

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-117**

PANEL: Ms Laura Diamond

APPEARANCES: The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: June 4, 2009

ISSUE(S): Whether the Appellant was properly classified as a “non-earner” for the purpose of calculating entitlement to Income Replacement Indemnity (“IRI”) benefits.

RELEVANT SECTIONS: Sections 70(1), 83(1) and 85(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 6 of Manitoba Regulation 37/94.

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

The Appellant worked as a film and theatre technician for approximately nine years. On April 13, 2008 she was injured in a motor vehicle accident. As a result of the accident, she sustained injuries of a sore neck, back, left shoulder, arm, knees, headaches, dizziness and dental injuries. As a result of these injuries she was unable to work for a period of time and became entitled to Income Replacement Indemnity (“IRI”) benefits.

The Appellant's case manager determined that at the time of the motor vehicle accident, the Appellant was classified as a non-earner. However, the case manager determined that because the Appellant had promised employment with a film company at the time of the motor vehicle accident, to start immediately following the motor vehicle accident, the Appellant would have held employment for that period, and as such was entitled to IRI benefits on that basis.

The Appellant did not agree that she should be defined as a non-earner and sought an Internal Review of the case manager's decision.

On August 25, 2008, an Internal Review Officer for MPIC reviewed the Appellant's employment status, concluding that as a member of the [text deleted] Union for the last seven years, the Appellant was hired by different production companies to work. At the time of the accident, she was scheduled to commence work two days later, on April 15, 2008. Accordingly, at the time of the accident she was not employed but was able to work and fit into the classification of non-earner. Due to the accident she was unable to hold an employment that she would have held if the accident had not occurred and was entitled to IRI benefits on that basis, as a non-earner, pursuant to Section 85(1) of the MPIC Act.

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

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal. She described her work as a film and theatre technician as well as the system of receiving work through two [text deleted] local unions: Local No. [text deleted] for theatre jobs and Local No.[text deleted] for film jobs. These

unions dispatch and assign her to work, but it is also up to the union member to find her own work.

The Appellant testified that she had worked with a production designer from [text deleted] in the past, and was approached on March 10, 2008 to see if she would be interested in working on a film in the art department. She agreed, and was given shooting dates and preparation dates for April.

The company emailed her the script and asked her if she could break it down to determine how many locations there were and what would be required in terms of sets and budgeting. The Appellant began this work on the understanding that she would be compensated for this work at the end of the shooting, along with compensation for “wrap time”. She indicated that a full two days of pay had been budgeted in this regard.

Work on the film was to start on April 15, 2008. However, the Appellant read the script in March and did a breakdown of properties which she emailed to the production designer on April 6, 2008. Another email setting out a set decorating list was sent by her on April 7, 2008.

The Appellant testified that on April 9, 2008 she received a one line breakdown shooting schedule showing locations and shooting schedules. She sent a further email on April 12, 2008 inquiring about obtaining photographs of the locations so that it would be easier to make a list for set decoration. She also received a preliminary crew list, which showed her on the list of people hired at the beginning stages of the film, on approximately April 11th or 12th.

However, she had not yet received any wages for this work.

The motor vehicle accident occurred on April 13, 2008 and she was not able to take up the position as a result of her injuries.

The Appellant submitted that a non-earner must mean a victim in an accident who is not employed. She submitted that she was employed, and was to start work on April 15, 2008. She has held regular employment on a full-time basis for a long period of time, which her Record of Employment substantiates. She had already been retained and employed by [text deleted] and listed on the final crew list. She had a guarantee of employment and had already begun to do some of the work, for which she would have been compensated at the end of the production, in those last two days. Accordingly, the Appellant submitted that she was not a non-earner and should have been classified as a full-time earner.

Evidence and Submission for MPIC:

Counsel for MPIC submitted that the evidence before the Commission was clear that the Appellant had promised employment and that there was no question she would have started employment with [text deleted] as of April 15, 2008. This was also supported by an employer verification of earnings. However, the Appellant had also testified that at no time did she receive any payment for work done between April 6 and April 12, 2008. Accordingly, Counsel submitted that the Appellant's evidence did not fall within the definition of employment under the Act. She had provided evidence that she did some work, but also that she was not paid for it and it is clear under the definition in the Act that she must receive remuneration.

Counsel for MPIC submitted that as such the Appellant's designation as a non-earner was correct. It was clear that she had promised employment and she was provided IRI benefits on that basis pursuant to the MPIC Act.

In the alternative, Counsel for MPIC submitted that, even if the Commission finds that the Appellant was employed at the time of the motor vehicle accident, she should be classified as a temporary earner under Section 70(1) of the Act and Section 6 of Regulation 37/94. The legislation provides that the Appellant's entitlement to IRI benefits as a temporary earner would be on the same basis as a non-earner.

Discussion:

Section 70(1) of the MPIC Act sets out the following definitions:

Definitions

[70\(1\)](#) In this Part,

"employment" means any remunerative occupation; (« emploi »)

"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; (« soutien de famille à temps plein »)

"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 student; (« non-soutien de famille »)

"temporary earner" means a victim who, at the time of the accident, holds a regular employment on a temporary basis, but does not include a minor or a student; (« soutien de famille temporaire »)

[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;

Manitoba Regulation 37/94**Meaning of temporary employment**

- 6** A person holds a regular employment on a temporary basis where the person
- (a) has held the employment for less than one year before the day of the accident;
 - (b) during the course of the employment, has been employed for not less than 28 hours per week, not including overtime hours; and
 - (c) is not covered by clause 4(b).

The onus is on the Appellant to show, on a balance of probabilities, that her determination as a non-earner by the case manager and Internal Review Officer was not correct.

The Commission has reviewed the evidence of the Appellant, along with the documents on the indexed file and the submissions of Counsel for MPIC and of the Appellant. The Commission finds that the Appellant was not a “non-earner” who at the time of the accident was not employed. Rather, the Commission finds that, at the time of the accident, the Appellant was employed by a film production company and had begun to perform some of her duties in that capacity. At that time, she fully expected to be remunerated for the duties performed in that preparatory work at the end of the shooting schedule. However, as a result of the motor vehicle accident, she was unable to undertake further duties, payment was not made and she became entitled to IRI benefits.

The Commission agrees with the alternative argument put forward by Counsel for MPIC that the Appellant was, at the time of the accident, a temporary earner. Her evidence established that she had been employed, as a film and theater technician for many years. However, the assessment under the Act is based not upon occupation or profession, but upon employment held at the time of the accident. The particular employment in question was employment she held for less than one year before the day of the accident. As a result, the Commission finds that the Appellant held regular employment on a temporary basis pursuant to Section 6 of Regulation 37/94.

Counsel for MPIC is correct in noting that, as a temporary earner, the Appellant's entitlement to IRI benefits falls under Section 83(1)(a) of the MPIC Act which provides:

Entitlement to I.R.I. for first 180 days

83(1) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:

(a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;

As a result, the Appellant's IRI for the first 180 days after the accident are determined on the same basis as a non-earner's entitlement, when she is unable to hold unemployment she would have held during that period if the accident had not occurred. Accordingly, the Appellant's IRI benefits would still be calculated based upon the employment with [text deleted] that she was unable to hold, and she did receive IRI benefits based on that employment.

As a result, the Commission finds that the Appellant's appeal is hereby allowed in part, and that the decision of the Internal Review Officer dated August 25, 2008 should be varied to reflect the Appellant's status as a temporary earner.

Dated at Winnipeg this 25th day of June, 2009.

LAURA DIAMOND

