

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-94**

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, [text deleted], was not present at the hearing; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: February 5, 2008

ISSUE(S): Whether the Appellant's Income Replacement Indemnity has been properly calculated

RELEVANT SECTIONS: Section 83(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 2 of Manitoba Regulation 39/94

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

At the request of the Appellant, a teleconference was scheduled for the hearing of his appeal, at 9:30 a.m. on Tuesday, February 5, 2008. A Notice of Hearing dated December 6, 2007 was sent to the parties advising them of the date the Commission had fixed for the hearing of the appeal by teleconference.

On December 21, 2007 the Appellant telephoned and spoke with staff at the Commission. He indicated that he could not participate in the teleconference scheduled for February 5, 2008. The

Director of the Commission advised the Appellant that, in order to request an adjournment, he should write to the Commission and set out his request for an adjournment and the reasons for the request. The Appellant became upset and responded with strong language. No written request for an adjournment was subsequently received.

On February 5, 2008, counsel for MPIC appeared before the Commission for the Appellant's hearing. However, when the Deputy Commissioner telephoned the Appellant at the telephone number he had provided for his workplace, he was not there. The Commission also telephoned the Appellant at his home telephone number. The Appellant did not answer and a message was left for him with his voice mail service.

The Appellant did not telephone the Commission in return or provide any reason for his failure to participate in the teleconference hearing.

The Appellant was injured in a motor vehicle accident on February 3, 2007. As a result he was unable to perform the essential duties of his employment from February 3rd to February 15th, 2007.

An Employer's Verification of Earnings ('EVE') form was completed by his employer, [text deleted]. Based upon the information from this form, the Appellant was identified as a temporary earner under the MPIC Act. The form also confirmed the Appellant's overtime earnings and vacation pay, received from the onset of his employment.

Based upon this information received from the employer, the Appellant's case manager calculated his Income Replacement Indemnity ('IRI') benefits, and set this out in a letter to the Appellant dated May 3, 2007.

The Appellant disagreed with this calculation and submitted an Application for Review of the case manager's decision.

At the Internal Review hearing, the Appellant advised the Internal Review Officer that his employer had not provided accurate information with respect to his earnings. The Internal Review Officer stated:

. . . In support of your argument for a greater GYEI, you have provided the Review Office with five pay stubs, two of which represent pay dates prior to the accident and three pay stubs received following your return to work. The pay stubs do not establish that any error was made by your employer or in the calculation of your GYEI.

On July 31, 2007, the Internal Review Officer upheld the decision of the case manager, confirming the decision and dismissing the Appellant's Application for Review. It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant

The Appellant did not appear at his appeal hearing. The Commission had reference to the following documents from the Appellant:

1. Application for Review dated May 30, 2007

The amount specified by my employer report and pay stubs differ. I work 50 hrs a week I'm in the [text deleted] trade I was also on winter hours which mean that 2 of those 50 hours a week becomes overtime which would be time & a half 48 hrs at regulat time at \$[text deleted] a hr then 2 hr at overtime at \$[text deleted] a hr.

2. Note from the Appellant dated May 19, 2007

To whom it may concern

May 19, 07

I wish to appeal the amount paid out to me in regard's (sic) to my knee injury in the accident feb. 3. 07 my employer claimed that I only work 44.5 hr per week but I work 50 hr per week contact my employer and confirm this or I will show you my pay stub's for the proof of my earnings

Your's truly
[the Appellant]

3. Notice of Appeal completed by the Appellant on August 16, 2007

Employer report not correct

Submission for MPIC

Counsel for MPIC submitted that the Appellant's gross yearly employment income ('GYEI') and IRI benefits were correctly calculated.

The Appellant was classified as a full time temporary earner. The method for his GYEI calculation is set out in Section 2(b) of Manitoba Regulation 39/94. It is to be calculated using the actual earnings during the pay period in which the accident occurred, divided by the number of weeks in the pay period, multiplied by 52.

The hours set out in the pay stubs submitted by the Appellant correspond with those reported on the EVE form submitted by the Appellant's employer.

Although the Appellant returned to work on February 16, 2007, his employer reported his total overtime earnings up to March 1, 2007. Documents show that he worked 22.5 hours of overtime between October 6, 2006 and February 1, 2007.

Accordingly, it was submitted by counsel for MPIC, although the figure of \$[text deleted] was used to calculate the Appellant's overtime earnings in the GYEI calculation, the correct figure for inclusion should have actually been \$[text deleted]. Therefore the Appellant received even more credit for overtime hours in the calculation of his GYEI that he should have been entitled to, and the Appellant's appeal should be dismissed.

Discussion

Basis for determining I.R.I. for temporary earner or part-time earner

83(2) The corporation shall determine the income replacement indemnity for a temporary earner or part-time earner on the following basis:

- (a) under clause (1)(a), if at the time of the accident
 - (i) the temporary earner or part-time earner holds or would have held employment as a salaried worker, the gross income that he or she earned or would have earned from the employment,
 - (ii) the temporary earner or part-time earner is or would have been self-employed, the gross income determined in accordance with the regulations for an employment of the same class, or the gross income that he or she earned or would have earned from the employment, whichever is the greater, and
 - (iii) the temporary earner or part-time earner holds or would have held more than one employment, the gross income earned or would have earned from all employment that he or she is unable to continue because of the accident;
- (b) under clause (1)(b), the benefit that would have been paid to the temporary earner or part-time earner.

Manitoba Regulation 39/94:

GYEI not derived from self-employment

2 Subject to this regulation, a victim's gross yearly employment income not derived from self-employment at the time of the accident is the sum of the following amounts:

- ...
- (b) in the case of a temporary earner or part-time earner, the salary or wages that are received or receivable with respect to employment that the temporary earner or part-time earner held or would have held, if the accident had not occurred, and that are the greater of
 - (i) the salary or wages received or receivable for the pay period in which the accident occurred, divided by the number of weeks in the pay period and then multiplied by 52, and
 - (ii) the salary or wages receivable during the first 180 days following the date of the accident divided by 180 and then multiplied by 365;

MPIC based its calculation of the Appellant's GYEI and the IRI benefits to which he was entitled, upon information derived from his employer in the EVE form completed by the employer on March 16, 2007.

From documents submitted by the Appellant, it appears that he took issue with the information submitted by the employer on this form.

However, the Appellant failed to appear at the teleconference hearing, or to submit any evidence to support his position.

Accordingly, the Commission is left with the evidence before us and with the information supplied by the employer on the EVE form.

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer and the calculation of his IRI benefits was not correct.

The Appellant has failed to produce any evidence or arguments to support his position. There is no evidence before the Commission to establish that the information supplied by the employer or the calculations of the case manager and conclusions of the Internal Review Officer were not correct. Accordingly, the decision of the Internal Review Officer dated July 31, 2007 is hereby confirmed and the Appellant's appeal dismissed.

Dated at Winnipeg this 26th day of February, 2008.

LAURA DIAMOND