Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-19-034

PANEL:	**Pamela Reilly, Chairperson** **Leona Barrett** **Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], was self-represented and did not attend the hearing;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.**
HEARING DATE:	**October 20, 2020**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity (IRI) benefits because of his MVA of February 18, 2018.**
RELEVANT SECTIONS:	**Sections 182(2), 184.1(1), 184.1(2), 70(1), 85(1), 85(3), and 86(1) 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

Background:

The Appellant was involved in a motor vehicle accident ("MVA") on February 18, 2018 when he lost control on ice and struck a parked vehicle. He reported that his head hit the steering wheel and he suspected that he lost consciousness, but was unsure of the

duration. At the time of the accident, the Appellant was a self-employed free-lance composer and music teacher working 20-40 hours per week. His occupation on an Initial Therapy Report stated “Administrator/consultant”. He had hoped to be able to return to his work tasks 2 months post-MVA. The Appellant sought Income Replacement Indemnity benefits (“IRI”) for lost income. The Appellant requested and provided authorization to communicate and receive all correspondence by email.

Pursuant to its legislation, MPIC requested the Appellant provide his 2015, 2016 and 2017 tax returns and Notices of Assessment to confirm self-employment at the time of the MVA and thereby determine his average gross yearly income. The Appellant had previously submitted tax information for the years 2014, 2015 and 2016 in respect of a December 2016 MVA. He insisted that MPIC use this documentation to determine his employment status and income for his February 18, 2018 MVA.

MPIC denied IRI benefits to the Appellant as set out in its Internal Review Decision (“IRD”) dated October 11, 2018. MPIC concluded, based upon the documentation provided by the Appellant that he did not hold employment at the time of the MVA and classified the Appellant as a non-earner. Therefore, the Appellant was not entitled to IRI benefits in the first 180 days of the MVA. MPIC further considered the medical evidence on file and concluded that the Appellant was not entitled to IRI as of the 181st day following the MVA because the Appellant was capable of working.

Subsequent to the IRD of October 11, 2018, MPIC acknowledged that it had mistakenly overlooked the Appellant’s request for a hearing on his internal review. Therefore, the Internal Review Officer scheduled a meeting with the Appellant to allow him the opportunity to submit further income documentation and to explain his position for receiving IRI benefits. At the meeting, the Appellant spoke about his circumstances but did not provide additional documentation. The Internal Review Officer affirmed the October 11, 2018 decision by way of his decision dated November 19, 2018.

The Appellant disagreed that he was a non-earner, and sent the Commission an email on February 15, 2019 stating that he was “appealing the decision”. The Commission accepted this as the date of appeal. The Appellant emailed his completed Notice of

Appeal on March 13, 2019. On April 5, 2019, the Appellant delivered 67 pages of documents to the Commission, which included a 3-page cover letter, the October 11, 2018 IRD, and some 57 untitled pages of material. These untitled pages mostly duplicated the documents previously provided to MPIC. They included partial emails with redacted information, unidentified and partially redacted bank statements, revenue/expense statements dated 2012 to 2017, a 2015 VPP INC Sub-contractor agreement, VPP invoices partially redacted, and Canada Revenue Agency website views of returns, Notices of Assessment, and Reassessment from 2011 to 2017, mostly redacted. The Appellant later forwarded a statement of revenue received via email from the Society of Composers, Authors and Music Publishers of Canada ("SOCAN"), an organization that distributes royalty payments to its members when, for example, radio stations play their music. The Appellant requested that the Commission determine his employment income as a Level 3 Composer and calculate IRI benefits accordingly.

Issue:

The issue before the panel is whether the Appellant is entitled to IRI benefits because of his MVA of February 18, 2018. This included the sub-issues of whether the Appellant was a non-earner, and whether he could hold employment beyond 180 days after the MVA.

Decision:

The Commission upheld the IRDs dated October 11, 2018 and November 18, 2018 and dismissed the appeal.

Preliminary and Procedural Matters:

Failure to Attend and History of Scheduling

The Appellant did not attend the hearing and therefore the panel considered the prior scheduling history in which Commission staff contacted the Appellant to move the appeal to a hearing. In response to Commission emails enquiring about the Appellant's readiness to set a hearing, the Appellant responded as follows:

> From: [Appellant email address]
> Sent: 19-Aug-19 12:52 PM

> Index file remains unopened [sic] as I am aware of the facts as presented.
>
> There is not [sic] need or time for me to revisit the fabrications and incompetence, and in accuracies [sic] of any thing [sic] MPI.
> …
> AS CLEARLY INDICATED TO THEM & DOCUMENTED TIRELESSLY
> 1) LEVEL 3 COMPOSER 20 PLUS YEARS
> 2) SUB CONTRACTOR FOR THE OWNER OF THE VEHICLE INVOLVED IN THE ACCIDENT
> 3) ATRTIS [sic] DEVELOPMENT CONTRACT FOR [TEXT DELETED]
> THE END

Further:

> From: [Appellant email address]
> Sent: 27-Aug-19 1:05 PM
>
> [text deleted],
>
> You should do what ever it is you think your remuneration or position is befitting of.
>
> My position has been CLEARLY ARTICULATED & the facts require no hearing to ascertain the simple truth of the matter.
>
> EVERYONE HAS TO WORK EVEN A PERSON BEGGING HAS TO ASK PEOPLE FOR MONEY PERIOD.
>
> And as a result of a motor vehicle accident the same has been affected and almost two years later this nonsense continues
>
> ALL WHILST YOU ALL RECEIVE REMUNERATION FOR THAT WHICH IS NOT REQUIRED and is documented in history including the
>
> articles in print, online, and in your possession.
>
> AND [sic] EPIC EXPERIENCE IN UNDER SERVICE [All emphasis in original]

On October 2, 2019, the Commission emailed the Appellant and asked if he would be filing any further documentation, including medical evidence, to include in the indexed

file. The email also asked whether the Appellant was ready to proceed to schedule a hearing. By email, dated October 8, 2019 the Appellant stated, among other things, that he would not require the indexed file because "there was simply a disruption of [his] earnings" because of his MVA related injury. He stated, "Substantial documentation has been submitted," and then accused MPIC of "negligence & malicious incompetence." The Appellant attached a March 9, 2018 physiotherapy note to this email and commented, "Do with them what you will…"

On October 10, 2019, Commission staff emailed the Appellant asking if he was ready to set a hearing date and whether he intended to call any witnesses. By return email of the same date, the Appellant responded, in part, as follows:

> … NON [SIC] OF THIS IS NECESSARY with respect to the facts.
>
> NON-EARNER-ING is absolutely NOT POSSIBLE ON EARTH (even for a beggar)..
>
> in this instance a COMPOSER (SOCAN 30 YEARS), not withstand [sic] supporting revenue streams
>
> DUE TO SYSTEMATIC SEGREGATION IN THIS REGION WITH RESPECT TO EDUCATED/EXPERIENCED BLACK MULTI-MEDIA PROFESSIONALS.
>
> in closing a motor vehicle accident disrupted the same and <u>there is no need for a pannel [sic],</u>
>
> <u>a hearing, any witnesses, and all the other NON SENSE which is ultimately a waste of tax payer resources.</u>
>
> <u>Deliberate however IMPOSED ON ME to seem fit to you and contact me with the result</u>
>
> where it correlates to the simple facts otherwise PLEASE LEAVE ME ALONE.
>
> epicaly [sic] under served [Underline added. All other emphasis in original]

The Commission scheduled a pre-hearing case conference on February 25, 2020 at 10:30 a.m. to discuss setting a hearing date for the appeal. The Commission provided the Appellant with the notice of the case conference as evidenced by the Canada Post confirmation of delivery dated January 28, 2020 and signed by the Appellant.

The Appellant did not attend the case conference and he did not request an adjournment. The Appellant left voice mail messages the morning of the case conference stating that he had a contractual occupation and would not attend the case conference because he was working. He asked how many staff members at AICAC it took to understand that in order to make a living he needs to actually procure work and 'bust his ass everyday' to work so that AICAC and the government can waste tax payers money. He left a second message that essentially repeated the statements made in the first message. After waiting fifteen minutes (in accordance with Commission practice), the case conference proceeded without the Appellant. Subsequent to the case conference, the Commission sent a letter to both the Appellant and MPIC counsel that outlined the issues for hearing and provided a further six weeks for either party to file additional evidence, failing which the matter would be set for hearing.

Via email dated April 29, 2020, the Commission forwarded to the Appellant additional documents submitted by MPIC. The email stated that June 3, 2020 was the deadline for filing additional material failing which the matter would be set for hearing. On April 30, 2020, the Appellant emailed his response, as follows:

> From: [Appellant email address]
> Sent: 30-Apr-20 4:18 PM
> 1) 30 years composer socan…
> 2) production of recordings NOT LIMITED TO LESSONS…
> 3) sub contracting to vpp [sic], subsequently the proprietor & owner of vehicle in the accident…
>
> SOME HOW THE LEVEL OF INCOMPETENCE AND INCAPABILITY
>
> MAKES CONFUSION OUT OF THE INDISPUTABLE TRUTHS THAT THE ABOVE MENTION [sic]

> THREE DISCIPLINES WERE ON GOING REMUNATIVE [sic] OCCUPATIONS AT THE TIME OF THE ACCIDENT. DISRUPTED AS A RESULT OF SAME.
>
> IN COLONIAL CAPITALISM EVEN A BUM HAS TO BEG (WORK) TO SURVIVE AS NOTHING IS FREE LAST I CHECKED.
> ONLY YOU INHERITED NATIONS PEOPLE ULTIMATELY AT COST TO THE TAXPAYER IGNORE
>
> THE FACTS HERE IN (ITEMS 1-3) AND CONTINUE EXEMPLIFY [sic] WHAT A WASTE OF TAXPAYER RESOURCES YOU ALL ARE. PERIOD
>
> DON'T CARE ABOUT YOUR TABS INDEXES ETC.

The Commission scheduled the hearing to commence at 9:30 a.m. on October 20, 2020. The Notice of Hearing highlighted the date, time and location of the hearing, and stated that should either party fail to appear or have a representative at the hearing, the Commission may proceed with the hearing and may alternately, dismiss the appeal, adjourn the hearing, or take such steps, as it deemed appropriate. The Commission received the Canada Post Delivery Confirmation dated September 11, 2020 that confirmed the Certified Mail delivery to the Appellant of the Notice of Hearing for October 20, 2020. (Note: The delivery confirmation stated that a signature was unavailable. The panel accepted the comment from Commission staff that Canada Post was not collecting signatures even if requested, due to the corona virus pandemic.)

On October 20, 2020, the Appellant did not appear at the hearing set to commence at 9:30 a.m. MPIC counsel attended and was ready to proceed. As is the practice of the Commission, the panel allowed a grace period (in this case of 20 minutes) for the Appellant to appear. The panel proceeded with the hearing in the Appellant's absence.

Legislation:

The MPIC Act provides as follows:

> **Commission to give notice of hearing**
>
> 182(2) The commission shall give reasonable notice of the hearing to the appellant and the corporation and shall, in the notice, identify the issues to be considered at the hearing.

How notices and orders may be given to appellant

184.1(1) Under sections 182, 182.1 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant

(a) personally; or

(b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.

When mailed notice received

184.1(2) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

Disposition

The legislation requires that the Appellant receive reasonable notice of the hearing with clearly identified issues so that he may fairly prepare, attend and present his position at the hearing. Based upon the Canada Post delivery confirmations referenced above, as well as the Appellant's communications, the panel found that the Commission provided the Appellant with notice of both the case conference and hearing dates. The Appellant acknowledged receipt of the tabbed evidence binder, which included a clear statement of the issues.

The panel found that the Commission followed the legislative requirements for notice, and further notified the Appellant of his right to give evidence or call witnesses. The Notice of Hearing clearly set out the consequences of not appearing at the hearing. The Appellant responded in writing that he did not care about the tabbed binder of documents, that the hearing was a waste of his time and resources and that we should deliberate as we saw fit, then notify him. The panel found that under the circumstances, it was appropriate to proceed in the absence of the Appellant, and deliberate on the merits of his claim. (Note: Subsequent to the hearing, the Appellant contacted the Commission in November 2020 to enquire when he would receive his decision and

reiterate that the Commission continue to communicate via email, including delivering his decision. The panel considered the Appellant's call as further evidence that the Appellant had notice of the hearing date and time.)

Substantive Issues:

Appellant's Submission

The panel considered the Appellant's Notice of Appeal emailed on March 13, 2019, which stated his reasons for appeal as follows:

> I do not agree with MPIC's decision for the following reasons:
> a) Grossly inaccurate summary of the fact [sic] with respect to 'NON EARNER' STATUS where by ongoing remunerative occupation is confirmed by SOCAN (SOCIETY OF AUTHORS COMPOSER AND MUSIC PUBLISHERS) INCOME VERIFICATION DECLARATION
> b) Sub contract services (disrupted as a result of the accident) to the owner of the vehicle in the accident
> c) Artist development agreement/gueerra [sic] (disrupted as a result of the accident)
> d) Items a-c make it clear and apparent that non earner status is a GROSS ATTEMPT TO "RAIL ROAD" THE CLAIM INTO A POSITION OF UNDUE DELAY. [All emphasis in original]

The Appellant's April 5, 2019 cover letter reiterated the above reasons and expanded his argument to include criticism of MPIC, argue that his three types of occupation had been "substantiated, documented, & proven at NAUSIEM [sic]", his bank statements substantiated his income related to his three occupations, and his contracts were examples of ongoing as opposed to past income. The Appellant submitted that he had proven his occupation as a Level 3 Composer and requested payment of IRI benefits based upon an income for that occupation. The panel accepted these statements as the Appellant's submission on appeal.

MPIC Submission

MPIC's counsel stated that there were two sub-issues: Was the Appellant employed at the time of the MVA, and was the Appellant able to work 181 days after the MVA? He referred the panel to the documentation showing MPIC's efforts to obtain information about the Appellant's employment status, and the corresponding evidence submitted by

the Appellant. In particular, MPIC asked the Appellant to provide documents that supported his active employment, and show that he was generating income at the time of the MVA. MPIC ideally looked for business records that a third party could verify.

MPIC counsel referred to the Appellant's 2014 to 2016 Notices of Assessment that did not identify income. He referred to the Appellant's financial statements, which were unverified by an accountant. MPIC referred to the Appellant's "Development Proposal" for client work and a "schedule of time commitment" and noted that these documents bore no signatures or proof of payment for work done. It appeared that the Appellant created all the documents, which were unverified by third parties.

The Appellant provided documentation from SOCAN that showed his ongoing receipt of royalties. MPIC Counsel explained that it considered royalties to be passive income as opposed to active income. This was not evidence of employment or that the Appellant performed work at the relevant time of the MVA.

MPIC counsel acknowledged that some self-employed claimants do not keep robust records. In those cases, as in this one, MPIC provided the claimant with the opportunity to meet and flesh out the information. MPIC pointed out that the Appellant declined to attend the hearing to explain his situation. MPIC submitted that it had acted reasonably in making its determination of non-earner status, which the Appellant had failed to rebut.

MPIC counsel addressed the issue of whether, as a non-earner, the Appellant could work as of the 181st day post-MVA and thereby receive IRI benefits. He explained that if a claimant recuperates, MPIC does not determine an occupation for the claimant and pay IRI. In this case, the medical evidence showed that the Appellant had recuperated because he stopped attending treatment. MPIC therefore concluded that the Appellant was capable of performing his work duties within the 180 days and beyond. MPIC requested that the panel uphold both IRDs.

Legislation:

The MPIC Act provides as follows:

Definitions

70(1) In this Part,

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

"non-earner" means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or student; (« non-soutien de famille »)

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

85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

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

Basis for determining I.R.I. for non-earner

85(3) The corporation shall determine the income replacement indemnity for a non-earner on the following basis:

> (a) under clause (1)(a), the gross income the non-earner would have earned from the employment;

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

86(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section 106, and the non-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 non-earner was receiving during the first 180 days after the accident.

Discussion:

The panel considered MPIC Act sections 70(1), 85(1), 85(3) and 86(1). Section 70(1) defines “employment” as any remunerative occupation and defines a “non-earner” as someone who, at the time of the accident, is not employed but is able to work.

Section 85(1) generally states that a non-earner is entitled to IRI during the 180 days following the MVA if he is unable to hold employment that he could have held during

that period but for the accident. Section 85(3) generally states that MPIC shall determine the IRI benefits based upon the gross income that the non-earner would have earned from employment.

The onus of proof for any Appellant is proof on a balance of probabilities. The panel found that the Appellant did not provide sufficient evidence that he held a remunerative occupation at the time of the MVA. The income tax information for the relevant time did not show any income. The panel found that the Appellant appeared to have created the "financial statements", "Development Proposal" and "schedule of time commitment", and these were insufficient to verify, on a balance of probabilities, that the Appellant had a remunerative occupation or income at the time of the MVA.

The documents provided by the Appellant contained redacted income and dollar amounts, were mostly untitled, unsigned, unverified and difficult to decipher. The Appellant did not attend the hearing to testify and explain to the panel the purpose or meaning of the documents. Therefore, there was no basis upon which to determine the income and corresponding IRI benefit for the Appellant.

The panel found that the SOCAN statement did not prove, on a balance of probabilities, employment at the time of the MVA. The statement apparently showed passive income from the Appellant's past work. The panel concluded on a balance of probabilities that the Appellant was a non-earner at the time of the MVA.

Section 86(1) refers to entitlement to IRI benefits after the first 180 days. If the Appellant is still unable to work because of the MVA, MPIC must determine an employment and income for the Appellant. The panel found that the medical evidence did not prove, on a balance of probabilities that after the first 180 days, the Appellant was unable to work because of his MVA injury. The June 6, 2018 Therapy Discharge Report from the Appellant's physiotherapist stated that the Appellant's symptoms were improving. The Report further stated that given the physiotherapist's observations, the Appellant "should have been back at regular duties by April 7, 2018" and he was "under the impression that [the Appellant] has improved since [he] has not come in for further treatment." This evidence was un-contradicted. The panel found on a balance or

probabilities that the Appellant had recuperated within the first 180 days and therefore was not entitled to IRI benefits pursuant to section 86(1).

Disposition:

Accordingly, the panel found that the Appellant had not proven, on a balance of probabilities that he was an income earner at the time of the MVA, or that he was incapable or working after 180 days because of his MVA injury. The panel upheld the Internal Review Decisions of November 19, 2018 and October 11, 2018, and dismissed the appeal.

Dated at [Manitoba] this 16th day of December, 2020.

PAMELA REILLY

LEONA BARRETT

LINDA NEWTON