employee relationship resulting in a denial of benefits to the employee has been extensively dealt with by labour arbitrators under the provisions of collective agreements.

10 In Brown & Beatty, the leading Canadian textbook on labour relations in respect of employees covered by collective agreements the authors state the mere absence of work due to illness or injury does not sever the employer-employee relationship unless there is a specific provision in the collective agreement to that effect, or there is some affirmative action taken by the employer to terminate the employment relationship or the employee resigns from his or her employment.

11 At page 8-70, the authors of Brown & Beatty state:

> In addition to these plans, employees who are unable to work by reason of illness or disability may be entitled to claim a range of other monetary benefits by virtue of their status as employees.[10] In this respect, and in contrast with the division of arbitral opinion as to the employment status of persons on lay-off,[10a] there is a consensus among arbitrators as to the status of persons who are absent from work owing to an injury or infirmity. Noting that, in the later circumstance, the absence is both informal and automatic, that the cause of the absence will effectively preclude the person from seeking or obtaining employment elsewhere during the period of absence, and that the person's primary job or position with his employer will continue,[11] arbitrators have generally taken the position that in the absence of some provision in the agreement to the contrary, such persons must be considered to be employees whose seniority may continue to accrue,[12] even though they are not in receipt of wages or even sick pay,[13] until some affirmative action is taken by the employer to terminate the employment relationship.[14] Similarly, persons

> on a leave of absence, even though not in receipt of wages, generally have been regarded as being employees.[15] Although not entitled to wages, in both cases, where entitlement is dependent only on the establishment of the employment relationship, arbitrators generally have held that such employees are entitled to receive such benefits as insurance premiums,[16] health and welfare benefits,[17] cost of living bonuses,[18] and sick-pay credits,[19] even where they have exhausted their sick-leave entitlement. (underlining added)

12 The footnotes 10-19 inclusive referred to in paragraph 10 hereof indicates the numerous reported arbitration awards which have dealt with these issues and are attached as Appendix A to these reasons.

13 The following arbitration awards illustrate the principles set out in Brown & Beatty in paragraph 10 hereof.

14 In Re United Automobile, Local 195, and Bendix-Eclipse of Canada Ltd. (1966) 17 L.A.C. 124, the union sought payment to an employee's widow of $5000 as a group life insurance benefit. The company had paid $4000, the amount to which the widow would have been entitled under the preceding collective agreement. The question for the arbitrator was whether the employee had been covered under a more recent collective agreement which provided for the larger payment, the employee having been on worker's compensation during the course of the new collective agreement.

15 The arbitrator, County Court Judge Bennett, concluded that the status of the deceased worker who was on worker's compensation at the time of his death did not sever the employment relationship between the worker and his employer and therefore

the deceased worker's widow was entitled to the additional life insurance payment under the more recent collective agreement.

16 In arriving at his decision, arbitrator Bennett cited with approval the following arbitration award:

> "in Re United Rubber Workers and Mansfield Rubber (Canada) Ltd. (1960), 10 L.A.C. 280, where the company had discontinued payment under the health insurance plan for the grievors who were on workmen's compensation, it was decided by the arbitration board that the employer-employee relationship continued to exist. The award, in part, stated at [p.286]:
>
> > ' " In contrast to the case of lay-off, one who suffers an injury arising out of his work, and who is compelled for physical reasons to disengage himself from active employment at his job, is in a different position. Here the job does not disappear, although the hourly rated employee ceases to earn, and it is submitted that the employer-employee relationship does not terminate with the disability, unless some further step is taken to terminate the relationship." ' (underlining added)

17 Arbitrator Bennett cited with approval the decision of the English Court of Appeal in *Warburton et al. V. Co-operative Wholesale Society, Ltd.* [1917] 1 K.B. 663. In that case, the Court held that an employer-employee relationship had not been severed when the employees were absent from work on workmen's compensation. Warrington L.J. stated at page 667:

> It is clear that mere absence from work owing to illness or accident does not determine the contract of services; *Cuckson v. Stones* (1959), 1 El. & El. 248, 120 E.R. 902; (underlining added)

18 In Re Joseph Brant Memorial Hospital of the Burlington-Nelson Hospital and Canadian Union of Public Employees, Local 1065 (1973) 5 L.A.C. (2d) 15. The grievor was absent from work due to a compensible work injury. The employer determined that the absence from work should result in a loss of seniority for the grievor and reduce the grievor's entitlement to vacation. An arbitration board rejected the employer's position and stated in part:

> The grievor, because of an injury at work, was receiving compensation from the Workmen's Compensation Board and was not required to make a written request for a leave of absence without pay. Indeed, the grievor was being paid throughout this period by both the Workmen's Compensation Board and the hospital. For part of that period the board made its payments directly to Mrs. Nelson but certainly the grievor was continued by the hospital as an employee, and was not advised of any change to her status. It has been held that absence from work owing to illness or accident does not determine the employment relationship. Hence, in the absence of any positive step by the hospital to terminate that relationship, Mrs. Nelson would continue as an employee and there is no need to grant a leave of absence in those circumstances. For reference in this regard see, *Re U.A.W., Local 195, and Bendix-Eclipse of Canada Ltd.* (1966), 17 L.A.C. 124 (Bennett); *re United Packinghouse, Food & Allied Workers and F. W. Fearman Co. Ltd 92968)* 19 L.A.C. 329 (Fox); *Re General Truck Drivers Union, Local 938, and Charlton Transport Ltd* (1972), 24 L.A.C. 39 (Brown). (underlining added)

The arbitration board allowed the grievance.

19 Arbitrators, when interpreting provisions of a collective agreement, are required to examine the intent of the parties from the language of the collective agreement in order to define the nature of the employment relationship and in order to determine the employment benefits to the employee.

20 In Re United Automobile Workers, Local 124, and Ekco Canada Ltd. (1970) 22 L.A.C. 220, (arbitrator Weatherill), the headnote states:

> The grievors alleged that their vacation pay for 1970 had not been correctly computed. The collective agreement provided that "an employee to be eligible for vacation must be on the payroll as of May 30th of the year in which the vacation falls." The employees were laid off in Aril, 1970, and were recalled in the summer of that year. The company treated these employees as being ineligible for vacation pay under the collective agreement and paid them vacation pay pursuant to the *Employment Standards Act*, 1968 (Ont.)., c. 35. *Held*, the phrase "on the payroll as of May 30th" does not require the employees to be paid in respect of that very day but rather requires the existence of an employment relationship as of that date. Those whose employment relationship had at that date ceased temporarily on account of lay-off would not be entitled to a vacation. However, vacation pay is an independent benefit. Express working would be required to deprive the employees of vacation pay, earned in 1969 and payable in 1970, by reason only of their being laid-off on May 30, 1970. The grievances were allowed. (underlining added)

21 In Re Nurses' Association and St. Mary's General Hospital, Kitchener (1972) 24 L.A.C. 307, the headnote of that case states:

> The employer claimed that, if an employee was absent from work for more than one month, the employee ceased to be continuously employed so that the employer was entitled to reduce his vacation benefits. The collective agreement provided that vacation benefits were to be based on the length of "continuous employment". *Held*, W.S. Cook dissenting, "continuous employment" referred to the employment relationship between the parties. Leaves of absences and absence due to illness, except as expressly provided for in the agreement, did not sever the employment relationship. The employer had no right to reduce the amount of vacation entitlement of employees absent from work, except where their employment relationships was broken by operation of the provisions of the agreement. (underlining added)

COURT DECISIONS

22 Court decisions relating to insurance claims made by employees against their employer and/or the employer's insurance carrier are consistent with the arbitrable jurisprudence cited above.

23 In Ciolfi v. Continental Insurance Co. 66 O.R. (2d) 131, (a decision of the *High Court of Ontario*), the plaintiff was receiving a weekly benefit from the Workers' Compensation Board for temporary total disability resulting from an injury at work some nine months earlier. He suffered injuries in an automobile and the issue of whether or not he was "employed" within the meaning of Sch. C, Subsection (2), Part II(a) of the Insurance Act, R.S.O. 1980, C. 218, was stated in the form of a special case. The plaintiff, some months after the accident, was granted a permanent disability pension.

24 Mr. Justice Bell Oyen at page 2 of the decision states:

> In Pineda v. Co-operators Group Ltd. (1985), 51 O.R. (2d) 787, 21 D.L.R (4th) 531, 12 C.C.L.T. 275 (H.C.J.), Cromarty J. decided that one of the ways in which an individual may be considered to be employed within Part II(a) of Subsection 2 is by the application of the ordinary meaning of the word "employed" as found in Part II(a). Cromarty J. accepted the reasoning in Houseworth v. Federation Ins. Co. of Canada, [1980] I.L.R. Paragraph 1-1263 (Ont. Div. Ct.), where the court held that a claimant was entitled to accident benefits as being "employed" even though he was laid off at the time of the accident since he was under a contract of employment. In Pineda, Cromarty J. found the claimant was under a contract of employment.

25 Mr. Justice Bell Oyen applied the above mentioned legal principles and concluded that the plaintiff was receiving a weekly benefit from the Workers'

Compensation Board for a temporary total disability resulting from an injury at work (some nine months prior to the motor vehicle accident) was "employed" for the purposes of the Ontario Insurance Act Part II benefits.

26 Vautour v. sun Alliance Insurance Company (1985) I.L.R. 1-1930, is a decision of the New Brunswick Queen's Bench. In that case the plaintiff was disabled from working as a result of injuries sustained in a motor vehicle accident. The issue was whether he was employed at the time of the accident within the meaning of the no fault provisions of the automobile insurance policy. The motor vehicle accident victim was a member of a construction union and had not worked for one and a half years prior to the accident, but on the day before the accident he was advised to report to a construction site for the next day. However that evening he was involved in the motor vehicle accident. It was held by the court that to be employed did not require a person to be engaged in actual physical or intellectual work, but that it was sufficient to be under contract or order to work.

27 The Court cited the decision in Lamb v. State Farm Mutual Automobile Insurance Co. (1982) I.L.R. 1-1534, (a decision of the Ontario Supreme Court) and stated,

> "In Lamb v. State Farm a laid off bricklayer accepted an offer to work as a construction supervisor commencing March 7th. On January 28th he was injured and could not start his job until much later than March 7th. Boland, J. accepted the definition of "employed" in Black's Law Dictionary, Fifth Edition, as "both the act of doing a thing and the being under contract or orders to do it". She stated that "employed at the date of the accident" did not require a person to be engaged in actual physical or intellectual labour at the time of the accident."

28 The Court held in the Vautour case that the plaintiff was an employed person for the purposes of the relevant insurance policy provisions.

29 In summary, the above mentioned legal and arbitrable authorities provide that:

1. (a) an employee who suffered injuries from a motor vehicle accident, and

   (b) who at that time was on a leave of absence and receiving Worker's Compensation benefits or LTD benefits or who was on any other form of leave of absence such as maternity leave, compassionate leave, educational leave or on layoff, and

   (c) subject to the relevant provisions of a collective agreement or a contract of employment, whichever is applicable, continues to be employed after the accident occurred until that person is either terminated from said employment or resigns from said employment;

2. The above mentioned leaves of absences do not automatically sever the employment relationship between employer and employees;

3. In order for a termination of the employment relationship to occur, there must be clear action taken by the employer to terminate the employment or clear action taken by the employee to resign from the employment.

DECISION

30 The Commission finds that the Internal Review Officer erred by concluding that the Appellant did not hold employment for the period from January 15, 2000, to May 23, 2000, and was therefore a non-earner and as a result thereof not entitled to receive IRI benefits for this period.

31 The Internal Review Officer further erred in determining that the Appellant was not employed by [text deleted] for the period of January 15, 2000, to May 23, 2000, because the Appellant had no intention of either resuming her previous employment or seeking any other alternative employment.

32 In the current appeal, the evidence established at the appeal hearing:

a) that prior to the accident the Appellant was employed under a contract of employment with [text deleted] as a health care aide;

b) during the course of that employment, the Appellant was entitled to take a leave of absence due to a disability and was entitled to receive long term monthly benefits while disabled from [Appellant's employer's insurer] pursuant to a contract of insurance between [text deleted] and [Appellant's employer's insurer];

c) when the Appellant was on a leave of absence due to the disability, there was no automatic termination of the employer-employee relationship;

d) when [Appellant's employer's insurer] terminated the long-term disability benefits on January 14, 2000, [text deleted] did not take any active steps to terminate the employment of the Appellant after that date nor did the Appellant at that time resign from her employment;

e) after January 14, 2000, the Appellant continued to be on a leave of absence from [text deleted] without receipt of any wages or LTD benefits; and

f) the Appellant continued to be an employee of [text deleted] after January 14, 2000, and was an employee of [text deleted] on May 23, 2000, the date [Appellant's orthopedic specialist] determined that the Appellant was capable of returning to work.

33 Section 81(1)(a) of the *Act* states:

> **Entitlement to I.R.I.**
> 81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
> (a) he or she is unable to continue the full-time employment;

34 The definition of a full-time earner under Section 70(1) of the Act is:

> **"full-time earner"** means a victim who, at the time of the accident, holds a regular employment on a full-time basis, but does not include a minor or student.

35 In R. v. Meek (1996) 115 Man.R. (2d) 11, Madame Justice Helper states at page 12,

> Ultimately, however, the interpretation of s. 70(1) depends upon the words chosen by the legislators in the context of the enactment as a whole.

36 Section 12 of *The Interpretation Act*, R.S.M. 1987, c. 180, states:

> Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best insures the attainment of its objects.

37 The Commission interprets that the words 'a regular employment on a full-time basis' contained in the definition of a full-time earner under Section 70(1) of the *Act* defines the nature and status of the Appellant's employment at [text deleted]. The Commission further determines that this definition does not require the Appellant to have been actively at work at [text deleted] at the time of the accident in order to come within this definition.

38 The Commission therefore finds that the Appellant was a victim within the meaning of the above mentioned definition because she was a person who suffered bodily injury as a result of a motor vehicle accident. The Appellant, at the time she took a leave of absence due to her disability, was employed by [text deleted] on a full-time basis and was not either a minor or a student. As a result, the Appellant comes within the four corners of the definition of a full-time earner pursuant to Section 70(1) of the *Act*.

39 The Commission further determines that as a full-time earner the Appellant was entitled to IRI benefits under Section 81(1) of the *Act* because as a result of the motor vehicle accident she was unable to continue her full-time employment for the period of January 15, 2000, to May 23, 2000.

CONCLUSION

40 The Commission therefore:

(a) directs that MPIC pay to the Appellant IRI benefits for the period from January 15, 2000, to May 23, 2000, together with interest thereon at the prescribed rate;

(b) the Commission retains jurisdiction in this matter and if the parties are unable to agree as to the amount of the IRI benefits then either party may refer this dispute back to this Commission for final determination; and

(c) the decision of the MPIC's Internal Review Officer dated November 27, 2000, is therefore rescinded.

Dated at Winnipeg this 24th day of July, 2001.

MEL MYERS, Q.C.

YVONNE TAVARES

WILSON MACLENNAN