

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-57**

PANEL: Mr. Mel Myers, 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 Mr. Jim Shaw.

HEARING DATES: September 24, 2001, and January 10, 2002

ISSUE(S):

1. Entitlement to an extension of time to file for a review;
2. Two-year determination process; and
3. Appropriate classification of employment at the two-year determination date.

RELEVANT SECTIONS: Sections 172(1) and (2) 60-day expiry date for seeking review, 106(1) Determination of employment, 107, and 109(1) of The Manitoba Public Insurance Corporation Act ('the Act'). Manitoba Regulation 39/94 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

On December 13, 1996, the Appellant, [text deleted], was involved in a motor vehicle accident and sustained injuries which rendered him unable to hold employment as a truck driver that he held at the time of the accident. As a full-time earner, the Appellant was entitled to receive an Income Replacement Indemnity ('IRI') in accordance with the provisions of Section 81(1)(a) of the MPIC Act.

By letter dated March 2, 2000, the Appellant was informed by MPIC that, in accordance with Section 107 of the Act, a two-year determination of employment had been completed. Section 107 provides:

New determination after second anniversary of accident

107 From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

The Commission is setting out herein the entire letter sent by MPIC to the Appellant, dated March 2, 2000, in order to illustrate the complex issues that the Appellant had to understand in order to pursue his claim in this matter. In this letter, the Appellant was advised:

As you are unable to hold the employment that you held at the time of the accident, the two-year determination was completed. This determination takes into consideration your post-accident physical and intellectual abilities, including an analysis of your transferable skills, and an occupational therapy assessment.

You had identified a vocational goal of being a self-employed commodities trader. Arrangements were made for you to attend an 11-week training course at [text deleted] to prepare you for this occupation.

Following the successful completion of your training at [text deleted], you began working out of your residence as a self-employed commodities trader. In accordance with Schedule C, which is the Table of Classes of Employment of the Manitoba Public Insurance Regulations, we have determined you under the classification of Managerial, Administrative and Related Occupations into "Financial Management Occupations". Employment as a self-employed commodities broker was identified using the National Occupation Classification Code #0121, "Commodities Trading Manager", which is then matched to our Schedule C. According to the current Schedule C for the year 2000, a Level 1 salary for "Financial Management Occupations" is \$40,257.00 per year. As you have been performing this occupation since December 1999, the Level 1 annual salary figure is applicable.

Your Income Replacement Indemnity (IRI) will continue for one year from the date of this letter. As you are currently self-employed as a commodities broker, you will soon begin to earn income from this occupation. As of this date, you have advised that you have not yet earned any income from this enterprise, but earnings are expected soon. Any income that you earn from your new occupation will reduce your IRI by 75% of the

net amount earned. Section 116 of the Manitoba Public Insurance Corporation Act, reads as follows:

I.R.I. reduction if victim earns reduced income

116(1) Where a victim who is entitled to an income replacement indemnity holds employment from which the victim earns a gross income that is less than the gross income used by the corporation to compute his or her income replacement indemnity, the income replacement indemnity shall be reduced by 75% of the net income that the victim earns from the employment.

Failure to report any earned income during this period could result in a suspension or termination of benefits. IRI will cease should your income level during the next year meet or exceed your benefit level.

One year after the date of the two-year determination, Section 115 provisions will apply, which reads as follows:

I.R.I. for reduced income from determined employment

115 If a victim becomes able to hold employment determined for him or her under section 107 or 108 but, because of bodily injury caused by the accident, earns from the employment a gross income that is less than the gross income used by the corporation to compute the income replacement indemnity that the victim is entitled, after the end of the year referred to in clause 110(1)(d), to an income replacement indemnity equal to the difference between the income replacement indemnity the victim was receiving at the time the employment was determined and the net income the victim earns or could earn from the employment.

Therefore, one year from the date of this letter, your Income Replacement Indemnity will be reduced by either your actual net earnings or the income level listed in the aforementioned Schedule C (\$40,257.00 gross earnings per year), which ever is higher. This would apply even if, for some reason, you do not actually hold employment at that time.

Once you have documented earnings from your new occupation as a commodities trader, we are to be contacted immediately and provided with said documentation so that your IRI entitlement may be reconciled.

Should you have any questions regarding this matter, feel free to contact the writer at [text deleted]. We advise you have the option to apply for a review of this decision. Any request must be made in writing within **sixty (60) days** of receiving this letter. Applications for Internal Review can be obtained from any of our claims locations or by contacting the writer directly.

On receipt of this letter, the Appellant did not, within 60 days thereof, make an application for an internal review of the two-year determination made by the case manager at MPIC pursuant to Section 172(1) of the Act.

On March 2, 2001, the IRI benefits to the Appellant were reduced pursuant to Section 115 of the Act. As a result, the Appellant contacted the case manager at MPIC on March 7, 2001, and informed the case manager that he wished to have the IRI benefits continued because he had not made any money in his capacity as a self-employed commodities trader. The case manager explained the two-year determination process to the Appellant, and the effect of the application of Section 115 in respect of IRI payments. In reply, the Appellant indicated that he did not dispute the two-year determination process but believed that MPIC was responsible for his back being permanently injured and should, therefore, continue to provide him with IRI payments for at least the next six months. This request was rejected by MPIC's case manager.

On March 9, 2001, the Appellant wrote to his case manager outlining his health problems that resulted from the motor vehicle accident and the history of his rehabilitation. The Appellant stated that in discussion with his rehabilitation consultant from [text deleted], he was informed that he would continue to receive IRI benefits until such time as he became finally capable of supporting himself without any further financial assistance from MPIC. The Appellant indicated that he understood that he would receive IRI for life, if needed.

Upon receipt of this letter, the case manager contacted the Appellant on or about March 15, 2001, and informed him that he would not be receiving IRI for the rest of his life. In reply, the Appellant advised the case manager that, although he wasn't unhappy about the two-year determination, he just wanted to receive his full IRI until a certain deal that he had been negotiating had been completed. The case manager advised him that the two-year determination

had been made in accordance with provisions of the Act and that the case manager could not change the amount of the IRI payments that the Appellant was receiving.

Application for Review

As a result of MPIC's rejection of the Appellant's request, the Appellant filed an Application for Review of the case manager's decision. In response, on April 4, 2001, the MPIC screening officer wrote to the Appellant and advised him that his Application for Review was filed beyond the 60-day time limit, as set out in Section 172(1) of the Act which provides:

Application for review of claim by corporation

172(1) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

The screening officer further stated:

... Your file indicates that your Case Manager's 2 March 2000 decision letter was signed for on 6 March 2000. That letter advises you have 60 days to request a review. Your review application, signed 19 March 2001, was marked received by MPIC on 27 March 2001. You can see you fall outside the 60 day period. I note your Application references a 15 March 2001 Case Manager decision, but I could find no such letter.

The Corporation is empowered to extend the 60 day period, but only where you provide it with a reasonable excuse for failing to apply in time:

“**172(2)** The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.”

I have assigned your file to Internal Review Officer [text deleted]. You should send your letter directly to him to consider whether or not your excuse is reasonable. His address is at the top of this letter. In order to expedite your matter, I would suggest you send your letter at your earliest convenience.

On April 6, 2001, the Appellant wrote to the Internal Review Officer and stated:

- (a) that in December 1999 he had met with a rehabilitation officer (assigned by [text deleted]) who informed him that he would receive IRI until he was able to become self-supporting;
and

(b) that when he received the case manager's letter in March 2000 advising him of the two-year determination, he was still under the impression that he would continue to receive IRI until he was self-supporting, that he never discussed this matter with his case manger, and that the first indication he had of a reduction of his IRI benefits was when he discovered that the amount of the IRI benefits that were deposited in his bank account were reduced from the previous amounts deposited to said bank account.

In this letter, the Appellant further states:

Had I realized in March of 2000 that my benefits were actually going to be reduced, I would have started my appeal then. As of April 1, 2001, we are on Social Assistance and are moving into a rent-subsidized apartment. I can no longer pursue a career as a commodities broker because I can not afford the telephone and internet costs.

I have worked very hard over the past year in becoming a commodities broker and have made great contacts. I have not made any money as yet, only expenses; which is typical of anyone starting in this type of business. However, I feel I am very close to make an income and am asking you to reinstate my benefits until such time as I can become self-supporting.

Internal Review Office Decision

In the Internal Review Office decision dated April 18, 2001, the Internal Review Officer rejected the Appellant's application for the following reasons:

1. **Extension of Time – Application of Sections 172(1) and (2) of the Act:**

The case manager's decision letter dated March 2, 2000, advising the Appellant of the two-year determination, was received by the Appellant on March 6, 2000. In this letter, the Appellant was advised that he had 60 days to request a review. The Application for Review was not made by the Appellant within the 60-day period but was received by MPIC on March 27, 2001. The Internal Review Officer concluded that the Appellant had not provided a reasonable explanation pursuant to Section 172(2) of the Act in order for an extension of time to be granted.

2. **Merits of the Claim – Application of Sections 107, 110(1)(d), 115 and 116 of the Act:**

The Internal Review Officer rejected the Application for Review on its merits for the following reasons:

The letter attached to your Application raises medical issues that are irrelevant to the decision you want reviewed. That decision recognizes that you are unable to return to your pre-accident work. It applies Section 107 of the Act to determine an employment for you. The employment chosen is that of a commodities trader. There is no evidence that this employment is beyond your physical capabilities. It is consistent with your training since you had completed an eleven-week training course to prepare you for this occupation. I also note that the course was arranged for you by MPI and that commodities trading was your own choice of occupation.

It is clear that Section 107 has been properly applied to your claim. Once that has been established, the reduction of your IRI one year later follows as a matter of course through the combined operation of Sections 107, 110(1)(d), 115 and 116 of *The Manitoba Public Insurance Corporation Act*. The way that works is clearly explained in [text deleted`s]'s decision and I have nothing to add to what he says.

Accordingly, your Application for Review must also fail on the merits.

Upon receipt of that decision, the Appellant filed a Notice of Appeal to this Commission on April 30, 2001.

Appeal Hearing Proceedings

Extension of Time

Section 184(1)(b) of the Act states:

Powers of commission on appeal

184(1) After conducting a hearing, the commission may

- (a) ...
- (b) make any decision that the corporation could have made.

The Commission is required, pursuant to Section 172(2) of the Act, to determine whether or not an extension of time should be granted to the Appellant to make a timely Application for Review in respect of his claim.

The Appellant testified at the appeal hearing in respect of the reasons why he did not apply for an internal review within the 60-day period pursuant to the provisions of Section 172(1) of the Act. The explanation provided by the Appellant is consistent with the explanation he provided to the case manager in his letter dated March 9, 2001, referred to earlier in this decision.

The Appellant informed the Commission that he had been a truck driver for many years, enjoyed this work and was able to provide a reasonable living for both himself and his family. As a result of the motor vehicle accident, he suffered significant injuries which prevented him from continuing his employment as a truck driver. The Appellant further informed the Commission that he was unable to earn any income as a commodities trader but asserted that he had been informed by the rehabilitation consultant at [text deleted] that until he became self-supporting he would continue to receive IRI payments.

The Internal Review Officer found it difficult to accept that the rehabilitation consultant had misrepresented the nature of the IRI coverage to the Appellant, but he supposed it was possible that the Appellant may have misunderstood the rehabilitation consultant's explanation in respect of this matter.

However, the Internal Review Officer found that this misunderstanding could hardly have survived the case manager's exceptionally clear position as set out in the case manager's letter to the Appellant dated March 2, 2000. The Internal Review Officer states in his decision:

... No reasonable person reading that letter would be left in any doubt that his IRI would be subject to reduction after a year. [Text deleted] spells things out on page three: "Therefore, one year from the date of this letter, your Income Replacement Indemnity will be reduced by either your actual net earnings or the income level listed in the aforementioned Schedule C (\$40,257.00 gross earnings per year) whichever is higher.

This would apply even if, for some reason, you do not actually hold employment at that time.”

I cannot accept your explanation. Accordingly, no “reasonable explanation” has been provided and I am rejecting your Application for Review.

The Appellant testified in a direct and straightforward manner, and the Commission finds that he was a credible witness. MPIC chose not to call the rehabilitation consultant to rebut any of the allegations made by the Appellant in his testimony in this respect. The Commission agrees with MPIC’s submission that there is no evidence that the rehabilitation consultant misrepresented the nature of the IRI coverage to the Appellant, but finds that the Appellant misunderstood the rehabilitation consultant’s explanation to him in respect of this matter.

The Commission agrees that the case manager did set out, as clearly as he could, the provisions of the Act relating to the two-year determination. However, Sections 107, 115, and 116(1), and the reference to Schedule C of Regulation 39/94, are complex provisions that require a great deal of analysis in order for a person who is not legally trained or familiar with the provisions of the Act (such as a case manager) to comprehend. The case manager’s letter might not be misunderstood by a person with legal training, such as the Internal Review Officer and the screening officer, or by a person employed by MPIC, such as a case manager who deals with these provisions on a daily basis. However, these provisions could be very confusing to a person such as the Appellant having regards to his education, training and level of sophistication.

It appears to the Commission that the contents of this letter overwhelmed the Appellant. The Appellant had been working for many years as a truck driver and had no legal training. He had no familiarity with the provisions of the Act or the practices and procedures of MPIC in respect

of an application for an extension of time, and he had received no legal advice in respect of these matters.

The Commission concludes that the Appellant honestly believed, based on the information he received from the rehabilitation consultant, that the IRI payments would continue until he became self-supporting. The Appellant did not fully appreciate the information set out in the case manager's letter to the Appellant dated March 2, 2000, with respect of the reduction of the IRI coverage effective one year from the date of the receipt of this letter. As a result, the Appellant continued to believe that the IRI payments would not be reduced or terminated until he was self-supporting and therefore he ignored, contrary to his own self-interest, the 60-day limitation period.

The Appellant first learned of the reduction of his IRI benefits, approximately one year after the date he received written notice that there would be a reduction in the income replacement benefits. It was at that time that the Appellant first understood that the IRI payments would not continue without being reduced until he was self-supporting. The Appellant at that time promptly made Application for Review of the reduction of the compensation to him.

Decision – Extension of Time

The Commission is satisfied that with regard to the totality of the circumstances, and pursuant to Section 172(2) of the Act, the Appellant has established, on the balance of probabilities, that he had a reasonable excuse in failing to apply for a review of the case manager's decision within 60

days after receiving notice of that decision. The Commission, therefore, extends the time to permit the Appellant to make a timely application for a review of the case manager's decision.

Merits of the Claim

The Appellant filed a Notice of Appeal dated April 30, 2001, wherein he indicates that his IRI should be continued until his earnings in his new position equal or exceed the amount of \$40,257. As a result of the accident, the Appellant was unable to continue his employment as a truck driver and, as a full-time earner, received IRI equivalent to 90% of his net income calculated in accordance with the Act and Regulations.

Pursuant to Section 107 of the Act, MPIC determined the employment of the Appellant as a commodities trader earning \$40,257 per year pursuant to Schedule C of Manitoba Regulation 39/94. As indicated earlier in this decision, MPIC wrote to the Appellant, in a letter dated March 2, 2000, to advise that, one year from the date of the letter (i.e., on March 1, 2001), the Appellant's Income Replacement Indemnity would be reduced either by his actual net earnings as a commodities trader or by the amount of \$40,257, being the gross earnings per year listed for a commodities trader in the above-mentioned Schedule C, whichever was higher. On March 1, 2001, MPIC, having determined that the income level listed in Schedule C was higher than the actual earnings of the Appellant, reduced the Appellant's IRI by that amount, in accordance with Section 115 of the Act.

At the initial appeal hearing on September 24, 2001, the Appellant testified as to the nature and scope of the functions he was undertaking in his self-employed endeavour and was subject to

cross-examination by counsel for MPIC. During the course of this hearing, the Commission became concerned as to the manner in which the case manager of MPIC, pursuant to Schedule C (Manitoba Regulation 39/94), classified the employment of the Appellant as a self-employed commodities broker.

The case manager informed the Appellant, in his letter to him dated March 2, 2000:

... In accordance with Schedule C, which is the Table of Classes of Employment of the Manitoba Public Insurance Regulations, we have determined you under the classification of Managerial, Administrative and Related Occupations into "Financial Management Occupations". Employment as a self-employed commodities broker was identified using the National Occupation Classification Code #0121, "Commodities Trading Manager", which is then matched to our Schedule C. According to the current Schedule C for the year 2000, a Level 1 salary for "Financial Management Occupations" is \$40,257.00 per year. As you have been performing this occupation since December 1999, the Level 1 annual salary figure is applicable.

At the conclusion of the initial hearing, the Commission requested legal counsel for MPIC to review whether their initial determination in respect of the above-mentioned classification was appropriate and reasonable and to advise the Commission and the Appellant. On November 29, 2001, legal counsel for MPIC provided the Commission with a copy of a memorandum dated October 23, 2001, from the acting senior case manager to MPIC's General Counsel and Vice-President. This memorandum sets out the process of how MPIC came to determine the Appellant as a commodities trader and concluded that, in MPIC's view, the two-year determination process was appropriate and reasonable in the circumstances. A copy of this correspondence was provided to the Appellant.

The appeal hearing was reconvened on January 10, 2002, at which time further submissions were heard by the Commission from the Appellant and from MPIC's legal counsel relating to the issue of whether or not the Appellant was appropriately classified pursuant to Schedule C under the

classification of Managerial, Administrative, and Related Occupations “Financial, Management Occupations.” At the conclusion of the proceedings on January 10, 2002, the hearing was adjourned.

On January 15, 2002, the Commission wrote to MPIC’s legal counsel as follows:

Further to the above-noted matter, an issue was raised during the Commissioners’ deliberations as to whether or not [the Appellant] was appropriately classified pursuant to Schedule C under the classification of Managerial, Administrative, and Related Occupations into “Financial Management Occupations.” Given the duties described by [the Appellant] as an importer/exporter, we are concerned as to whether his occupation can be best described as “Commodities Trading Manager” or whether a determination under the classification of Sales Occupations might be more appropriate given the nature and duties of his self-employed venture, as set out by [the Appellant] during the hearing.

Please provide any comments you may have regarding the aforementioned to the Commission no later than January 25, 2002, in order that the Commission may proceed to finalize its decision.

A copy of this letter was forwarded to the Appellant.

On January 23, 2002, legal counsel for MPIC confirmed MPIC’s position again that the classification of the Appellant by MPIC was appropriate and reasonable. In this letter, legal counsel further stated: “Moreover, to explore such an issue at this point in time raises evidentiary problems (for example, comparing classifications of employment) and potential jurisdictional issues.”

In reply, the Commission wrote to MPIC’s legal counsel on January 25, 2002:

We acknowledge receipt of your letter of January 23, 2002, wherein you comment that exploring the issue of the appropriateness of the classification at this point in time raises evidentiary problems and essential jurisdictional issues. Please be advised that the issue of [the Appellant’s] job function was discussed at the first hearing. Evidence was given by [the Appellant] as to the nature and scope of the functions he was undertaking in his self-employed endeavour. [the Appellant] was subject to cross-examination (by [text deleted], as she then was) and, accordingly, the Commission received submissions from

both parties regarding the nature of the employment that [the Appellant] was performing at that time.

If you have any further submissions regarding the evidentiary or jurisdictional issues arising from this matter, please provide any particulars in that respect to the Commission no later than February 8, 2002. Further, if you have any additional information regarding the job functions of a self-employed commodities broker as identified pursuant to the National Occupational Classification Code No. 0121, "Commodities Trading Manager", we would appreciate receiving that information along with any further submission you may wish to make.

On February 7, 2002, legal counsel for MPIC replied and stated:

We acknowledge with thanks receipt of your letter dated January 25, 2002.

At the outset, we note that although [the Appellant] has objected to his Income Replacement Indemnity being reduced one year after the determination took place, he has not actually challenged the determination process per se either in his Application for Review or Notice of Appeal. We also draw your attention to documents No. 7 and 9 wherein the Case Manager records that [the Appellant] was neither unhappy with nor disputing the two year determination process. As noted in your letter of January 15, 2002, the issue was raised during the Commissioners' deliberations (post-hearing).

Overall, we remain of the view that Section 109 of the Act was correctly applied in determining employment for [the Appellant] as a commodities broker. This occupation was his choice and he successfully completed the extensive training course at [text deleted]. There is no indication that this employment is beyond [the Appellant's] physical and mental capabilities.

We respectfully submit that the nature and duties of [the Appellant]'s current employment activities are not relevant in assessing the appropriateness of the determination process which, pursuant to Section 109, takes into consideration the relevant factors "at the time of the determination". In this regard, pursuant to Section 184(1)(b) of the Act, the Commission is in no better position than the Corporation. In any event, there does not appear to be any cause attributable to the accident which is preventing [the Appellant] from being a commodities broker.

We thank you for the opportunity to expand upon the submission contained in our letter of January 23, 2002.

The Commission determines that the substance of the Appellant's appeal to the Commission was the reduction in the IRI resulting from the two-year determination of the Appellant on March 2, 2000, as a commodities trader. The essential complaint in the appeal was the reduction of IRI

payments which had resulted from the inability of the Appellant to earn an income while he was purportedly carrying out the duties of a commodities trader. The manner in which MPIC determined the Appellant's employment classification was central to the Appellant's appeal.

Section 183(7) of the Act states:

Effect of lack of formality in proceedings

183(7) No proceeding before the commission is invalid by reason only of a defect in form, a technical irregularity or a lack of formality.

The failure of the Appellant to specifically challenge the classification was a defect of form and/or a technical irregularity. However, MPIC was not prejudiced in these proceedings due to the lack of specificity of the Notice of the Appeal. The Commission finds that MPIC:

1. was informed by the Commission that the issue of the manner in which MPIC classified the employment status of the Appellant was a matter that the Commission would deal with during the course of the appeal;
2. was given a full opportunity by the Commission to conduct an investigation to determine whether or not the process of classification of the Appellant's occupation and date of determination was reasonable; and
3. was permitted on several occasions during the course of the two Commission hearings, and subsequently by written submissions, to deal fully and completely with the classification issue.

As a result, the Commission has jurisdiction to determine whether or not MPIC appropriately classified the Appellant as a commodities trader on the date of determination on March 2, 2000. At the initial appeal hearing, the Appellant adduced evidence as to the nature of his occupation as of the date of determination on March 2, 2000. During the course of this hearing, the Commission became concerned as to whether or not an appropriate occupational classification had been made by MPIC. Subsequent to the adjournment of the initial hearing, the Commission, by letter dated January 15, 2000, invited legal counsel for MPIC to review whether the two-determination was appropriate and reasonable and to advise the Commission and the Appellant.

As a result, MPIC, after conducting an internal review of this matter, advised the Commission that the Appellant's determination as a commodities trader was appropriate and reasonable. On receipt of the Commission's letter dated January 15, 2002, legal counsel for MPIC was aware that the matter of the appropriate classification of the Appellant as a commodities trading partner was an issue that the Commission intended to deal with during the course of the appeal proceedings.

At the second hearing, the parties were given a full opportunity to deal with the issue of the appropriate classification, and the Commission heard evidence and argument as to whether the Appellant was in sales or was acting as a commodities trader as at the date of determination on March 2, 2000. At the conclusion of the second hearing, the Commission wrote again to MPIC's legal counsel and gave MPIC a further opportunity to make further submissions on the evidentiary and jurisdictional issues on the appeal. It should be noted that in the Commission's letter to MPIC dated January 25, 2002, MPIC was asked to provide information in respect of National Occupation Classification Code #0121. On February 2, 2002, MPIC's legal counsel replied to the Commission and provided no information to the Commission in respect of this matter.

During the course of the Commission's deliberations and in the process of the preparation of its decision in this matter, the Commission obtained the occupational description identified as National Occupational Classification Code #0121, issued by Human Resources Development Canada. By letter dated April 3, 2002, the Commission wrote to MPIC's legal counsel and provided a copy of the occupational description and stated:

Please advise if the enclosed occupational description is the same or similar to the occupational description used by the case manager in arriving at the two-year determination of the Appellant as a self-employed commodities broker. If the

enclosed occupational description is not the same or similar to that used by the case manager in making the two-year determination, would you kindly provide this writer with the document containing the occupational description that the case manager identified as the National Occupation Classification Code #0121 “Commodities Trading Manager” when he determined the two-year occupation of the Appellant as a self-employed commodities broker.

MPIC’s legal counsel replied by letter dated April 18, 2002, enclosing an inter-departmental memo dated April 18, 2002, from an MPIC senior case manager to legal counsel. This inter-departmental memorandum stated, in part:

The following is in response to the correspondence received by the Automobile Injury Compensation Appeal Commission dated April 3, 2002.

The occupational description attached to the above noted correspondence is in fact the document used by the Case Manager in arriving at the two-year determination of the Appellant as a self-employed commodities broker.

To explain this process/step in more detail and further to my previous memo of October 23, 2001, resources such as a Vocational Rehabilitation Consultant and Income Replacement Unit Supervisor are also relied upon in arriving at a proper two-year determination.

The Vocational Rehabilitation Consultant is a professional that has the expertise, qualifications and experience to provide all areas of Vocational Rehabilitation services. ...

With all relevant vocational information on file, the Case Manager in conjunction with the Income Replacement Unit Supervisor, discuss, judge, determine and identify the occupation in the National Occupation Classification. Clearly a Commodities Trader was identified as a “Commodities Trading Manager”. This code of #0121 is entered into a database provided by Pricing and Economics, which roles [sic] the NOC codes into Schedule C. Schedule C matched with Financial Management Occupations, which in turn provided a GYEI of \$40,257 for the year 2000.

A key objective in determining an occupation is to come as close as possible to the GYEI entitlement so that the economic effects resulting from the motor vehicle accident on the injured party’s residual earning capacity, is lessened.

In conclusion, the Commission is satisfied that it has jurisdiction in this matter to determine whether or not the Appellant was appropriately classified as a commodities trader on March 2,

2000. MPIC was given a full opportunity during the hearings, and subsequently in writing, to address this issue.

Decision

The Internal Review Officer adopted the position of the case manager who, in his letter to the Appellant dated March 2, 2000, stated:

You had identified a vocational goal of being a self-employed commodities trader. Arrangements were made for you to attend an 11-week training course at [text deleted] to prepare you for this occupation.

Following the successful completion of your training at [text deleted], you began working out of your residence as a self-employed commodities trader. In accordance with Schedule C, which is the Table of Classes of Employment of the Manitoba Public Insurance Regulations, we have determined you under the classification of Managerial, Administrative and Related Occupations into "Financial Management Occupations". Employment as a self-employed commodities broker was identified using the National Occupation Classification Code #0121, "Commodities Trading Manager", which is then matched to our Schedule C. According to the current Schedule C for the year 2000, a Level 1 salary for "Financial Management Occupations" is \$40,257.00 per year. As you have been performing this occupation since December 1999, the Level 1 annual salary figure is applicable.

The Commission is satisfied that in determining the employment of the Appellant, MPIC did consider the factors as set out in Section 109 in respect of the education, training and work experience, and physical and intellectual abilities of the Appellant at the time of determination, and the knowledge of skill acquired by the Appellant in respect of the 11-week training course the Appellant had attended in order to prepare for his new occupation.

The Commission further notes that the case manager did consider Schedule C under Manitoba Regulation 39/94 as she was required to do under Section 109(1) of the Act.

The Commission concludes, however, that the case manager erred in determining the nature of the work being performed by the Appellant at the time of the two-year determination on March 2, 2000, and as a result, mistakenly classified the Appellant as a self-employed commodities broker rather than as a self-employed sales person in the import and export business.

The Commission is satisfied, on a balance of probabilities, that the nature of the work performed by the Appellant at the time of the two-year determination on March 2, 2000, was not of a financial nature but was of a sales nature. The Appellant was not involved in the trading of commodities on March 2, 2000, but had been involved in the importing and exporting of products.

While he was still a truck driver, the Appellant got involved in the import and export of products as a hobby. After the motor vehicle accident, the Appellant decided to convert his hobby of importing and exporting into a business. The Commission determines that, although the Appellant wished to be a commodities trader and so indicated his desire to MPIC, the evidence does not establish that the Appellant, at the date of the determination on March 2, 2000, was acting a commodities trader. The Commission is satisfied that, on the balance of probabilities, on March 2, 2000, the Appellant was self-employed as a salesperson in the import and export business.

During the course of the hearings, MPIC did not explain or provide any information to the Commission in respect of the meaning in the National Occupation Classification Code #0121 of “Commodities Trading Manager” and the manner in which this matched to Schedule C “Financial Management Occupations”, which resulted in the Appellant being classified as a commodities trader. As a result, in the Commission’s letter to MPIC’s legal counsel on January

25, 2002, the Commission requested additional information regarding the job functions of a self-employed commodities broker and identified, pursuant to the National Occupational Classification Code #0121, as Commodities Trading Manager, and asked for any further information or submissions in respect to this matter. A reply by MPIC's legal counsel in a letter to the Commission dated February 7, 2002, failed to provide any information as to the meaning of the above-mentioned code number 0121 and the manner in which this code applied to Schedule C, resulting in the Appellant being classified in the financial management occupation as a commodities trader. It appears that MPIC was unable to explain to the Commission the basis upon which it classified the Appellant as a commodities trader.

The Commission, after hearing the Appellant's testimony in respect to his employment at the date of the two-year determination, and after examining the Table of Classes of Employment in Schedule C of Manitoba Regulation 39/94, within the category of "Financial Management Occupations", became concerned as to whether an appropriate employment classification had been made by MPIC.

The Commission finds that the Appellant's classification of employment, as set out in the Table of Classes of Employment in Schedule C of Manitoba Regulation 39/94 within the category of "Financial Management Occupations", is a classification wholly inconsistent with a person who is self-employed in a sales capacity. The Appellant was not exercising management functions, such as supervising a number of employees, hiring and firing of employees, attending meetings with other supervisors, or receiving instructions from senior officers such as a chief operating officer or vice-president. The Appellant was not trading commodities or managing commodity traders. On the contrary, the evidence that was presented to the Commission by the Appellant indicated that he was acting as a self-employed salesperson, not exercising any management or

supervisory functions, and was not involved in the financial activities of a commodities trader and/or manager.

The Commission's concern with respect to the appropriate occupational classification was confirmed when it obtained the occupational description entitled National Occupational Classification Code #0121 which MPIC advised was the document used by MPIC to determine the Appellant's occupation as a self-employed commodities broker as at the date of the two-year determination on March 2, 2000.

The National Occupational Classification Code #0121 sets out the following information:

0121 Insurance, Real Estate and Financial Brokerage Managers

Insurance, real estate and financial brokerage managers plan, organize, direct, control and evaluate the activities of departments or establishments that provide insurance, mortgage, real estate and investment services. They are generally responsible for business development and must ensure that their group reaches performance levels related to established objectives. They are employed by insurance companies, real estate firms, stockbrokers, investment dealers, mortgage brokers and security and commodity exchanges.

Example Titles

bond sales manager
 brokerage manager - investments
commodities trading manager
 financial brokerage manager
 insurance claims service manager
 insurance manager
 investment manager
 mortgage broker manager
 real estate service manager
 securities sales director
 trading floor manager

Main duties

Insurance, real estate and financial brokerage managers perform some or all of the following duties:

- Insurance managers plan, organize, direct, control and evaluate the operations of an establishment or department that provides automobile, fire, life, property or other types of insurance services.

- Real estate service managers plan, organize, direct, control and evaluate the operations of an establishment or department that buys, sells and leases residential and commercial property for clients.
- Mortgage broker managers plan, organize, direct, control and evaluate the operations of an establishment or department that finds lenders or lending institutions on behalf of clients seeking a mortgage.
- Securities managers plan, organize, direct, control and evaluate the operation of an establishment or department that buys and sells stocks, bonds and other forms of investments on behalf of individual or institutional clients; manage the investments of their own clients.

Employment requirements

- A university degree or college diploma in business administration, economics or other related field is usually required.
- Several years of experience within the appropriate industry are usually required.
- Licensure appropriate to the service sold, such as real estate, mortgage, securities or insurance, may be required.
- In the insurance industry, a recognized professional designation is usually required.

Additional information

- There is no mobility between the different types of managers in this unit group.
- Progression to senior management positions is possible with experience.

Classified elsewhere

- *Banking, Credit and Other Investment Managers (0122)*
- *Financial Managers (0111)*
- *Other Business Services Managers (0123)*
- *Sales, Marketing and Advertising Managers (0611)*

(underlining added)

The contents of this document in respect to the duties and qualifications of a commodities trading manager were used by MPIC to obtain a match with Schedule C of Manitoba Regulation 39/94 to classify the Appellant as a self-employed commodities broker at a Level 1 salary for “Financial Management Occupations” in the amount of \$40,257 per year.

The above-mentioned National Occupational Classification Code #0121 describes the functions of a financial brokerage manager as a person planning, organizing, directing, controlling and

evaluating the activities of departments or establishments that provide investment services. This manager is responsible for business development and must ensure that the group reaches performance levels related to established objectives. These managers are employed by security and commodity exchanges.

A financial brokerage manager would perform some or all of the following duties:

Securities managers plan, organize, direct, control and evaluate the operation of an establishment or department that buys and sells stocks, bonds and other forms of investments on behalf of individual or institutional clients; manage the investments of their own clients.

The duties that the Appellant performed as of the date of the two-year determination, on March 2, 2000, were not remotely connected to the occupational description's main duties of a commodities trading manager.

In addition, there was no evidence provided to the Commission that the Appellant had obtained:

1. the formal education,
2. the years of experience, or
3. the appropriate licence that may have been required by Manitoba law,

as set out under the employment requirements as provided in the National Occupational Classification in order to qualify as a commodities trading manager.

In conclusion, all of the evidence that was provided to the Commission as to the job functions of the Appellant at the date of the two-year determination (March 2, 2000) was the testimony of the Appellant at the Commission hearings. This evidence satisfies the Commission that he was not performing the functions of a self-employed commodities broker on the date of the two-year determination (March 2, 2000). The Commission, having regard to the totality of the evidence,

is satisfied that, on a balance of probabilities, on the date of the determination the Appellant was self-employed as a salesperson in an import/export business. The Commission concludes that MPIC improperly classified the Appellant as a self-employed commodities broker under Schedule C of Manitoba Regulation 39/94, effective March 2, 2000.

The Commission is further satisfied that the work that the Appellant was doing on March 2, 2000, is consistent with the class of employment as set out in Schedule C, Manitoba Regulation 39/94, under Section 9 – Sales Occupations, Commodities – Sales Persons.

Conclusion

The Commission therefore:

- (a) refers the issue of the two-year determination, effective March 2, 2000, back to MPIC and directs that MPIC properly classify the Appellant's occupation pursuant to Schedule C of Regulation 39/94, under the class of employment in Section 9 – Sales Occupations, and determine his gross earnings per year;
- (b) directs that MPIC, as of March 2, 2001, calculate the IRI payable to the Appellant, in accordance with the new classification;
- (c) directs that MPIC pay to the Appellant the difference between the IRI determined pursuant to Section 115 of the Act, utilizing the net income the Appellant earns or could earn from the employment (as classified pursuant to subsection (a) above), and the amount of IRI the Appellant has already received since March 2, 2001, together with interest thereon, pursuant to Section 163 of the Act;
- (d) retains jurisdiction in this matter; if the parties are unable to agree to the appropriate employment classification, Level of annual payment, or the amount of compensation, either party may refer this dispute back to the Commission for final determination; and

- (e) determines that the decision of MPIC's Internal Review Officer bearing date April 18, 2001, be rescinded and the foregoing substituted for it.

Dated at Winnipeg this 24th day of April, 2002.

MEL MYERS, Q.C.

YVONNE TAVARES

COLON C. SETTLE, Q.C.