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Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-59**

PANEL: Ms Laura Diamond, Chairperson
Dr. Patrick Doyle
Ms Deborah Stewart

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted] via teleconference;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Kathy Kalinowsky.

HEARING DATE: March 11, 2008

ISSUE(S): Entitlement to Income Replacement Indemnity

RELEVANT SECTIONS: Section 110(1)(a) 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 December 13, 2002. At the time of the accident, the Appellant was employed as the head cook at her husband's restaurant, [text deleted]. She advised her case manager that she couldn't cook because of her sore neck, headaches and sore left arm, as a result of the motor vehicle accident. However, she indicated that she returned to work, working two (2) to three (3) hours per day doing management and cashier duties.

The Appellant completed an Application for Compensation indicating that she was employed full time from September 1, 2001 as the manager and cook at the [text deleted], earning \$500.00 per week. She also completed the Employer's Verification of Earnings form stating that she was employed as a manager and owner of the restaurant, netting \$2,000.00 per month, and attaching a pay stub dated November 20, 2002 in the amount of \$2,000.00.

The Appellant then met with her case manager on April 29, 2003. She advised that she had returned to work on December 14, 2002, working one (1) hour per day for the next three (3) weeks. She started working three (3) hours per day on January 7, 2003 until the business was sold on April 1, 2003, when her employment was terminated. She stated that from April 1st to 15th, 2003, she remained at the restaurant helping out the new owners, working four (4) hours per day.

The Appellant also provided her case manager with copies of her 1999, 2000 and 2001 tax returns, as well as a copy of her T4 for the year 2002 and a copy of her 2002 income tax return and Notice of Assessment.

The Appellant's case manager provided her with a decision letter on September 11, 2003. The case manager indicated that she had spoken with the Appellant's ex-husband, and the owner of the restaurant, on July 9, 2003, when he stated that the Appellant was paid \$2,000.00 bi-weekly and that following the motor vehicle accident on December 13, 2002, he continued to pay her.

However, the case manager indicated that on July 11, 2003, [Appellant's ex-husband] called back to state that he now recalled he had hired someone else in December to cover for the

Appellant and that he had not paid her from December until the end of March. The case manager was not able to obtain any documentary substantiation of this.

Her letter concluded:

Based on the information received to date, there would be no entitlement to IRI as you continued to earn income equal to the gross income on which your IRI was determined.

The Appellant filed an Application for Review dated November 18, 2003. The Internal Review Officer reviewed the documents on file, such as photocopied cheques and bank statements. The Appellant advised her that one of the cheques, for the period from December 1st to the 31st, 2002 was with respect to a Christmas bonus, but the original copy of that cheque did not so indicate.

The Internal Review Officer also referred to the case manager's contradictory conversations with [Appellant's ex-husband]. She concluded:

I have now reviewed the bank statement from December 31 to January 31 and, as stated above, see no information to contradict your case manager's conclusion that you were paid from the business after your accident and therefore you were collecting a gross income equal to or greater than the gross income on which your IRI was determined. As a result, you were not entitled to any IRI benefits resulting from your accident of December 13, 2002.

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

Submission for the Appellant

The Appellant did not participate or testify at the teleconference hearing into her appeal. However, her counsel referred the panel to documentary evidence on the file in support of his submission that the Appellant had lost income due to her inability to work following the motor vehicle accident and that she should be entitled to IRI benefits as a result.

Counsel submitted that the Appellant's income tax statements for the year 2002 indicated that she had been earning \$2,000.00 a month working at the restaurant. This was supported by her Notice of Assessment from the year 2002 which set out a salary of \$24,000.00.

He reviewed the photocopies of cheques which were on the file for the period from April to December of 2002. He also reviewed bank statements for January and February of 2003. He submitted that there was no evidence to suggest that the Appellant had received anything by way of salary after December 10, 2002. He noted that the Appellant was estranged from her former husband and that she had relocated to [text deleted] with her child. This, he submitted, accounted for the reason that the Appellant's husband was difficult in his dealings with MPIC.

He also referred to a Statutory Declaration filed by the Appellant's sister which advised that the Appellant had stayed with her following the separation, as she needed rent free accommodation, having not been in receipt of any salary since the motor vehicle accident.

Counsel submitted that the cheque which the Appellant received, following the motor vehicle accident in December, represented a Christmas bonus, and was not salary.

He submitted that the Appellant should be entitled to receive IRI benefits from the time of the motor vehicle accident, to July of 2003, when she became able to earn income again.

Submission for MPIC

Counsel for MPIC noted that this was a difficult case, as the evidence was poor and this was compounded by the Appellant's failure to testify.

Counsel noted that IRI benefits are payable when claimants are incapable of working. The documentary evidence on the file indicated that while the Appellant may have not been working full duties, or full time, after her motor vehicle accident, she did return to work, for two (2) or three (3) hours a day to perform her duties as a manager or cashier.

Accordingly, her case manager requested that she provide pay stubs and similar information from December 12, 2002 onward, so that it could be determined how much she earned, and IRI benefits could be paid as a “top-up”, for the hours she was unable to work at her full duties. The issue became more one of how much IRI the Appellant would be entitled to, rather than whether she was entitled to IRI benefits at all. However, the case manager was not able to obtain the relevant information from the Appellant in order to ascertain her entitlement to IRI benefits. Some documentary evidence indicated that the Appellant continued to be paid, at the rate of \$2,000.00 per month, in the period following the accident.

MPIC also had concerns regarding the cheque which the Appellant contended was a Christmas bonus, as the cheque appears to have been altered.

Accordingly, counsel submitted that MPIC has no idea whether the Appellant was in receipt of some employment income in the period following the accident. Without any further evidence, such as income tax records etc., MPIC could not establish whether she had any income during this period of time. Given the conflicting evidence of the Appellant’s husband and the Appellant’s failure to adduce the requested information, counsel for MPIC submitted that the Appellant had not met the burden upon her of establishing, on a balance of probabilities, that the decisions of her case manager and of the Internal Review Officer were incorrect.

Discussion

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;
- (b) the victim is able to hold the employment referred to in subsection 82(1) (more remunerative employment);
- (c) the victim is able to hold an employment determined for the victim under section 106;
- (d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;
- (e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;
- (f) the expiration of a time that is fixed under Subdivision 1 (sections 81 to 105);
- (g) the victim dies.

The onus is on the Appellant to establish, on a balance of probabilities, that she was entitled to an IRI for the period from December 2002 to July 2003.

Counsel for MPIC established, based upon documentary evidence on the file, that the Appellant had reported working part-time, at partial duties, following the motor vehicle accident.

Counsel, in her submission, accepted that the Appellant may not have been able to work full time following the motor vehicle accident, and that there may have been partial hours that the Appellant could not work, entitling her to some IRI benefits. As a result, MPIC has asked the Appellant to provide verification of her earnings, in order that they could determine what portion of her income might have been reduced due to the motor vehicle accident.

However, the evidence established that despite repeated requests, the Appellant failed to provide such verification for any period after December 31, 2002. She provided her income tax Notice

of Assessment for the year 2002, which showed regular earnings of \$24,000.00 for that year.

However, the Appellant did not provide any Notice of Assessment, Income Tax Returns or T4 slips for the year 2003, which covered the period in which she may have suffered a reduced income as a result of the motor vehicle accident.

In the absence of any testimony by the Appellant, or documentary evidence showing the Appellant's income for the relevant period in 2003, the panel finds that the Appellant has failed to meet the onus upon her of establishing, on a balance of probabilities, that she was entitled to receive IRI benefits for the period from December 2002 to July 2003.

Accordingly, the panel finds that the decision of the Internal Review Officer dated December 23, 2003 should be upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 16th day of April, 2008.

LAURA DIAMOND

DR. PATRICK DOYLE

DEBORAH STEWART