

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-65**

PANEL: Ms Laura Diamond, Chairperson
Dr. Patrick Doyle
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.

HEARING DATE: June 10, 2009

ISSUE(S): Whether the Appellant is entitled to further Income Replacement Indemnity benefits

RELEVANT SECTIONS: Section 110(1)(e) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

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 was injured in a motor vehicle accident on January 27, 2004. At the time of the accident he was employed by [text deleted], and was also the Director, President, Secretary and Shareholder of [text deleted], which offers custom hunting and fishing trips.

Due to injuries sustained in the accident, the Appellant was unable to carry out many of his duties at [text deleted]. MPIC, in assessing his entitlement to income replacement indemnity

("IRI") benefits, concluded that he was a full-time earner employed as an outfitter/service manager. His IRI benefits were based on Schedule C as a level 3 Accommodation Service Manager resulting in a Gross Yearly Employment Income ("GYEI") of \$40,358.

When the Appellant returned to work with reduced hours, as he recovered, he would receive a top-up of IRI benefits based on the percentage of duties he was working.

The Appellant provided some personal and corporate income tax information to MPIC, who continued to request more information. In 2007, he received a partial IRI payment for 2007 (representing the duties he was unable to perform in the months of April, May and June), in the amount of \$8,006.56. At that time, MPIC requested copies of his 2006 personal income tax return, 2006 corporate tax return and 2006 financial statements, in order to determine his 2007 IRI entitlement in November of 2007.

After receiving some of this information, the Appellant's case manager wrote to him on September 26, 2007 to advise that a review of his 2006 corporation and personal tax returns confirmed an adjusted corporation income of \$42,646 and a personal employment income of \$15,000. Since his gross employment income now exceeded the GYEI on which his IRI was based, MPIC concluded, his entitlement to IRI would end, based on Section 110(1)(e) of the MPIC Act.

The Appellant sought an Internal Review of this decision. On May 8, 2008, an Internal Review Officer for MPIC upheld the case manager's decision. Although the Appellant had argued at the hearing that his IRI should be calculated based on his personal income only and that his IRI top-

up benefits should not be cut off, since his gross income was not equal to or greater than the gross income on which his IRI was determined, the Internal Review Officer did not agree.

She did not agree with the Appellant's submission that it was not proper to take into account corporate earnings when the corporation that pays the Appellant also pays the wages of other employees and that the money that he has earned has been consistent with past years and represents fair market compensation for the services he provided to [text deleted]. The Internal Review Officer concluded that the Appellant was not entitled to a continuation of the top-up of his IRI, as his current income did exceed the GYEI on which his IRI was based. She concluded that he could not have both the benefit of IRI being based on his corporate earnings and have a top-up of IRI based on personal income.

It is from this decision of the Internal Review Officer that the Appellant has now appealed. The parties agreed that the issue before the Commission was whether the Appellant's IRI benefits for the last six months of 2007 should be reinstated on an ongoing basis. There was no issue between the parties regarding the Appellant's ability to do his duties, but rather, only the ongoing entitlement to IRI remained at issue.

Evidence and Submission for the Appellant:

The Appellant's accountant testified at the hearing into the Appellant's appeal. He reviewed balance sheets as well as financial statements, corporate tax returns and personal returns for the Appellant and [text deleted]. He testified that he had been preparing such returns for the Appellant for approximately the last ten years.

He described the tax planning which had been in effect for the Appellant and the Corporation in the years 2003, 2004 and 2005, including such matters as bonuses payable, shareholder loans accumulating within the corporation, and retained earnings.

The accountant reviewed the corporation's sources of revenue, including income received in 2004 from the sale of the rights to licences for deer hunting, which, in his view, was a disposition of a fixed asset which fell into the corporation's profits that year, but which was not the Appellant's income and so not declared on his personal return.

He reviewed the employment income which flowed to the Appellant from the corporation and how it was handled, as well as decisions in various years as to whether the Appellant required cash which should be taken into personal income and paid at his own tax rate, or retained in the corporation with or without the payment of dividends.

He also reviewed the rental income which appeared on the Appellant's personal income tax returns. This was paid to him by the corporation over the years for use of the lodge building and lands owned by the Appellant and his wife.

Counsel for the Appellant submitted that Section 110(1)(e) of the MPIC Act does not allow MPIC or the Commission to consider the income of the corporation in determining whether or not the Appellant was in receipt of gross income equal to or greater than the gross income on which his IRI was determined.

MPIC had made a decision, when paying IRI benefits at the outset, to pay IRI benefits based on the GYEI formula under the Act and Regulations. No one had challenged this decision. At that

time, MPIC satisfied itself that it had sufficient information to determine IRI benefits. It chose to do so by use of Schedule C.

When the Appellant's income tax returns became available for the corporation's year ending June 2006 (in June 2007), copies of these were provided to MPIC. It was then that MPIC reversed its decision regarding the amounts of IRI benefits to be paid to the Appellant in 2007. This, it was submitted, MPIC could not and should not have done, as the Appellant's IRI benefits had already been determined. What MPIC was trying to do was go behind that determination, which had already been made, and look at the corporation's income.

However, since Section 110(1)(e) triggers the termination of IRI benefits and only makes reference to the amounts a victim receives as gross income as the test triggering operation of the Section, the corporation must prove that the Appellant holds an employment from which gross income is equal to or greater than the amount the IRI was based on. It cannot, however, look at the corporation's income. MPIC cannot pierce the corporate veil, but rather, can only look at employment income the Appellant has received in making this determination.

Counsel for the Appellant submitted that MPIC cannot reference Regulation 39/94 regarding the "Determination of Income and Employment (Universal Bodily Injury Compensation) Regulation" and its definitions and calculations of gross income and GYEI, as Section 110(1)(e) does not refer to the Regulations. The only reference to the Regulation is found in Section 81(2), the section used to determine IRI benefits for a self-employed full-time earner "on the basis of the gross income determined in accordance with the Regulations for an employment of the same class, or the gross income the full-time earner earned from his or her employment, whichever is greater...". While the Regulation can be used to determine entitlement to IRI benefits under

Section 81(2)(a), Section 110(1)(e) does not make reference to the Regulations, and so the Regulations cannot assist and do not apply in regard to ending entitlement.

Submission for MPIC:

Counsel for MPIC submitted that calculations under the *Income Tax Act* which may have been utilized by the Appellant's accountant are different from the regulations and rules under the *MPIC Act* for treating corporations and employees.

Counsel pointed to Section 3 of Regulation 39/94 to define the gross income received by the Appellant in regard to Section 110(1).

Counsel for MPIC explained that claimants are given the benefit of the doubt, when MPIC is setting GYEI and IRI benefits for self-employed individuals. Schedule C was utilized in this case to set the Appellant's IRI benefits. Then, MPIC requested information regarding the income of the corporation and the employee. When it received the Appellant's and the corporation's 2006 tax returns, it determined that the Appellant, had, for 2007, an adjusted corporation income of \$42,646 and a personal employment income of \$15,000. The total of approximately \$57,000 exceeded the GYEI of approximately \$40,000 which was used to determine the Appellant's current IRI entitlement.

A further review of the 2007 corporate and personal income tax returns revealed income for 2007 of approximately \$58,000 for the corporation, which also exceeded this amount.

Counsel for MPIC submitted that these amounts were correctly determined. He submitted that gross income is defined in Section 1 of Regulation 39/94, which defines GYEI as having the same meaning as “gross income” has in Part 2 of the Act.

GYEI is then defined for self-employment, under Section 3(1) of the Act regarding “GYEI derived from self-employment or a Canadian-controlled private corporation”. In this regard business income means the income derived from a Canadian-controlled private corporation by way of a significant influence shareholder interest less any expenses that relate to the income (but not including capital cost allowance or allowance, eligible property or any capital gain or loss, etc.).

The Appellant is a 100% shareholder of this corporation according to the definition of Canadian-controlled private corporations and significant influence shareholder under Sections 3(1) and 3(3) of the Regulation.

Counsel for MPIC rejected Counsel for the Appellant’s contention that the Regulations do not apply to Section 110(1), or that the Commission should not consider earnings retained by the corporation when looking at the Appellant’s income received. This, he submitted, was the reason why Section 3 of the Regulation was invented, so that Appellants cannot artificially control amounts received between themselves and their controlled corporations.

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:

(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;

The onus is on the Appellant to show that the Internal Review Officer was in error, and that the Appellant should be entitled to receive IRI benefits for the latter part of 2007 and ongoing.

Section 110(1)(e) of the Act disentitles a victim to an IRI benefit when he or she holds an employment from which the gross income is greater than the determined IRI.

In this regard, the panel has considered the effect of Regulation 39/94 upon the factors to consider in calculating income under Section 81(2) and/or Section 110(1)(e) of the Act.

When examining whether a claimant qualifies for IRI, Section 81(2)(a)(ii) applies to a full-time self-employed earner.

Determination of I.R.I. for full-time earner

[81\(2\)](#) The corporation shall determine the income replacement indemnity for a full-time earner on the following basis:

(a) under clauses (1)(a) and (b), if at the time of the accident

(ii) the full-time earner is self-employed, on the basis of the gross income determined in accordance with the regulations for an employment of the same class, or the gross income the full-time earner earned from his or her employment, whichever is the greater,

Under this provision, the operative element in calculating a claimant's IRI is his or her "gross income". This is to be determined according to one of two alternative formulas. One formula is "the gross income determined in accordance with the regulations for an employment of the same class". The other formula is "the gross income of the full-time earner earned from his or her

employment”. The higher amount will prevail. In the Appellant’s case the calculation of gross income was determined in accordance with the regulations for an employment of the same class.

In assessing whether an Appellant ceases to qualify for IRI, Section 110 of the Act identifies the circumstances when a claimant will cease to qualify. Section 110(1)(e) provides:

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:

(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;

In the appeal before us, the central issue is the meaning of “gross income” in Section 110(1)(e).

Counsel for MPIC has argued that any discussion about the meaning of “gross income” in these provisions is incomplete if it does not include a reference to the Determination of Income and Employment (Universal Bodily Injury Compensation) Regulation, Manitoba Regulation 39/94. Counsel for the Appellant argues that much of that Regulation is dedicated to the notion of GYEI. By contrast, the Act never refers to that concept, referring only to “gross income”. Accordingly, the Regulation does not assist in interpreting Section 110(1)(e).

The panel is of the view that a careful reading of the Act and Regulations suggests that the Regulation is very important to defining all occurrences of the term “gross income” in the Act. The Regulation includes a definition that clarifies that, wherever the Regulation refers to the concept of “GYEI”, it is intended to have the same meaning that “gross income” has in the Act.

Regulation 39/94:

Definitions

1 The following definitions apply in this regulation.

"**gross yearly employment income**" has the same meaning that "**gross income**" has in Part 2 of the Act

In other words, the two concepts are meant to be referring to the same thing.

As well, Section 81(2)(a)(ii) references Regulations for an employment of the same class.

This is a reference to the subject matter of Section 8 of the Regulation.

Regulation 39/94:

GYEI for classes of employment

8 The classes of employment and the corresponding gross yearly employment incomes set out in Schedule C apply in respect of the following provisions of the Act:

- (a) subclause 81(2)(a)(ii) (full-time earner);
- (b) subclause 83(2)(a)(ii) (temporary earner or part-time earner);
- (c) subclause 89(2)(a)(ii) (student);
- (d) subclause 95(2)(a)(ii) (minor);
- (e) section 106 (factors for determining employment);
- (f) section 107 (determination of employment after second anniversary of accident).

However, the rest of the Regulation is not dedicated specifically to classes of employment. It is more generally relevant to all occurrences of the term "gross income". For example, Section 3 of the Regulation consists of three subsections that explain the notion of GYEI from self-employment, and there is nothing about these provisions that has anything to do with classes of employment.

The Act expressly confers upon MPIC the authority to make regulations addressing several points regarding the notion of gross income, with such authority found under Section 202 of the Act.

Regulations

202 Subject to the approval of the Lieutenant Governor in Council, the corporation may make regulations for the purpose of this Part

- (a) defining a word or expression used and not defined in this Act;
- (b) enlarging or restricting the meaning of a word or expression used in this Act;
- (f) respecting gross incomes, including determining gross incomes for salaried workers and self-employed workers, establishing classes of employment, and determining the amount of gross incomes on a weekly or yearly basis;
- (u) respecting any other matter that is incidental or conducive to the attainment of the objects and purposes of this Part.

The panel does not agree that Regulation 39/94 should be disregarded when it comes to understanding the concept of “gross income” in Section 110(1)(e). Generally speaking, regulations are to be presumed to be valid on their face and the panel does not accept the notion that it should ignore Regulation 39/94.

The panel has also had regard to the principle of statutory interpretation regarding the “Presumption of Consistent Expression”. The essential point of this principle is that, whenever the legislature uses the same word or phrase in different provisions of a statute, it is presumed that the Legislature intended the word or phrase to have the same meaning. This is a rebuttable presumption, but in this case, the panel finds that it is reasonable to conclude that the Legislature did not intend for the meaning of “gross income” to shift between the time a person qualifies for IRI to the time they cease to qualify for it.

Accordingly, the panel finds that gross income under Section 110(1)(e) should be interpreted consistently with the interpretation of that term under Section 81(2)(a) of the Act and Regulation 39/94. For the income of the Appellant to be taken into consideration under that Section, it

should be defined as including business income derived from a Canadian-controlled private corporation by way of a significant influence shareholder interest less certain expenses.

Regulation 39/94

GYEI derived from self-employment or a Canadian-controlled private corporation

3(1) In this section, "business income" means the income derived from self-employment or a Canadian-controlled private corporation, by way of proprietorship, partnership interest, or significant influence shareholder interest, less any expense that relates to the income and is allowed under the Income Tax Act (Canada) and The Income Tax Act of Manitoba but not including the following:

- (a) any capital cost allowance or allowance on eligible capital property;
- (b) any capital gain or loss;
- (c) any loss deductible under section 111 (losses from other years) of the Income Tax Act (Canada).

GYEI from self-employment

3(2) Subject to Section 5, a victim's gross yearly employment income derived from self-employment that was carried on at the time of the accident is the greatest amount of business income that the victim received or to which the victim was entitled within the following periods of time:

- (a) for the 52 weeks before the date of the accident;
- (b) for the 52 weeks before the fiscal year end immediately preceding the date of the accident;
- (c) where the victim has operated the business for not less than two fiscal years before the date of the accident, for the 104 weeks before the fiscal year end immediately preceding the date of the accident divided by two;
- (d) where the victim has operated the business for not less than three fiscal years before the date of the accident, for the 156 weeks before the fiscal year end immediately preceding the date of the accident divided by three;

or according to Schedule C.

Definitions

3(3) For the purposes of this section, "Canadian-controlled private corporation" means a Canadian-controlled private corporation as defined in subsection 125(7) of the Income Tax Act (Canada);

"significant influence shareholder" means a shareholder in a Canadian-controlled private corporation who

(a) holds 20% or more of the voting rights in the corporation, and

(b) can demonstrate an active, authoritative influence over the day to day financial and administrative operations of the corporation.

The Appellant meets these definitions of a significant influence shareholder of a Canadian-controlled private corporation. MPIC was correct in applying the Regulation to calculate the gross income received by the Appellant under Section 110(1)(e) as including both employment income and corporate income. In this way, the panel finds that gross income under Section 110(1)(e) is interpreted consistently with the interpretation of that term under Section 81(2) of the Act and Regulation 39/94. The income of the Appellant to be taken into consideration under that Section should be defined as including income from employment and from the corporation.

Accordingly, the panel finds that the Appellant was not entitled to receive IRI benefits for the latter period of 2007 during which, according to Regulation 39/94 and Section 110(1)(e), he received income in excess of his IRI entitlement. Accordingly, the decision of the Internal Review Officer dated May 8, 2008 is hereby confirmed and the Appellant's appeal dismissed.

Dated at Winnipeg this 19th day of August, 2009.

LAURA DIAMOND

DR: PATRICK DOYLE

PAUL JOHNSTON