

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-09-74**

PANEL: Ms Laura Diamond

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

HEARING DATE: March 22, 2010

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

RELEVANT SECTIONS: Sections 81(1) and (2) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 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 was injured in a motor vehicle accident on August 9, 2008. He reported injuries to his hands, shoulders, left arm, face and left leg.

At the time of the accident, the Appellant was employed as a [text deleted] producing daily and weekly newsletters for [text deleted]. Subsequent to the accident, he reported working unpaid overtime hours at [text deleted] to compensate for the time required to perform his duties. He claimed that the injuries from the accident caused him pain and dexterity problems making

overtime necessary and that he worked approximately an extra 10 to 35 hours per week post-accident, without being paid.

On March 26, 2009, the Appellant's case manager issued a decision which indicated that as he continued to work following the motor vehicle accident (albeit longer hours) the injuries sustained in the motor vehicle accident did not preclude him from performing the essential duties of his employment. Accordingly, there was no entitlement to income replacement indemnity benefits.

The Appellant sought an Internal Review of this decision. On June 5, 2009, an Internal Review Officer for MPIC upheld the case manager's decision. The Internal Review Officer found that, post-accident, the Appellant was able to perform the essential duties of his occupation, although there was additional time spent. He had not demonstrated an actual loss of income and was not entitled to IRI benefits on that ground.

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

Preliminary Matters:

Prior to the Appellant's appeal hearing, the Appellant submitted documentation to the Commission which set out the relationship of the Appellant as a sole shareholder of [text deleted] The Appellant's documentation included a summation of the company's gross revenue experience since the accident compared to the same months a year earlier. This documentation submitted that the company suffered a decline in gross income attributable to the consequences of the accident.

At the appeal hearing, counsel for MPIC indicated that the case manager's and Internal Review Officer's decisions dealt only with the Appellant's ability to work and whether he was entitled to Income Replacement Indemnity ("IRI") benefits under Section 81(1) and (2) of the MPIC Act and Section 8 of Manitoba Regulation 37/94. Neither decision dealt with any discussion of income loss by the corporation and possible entitlements that might arise as a result.

Accordingly, counsel for MPIC recommended that this issue of potential income loss of the company be referred back to the Appellant's case manager for determination. After some discussion, the Appellant agreed with this recommendation. Accordingly, it was concluded that, by agreement of the parties, the issue of income loss of the corporation and any Personal Injury Protection Plan ("PIPP") benefits that may flow to the Appellant as a result of that would be referred by [text deleted] to the Appellant's case manager for determination.

Evidence and Submission for the Appellant:

The Appellant indicated that the motor vehicle accident was very serious. Two years later, he is still feeling its effects. He had done everything he could to control his condition or improve it, but had not found this very helpful.

He described his employment as a [text deleted] who produced daily and weekly newsletters which were paid for by clients in advance. He indicated that the company had the obligation to provide the information which had been paid for, but because of the motor vehicle accident it was, and still is, extremely difficult for him to do this.

The Appellant testified that in order to hold the business together he had to work twice as long as his normal work week hours and this still did not prevent income loss by the company. The

Appellant had to work extra hours and even then, felt he did not maintain the quality of his work, which requires a great deal of thinking, reasoning and concentration. This was badly impaired by the motor vehicle accident. The Appellant submitted that MPIC's refusal to compensate him for the overtime hours he was forced to work, is analogous to MPIC refusing to pay a piecework employee for the longer hours required to produce the same number of pieces.

The Appellant also testified that prior to filing his appeal, MPIC had negotiated with him and accepted the principle that his unpaid overtime should be compensated with IRI benefits. However, MPIC then withdrew that decision and no compensation was approved. He felt he had been treated unfairly by MPIC.

The Appellant confirmed that he had not been able to attend at his office for eight days, but that he worked at home during this period, because he was too hurt and too disfigured to attend the office. He continued to produce the daily and weekly newsletters, without missing any publications, because to miss any would be extremely serious. However, he felt that what he produced was not of his usual quality and that it took twice as long to do it. As well, he worked in extreme pain.

The Appellant indicated that what he does is very specialized and he could not hire someone to replace him.

He confirmed that he continued to receive his regular salary.

On cross-examination, the Appellant also stated that it was his understanding that at a meeting with MPIC where his request for IRI benefits was discussed and his financial records requested

by MPIC, there could have been no other reason for requesting such private information if MPIC was not prepared to pay for his income loss. He confirmed that he had never received a letter from MPIC confirming that the overtime would be paid, but indicated that he had come to a verbal understanding that this would happen.

The Appellant indicated that this meeting occurred on approximately March 23, 2009. Counsel for MPIC reviewed the case manager's notes with him which were prepared following that meeting, including the case manager's note indicating that MPIC normally paid for hours of work that people are unable to complete. Yet the Appellant had been surprised when, on March 26, 2009, he received the decision letter indicating that he would not be compensated for unpaid overtime.

The Appellant submitted that he was not able to "substantially" do his job, and he was only able to earn his salary through extraordinary effort and time. He submitted that he was entitled to be compensated for that overtime.

Submission for MPIC:

Counsel for MPIC submitted that, according to the Appellant's testimony, he had continued to work following the motor vehicle accident. He did not miss the publication of any of his newsletters.

MPIC had conducted, through an occupational therapist, a Job Demands Analysis/Percentage of Duties Assessment which showed that the Appellant was able to perform all the duties of his job following the motor vehicle accident, with a notation that extra time was recorded for some duties such as working on the computer.

Counsel submitted that although the Appellant testified that extra time was required, there was no indication that he could not do his duties. He continued to do them and to produce his newsletter, which does not fall within the definition of “substantially unable to perform the duties of one’s occupation” envisioned by the MPIC Act. The Appellant continued to receive his wages as well.

Counsel for MPIC examined Section 81(1) of the MPIC Act which provided that a claimant is entitled to IRI benefits if they are unable to continue their employment. The Appellant was able and did continue his employment, she submitted, and as such was not entitled. There was no income loss. He continued to receive the same pay that he had received before the motor vehicle accident.

With regard to whether MPIC had agreed to pay such an indemnity in discussions, counsel submitted that the Appellant had failed to establish that an agreement had been reached which would lead to MPIC being stopped (sic) in any way from issuing the decision letter of March 26, 2009. The Appellant had testified that it was his understanding that this was the purpose of the meeting of March 23, 2009 and that there could have been no other purpose for such a meeting or requests made by MPIC. However, the MPIC Act requires that decisions of MPIC be provided in writing and no such decision indicating that MPIC would pay IRI benefits to the Appellant was issued. The only written decision issued was contained in the letter of March 26, 2009 denying that benefit.

Accordingly, counsel for MPIC submitted that the Appellant’s appeal should be dismissed.

Discussion:

The onus is on the Appellant, to show, on a balance of probabilities, that he is entitled to receive an IRI benefit as a result of the motor vehicle accident.

Manitoba Regulation 37/94:**Meaning of unable to hold employment**

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

MPIC Act:

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

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
 - (i) the full-time earner holds an employment as a salaried worker, on the basis of the gross income the full-time earner earned from the employment,
 - (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, and

(iii) the full-time earner holds more than one employment, on the basis of the gross income earned from all employment that he or she is unable to continue because of the accident;

(b) under clause (1)(c), the benefit that would have been paid to the full-time earner.

The Commission finds that the Appellant has failed to establish, on the evidence, that MPIC was estopped, through any prior agreement or promise to pay IRI benefits, from issuing the case manager's letter of March 26, 2009 denying such benefits.

The evidence established that the Appellant continued to perform the duties of his job and that he continued to receive all of his wages, subsequent to the motor vehicle accident. Accordingly, he has failed to establish, on a balance of probabilities, that he was substantially unable to perform the essential duties of his employment post-accident or that he was entitled to an income replacement indemnity because he was unable to continue full-time employment as a result of the accident. The Appellant did not demonstrate an inability to perform his duties or a loss of income such that he would be entitled to IRI benefits under the MPIC Act and Regulations.

Accordingly, the Internal Review Officer's Decision of June 5, 2009 is hereby confirmed and the Appellant's appeal is dismissed.

As indicated by counsel for MPIC and agreed to by the parties, the issue of the Appellant's entitlement to PIPP benefits flowing from any loss of income the company may have suffered will be referred back to a case manager for consideration, by counsel for MPIC.

Dated at Winnipeg this 21st day of April, 2010.

LAURA DIAMOND