Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-22

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Les Marks** **Ms Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Bob Sample of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.**
HEARING DATE:	**October 31, 2007**
ISSUE(S):	**Whether the decision to recalculate the Appellant's Income Replacement Indemnity entitlement was made correctly in accordance with the provisions of the legislation.**
RELEVANT SECTIONS:	**Section 89(1) & (2) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant was injured in a motor vehicle accident on September 13, 2001. At the time of the accident she was a student [text deleted]. She was also employed as a part-time waitress at [text deleted], and self-employed as a part-time model with [text deleted].

As a result of injuries sustained in the accident, the Appellant was not able to continue with her employment as a waitress or with her modeling. The Appellant's case manager collected information from her modeling agency, [text deleted], regarding the modeling work she usually did, as well as modeling contracts she was missing out on due to her injuries. It was established that one of the larger, more lucrative modeling contracts the Appellant was not able to fulfill involved a contract for work in [text deleted] during January and February of 2002 for amounts of approximately [text deleted] dollars after expenses.

The Appellant's Income Replacement Indemnity ('IRI') benefits were calculated by MPIC on many different occasions. A major calculation and assessment was done by MPIC's IRI calculator, [text deleted], on June 25, 2002. Following this, on July 22, 2002, the Appellant's case manager calculated her IRI benefits for employment with [text deleted] and self-employed earnings from modeling.

The case manager's decision was then clarified, by a letter dated September 19, 2002. The case manager attempted to address the Appellant's concerns "that your earnings as a result of the [text deleted] contract should be annualized with other earnings to produce a higher GYEI." The case manager indicated:

> You received the maximum Income Replacement Indemnity payment for the 60 day period of the contract as provided under 89(1) resulting in no further entitlement by way of increased GYEI prior to or following the period where you would have held this employment.

The Appellant sought an internal review of the case manager's decision. On January 27, 2003, [text deleted], an Internal Review Officer for MPIC, found that the Appellant, in receiving the maximum IRI for the months that she would have been working in [text deleted], had been

adequately compensated for that contract. He reviewed and set out the appropriate method, in his view, for calculating the Appellant's IRI entitlement. He found that the Appellant's fluctuating month-to-month modeling self-employment had been accurately calculated, and found that he was:

> . . . rescinding the "recalculation" of your entitlement as it does not take into account the Sections I have referred to. Your file will be returned to the Case Manager for recalculation of your entitlement taking into account the above provisions which I have referred to in the preceding paragraph.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Expense Ratio

An Internal Review decision of MPIC dated February 6, 2004 dealt with the question of whether the correct expense ratio was used to calculate the Appellant's self-employment income from [text deleted]. Prior to the hearing of the Appellant's appeal on October 31, 2007, the Appellant indicated, and confirmed at the hearing, that she was no longer seeking to appeal the question of the expense ratio and that aspect of the appeal was to be withdrawn. Accordingly, the hearing held on October 31, 2007 proceeded to deal only with the issue of whether the decision to recalculate the Appellant's IRI entitlement was made correctly in accordance with the provisions of the legislation.

Submission for the Appellant

Counsel for the Appellant carefully reviewed the case manager's decision letters and the Internal Review decision of [text deleted]. According to his interpretation, [MPIC's Internal Review Officer] had found that the IRI calculator, [text deleted], was wrong in annualizing the Appellant's employment income. He found instead that since she received full IRI benefits for

the months that she would have been in [text deleted], the [text deleted] contract had already been taken into account, for the maximum benefits, in calculating her IRI entitlement. Therefore, he rescinded [MPIC's IRI Calculator's] calculations. However, it was submitted, on behalf of the Appellant, that [MPIC's Internal Review Officer's] method of calculation was not correct pursuant to Section 89(1) and Section 89(2)(a) of the MPIC Act. He submitted that there are three (3) separate figures which should be taken into account and compared under Section 89(2)(a). This is how self-employed income should be determined. MPIC should consider income for employment of the same class, income that the student earned, or income that the student would have earned from the employment, whichever is greater.

Counsel for the Appellant submitted that MPIC should have, in calculating "would have earned" income, taken into account all income which the Appellant would have earned between October 2001 and June 2002 and divided it by the number of days to arrive at a gross yearly employment figure for one (1) day which can then be multiplied by three hundred sixty-five (365) days. He submitted that the method which MPIC had used, in calculating "would have earned income" on a monthly basis, and then comparing it to the annualized gross yearly employment income potential for employment of the same class and that the student had earned in the past, was tantamount to comparing "apples to oranges".

He submitted that the only fair and accurate calculation must be based upon an annualized calculation of what the student would have earned.

Submission for MPIC

Counsel for MPIC reviewed the earlier calculations of the Appellant's case manager from July 22, 2002 and September 19, 2002.

She then reviewed the Internal Review decision letter of [MPIC's Internal Review Officer] dated January 27, 2003, in detail. [MPIC's Internal Review Officer] had referred to [MPIC's IRI Calculator's] memo of calculation but did not agree that any further amount was owing to the Appellant for the [text deleted] contract. In [MPIC's Internal Review Officer's] view, counsel argued, calculating the Appellant's self-employed GYEI regarding [text deleted], on an annualized basis, based upon the income she earned between January 1, 2001 to September 23, 2001 was incorrect.

She went on to submit that the case manager, in initially following the IRI calculator, did not correctly assess the Appellant's IRI entitlement. However, she submitted, [MPIC's Internal Review Officer] properly assessed the method for determining self-employment income and the relevance of the [text deleted] contract when he stated:

> [MPIC's IRI Calculator's] calculation of your self-employed GYEI ([text deleted]) was based upon the income you earned between January 1, 2002 to September 23, 2001 which was then annualized for a GYEI of $[text deleted].
>
> As indicated above, the method of calculation a student's IRI entitlement is provided for within the provisions of the Act. [MPIC's IRI Calculator's] reconciliation of your IRI entitlement relating to your self-employed modeling position does not take into account Sections 89(1)(a) and 89(2)(a)(ii) of the Act which state:
>
> > **Entitlement to I.R.I.**
> > **89(1)** A student is entitled to an income replacement indemnity for any time 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.
> >
> > **Determination of I.R.I.**
> > **89(2)** The corporation shall determine the indemnity to which the student is entitled on the following basis:
> > (a) under clause (1)(a), if at the time of the accident,
> >
> > (ii) the student is or could have been self-employed, the gross income that is determined in accordance with the regulations

> for an employment of the same class, or that the student earned or would have earned from the employment, whichever is the greater.
>
> Therefore, based upon the above, I am unable to conclude that you are entitled to further monies as a result of the [text deleted] contract. It appears that you were adequately compensated for that contract as a result of being paid the maximum IRI for the months that you would have been working in [text deleted].

The Internal Review Officer found that both the IRI calculator and the case manager, while correctly calculating potential gross income for employment of a same class or that the student earned, had failed to consider what the student "would have earned" from the employment.

Counsel for MPIC took the position that the method used to calculate the Appellant's entitlement (set out in the calculations attached to the case manager's decision of July 23, 2003), were the most sensible method of approaching the question.

These calculations attempted to assess the amount the Appellant "would have earned" under Section 89(2) by attributing different earnings or projected earnings to her potential modeling contracts for each month between October 2001 and July 2002.

Counsel for MPIC submitted that because the Appellant's potential earnings from modeling were "hit and miss", varying so much from month to month, she could not be treated as a seasonal worker, and it did not make sense to average her earnings over time.

Counsel also submitted that the Commission should take into account the provisions of Section 89(2)(a)(iii), as the Appellant held or would have held more than one (1) employment.

Counsel for MPIC submitted that the Appellant had been fully compensated for the amounts she was able to earn under the [text deleted] contract through the maximum IRI benefits she received for those months. She submitted that the decision of the Internal Review Officer should be upheld.

Discussion

Entitlement to I.R.I.
89(1) A student is entitled to an income replacement indemnity for any time 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;
(b) he or she is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

Determination of I.R.I.
89(2) The corporation shall determine the indemnity to which the student is entitled on the following basis:
(a) under clause (1)(a), if at the time of the accident
(i) the student holds or could have held an employment as a salaried worker, the gross income the student earned or would have earned from the employment,
(ii) the student is or could have been self-employed, the gross income that is determined in accordance with the regulations for an employment of the same class, or that the student earned or would have earned from the employment, whichever is the greater, and
(iii) the student holds or could have held more than one employment, the gross income the student earned or would have earned from all employment that he or she is unable to hold because of the accident;

Student entitled to greater I.R.I.
92 A student who is entitled to an income replacement indemnity under section 89 and under section 90 or 91 shall receive whichever is the greater.

The onus is on the Appellant to establish, on a balance of probabilities, that the Internal Review Officer's assessment of her IRI entitlement was not correct.

The panel is of the view that the evidence on file shows a pattern of fairly regular engagement in work by the Appellant as a model. Documents on the file, from the [text deleted], set out regular

requests and demand for the Appellant's services as a model from October 1, 2001 until June 30, 2002 when she graduated from her studies.

When asked to comment upon the Appellant's submission that the same comparators had not been used for the different income calculations under Section 89(2)(a)(ii), counsel for MPIC replied that this was not the relevant section. She submitted that, as the Appellant had more than one (1) employment, the relevant calculations should be made pursuant to Section 89(2)(a)(iii).

Section 89(2)(a)(iii) provides that where a student could have held more than one (1) employment, the gross income the student earned or would have earned from all employment that she was unable to hold because of the accident shall determine the indemnity to which a student is entitled.

> **Determination of I.R.I.**
> **89(2)** The corporation shall determine the indemnity to which the student is entitled on the following basis:
> (a) under clause (1)(a), if at the time of the accident
> . . .
> (iii) the student holds or could have held more than one employment, the gross income the student earned or would have earned from all employment that he or she is unable to hold because of the accident;

However, the panel agrees with the comments of counsel for the Appellant in regard to the application of Section 89(2)(a)(iii). He pointed out that this Section was not mentioned anywhere in the indexed file, nor had it been mentioned in [MPIC's Internal Review Officer's] decision, which set out the provisions of Section 89(1)(a), and Section 89(2)(a)(ii) before finding that the file should be "returned to the case manager for recalculation of your entitlement taking into account the above provisions which I have referred to in the preceding paragraph."

Nor was there any mention of Section 89(2)(a)(iii) in the case manager's letter of July 23, 2003

which recalculated the Appellant's entitlement.

Further, counsel for the Appellant submitted that Section 89(2)(a)(iii) makes no reference to self-employment, but rather, applies to individuals holding more than one (1) employment. In the Appellant's case, where she had both employment income and self-employed income, it would be necessary to apply Section 89(2)(a)(i) to the employment income and Section 89(2)(a)(ii) to the self-employed income.

The panel finds that this is a more appropriate application of the statute. The Appellant does not have more than one (1) employment. Rather, her work history is a hybrid, or mix of employment and self-employment. We agree that Section 89(2)(a)(i) should be applied to determine her entitlement to indemnity for loss of employment income and Section 89(2)(a)(ii) should be applied to determine her entitlement to an indemnity for her self-employed income.

Counsel for MPIC also submitted that because the Appellant was in receipt of the maximum IRI benefits for January and February 2002 (the anticipated period of the two (2) month [text deleted] contract), she had been fully compensated for the [text deleted] contract, and therefore, no further compensation would flow to her as a result of that contract.

The problem with this argument is that there is no basis for taking that factor into consideration in the calculation process set out in Section 89(2)(a)(ii), when a calculation of indemnity is being undertaken. MPIC showed a willingness and ability throughout the period of the Appellant's disability to calculate, recalculate and recalculate again what her IRI benefits should be or should have been. MPIC knew what she had earned in the past and calculated indemnity for employment in the same class. In attempting to calculate what she would have earned as a

model, the amounts actually received or paid out as IRI benefits are not a relevant factor to be considered under the legislation.

The panel agrees with counsel for the Appellant that, in considering the IRI already paid out, when calculating what the Appellant would have earned, the Internal Review Officer took into account an irrelevant consideration. Further, it is the panel's view that the Internal Review Officer failed to do a correct assessment or comparison of relevant factors under Section 89(2)(a)(ii).

That section requires that MPIC select the greater of three (3) different gross income calculations to determine the student's indemnity. Two of those factors, "employment of the same class" or "that the student earned", are to be calculated in accordance with Regulation 39/94, Section 3(2). When MPIC calculates those factors, it does so on an averaged or annualized basis. The figures used for determination of income that the student earned (ie calculations performed under Section 3(2) of Regulation 39/94) are set out in [MPIC's IRI Calculator's] memorandum of June 25, 2002 and appear to be based upon an annualization of the figures.

For example, under Regulation 39/94, Section 3(2)(a), business income from the fifty-two (52) weeks prior to the accident, found in the Appellant's 2001 personal tax return for the period from January 1, 2001 to September 23, 2001 (266 days) is adjusted such that the Appellant's net income for the period is divided by 266 days and then multiplied by 365 days to arrive at a total adjusted net income.

Income for relevant occupations under Schedule C of Regulation 39/94 (Artistic, Literary, Recreational and related occupations) is also set out as annualized income.

However, when calculating the gross income the student "would have earned" from the employment, MPIC preferred to calculate the Appellant's earnings on a month-by-month basis.

The panel is of the view that in order to determine which is the greater number to be used to determine entitlement under Section 89(2)(a)(ii), the three (3) numbers used as comparators should be calculated on the same basis.

We are of the view that because the method used by MPIC to calculate "would have earned" income on a monthly basis was different than the method used to calculate income for employment of the same class or that the student earned, it cannot be used to obtain an equivalent comparator for determining which is the greater amount under that section of the Act. The panel agrees with counsel for the Appellant that the method MPIC has used to undertake this calculation and comparison, is like a comparison between apples and oranges.

The panel finds that, based upon the evidence on the file, the Internal Review Officer erred in his assessment of the Appellant's entitlement to IRI benefits. Accordingly, the Commission directs MPIC to refer the question of the Appellant's IRI benefits back to the IRI calculation unit to:

a) recalculate the gross income the Appellant "would have earned" for the period from October 1, 2001 to June 30, 2002 on an annualized basis;
b) compare the figure in a) above with the calculations of gross income for employment in the same class and that the student earned, and determine which amount is greater;
c) determine the indemnity to which the Appellant was entitled and recalculate the IRI which should have been paid to her on the basis set out in a) and b) above and compensate the Appellant for any additional IRI that she should have been paid for

the period between October 1, 2001 and June 30, 2002.

Interest shall be added to this amount, in accordance with Section 163 of the MPIC Act.

The Appellant's appeal on the issue of the proper expense ratio is hereby dismissed.

The Appellant's appeal on the recalculation of her IRI entitlement based on her modeling income, is allowed.

Dated at Winnipeg this 11th day of December, 2007.

LAURA DIAMOND

LES MARKS

SANDRA OAKLEY