Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-010 AND AC-11-077

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Linda Newton** **Ms Wendy Sol**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.**
HEARING DATE:	**June 19, 2012**
ISSUE(S):	**Whether Income Replacement Indemnity benefits were correctly calculated.**
RELEVANT SECTIONS:	**Sections 83 and 84 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 2, 5 and 6 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 April 13, 2008. As a result of her injuries she was unable to work and became entitled to Income Replacement Indemnity ("IRI") benefits.

The Appellant filed appeals with the Commission regarding several issues. On June 25, 2009, in AC-08-117, the Commission found that the Appellant was a temporary earner at the time of the accident and that her entitlement to benefits for the first 180 days after the motor vehicle accident should be determined according to Section 83(1) of the MPIC Act.

On August 27, 2010, in AC-09-111, the Commission found that MPIC had prematurely terminated the Appellant's IRI benefits and found that she was unable to hold her determined employment and that her IRI benefits should be reinstated.

On February 23, 2011, in AC-09-148, the Commission dismissed the Appellant's appeal, finding that the appropriate 180 day determination of the Appellant's employment was "support occupations in motion pictures, broadcasting and the performing arts". The Commission also concluded that the issue of whether the Appellant's IRI benefits had been correctly calculated in accordance with Section 84(1) of the MPIC Act, for the period following the first 180 days after the motor vehicle accident, was not before it on appeal. The panel referred that matter back to MPIC's case manager for a determination.

This led to appeals regarding two Internal Review decisions from MPIC (dated January 25 and June 7, 2011) dealing with the calculation of her IRI benefits under Section 84 of the MPIC Act. The Appellant disagreed with several of the methods used to calculate her IRI benefits and these decisions were also appealed to the Commission.

The Commission held a hearing on November 7, 2011 and heard submissions from the Appellant and MPIC regarding MPIC's calculation of the Appellant's IRI benefits. At the hearing, counsel for MPIC, while disagreeing with the Appellant's interpretation of Section 84 of the MPIC Act and of the Regulations, did agree that in several areas the IRI calculations did warrant further examination as MPIC had failed to properly apply all of the appropriate sections of the MPIC Act and Regulations in its calculations.

Although the Internal Review decisions in question did not directly deal with entitlements under Section 83 of the Act, the methods for calculating these amounts were considered, as they may be relevant to the calculation of amounts under Section 84 of the Act.

The panel summarized:

> "Counsel for MPIC admitted that MPIC had failed to follow the procedure dictated by these sections of the Act and Regulations, when calculating the Appellant's 181 day entitlement to IRI benefits. What the IRI calculator should have done, she submits, was to go through and compile information from the 5 years prior to the motor vehicle accident and take that into consideration in the calculations. It does not appear, she noted, that this had occurred.
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> Rather, the IRI calculator had simply taken an average of the IRI calculations from the first 180 days.
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> Counsel for MPIC also submitted that the Appellant's interpretation of the legislation leads to an illogical result. She submitted that if a claimant was to have held an unusually high paying job for a portion of the first 180 days following an accident, MPIC should not be required to base IRI benefits after 180 days on this amount alone, because it does not correctly reflect the earning potential the claimant has lost as a result of the motor vehicle accident.
>
> The Commission has reviewed Section 84 of the Act and Regulation 39/94. The panel agrees with the submission of counsel for MPIC that all of these provisions must be considered together and applied when calculating IRI benefits pursuant to Section 84(1).
>
> As MPIC has failed to apply all of the appropriate sections of the Act and Regulations referred to above, the Commission will uphold the Appellant's appeal in this regard, and overturn the decisions of the Internal Review Officer dated January 25, 2011 and June 7, 2011. The Commission will refer the calculation of the Appellant's IRI benefits for the period from the 181st day following the motor vehicle accident to date, back to the IRI calculator for recalculation."

In regard to the Appellant's submission that the IRI calculator had failed to include wage amounts for "kit rental" when calculating GYEI for her promised employment, the panel noted:

> "The panel agrees with counsel for MPIC that there is insufficient evidence or information on the Appellant's indexed file to determine whether kit rental was properly considered in MPIC's calculations of IRI entitlement. This could impact IRI calculations for both the first 180 days, and the period from the 181st day. Accordingly, the panel will refer this issue back to the IRI calculator for investigation and consideration."

In regard to the Appellant's submission that her IRI benefits were not properly calculated as the amount used for income calculation would be based on the amounts received by a casual worker, with lower seniority, who ultimately filled the positions, the panel noted:

> "Counsel for MPIC indicated that MPIC relied, in this regard, upon information received from the Appellant's business agent. However, she offered to ask the IRI calculator to investigate this issue in the recalculation process.
>
> Accordingly, the panel will refer this issue back to the IRI calculator for investigation and consideration."

In regard to the Appellant's submission that MPIC had erred in failing to contact all of the three different unions which facilitated the Appellant's access to employment, the panel noted:

> "Counsel for MPIC indicated that as the materials on the Appellant's indexed file did not indicate whether or not these additional unions were contacted, this would be an appropriate issue to be clarified at the case management and IRI calculation level.
>
> Accordingly, the Commission will refer the issue of investigation of all three unions through which the Appellant arranged employment to the Appellant's case manager and IRI calculator for investigation and consideration."

The Commission's decision following the hearing of November 7, 2011, and dated December 12, 2011, stated that:

> "A. The Appellant's appeal regarding the calculation of IRI benefits as a temporary earner between April 21, 2008 and April 15, 2009 and between April 16, 2009 and September 30, 2010 will be referred back to the case manager and IRI calculator for recalculation;
>
> B. the Appellant's appeal on the issues of "kit rental", seniority, part-time earnings and investigation with the Appellant's unions will be referred back to the case manager and IRI calculator for recalculation;
>
> C. the notional deductions for CPP, EI and Income Tax benefits, as well as interest calculations, will then be recalculated regarding the new IRI benefit calculations;
>
> D. the Appellant shall be entitled to interest upon the monies due to her by reason of the foregoing decision, in accordance with Section 163 of the MPIC Act;
>
> E. the Commission shall retain jurisdiction in this matter and if the parties are unable to agree on the amount of compensation either party may refer this issue back to the Commission for final determination;

F. the decisions of Manitoba Public Insurance Corporation's Internal Review Officer, bearing date January 25, 2011 and June 7, 2011 will be varied accordingly.

Following the Commission's decision of December 12, 2011, the parties were still unable to agree regarding the proper calculation of the Appellant's IRI benefits. The hearing was reconvened on June 19, 2012 to deal with this issue. Prior to the hearing, the parties, at the Commission's request, provided written submissions setting out their positions regarding the appropriate calculations for the Appellant's IRI benefits. As well, the Appellant gave evidence at the hearing regarding methods of payment from her occupation, and both parties made oral submissions regarding appropriate calculations. The outstanding issues between the parties addressed at the hearing were:

A) Section 83 calculation of IRI benefits (the first 180 days after the accident) In particular:

i. seniority levels used in calculating wage amounts used in determining the Appellant's IRI entitlement;

ii. MPIC's investigation with other unions to which the Appellant belonged regarding other employment she would have held in the period following the motor vehicle accident.

iii. inclusion of amount for "kit rental" in the Appellant's IRI calculation.

B) The method of calculation of IRI benefits from the 181st day following the accident.

Evidence for the Appellant:

The Appellant testified at the hearing held on June 19, 2012 in order to give background information regarding payment procedures for kit rentals, seniority and wage rates, and the method for obtaining employment through her unions.

The Appellant explained that at the time of the motor vehicle accident, the high season for film work was approaching. While she explained that she usually works in theatre in the winter, in the summertime her work is almost always in film. She belonged to three unions: one was a [Union #1], one was a [Union #2] which did not operate by seniority, and the third was a [Union #3] which operated by seniority.

The Appellant explained that when MPIC contacted her business manager to calculate the amounts she would have earned in the first 180 days following the motor vehicle accident, the wages that were used were based upon the wages which would flow to her replacement, an apprentice or casual, and did not reflect her seniority standing. She stated that historically, she would have been earning, on average, around $1,000 per week during this period. Because MPIC used averages based upon her business manager's information, which did not reflect her seniority or explore jobs she might have held through other unions, the calculations used were not correct.

The Appellant explained that part of any job included, on top of wages, an amount for "kit rental". This included the requirement for the Appellant to provide such items as cell phones, laptops, scanners, art department supplies, cameras and software. These are items that belong to her and that she uses on the production. Production budgets provide levels of compensation for her in return for providing those materials. The budget of the production will determine where it falls in a tier system and how much compensation she would be entitled to for the kit rental. She stated that on average, the amount was $100 a week, although amounts varied between jobs and productions.

The Appellant provided copies of documents such as "crew weekly time sheets" and "time report summary (crew)", pay stubs and rentals history breakdowns. These showed the amounts which the Appellant had received for kit rentals while working in various positions. The Appellant explained that these amounts were reflected in her paycheques, included in gross pay by her employers and claimed by her as taxable income when she filed her Income Tax Returns.

Submissions:

A. Section 83 Calculation of IRI during the first 180 days:

(i) and (ii) Seniority and Investigation with Unions

The Appellant submitted that MPIC had failed to properly investigate the amounts that she would have made following the motor vehicle accident, by failing to enquire of the three different unions of which she was a member as well as to take into consideration her seniority level at the time. The Appellant submitted that she would have been offered more than part-time employment during the period. MPIC failed to investigate all the various employments that she could have held across the three different union industries. As well, all the jobs that were calculated within the first 180 days following the accident were done so on the basis of someone else's status, using the individuals that replaced her, who were apprentices or casual workers. She submitted that her potential earnings were based upon the income of another member working in a different capacity and her earnings.

Counsel for MPIC noted that, in accordance with the Appellant's testimony, the only union that proceeded by seniority was [Union #3]. As well, MPIC had collected information regarding the jobs that the Appellant would have been offered, in the first 180 days from her business agent, [text deleted] MPIC submitted that the business agent would have been fully aware of the Appellant's seniority when providing information regarding the job she would have been offered

and the wages she would have made. A series of letters on the Appellant's indexed file from [Appellant's business agent] set out, in some detail, the jobs that the Appellant would have done, as well as the positions, hours of work and wage rates which she could have expected.

Further, MPIC noted that it based its IRI calculations on five different jobs which the Appellant would have held in the first 180 days following the motor vehicle accident. As indicated by the employment dates, MPIC received information demonstrating that the Appellant would have had promised employment for all but five days of the 180 days following the accident. With this full employment, it is unlikely that the Appellant would have attained other employment and therefore MPIC had properly investigated and calculated IRI on this basis.

(iii) Kit rental:

The Appellant submitted that amounts paid to her for kit rentals were part of her wage and were taxable income recognized when she filed her returns with Revenue Canada. She submitted that the correct interpretation of the kit rental payments was as income. She would have been working on those jobs, not as an independent contractor, but as an employee. The same logic should be applied to it as might be applied to vacation pay or per diem amounts. The kit rental items were items she had to provide in order to be employed and she was compensated as such, with those amounts being shown on her pay stubs as gross pay.

Counsel for MPIC submitted that the kit rental payments to the Appellant were similar to a uniform allowance. Since the Appellant was not working; she did not need the items in the kit rental, just as she would not have needed a uniform if she was not working. No reimbursement was necessary for loss such as wear and tear on the items, new replacement of printer cartridges or memory sticks, as when she was not working the items would not be used.

In the alternative, counsel for MPIC submitted that should the panel find that kit rental amounts were a properly reimbursable item, the calculation of amounts should not be based upon the averages which the Appellant had put forward, but rather should be referred back to the case manager to do a proper calculation based upon the collective agreement in effect at the time for the projects listed in the IRI calculation.

B. Calculation of IRI After the First 180 Days:

The Appellant submitted that MPIC had not properly applied Section 84 of the MPIC Act in determining her IRI benefits after the first 180 days. She submitted that MPIC had misinterpreted the meaning of Section 84(1) and 84(3) of the MPIC Act as well as Regulation 39/94.

MPIC had simply taken the jobs she would have held during the first 180 days after the motor vehicle accident and divided this to come up with an average entitlement of approximately $41,000 annually. MPIC had asserted that the high level of earnings which she would have enjoyed with the first of those positions ([text deleted]) was an anomaly and to allow her to collect IRI on this basis after the first 180 days would have resulted in unjust enrichment. However, the Appellant maintained that the scheme of the MPIC Act and Regulations provided that the IRI she would receive after the first 180 days "shall not be less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident" (see Section 84(1)).

Section 5(2) of the Regulations dictates that the Gross Yearly Employment Income ("GYEI") for a temporary earner after the 180th day following the accident will be determined by the greatest

of the amounts received under Section 5(1) (GYEI during the first 180 days after the accident, as calculated under Section 2) or Section 6, which considers the GYEI in the five years preceding the accident.

Further, Section 2 of Manitoba Regulation 39/94, provides that GYEI as a temporary earner should be based on employment she would have held if the accident had not occurred and that is the greater of "the salary or wages received or receivable for the pay period in which the accident occurred..." and "the salary or wages receivable during the first 180 days following the date of the accident divided by 180...".

All of these provisions require MPIC to focus on the greatest amount. In her case, the Appellant submitted, the greatest IRI payment she received was based upon promised employment she would have held with [text deleted] between April 15 and June 2, 2008, which resulted in a GYEI of $72,006.70 and a bi-weekly entitlement of $1,731.67.

The Appellant distinguished between the calculations to be made under Section 83(1) of the MPIC Act, which called for IRI calculation based upon the specific employments the Appellant would have held during that period. Under Section 84, when determining IRI benefits after the first 180 days, a different scheme applies. It is not open to MPIC, she argued, to loosely interpret that legislation by attempting to base IRI under Section 84(1) on some average of earnings when the legislation does not speak to that.

The Appellant noted that Section 84 was dealing with a situation, after 181 days, of more chronicity, and that the legislation was very clear that the greatest amounts should be applied. Nothing in the MPIC Act or Regulations stated that these amounts should be averaged.

Counsel for MPIC submitted that Section 84(1) of the Act must be considered in conjunction with Section 84(3) of the MPIC Act, as well as the Regulations. Since Section 84(3) requires a consideration of the employment the Appellant could have held as well as her work experience and earnings and the Regulations, the IRI calculator undertook the calculation under Section 6 of the Regulations, which provides that the GYEI of a temporary earner after the 180th day should be calculated using the greatest GYEI earned by the Appellant from employment in any of the five calendar years preceding the motor vehicle accident.

The IRI calculator determined the earnings of the Appellant for each of the five calendar years preceding the accident and concluded that, on an indexed basis, the greatest amount was $33,077.91 annually. In this way, MPIC considered Section 84(3) of the MPIC Act, which, counsel submitted, tempers 84(1) and requires MPIC to look at the work experience of the Appellant in the five years prior to the motor vehicle accident.

That number was then compared with the highest amount that the Appellant would be considered to have earned in the first 180 days following the accident, which was approximately $72,000. Since this is a much higher amount, counsel for MPIC submitted that it was an irregularity.

Therefore, MPIC used this information regarding the Appellant's earnings in the previous five years to conclude that the fairest approach was to use the average earnings that the Appellant would have earned in the first 180 days, which would result in a GYEI of approximately $41,000. This number was greater than the highest earnings from the previous five years (approximately $33,000) and, as such, the IRI calculator took an average of the GYEIs calculated based on the Appellant's potential earnings in the first 180 days following the accident

of $41,379.03. This was used to calculate the Appellant's IRI entitlement from the 181st day onward, in accordance with Section 84(1) and 84(3) of the MPIC Act.

Discussion:

The MPIC Act 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;
>
> (b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.
>
> **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;
>
> **Entitlement to I.R.I. after first 180 days**
>
> 84(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold

the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

Determination of I.R.I.

84(3) The corporation shall determine the income replacement indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment, considering

(a) whether the victim could have held the employment on a full-time or part-time basis;

(b) the work experience and earnings of the victim in the five years before the accident; and

(c) the regulations.

Manitoba Regulation 39/94 provides:

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;

(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;

(d) any of the following benefits, to the extent that the benefit is not received as a result of the accident

(vii) the cash value of any other benefit that the victim received, or was entitled to receive, in the 52 weeks before the date of the accident;

GYEI of a temporary or part-time earner for first 180 days

5(1) The gross yearly employment income of a temporary earner or part-time earner for the first 180 days after the date of accident is the amount calculated under sections 2 and 3.

GYEI of temporary earner or part-time earner after 180th day

> 5(2) The gross yearly employment income for a temporary earner or part-time earner after the 180th day following the date of the accident is the greatest of the amounts determined under subsection (1) and sections 6 and 7.
>
> **GYEI of victim holding employment corresponding to determined employment for five years and at time of accident**
> 6 The gross yearly employment income of a victim who, at the time of the accident, held employment corresponding to employment determined for him or her by the corporation and who, in the five calendar years preceding the date of the accident, held such employment, is the greatest gross yearly employment income earned by the victim from the employment in any of those calendar years as determined under sections 2 and 3, indexed under Schedule B and then adjusted under Schedule A.

The onus is on the Appellant to show, on a balance of probabilities, that her IRI benefits were not correctly calculated by MPIC. The panel has reviewed the documentary evidence on the Appellant's file, the verbal testimony of the Appellant and the oral and written submissions of both the Appellant and counsel for MPIC.

A. Calculation of IRI Benefits for the first 180 Days:

i) Seniority

The Appellant argued that the amounts used to calculate her GYEI and IRI entitlement during the first 180 days were based on the rates which would have been earned by her replacements. These amounts would have been much lower, she maintains, than the rates she would have attracted, as she had far greater seniority. The Appellant argued that the information MPIC obtained from her business agent, [text deleted], and the production accountant for [text deleted] were vague and general and did not address her specific situation.

Counsel for MPIC argued that they had properly investigated the wages the Appellant would have earned, basing its calculations upon information obtained from her business agent, who was well familiar with her seniority level and the wages she would have earned.

The evidence established that seniority was relevant for the [text deleted] work of [Union #3] only. However, the Appellant failed to produce further evidence of her seniority standing or the relevant seniority position of her replacements. No evidence was provided regarding the seniority lists, the rates the replacements received or what the Appellant says she should have received instead.

The panel finds that the Appellant has failed to meet the onus upon her of establishing, through the evidence and on a balance of probabilities, that the Internal Review Officer erred in omitting seniority variations and accepting the amounts used in calculating the Appellant's potential earnings during the first 180 days following the motor vehicle accident.

ii) Investigations with Unions:

The Appellant took the position that MPIC failed to properly investigate with all three of her unions as to further jobs that she would have held, beyond the five jobs listed in MPIC's submission which were used to calculate IRI benefits during the first 180 days following the motor vehicle accident.

MPIC argued that the calculations performed by the IRI calculator showed the Appellant was entitled to wages for all but five of the first 180 days following the motor vehicle accident and that her IRI benefits were calculated on this basis. Accordingly, it was unlikely that there was potential work missing from this calculation.

The panel finds that the Appellant did not produce sufficient evidence to meet the onus upon her to show, on a balance of probabilities, that the Internal Review Officer erred in accepting the case manager and IRI calculator's assessment of the work that the Appellant would have held during the first 180 days following the motor vehicle accident.

iii) Kit Rental:

The Appellant argued that she would have received approximately $100 a week, on average, for kit rentals. She took the position that she should be entitled to reimbursement of the amount for kit rentals in connection with her promised employment with [text deleted], although she was not seeking reimbursement of the kit rental amount regarding the calculation of any other promised employments.

MPIC took the position that amounts for kit rental should not be included in the Appellant's GYEI calculation because the Appellant would not be required to provide these items while off work and therefore there is nothing to reimburse.

The panel agrees with the Appellant that she should be entitled to have kit rental amounts included in the calculation of her IRI benefits. The Appellant provided documentary evidence, including statements of earnings and pay stubs that showed kit rental as taxable income. She also provided a rental history for various years in jobs that showed compensation for kit rental, with amounts depending upon the budget of the particular production and the category of job held. The Appellant explained that kit rental involves her providing various items ranging from laptop computers to software and printers. The amounts paid for this are determined by the budget of the particular production which in turn determines the tier of the project. Then, certain job categories attract weekly kit rental amounts which are set out in the collective agreement for each tiered production level.

The panel was not persuaded by MPIC's submission that these amounts were only intended to compensate for items actually used and that since the Appellant did not actually fill the positions and perform the jobs, she had not lost out on these amounts. Rather, the panel finds that the

provision of the kit is a requirement in order to be hired and do the job and the kit rental is part of the salary, remuneration or compensation package for the job and should be included in the amounts used by MPIC to calculate GYEI and IRI benefits.

This is consistent with Manitoba Regulation 39/94, Section 2(d)(vii):

> **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:
>
> (d) any of the following benefits, to the extent that the benefit is not received as a result of the accident
> (vii) the cash value of any other benefit that the victim received, or was entitled to receive, in the 52 weeks before the date of the accident;

However, the amounts that the Appellant suggested would have been paid for weekly kit rental were approximations based upon historical data or other productions, which may have been paid at a higher or lower kit rental rate. The panel did not receive sufficient evidence particularizing the amounts the Appellant would have been paid in weekly kit rental. Accordingly, the panel will refer the amount of the weekly kit rental to be used in the calculation of GYEI and IRI for the [text deleted] position to the case manager for calculation. The panel orders the case manager to obtain a copy of the relevant collective bargaining agreement in force for the period (April 15, 2008), determine the budget and tier level of that production, and calculate the kit rental amount for an [text deleted] Director on that production. This weekly amount should then be included in the calculation of the Appellant's GYEI and IRI benefits.

B. <u>Calculation of IRI benefits after the first 180 days:</u>

The panel notes that MPIC made a number of errors when calculating amounts to consider when arriving at appropriate IRI after the first 180 days. Of concern to the panel were errors found in basic calculation. For example, MPIC used insurable earnings from five records of employment

supplied by the Appellant for the year 2006, which were included in the Appellant's indexed file. In its submission, MPIC calculated earnings for 2006 in the amount of $28,582.53.

However, when the panel reviewed the same five records of employment and calculated the totals, this calculation resulted in total earnings of $35,322.54, even before annualization or indexing.

Another example was found when MPIC initially submitted that there was no tax information available for the Appellant's earnings in 2007. Subsequent discussion at the hearing revealed that the Appellant's Notice of Assessment for the year 2007 had been faxed in on June 18, 2008 and was in the indexed file prepared by the Commission for the hearing of June 19, 2012.

Although these calculations for the previous five years earnings were in the end lower than the amount of income the Appellant would have received on an annualized basis from [text deleted] and her average earnings during the first 180 days (and as a result no longer germane to the calculations in this appeal), it is of some concern to the panel that, in such a complex case, such basic mathematical and calculation errors seemed to have occurred.

Both parties thoroughly addressed the interpretation of Section 84 of the Act in regard to the calculation of the Appellant's IRI benefits after the first 180 days.

The Appellant submitted that under Section 84(1), the IRI for the last 180 days cannot be less than any of the IRI she earned during the first 180 days. Since her annual earning level for the first job she would have held, with [text deleted], was approximately $72,000 when annualized

(plus kit rental), this is the amount which must be used, she submits, to calculate her IRI entitlement for the period following the 180 days.

MPIC submitted that Section 84(1) must be tempered by Section 84(3) of the Act. Both the panel and counsel for MPIC agreed at the first hearing that MPIC had failed to do all of the relevant investigations and calculations set out in Section 84(3). For the appeal hearing on June 19, 2012, those calculations have now been done. MPIC calculated the amounts it believed represented the work experience and earnings of the Appellant in the five years prior to the motor vehicle accident, pursuant to Section 84(3)(b). However, MPIC concluded that these amounts from the previous five years were actually all lower, on an annual basis, than the average earnings levels of the Appellant in the first 180 days. Counsel for MPIC noted that the Act and Regulations directed MPIC to use the greater number of salary or wages of a temporary earner under Section 2 of the Regulations or the greatest GYEI in the five calendar years preceding the accident. When asked why, in order to arrive at the greatest GYEI, MPIC compared the highest number from the previous five years with the <u>average</u> of the GYEIs attributed to the Appellant for the job she would have held during the first 180 days, counsel for MPIC submitted that it was trying to arrive at her average loss. Counsel submitted that the amount the Appellant would have earned from [text deleted] was atypical and not at her normal earnings level. This would have resulted in a windfall to her. The calculator was trying to balance the IRI from the first 180 days with her average loss.

The Appellant submitted that while Section 83, in dealing with IRI for the first 180 days, did [by operation of Section 83(1)(a) and 83(2)(iii)] address the amounts that the Appellant would have earned over that period, Section 84 does not contain such a reference. Section 84 calls upon MPIC to determine IRI after the first 180 days based upon the greatest IRI received during the

first 180 days, and the language of Section 84(1) is mandatory in that regard, using the word ″shall″.

While counsel for MPIC did admit that Section 84 does not include a similar provision to that found in Section 83(2) regarding employments the temporary earner "would have held", which would allow MPIC to consider all the employments the Appellant would have held during that period, she could not explain the use of the word ″any″ in Section 84(1) when requiring that IRI after 180 days shall not be less than any IRI the temporary earner was receiving during the first 180 days. Counsel′s submission was that Section 84(1) of the Act must be tempered by Section 84(3), and that to consider and compare all the previous years′ income with the average of the first 180 day employment was the most reasonable and balanced approach which satisfied the intent of the legislative scheme.

However, the panel finds that Section 84(3), while it does direct MPIC to consider the earnings of the Appellant over the previous five years, does not direct MPIC to pay IRI after the first 180 days based upon any averaging of IRI paid in the first 180 days. Rather, if the amounts calculated under Section 84(3)(b) for the previous five years are lower, Section 84(1) will prevail to require MPIC to pay IRI based upon the greatest of the IRI received during the first 180 days.

This is reflected in the Regulations where Section 5(2) provides that GYEI for a temporary earner after the 180th day is the greatest of the amounts determined under Section 5(1) of the Regulations (i.e. GYEI for the first 180 days calculated under Section 2 of the Regulations) and Section 6 (i.e. the greatest GYEI earned by the victim from employment in any of the five preceding calendar years, as indexed). The GYEI calculation for a temporary earner under

Section 2 of the Regulations also utilizes a calculation based upon the greater of the salary or wages receivable for the "pay period in which the accident occurred" and the salary or wages receivable during the first 180 days.

The panel agrees with the Appellant that Section 84 of the Act and the Regulations do not instruct MPIC to compare average earnings during the first 180 days with the highest annual income in the five calendar years preceding the motor vehicle accident. Rather, Section 84(1) and Section 2 of the Regulations require MPIC, in this case, to use a higher salary, not less than any IRI received during the first 180 days, and salary attributable to the pay period in which the accident occurred. In the Appellant's case both the greatest IRI received during the first 180 days and the salary receivable for the pay period in which the accident occurred was the amount attributed to the [text deleted] production. As a result, the Appellant′s entitlement to IRI after the first 180 days should be based upon that salary, as it was the highest IRI she was receiving as a temporary earner during the first 180 days after the accident.

Accordingly, the Appellant′s appeal in regard to the calculation of her IRI benefits after the first 180 days is upheld and the Internal Review Decision of June 7, 2011 will be varied accordingly. She shall be entitled to receive IRI in connection with her promised employment with [text deleted] which includes an amount for kit rental. The amount of the kit rental will be referred back to the case manager for calculation.

The Appellant shall then be entitled to receive IRI benefits after the first 180 days which are not less than the IRI benefits the Appellant would have earned, including appropriate amounts for kit rental, regarding her promised employment with [text deleted].

Dated at Winnipeg this 9th day of August, 2012.

LAURA DIAMOND

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