Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant
AICAC File No.: AC-95-3

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('M.P.I.C.') represented by Ms Joan McKelvey** **[Text deleted], the Appellant, appeared in person**
HEARING DATE:	**June 2nd, 1995**
ISSUE:	**1. The propriety of seven-day deductible period prior to commencement of compensation;** **2. time/Wages lost when attending for medical treatment;** **3. income replacement indemnity calculations.**
RELEVANT SECTIONS: Act ('the	**Section 152(2), 81(1), 111(1), 112(1) 113 and 138 of the M.P.I.C. Act'), Regulation 37/94, Sec. 4, and Regulation 40/94, Sec. 5.**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons for Decision

THE FACTS

[the Appellant] was injured on May 16th, 1994 as a result of a rear-end automobile collision. He sustained injuries to his neck and lower back which resulted in muscle spasms and headaches. He required a prescribed treatment of chiropractic adjustments, manual traction of the

lumbar spine and physiotherapy exercises. As a result of his accident [the Appellant] was required to be absent from his workplace for eleven and one-half days.

[The Appellant] testified that his employment contract with [text deleted] only called for him to work 198 days in each school year, although his annual salary is, for convenience, spread over 12 months.

[The Appellant's] claim, outlined below, was dealt with by M.P.I.C.'s internal review officer, [text deleted], by written decision of December 19th, 1994, and it is from that decision that [the Appellant] now appeals. This Commission is empowered, by Section 184(1) of the Act, after conducting a hearing to confirm, vary or rescind the decision of the internal review officer or to make any decision that the Corporation could have made.

(a) **Seven-day Waiting Period**

[The Appellant] appeals, firstly, from a decision of M.P.I.C. denying him income replacement indemnity for the first seven days after his absence from employment as a result of the accident.

Section 152(2) of the Act reads as follows:

> "Waiting period before first I.R.I. payment
> 152(2) No income replacement indemnity shall be paid in respect of the first seven days after the day of the accident, except an income replacement indemnity payable under Subsection 117(3) (relapse after more than two years)."

He believed this to be an unfair measure and that an individual who has been injured in an accident, through no fault of his own, should be compensated for the full time lost as a result of that injury. The mandate of this Commission is limited to administering the law as we find it; we cannot override the statute by substituting different views for those of the legislators. It was noted that many forms of accident and sickness insurance include a deductible period or a deferred start for payments.. [Tthe Appellant] indicated that he was aware of this, in that he has another disability insurance policy that provides for just such an hiatus before disability payments commence.

Section 152(2) quoted above, clearly establishes that there is no entitlement to income replacement indemnity for those first seven days, and for this portion of the appeal we confirm the decision of the internal review officer.

(b) **Time/Wages Lost When Attending for Medical Treatment**

The second part of [the Appellant's] claim is for benefits lost as a result of attendance for prescribed treatments related to his automobile injury. M.P.I.C., while continuing to ensure that the medical and paramedical bills are paid, has denied further coverage for pay and allied benefits lost by [the Appellant] through those attendances.

There was no evidence before us that [the Appellant] would actually be out of pocket by taking time off work to attend at the office of his physician, chiropractor or

physiotherapist. It is possible that a claimant who is required to forfeit pay or other monetary benefits under those circumstances may be entitled to reimbursement under Section 5 of Regulation 40/94, which reads, in part, as follows:

> "5. Subject to Sections 6 to 9, the Corporation shall pay an expense incurred by a victim....for the purpose of receiving medical or paramedical care in the following circumstances:
> (a) when care is medically required and is dispensed in the province by a physician,.....chiropractor, physiotherapist...or is prescribed by a physician;....."

A decision upon that point may have to be made in a more appropriate situation. Where, as in the present case, a claimant is covered by a plan under which he is entitled, or required, to take paid sick leave for time spent in visits to health care providers, he might be covered under the foregoing language of Section 5 if he has used up his allowable sick leave benefits and is required to take leave of absence without pay, or if there are other, quantifiable, monetary expenses to which he is actually put by taking time off work. That form of compensation would normally differ from income replacement indemnity ('I.R.I.'), in that it is applicable to situations wherein the claimant has been able to resume full-time employment but needs the occasional, brief absence for medical treatment or examination, whereas I.R.I. is intended to cover absences due to the victim's being unable to resume his full-time employment.

Although [the Appellant] was only absent from his workplace for 3 full days (May 24th, 25th and 26 of 1994), he was also away for a further 17 half-days over the course of the succeeding six months. M.P.I.C. has elected (correctly, in our view, to treat the result as an aggregate of eleven and one-half days of necessary absence and, therefore, to deal with that portion of [the Appellant's] claim as being one for I.R.I. rather than as one for reimbursement of expenses, since it does not appear that any of those absences were for medical visits. I.R.I. is payable to a

full-time earner who is unable to continue the full-time employment, regardless of whether that person is covered by a paid sick-leave plan; expenses are only compensible if actual loss occurs.

Two other points, under the general heading of 'sporadic absences from work', are worthy of mention.

(i) The first relates to claims for reimbursement of salary and any other, quantifiable expenses for time necessarily taken off work for visits to medical and paramedical personnel. Without attempting any definition of 'expenses', we note only that, to the extent that any such expenses are claimed, they should be supported by some evidence that reasonable efforts have been made by the claimant to schedule such visits during his/her non-working hours. In other words, if any such expenses are reimbursable, they must be shewn to have been necessary.

(ii) The other relates to the situation wherein, as here, we have a victim who, conscientiously trying to resume full-time duties, is nevertheless obliged during convalescence to return to work for half-days or on some other, part-time basis.

M.P.I.C.'s file regarding [the Appellant] indicates that the Corporation only decided to pay him for his 17 half-days off work because, although 'direction came from Claims Coverage Committee in July (1994) indicating that no compensation is to be paid for sporadic half-days missed from work', [the Appellant] had been advised prior to that policy direction that he was entitled to compensation for half days missed from employment.

We find nothing in the Act or the Regulations to support the policy direction quoted above which, in cases of bona fide absence resulting from the automobile injury, would in our view produce an inequity or, alternatively, encourage less responsible conduct on the part of the claimant. If a claimant can get paid by staying away for a full day but get nothing by going back to work for one half a day, he is more likely to opt for the full day's reimbursement.

We express the view, therefore, that M.P.I.C.'s decision in this regard was the correct one, but for the wrong reason.

In this same context, we also note the provisions of Section 138 of the Act, which reads as follows:

> "Corporation to assist in rehabilitation
> 138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market."

While that Section gives the Corporation a reasonable amount of discretion, it seems clear to this Commission that part of the healing or rehabilitation process will frequently consist of a gradual return to work, initially on a part-time basis. The policy directive cited above seems to negate the basic intent of Section 138 and, if only for that reason, to be wrong.

In the event, since we have no evidence that [the Appellant] suffered any expense, nor anything to tell us that he will do so in the future, by taking time off work for para-medical visits, this portion of his appeal must also fail and we confirm the decision of the internal review officer.

(c) **Income Replacement Indemnity Calculations**

[The Appellant's] third ground of appeal arises from M.P.I.C.'s use of a 52-week year as the base for calculating his I.R.I., whereas his employment contract only requires him to work for 198 days in the year.

Section 4 of Manitoba Regulation No. 37/94, which was adopted pursuant to the Act, defines 'full-time employment' in these terms:

> "Meaning of full-time employment
> 4 A person holds regular employment on a full-time basis in the following circumstances:
> (a) the person is employed at one employment for not less than 28 hours, not including overtime hours, in each week of the year preceding the day of the accident; or
> (b) the person is employed at one employment
> (i) for at least 28 hours per week, not including overtime hours, and
> (ii) for not less than two years, for successive or intermittent periods of not less than eight months and with intervals of not more than four weeks.

[The Appellant] falls within the language of subparagraph (b) of that section, and is therefore a full-time earner.

Section 81(1) of the Act provides, in part, that a full-time earner is entitled to an income replacement indemnity

> "if....the following occurs as a result of the accident:
> (a) he or she is unable to continue the full-time employment;...."

[The Appellant] was disabled for 11 1/2 days in all, during which he was unable to continue his full-time employment..

The method whereby I.R.I. is to be calculated is found in Sections 111 and 112 of the act and in Manitoba Regulation 39/94. Copies of the applicable sections of the Act and of that Regulation are annexed as schedules to these Reasons.

(i) M.P.I.C. must first determine the claimant's gross yearly employment income by using the formula set out in Section 2(a) of the Regulation which, in essence, arrives at [the Appellant's] annual income from his employment of $53,275.92.

(ii) M.P.I.C. must next calculate the claimant's net income, by reference to Section 10 of that same Regulation, for which purpose the insurer arrived at a net figure of $36,495.82.

(iii) Section 111(i) of the Act fixes I.R.I. at "90% of his....net income <u>computed on a yearly basis</u>" (subject to maximum gross earnings of $55,000.00) and Section 112(i) requires M.P.I.C. to deduct, from the year's gross, an appropriate amount of income tax, Canada Pension Plan contributions and Unemployment Insurance premiums. These calculations were made and applied by M.P.I.C. in arriving at [the Appellant's] net income computed on a yearly basis. 90% of that net figure is $32,846.24.

[The Appellant] appears to agree with that calculation, but argues that the next two steps taken by M.P.I.C.'s adjusting team - namely: dividing 90% of the net annual income by 26 in

order to arrive at a bi-weekly income, and then dividing that result by a further 14 to determine a daily rate - were unfair and improper. He says, rather, that the $32,846.24 should be divided by 198 (the number of days covered by his contract) to produce an I.R.I. of $165.89 per diem.

M.P.I.C.'s initial calculations gave a per diem figure of $90.24. However, [text deleted], the internal review officer, decided that it would be more appropriate to divide the bi-weekly income by 10, rather than by 14, where the compensible period of disability was less than 14 days, and he therefore increased that initial award from $90.24 to $126.33 per diem.

We offer no comment upon the Corporation's decision to afford different treatment to the short-term disability, other than to say that we do not wish to vary MPIC's Internal Review Officer's award. The Act and the Regulations do not require the insurer to make its calculations of I.R.I. based upon the number of days during which the claimant is normally required to work: that would call for separate and different bases of computing the I.R.I. for several people in the same plant who, by virtue of differing degrees of seniority, had earned different amounts of vacation time and different sick-leave benefits. We are satisfied that this was not the intent of the legislature. All insured persons are to be treated in the same way, by computing at least their net bi-weekly income as one-twenty-sixth of their net yearly income from employment. Therefore, we cannot accept [the Appellant's] position and we confirm the decision of the internal review officer.

[The Appellant's] Notice of Appeal raised two other matters - his entitlement to compensation for snow-removal from his driveway and his right to attend for both chiropractic and physiotherapy during the same time - frame at the expense of M.P.I.C. However, neither of these

seems to have been raised before the internal review officer and, unless he has dealt with them, we have no jurisdiction in that regard.

Dated at Winnipeg this 7th day of June 1995.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED