Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-10

PANEL:	**Mr. J.F.Reeh Taylor, Q.C. (Chairperson),** **Mr. Charles Birt, Q.C., and** **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:	**Thursday, April 18th, and Thursday, May 2nd, 1996.**
ISSUE:	**How does a 'non-earner' qualify for I.R.I.?** **Calculation of I.R.I., if awarded.**
RELEVANT SECTION:	**Sections 85(1)(a) and 85(3)(a) of the M.P.I.C. 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.

THE FACTS:

[Text deleted] , the Appellant, has spent approximately thirteen years successfully employed in the restaurant industry, eight of those years having been spent as the owner/manager of his own, fast food restaurant, using the trade name [text deleted] in [text deleted] in Manitoba; prior to that, he had been employed as food and beverage manager at the [text deleted], for two years, and before that had spent three years overseeing the creation and operation of four new fast food

restaurants in the [text deleted] region of British Columbia - all, so far as we can determine, with marked success. [the Appellant] has a certificate or diploma in [text deleted] from [text deleted], where he attended classes [text deleted], majoring in marketing. His restaurant experience covers a broad spectrum, including the recruitment, training and ongoing management of staff, the purchasing of equipment, inventory and supplies, management training, preparation of operations manual, payroll and other accounting systems, setting and attaining or exceeding targets, as well as the public relations and other, general, aspects of management activities.

As a part of a divorce settlement, the assets of [the Appellant's] business were divided between [the Appellant] and his wife: [text deleted] received the realty; he retained all other operating assets of the business, including the physical equipment and trade name. Not wishing to become his wife's tenant, [the Appellant] placed the physical assets of the business in storage and voluntarily withdrew from the work force for about thirteen months, spending part of that time overseas on vacation and, occasionally, appraising the operations of foreign restaurants to ascertain the extent (if any) by which their standards might usefully be adopted in Canada.

His evidence, which we accept, is that he decided in late August or very early September of 1995 to re-enter the work-force. On or about September 15th, 1995, he started sending out resumes and job applications in response to specific advertisements that he found in [text deleted] newspapers. Of the first twelve such applications that he sent out, he had three responses and was called in for three interviews. Unfortunately, before any of his enquiries could bear fruit, [the Appellant] was injured in an automobile accident on September 23rd, 1995; his resultant injuries appear to have rendered him unable to hold down a job of any consequence - in particular, any employment for which he is

qualified or, indeed, any other job requiring a combination of mental and physical endurance seems to be beyond his present capacity - at least for the time being.

[The Appellant's] evidence, with regard to the three responses that he did receive, was that he had actually been interviewed by [text deleted], who had indicated that [the Appellant] was certainly on their short list and that he wished to call [the Appellant] in for a second interview because [text deleted] were thinking of buying another [text deleted] at that time; he had had calls, also, from a gentleman at [text deleted] restaurant who seemed interested in interviewing him, and a call from a [text deleted] who wanted to interview [the Appellant] about a position managing a ski lodge at [text deleted]. The [text deleted] interview occurred prior to the accident; the other two calls came after the accident. To each of those gentlemen [the Appellant] felt obliged to indicate that, as a result of his accident, he would not be fit enough for some time to handle the jobs that they had discussed with him. Since then, [the Appellant] has remained unemployed by reason of his disability.

The Commission has also received written and oral testimony from [text deleted], Executive Director of the [text deleted]. [Text deleted's] evidence, in a nutshell, was to the effect that gross sales in Manitoba's restaurant industry had grown slowly but steadily in each year after the serious slump of 13.5% which had followed the advent of the federal Goods and Services Tax in 1991; that he could see no signs of reduction in gross sales nor, therefore, in the demand for experienced management personnel in the foreseeable future; that [the Appellant] appeared, on paper at least, to be well qualified for restaurant management; that September and, indeed, most of the remainder of the year up to the end of December, would normally see busy times and active recruitment of permanent staff in that industry, and that, given intensive effort by [the Appellant] in a serious search for work, a

position would have been found by him within no more than two months after his accident of September 23rd, 1995.

[Text deleted's] evidence as to the strong likelihood of employment for the appellant is not only supportive of [the Appellant] but is, itself, borne out by the Labour Market Information published by Human Resources Development Canada for the [text deleted] area, which shews prospects for restaurant and food service managers to have been good in October of 1995, and future prospects to have been above average.

[The Appellant] has applied for income replacement indemnity (I.R.I.), to take effect one week after his accident and to cover the first 173 days thereafter; from the 180th day following his accident, a different section of the Act, with which we are not here concerned, becomes applicable.

As to the quantum of income replacement,[the Appellant] seeks a gross of $35,000.00 as a base, pointing to these factors which, he submits, should guide this Commission:

(a) his own, pre-tax, average weekly earnings during the last years of his self-employment, being $575.00 per week or $29,900.00 per annum;

(b) the average income for persons in service management occupations reflected in Schedule C to Regulation 39/94, wherein M.P.I.C. pegs the employment income of someone in level 3 (i.e. over ten years of experience) in a service management occupation at $33,865.00;

(c) the job description of Restaurant and Food Service Managers, being part of Exhibit 2 filed with this Commission, combined with [the Appellant's] own testimony which, he says, fits him neatly into that job description and, therefore, qualifies him as a 'service manager' of

the sort referred to in (b) above;

(d) his further testimony that he would not, initially at least, have accepted a job offer at $25,000.00, nor anything less than $30,000.00 because, as he puts it, "those jobs are certainly out there" and he was confident enough in his own abilities to feel sure that he could land one in fairly short order;

(e) the fact that, as long ago as the years 1979 to 1982, he had been earning over $30,000.00 p.a. working for [text deleted], successfully starting up and running several restaurants for that chain, and his belief that, while salaries in the industry had not risen astronomically since then, salaries had certainly risen to some fair extent in the intervening decade and he therefore felt that his goal of $35,000.00 was justifiable.

[The Appellant] also points to the fact that he still had the operating assets of his former business and could just as easily have gone back into business for himself with the bank financing that, he felt sure, would have been readily available, but given the well-known track record of new, small restaurants across the country we incline to the view that [the Appellant] was wise, in the Fall of 1995, to have been looking for work as a fairly senior employee rather than returning to the owner/manager role in an industry that was already one of the most highly competitive in the Province, if not in the whole country.

Ms McKelvey, for M.P.I.C., submits that, in the first place, the job market for food service managers in [text deleted] in the Fall of 1995 was extremely depressed, that even the income figures for restaurant and food service managers in the [text deleted] area (as produced by Human Resource Development Canada) only reflect an average of $24,869 per annum, that the competition for all jobs in the admittedly growing industry is, and was in September of 1995, nonetheless fierce, and that

$24,869.00 should, in any event, be viewed as the absolute maximum gross income upon which to base I.R.I. for someone in [the Appellant's] situation - and only then for a candidate of outstanding qualifications. Someone re-entering the work force after a year's absence, and who has not been subject to the disciplines of working for someone else for a good many years, is likely to have to start near the bottom of the applicable income bracket until some reasonable period of probation has been served and the employee's value determined.

However, argues Ms McKelvey, quantum only becomes a relevant consideration if the appellant has brought himself within the four corners of Section 85(1)(a) of the Act, recited below, and since [the Appellant] has failed to do so his claim should be dismissed without the need to consider quantum. Ms McKelvey also points out that the office of Employment and Immigration Canada at [text deleted], in a letter to M.P.I.C., said that there were no recorded opportunities for a restaurant manager during the six months ending on April 30th, 1996. It should also be noted that this runs counter to the advice of that department's [text deleted] office, and that [the Appellant] did not confine his job search to [text deleted] - indeed, we do not believe that he ever did file an application for employment in [text deleted]; his employment horizon was much broader than that. As well, [text deleted] had testified that only a small percentage of job opportunities in that industry are ever posted

since most information of that kind is disseminated by word of mouth or, not infrequently, by direct approach on the part of a potential employer to a 'target' employee, or vice versa.

M.P.I.C. has refused [the Appellant's] initial claim for I.R.I., upon the basis that he did not have a firm, bona fide offer of employment in hand which he was prevented from accepting by reason of the

injuries caused by the accident. It is from that decision that [the Appellant] now appeals.

THE LAW.

The section of the Act that sets out the entitlement of a 'non-earner' to I.R.I. is Section 85(1)(a), which reads as follows:

> "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;.....".

[The Appellant] was a 'non-earner', within the meaning of the Act, at the time of his accident, in that he was capable of working but was not then gainfully employed. The question to be decided, then is whether he was unable to hold an employment that he would have held had the accident not occurred. The operative word, in this context, is '*would*'; the statute does not say '*might* have held', nor does it say '*could* have held'. Our task is to ascribe the correct meaning to that section. The 6th edition of Black's Law Dictionary defines *would* as 'a word sometimes expressing what might be expected or preferred or desired. Often interchangeable with the word *should* but not with *could'* The Oxford Universal Dictionary defines *'would'* as 'the feeling or expression of a conditional or undecided desire or intention'; the New Lexicon, Webster's Dictionary of the English Language, 1991 edition, expresses it this way: '*past of* WILL: *auxiliary v.* used to express condition, as in *she would go if you would:* used to express the future in indirect speech, as in *he said he would come:* used in polite request, as in *would you please get me my hat:* used, rhetorically, to express a wish, as in *would she were here!* used to express doubt, as in *it would appear to be the case*.'

Section 12 of the Interpretation Act of Manitoba, being Chapter I 80 of the Revised Statutes of Manitoba, 1987, provides that:

> "12. Every enactment shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects."

In an earlier decision of this Commission, in the appeal of [text deleted] that we decided on November 21st of 1995, we held that, in order to qualify for I.R.I. during the 180 days after an accident, an applicant must have received a bona fide job offer that his accident prevented him from accepting. While we are of the view that the Commission's decision in [text deleted's] case was the correct one, since no evidence was there presented to us from which we might reasonably have inferred either the likelihood of employment or an inability on his part to accept employment due to his accident, we are nevertheless of the view that our interpretation of Section 85(1)(a) in [text deleted's] case was too narrow, and that a more appropriate interpretation may be stated this way: **in order to qualify for Income Replacement Indemnity during the first 180 days following injury in an automobile accident, a 'non-earner', as defined in the Act, must establish upon a reasonably strong balance of probabilities that, but for the accident, he or she would have been employed in an occupation for which, at the time when the employment would have become available, he or she was qualified.** The onus is also upon the claimant to adduce sufficient evidence from which the insurer may determine a proper level of income replacement since, in the absence of that evidence, the claimant runs the risk of being placed at the lowest income level of the chosen category.

M.P.I.C., relying in part upon the rationale of this Commission in the [text deleted] case referred to above, argues that the word 'would' in the section quoted above has a more restricted meaning and

requires a much greater measure of certainty. In other words, says the insurer, a claimant in [the Appellant's] position must be able to produce a firm offer of employment that he would have accepted had the accident not occurred - an onus akin to that placed upon the Crown in criminal cases of proof beyond a reasonable doubt or, as it has sometimes been described, "an abiding conviction to a moral certainty". We are of the view that this goes further than the framers of the Act intended. It would place in an almost impossible position the claimant who did not have an actual and acceptable offer of employment in hand at the time of the accident. The Act speaks of the claimant's inability to hold employment "at any time during the 180 days.....", and is thus not limited to what existed upon the date of the accident. To adopt the position of M.P.I.C. would require a disabled claimant seeking I.R.I. to make the rounds of potential employers, asking them, in effect, "would you employ me if I were not unable, as I now am, to accept the employment that I am asking you to offer me?" That, patently, places a claimant in what has become known as a Catch 22 situation.

It is our view that the object of this section of the statute is to require the insurer to replace at least a portion (specifically, 90%) of the net, post-tax income that a claimant would have been able to earn but for the accident, and that the claimant needs only to establish the likelihood of those earnings on a reasonably strong balance of probabilities. By that, we mean something stronger than a mere, slender balance that could have been inferred had the legislature used the word *might* rather than *would*, but nevertheless falling short of the heavier onus that must be met by the prosecution in a criminal case. None of the quoted sources suggests that the legislative use of the word *would*, even when used in the present context, necessarily implies certainty.

We find that the appellant has met that onus; we are satisfied that, within two months after he commenced his search for suitable employment in Manitoba, he would have found it. As to the income level at which he would have been employed, we find that a gross, annual income of $30,000.00 would have been appropriate, at least as a starting salary. While it is probable that his position would, initially, have been a probationary one and his salary might well have exceeded the $30,000.00 figure after a given number of months, the amount of any such increase becomes too speculative for us to prophesy. We base our figure, in part, upon Schedule C in Regulation 39/94 which, although it uses an income level of nearly $34,000.00, seems to presuppose an applicant well settled in his job rather than someone who, like [the Appellant], would be re-entering the work force after slightly more than a year of voluntary absence and after a much longer time removed from the sometimes troubling discipline of working under the orders of a stranger following seven or eight years of being one's own boss. For that reason, we find that the $33,865.00 figure is higher than [the Appellant] would probably have commanded as a re-entry level salary. On the other hand, the figure of $24,869.00 provided by Human Resource Development Canada was merely the average for the [text deleted] region, and we are of the view that [the Appellant's] background and experience would have qualified him for a salary above the average.

DISPOSITION.

We find:

(i) that the appellant was, by reason of an automobile accident that occurred on the 23rd of September, 1995, rendered unable to hold an employment that he would have held if the accident had not occurred;

(ii) that the foregoing inability commenced on November 15th, 1995, and continued up to and including the 180th day following the 23rd of September;

(iii) that the appellant is, therefore, entitled to income replacement indemnity for the foregoing period, based upon a gross income of $30,000.00 per annum.

Dated at Winnipeg, Manitoba, this 6th day of May, 1996.

Charles Birt, Q.C. J.F.Reeh Taylor, Q.C. Lila Goodspeed