Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-054

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Leona Barrett** **Ms Jean Moor**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**October 15 and 16, 2012 (with submissions November 5, 2012 and December 3, 2012)**
ISSUE(S):	**Whether the Appellant's Income Replacement Indemnity benefits were properly terminated effective December 31, 2004 based on Section 110(1)(e) of the MPIC Act.**
RELEVANT SECTIONS:	**Sections 81(1); 81(2); 110(1)(e); 111 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 2(1) and 3(1) of Manitoba Regulation 39/94.**

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 October 12, 2004. At the time of the motor vehicle accident the Appellant was self-employed as a farmer and had also worked as a salesman [text deleted].

As a result of injuries suffered in the motor vehicle accident, the Appellant was not able to perform all of his farming duties and was in receipt of Income Replacement Indemnity ("IRI") benefits from MPIC as a result. However, he was able to continue with his other employment and did earn income from that employment.

When determining the IRI benefits to which the Appellant was entitled, MPIC calculated his Gross Yearly Employment Income ("GYEI"). IRI benefits were paid on this basis. However, when MPIC reviewed the income earned by the Appellant (based upon his Income Tax returns from the years 2005 and 2006) it concluded that his total income earned in 2005 and 2006 exceeded the Appellant's GYEI and as such, his entitlement to IRI benefits would end effective December 31, 2004.

This decision was set out by the Appellant's case manager in a letter dated September 24, 2007 which indicated that pursuant to Section 110(1)(e) of the MPIC Act which provides that a victim ceases to be entitled to an IRI benefit when the victim holds an employment from which the gross income is equal to or greater than the gross income on which the victim's IRI is determined. As the income the Appellant earned from his employment (selling [text deleted]) exceeded the GYEI which had been calculated as a basis for his IRI benefits, he was not entitled to receive additional IRI benefits.

The Appellant sought an Internal Review of this decision. At the Internal Review Hearing, the Appellant argued that employment income and self-employed income should not be lumped together. He argued that pursuant to Section 3 of Regulation 39/94 under the MPIC Act, Schedule C should have been used to calculate the Appellant's GYEI.

The Internal Review Officer considered this argument and stated:

> "...However, Section 81(2)(a) is used to determine how an IRI should be calculated for a full time earner. In that subsection the Corporation is to look at a full time earner who holds an employment of a salaried worker, a full time earner who is self-employed, and a full time earner who holds more than one employment. From my reading of that section that would mean that you can be employed and self-employed and that according to Section 81(2)(a)(iii) if you are employed and self-employed at the same time, both of those employments will be lumped together which took place in your client's case. As a result, the GYEI was calculated correctly..."

As there was no dispute that the amounts earned by the Appellant in 2005 and 2006 did exceed the GYEI, the Internal Review Officer concluded that the case manager's decision should be upheld, as the Appellant's income was equal to or greater than the gross income for those years on which the Appellant's IRI was determined.

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

The parties did not introduce any oral testimony at the hearing into the Appellant's appeal, but rather relied upon the documents contained in the Appellant's indexed file.

<u>Submission for the Appellant:</u>

Counsel for the Appellant submitted that the Appellant's IRI benefits were not properly terminated on December 31, 2004 based upon Section 110(1)(e) of the MPIC Act. Counsel's argument turned upon the interpretation of the words "gross income" in Section 81(2)(a)(iii) of the MPIC Act and its impact upon Section 110(1)(e). Counsel submitted that Section 81(2)(a)(iii) requires that the Corporation determine IRI benefits for a full-time earner who 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 motor vehicle accident.

The Appellant's injuries included a separated shoulder, sprained arm, cuts and road rash, sore back and neck. These injuries prevented him from working at his employment as a [text deleted] farmer. However, prior to the motor vehicle accident, the Appellant had also worked at [text deleted] as a salesman [text deleted] and, around August 2004, had also begun selling [text deleted] for [text deleted]. He was able to continue selling [text deleted], in spite of his motor vehicle accident injuries.

A review of his Income Tax returns shows that in 2004 the Appellant earned $17,000 in employment income, over and above his farming income. His 2005 and 2006 Income Tax returns show an increase over this amount in earnings of $44,000 in 2005 and $49,000 in 2006.

Counsel submitted that in taking the salesman income into account in 2005 and 2006, when calculating the Appellant's employment income, MPIC made an error. His IRI was based only upon his farming income and not both incomes. Therefore, the employment income considered to determine his continued entitlement to IRI benefits under Section 110(1)(e) should not be based upon both incomes.

The result of this faulty assessment on the part of MPIC was that because the Appellant held a second job, he was not entitled to receive IRI benefits. This is not right, it was submitted, and is contrary to indemnity principles, as the Appellant was denied insurance for the job he couldn't perform, because he held another job which he could perform. The Appellant's position was that the two incomes should not be lumped together, because Section 81 of the MPIC Act only refers to the income from the employment that the Appellant was unable to continue. Although the Appellant kept advising MPIC that he had another job, which accounted for the income, MPIC continued to apply Section 110(1)(e) in error.

Counsel for the Appellant argued that it could not have been the intention of the legislature, where an individual has two jobs and could only do one, to disentitle him from IRI benefits for the job which he could not do. This would be an absurd result if a farmer who could not complete his farming job due to his motor vehicle accident injuries receives no IRI compensation. This is contrary to the principles of indemnification for insurance purposes.

Counsel submitted that there is reason that both Section 81 and Section 110 of the MPIC Act refer to income from the employment the Appellant was unable to continue. MPIC's approach of adding two jobs and comparing this income to the one the Appellant was still able to perform creates an unfair result. He ought to be able to do as well as he can at his second job, without it affecting the insurability of his farming loss. The motor vehicle accident did not affect the Appellant's ability to be a salesman, and in fairness, the legislation must not lump together all of his income. Rather, a different approach is required for people who have two jobs and, counsel submitted, Section 81 does make this distinction for people who have two jobs.

The Appellant relied upon the Commission's decision in *[text deleted]* AC-07-49. In that case, the victim had a full-time teaching job. As a result of his motor vehicle accident injuries he was not capable of working as a teacher.

However, at the time of the accident the Appellant also worked in a self-employed capacity as an instructor-owner and it was determined that he was capable of performing 50% of his pre-accident duties as an instructor-owner. The Appellant argued that his IRI benefits had not been properly calculated when MPIC reduced his IRI from the teaching position he was unable to hold by virtue of the fact he was capable of holding 50% of his duties in his self-employment.

The Commission found that pursuant to Section 81(2)(iii) of the MPIC Act, a full-time earner who holds more than one employment is entitled to IRI benefits on the basis of the gross income earned from all employment that he or she is unable to continue because of the accident. The Commission stated:

> "...The methodology which reduced the Appellant's IRI benefits resulted in a fundamental unfairness to the Appellant. The reduction in his IRI to account for the fact that he could carry out fifty (50%) percent of his self-employed duties had the effect of reducing the IRI attributable to the Appellant's teaching position, even though he was not able to continue that employment. The administrative policy implemented by MPIC had the effect of reducing the Appellant's combined IRI for his two jobs, to an amount that was less than the IRI to which the Appellant would have been entitled if he only held the teaching position. As a result, the Appellant was negatively impacted, which we find improper."

Counsel submitted that the result should be similar in this appeal. The Appellant already held the salesman's job when he was injured in the motor vehicle accident. He continued to work at this job, but he could not perform all of his farm duties and so, on that basis, he was entitled to IRI, no matter whether he had income off the farm or not. This is a general principle of indemnity under insurance principles at common law and is meant to put the Appellant back to his original position and make him whole.

Submission for MPIC:

Counsel for MPIC indicated that MPIC had not clearly understood, at the time when the Appellant's IRI benefits were calculated, that he had a second employment. He indicated to the Commission that he would require time to consult again with the IRI calculator, and review the argument which the Appellant's counsel had put forward at the hearing. He indicated that he wished to submit his argument in writing, after reviewing all of the material.

Counsel for the Appellant expressed his disappointment that MPIC was not prepared to proceed with a submission at the hearing.

However, the Commission indicated that it would provide counsel for MPIC with three weeks to submit a written argument to the Commission and counsel for the Appellant. This submission was received on November 5, 2012.

Counsel for MPIC submitted the Appellant's benefits were properly terminated in accordance with Section 110(1)(e) of the MPIC Act. He noted that for reasons that were not entirely clear, the Appellant did not initially disclose to MPIC the second employment which he held at the time of the motor vehicle accident, as there was no reference to that employment in the Application for Compensation. It was not until MPIC received the Appellant's Income Tax information that it became aware of his claim to hold a second employment at the time of the accident. However, MPIC accepted the Appellant's second employment and indicated that it was properly taken into account in the reconciliation of IRI benefits completed by MPIC's IRI calculator provided by counsel for MPIC on January 26, 2011.

Counsel for MPIC noted that Section 181(1) and (2) of the MPIC Act provides for entitlement to IRI benefits. As the Appellant had two employments at the time of the accident, Section 81(2)(a)(iii) of the MPIC Act is particularly applicable to a situation where someone has more than one employment. That Section provides how the IRI of a full-time earner shall be determined if "(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."*

Section 111(1) of the MPIC Act provides that the Appellant's IRI should be equal to 90% of net income computed on a yearly basis, and Section 1 of the Regulations defines "*Gross* Yearly Employment Income*"* as having the same meaning as "Gross Income" under Part 2 of the MPIC Act.

A review of Regulation 39/94, and in particular Section 2(a) and 3(1) of that Regulation, demonstrates how the Appellant's GYEI was calculated for both his employment and self-employment positions. The GYEI from his employment fell under Section 2 and was comprised of salary or wages and the GYEI from self-employment fell under Section 3(1) of the Regulation.

Counsel for MPIC characterized the Appellant's argument as a claim that Section 81(2) somehow creates an ongoing indefinite IRI entitlement where a claimant holds two jobs at the time of the accident and cannot resume one of them. However, it was submitted that this interpretation would mean that if the Appellant directed all or more of his efforts to his sales employment, he could continue to receive IRI benefits for his farming position as long as he couldn't resume that occupation. No matter how high the Appellant's income grows from selling [text deleted], he would still be entitled to receive IRI.

MPIC took the position that this result was clearly not intended by the legislature. The purpose of IRI reimbursement under the MPIC Act is to financially restore the injured party to within 90% of the position he was in before the accident.

Counsel for the Appellant had acknowledged that if he had only one job at the time of the accident which he could no longer perform and he subsequently obtained an alternate position from which he earned twice as much income as the original position, his IRI benefits would be properly terminated in accordance with Section 110(1)(e) of the MPIC Act. Counsel submitted that this was incompatible with the Appellant's interpretation of how Section 81(2)(a)(iii) and Section 110(1)(e) should operate.

MPIC took the position that the Appellant's interpretation of Section 81(2)(a)(iii) created a potentially absurd result that was not supported by a plain reading of the legislation. It was clearly not intended that an individual holding more than one employment at the time of the accident could continue to receive IRI indefinitely as long as they are unable to resume one specific employment, despite what they earned from their other positions.

Counsel submitted that if MPIC had been aware of the Appellant's second employment from the outset, his GYEI would have been calculated by combining both employments and pro-rating the IRI entitlement for the employment he could no longer perform as a result of the accident. The IRI calculator's reconciliation factored in the second employment to produce a combined GYEI of $36,557.47.

i.e.	Self-employment GYEI	=	$28,185.00	(incapable job)
	Employment GYEI	=	8,372.47	(second job)
	Combined GYEI		$36,557.47	

As a result, the pro-rated IRI entitlement for the incapable job was $28,185.

Pursuant to these calculations, the Appellant's entitlement to IRI benefits would be terminated when his gross income from employment exceeded the combined GYEI of $36,557.47, pursuant to the application of Section 110(1)(e) of the MPIC Act. As the evidence indicates that the Appellant did report income in excess of this figure, the termination of his IRI benefits was proper.

Counsel noted that the Internal Review Officer was not aware that the Appellant held two employments at the time of the accident. Accordingly, her reference to lumping both employments together, in her Internal Review Decision, did not envision the IRI calculator's reconciliation, which was not completed until after November 23, 2010. The Internal Review Officer was merely referring to adding them together in the Section 110(1)(e) part of the decision.

Counsel for MPIC addressed the Commission's decision in *[text deleted]* AC-07-49, which dealt with issues relating to maximum insurable earnings limits and not Section 110(1)(e) of the MPIC Act. He submitted that therefore, it was not applicable to the facts in the present case.

Counsel submitted that Section 110(1)(e) does not require that the Appellant have the capacity to return to the pre-accident employment from which he receives IRI benefits. Rather, that concept is contemplated by Section 110(1)(a) of the MPIC Act. Section 110(1)(e) operates to terminate IRI benefits when the individual is back in essentially the same or better financial position as he was at the date of the accident.

The provision contemplates "*an employment*" and does not specify that it must be the same employment held prior to the accident. It encompasses any employment where the gross income is greater than that which his IRI entitlement was based upon.

Accordingly, as the calculations in the IRI calculator's reconciliation were properly based upon the requirements of Section 81(2)(a)(iii) and Section 110(1)(e) of the MPIC Act, counsel submitted that the Appellant's IRI benefits had been properly terminated and the Internal Review decision should be upheld, with the appeal dismissed.

<u>Appellant's Reply:</u>

The Commission received a submission from the Appellant, in reply to the submission of MPIC, on December 3, 2012.

Counsel for the Appellant submitted that if, as MPIC submitted, GYEI includes income from both the Appellant's employment and self-employment and GYEI has the same meaning that "Gross Income" has in Part 2 of the Act, then GYEI should only include income from "all employment that he or she is unable to continue because of the accident". In this case, that is the self-employment.

Although counsel for MPIC submitted that Sections 2(a) and 3(1) of Regulation 39/94 demonstrate how the Appellant's GYEI was calculated for both his employment and self-employment positions, counsel for the Appellant noted that Regulation 39/94 makes no mention of how to calculate GYEI for a victim who holds more than one employment. It sets out how GYEI not derived from self-employment is to be calculated but does not state that the GYEI for

a victim who holds more than one employment is calculated by combining both employments and pro-rating the IRI entitlement for the employment he can no longer perform.

Counsel for the Appellant submitted that for MPIC's argument to make sense the term "the gross income on which victims income replacement indemnity is determined" referred to in s. 110(1)(e) of the Act must be the victim's gross income from all employment held at the time of the accident prior to it being pro-rated. He submitted that this is inconsistent with previous references to this section by the Commission in *[text deleted],* AC-08-33 and *[text deleted],* AC-08-65, where the Commission stated that:

> "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"

The underlined phrase "greater than the determined IRI" is substituted for the phrase "greater than the gross income on which victim's Income Replacement Indemnity is determined". Thus, determined IRI is the proper income to be compared. Further, if GYE has the same meaning that gross income has in Part 2 of the Act, than gross income in Section 81(2)(a)(iii) means income from all employment that he is unable to continue because of the accident. The Appellant submitted that it was important for there to be consistency in statutory interpretation, as the Commission noted in [text deleted], AC-03-33 at page 12:

> "This 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."

It follows, he submitted, that gross income under Section 110(1)(e) should be interpreted consistently with the interpretation of that term under Section 81(2)(a)(iii).

Further, counsel for the Appellant characterized MPIC's submission that the interpretation sought by the Appellant would mean that the Appellant could continue receiving IRI benefits indefinitely as speculative, and not the question before the Commission. Further, where an individual was unable to resume a specific employment, MPI could determine a new employment under Section 107 of the Act at the second anniversary date of the accident, or terminate IRI benefits under Section 160(c) if the individual would not accept a new employment.

In summary, the Appellant submitted:

> "Section 110(1)(e) operates to terminate IRI benefits when the individual is back in essentially the same or better financial situation as he was at the date of the accident. [The Appellant] is unable to perform 25% of his farm duties. His farm income has yet to exceed the determined IRI so he should still be entitled to receive IRI. As of February of this year farming is his only occupation. It is not practical for him to give up farming for a new employment when he is capable of 75% of the duties....."

<u>Discussion:</u>

The MPIC Act provides:

> **Entitlement to I.R.I.**
>
> 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;

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;

I.R.I. is 90% of net income

111(1) The income replacement indemnity of a victim under this Division is equal to 90% of his or her net income computed on a yearly basis.

Manitoba Regulation 39/94 provides:

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.*

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:

(a) in the case of a full-time earner, 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;

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).

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in concluding that the Appellant's IRI benefits should be terminated on December 1, 2004. The panel has reviewed the documents on the Appellant's indexed file as well as the submissions of counsel.

We find that in determining the Appellant's IRI benefits, MPIC ultimately took into consideration the Appellant's income from both his employment and his self-employment. Although MPIC appears to have been initially unaware of the sales employment income, and the Internal Review decision of June 17, 2008 miscalculated the total income earned, this was set right by the IRI calculator's memorandum dated October 24, 2010:

"Claimant submitted the following documents to verify his employment earnings with [text deleted], for review:

- Letter from [text deleted] detailing the claimant's commission earnings earned prior to the MVA
- Spreadsheet showing claimant commission earnings from sales taking place August 12, 2004 to July 4, 2005
- Pay stub for the period ending June 15 – July 15, 2005

As per review of the information submitted, the claimant's employment GYEI has been established and added to the claimant's self-employed GYEI.

As per review of sales spreadsheet, claimant earned $5,574 of commission earnings for the period of August 1 (start date of employment) to March 31, 2005 (243 days).
Employed GYEI - $5,574/ 243 days * 365 days = $8,372.47

October 21, 2004:
Employed GYEI = $8,372.47
Self-employed GYEI - $28,185
Combined GYEI $36,557.47

2005 Annual Tax Review:

As per review of 2005 Detailed Tax Return, claimant has farming income & employment income. It has been noted that the claimant is 60% owner of the farming operation.

2005 Taxation Year:
Employment income = $26,673.50
Other employment income = $1,200.00
Gross farming income = $108,071.00
Net farming income = $76.00
CCA = 428,367.00

Total gross income for IRI purposes = $26,673.50 + $1,200.00 + $76 + ($28,367 * .6) = $44,969.70

006 Taxation Year:
Employment income: $34,580.00
Gross farming income: $73,845.00
Net farming income = ($3,749.00)
CCA = $28,227.00

Total gross income for IRI purposes = $34,580.00 + (-3,749) + (28,227 * .6) = $47,676.20"

These same two incomes were then considered when determining whether the Appellant's gross income earned was equal to or greater than the gross income on which his IRI benefits had been determined.

This can be distinguished from the factors before the Commission in the *[text deleted]* decision, supra. In that case, the Commission only had to consider the initial determination of the Appellant's level of income, which was used to determine his IRI benefits. That calculation dealt with the application of Section 114 of the MPIC Act, which sets a maximum cap on IRI,

subject to indexing. The panel found that MPIC did not act fairly when it used both the employment which the Appellant could not perform and the self-employment which he could perform in part, when using this cap to reduce his IRI benefit.

Section 110(1)(e) of the MPIC Act and the events that might end entitlement to IRI were not considered and applied in that appeal, as they were not relevant.

This panel does not find that MPIC acted unfairly when it used the Appellant's employment and self-employment to calculate both his level of IRI benefits and then the income he earned which might trigger the application of Section 110(1)(e) of the MPIC Act.

Section 110(1)(e) of the MPIC Act applies to end entitlement to IRI benefits when "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". (Emphasis added)

Section 70(1) of the MPIC Act defines employment as:

> **"employment"** means any remunerative occupation;

The Commission finds that this definition and Section 110(1)(e) operate to direct MPIC to terminate IRI benefits when the victim's income from any remunerative occupation is equal to or greater than the gross income on which his IRI was determined. In this case, this includes income from both the Appellant's employment and self-employment.

Accordingly, the Commission finds that the Internal Review decision, as amended by the IRI calculator's memorandum of October 24, 2010, was correct and should be upheld. MPIC did not err in terminating the Appellant's IRI benefits under Section 110(1)(e) based upon the income he had earned from both his self-employment and his employment, as this exceeded the gross income on which his IRI benefits were determined. The Appellant's appeal is therefore dismissed.

Dated at Winnipeg this 19th day of December, 2012.

LAURA DIAMOND

LEONA BARRETT

JEAN MOOR