Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-37

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:	**October 28th, and December 16th, 1996**
ISSUE(S):	**(i) Whether appellant entitled to I.R.I. for certain days when pain from m.v.a. injuries allegedly prevented work;** **(ii) calculation of I.R.I. for self-employed taxi driver - U.I. premiums to be omitted but C.P.P. contributions increased.**
RELEVANT SECTIONS:	**Sections 81(1)(a), 81(2)(ii), 110(1) and 183(5) of the M.P.I.C.Act, and Regulation 39/94.**

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

This matter first came before us on Monday, October 28th, 1996. After hearing most of the evidence that was to be presented to us, we adjourned the hearing in order that inquiries might be made of [text deleted], to determine the number of days between April 7th and June 30th

of 1994 when [the Appellant] was away from work due to his injuries. [The Appellant] undertook to check his own records covering that same period and, in addition, Ms McKelvey undertook to pursue, with the department at M.P.I.C. responsible for calculating income replacement indemnity ('I.R.I.') the reason why, when making their calculations, they had deducted unemployment insurance premiums from [the Appellant's] gross yearly employment income, in light of the fact that, as a self-employed cab driver, he was not eligible for unemployment insurance and was not required to pay those premiums. We shall deal with each of those deferred matters, later in these Reasons.

The basic facts relevant to [the Appellant's] appeal are simply stated. He had three concerns:

1. Firstly, although he had initially been classified for purposes for income replacement indemnity at Level 2 in the category 'Taxi Drivers and Chauffeurs', he was subsequently reclassified by M.P.I.C. at Level 3, which gave rise to the need for an adjustment in the amount of his income replacement indemnity. That much had been agreed upon between [the Appellant] and M.P.I.C. but, at the time when he first appeared before this Commission, a couple of months after that adjustment had been agreed upon, he had still not received the appropriate cheque. We indicated that this shouild be addressed forthwith and, by the time when we reconvened on December 16th, that problem had been remedied.

2. [The Appellant] did receive income replacement for the period commencing seven days following his accident until the 7th of April 1994, when his I.R.I. payments were

terminated upon the basis that he had recovered sufficiently to return to his former employment. It might be added that, at some point, his physiotherapy benefits were also terminated but, upon the advice of [the Appellant's] physician that [the Appellant] still needed physiotherapy, were reinstated, and the physiotherapy payments are not the subject of his appeal. He does say, however, that there were twenty days in 1994, following the termination of his I.R.I. on April 7th, and one day (January 3rd) in 1995 when, due to pain stemming from his injuries sustained in the automobile accident, he was unable to work at all. It is for those twenty-one days that he now claims income replacement indemnity.

3. M.P.I.C., in calculating the amount of [the Appellant's] I.R.I., deducted hypothetical unemployment insurance premiums from his deemed gross yearly employment income (G.Y.E.I.) calculated pursuant to Schedule C of Regulation 39/94. [The Appellant] claimed, correctly, that he was self-employed and, therefore, neither eligible for unemployment insurance benefits nor required to make unemployment insurance contributions.

With respect to [the Appellant's] claim for I.R.I. for the twenty-one days allegedly missed from his work as a result of his accident, we were presented with evidence, partly in the form of internal memoranda prepared by M.P.I.C. investigators or employees and partly in the form of written statements signed by others, tending to show that [the Appellant] was back driving cab on a full-time basis on April 7th of 1994, although he denied having done so. We do not believe that very much hangs or falls upon the question whether [the Appellant] was or was not working on April 7th, despite the fact that, by his own admission, [the Appellant] was certainly well enough to perform a number of errands that day, using his vehicle, and at least to pick up a

couple of paying passengers on his way home. He acknowledges quite freely that he was working most of the time from the date when his I.R.I. was terminated until the beginning of 1995. His evidence to us, and the statements that [the Appellant] and others gave to the Adjuster, certainly give rise to a question of credibility but, in our view, it is not necessary for us to make any final determination of that question. The real question before us is whether there is sufficient evidence upon which we can reasonably conclude that [the Appellant's] accident of March 4th, 1994, prevented him from working upon the twenty-one dates that he listed for us.

It is noteworthy that, despite several requests for that same information made by M.P.I.C.'s Internal Review Officer, and despite the fact that, at our earlier hearing in October we, also, specifically asked [the Appellant] for some clear evidence of the dates to which he referred, the Internal Review Officer never did receive the requested information and all that we have received is a handwritten list on one sheet of paper, all quite obviously written at the same time within a few days prior to the hearing. [The Appellant] says that the dates shown on that list were extracted from a driving log that he had left with his tax accountant, but gives no reason why the accountant would have needed that log nor, if so, why the accountant would still need it and why it could not have been produced to us at the hearing. That might have gone some distance toward persuading us of what he was alleging, although it must be added that, again by [the Appellant's] own admission, a number of the days shown on his list are days when he probably would not have been working in any event. [The Appellant's] tax accountant, in response to an enquiry made subsequent to the hearing pursuant to Section 183(5) of the M.P.I.C.Act, tells us that he does not have, and does not recall ever having received, such a driving log.

As matters stand, we are not able to find, upon a balance of probabilities, that [the Appellant] was, in fact, precluded from his normal employment on the dates in question by reason of his automobile accident of March 4th, 1994. In this context therefore, we are obliged to confirm the decision of the Internal Review Officer.

In parenthesis, we note that there is a comment in the decision of the Internal Review Officer that may be open to misinterpretation. A statement to the effect that [the Appellant] was "not completely disabled" might lead a reader to infer that total disability is a prerequisite to income replacement indemnity. Section 81(1) of the M.P.I.C. Act provides that

> "a full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the full-time employment;..."

In other words, if, as a result of the accident, the victim is only able to work part-time, then the victim is entitled to I.R.I. to cover only those periods during which, as a result of the accident, he or she is unable to work.

Finally, there is the question of the unemployment insurance premiums that were deducted from [the Appellant's] deemed G.Y.E.I.. If a victim, being self-employed and, therefore, ineligible for unemployment insurance benefits, is not required to pay unemployment insurance premiums, then patently those premiums should not be deducted from his G.Y.E.I. We are not convinced that the increased Canada pension plan premiums for a self-employed victim would be exactly equal to the U.I. premiums that he is not required to pay. This question is, therefore, referred back to M.P.I.C. for an exact calculation of the deductions that ought to be made from

[the Appellant's] deemed G.Y.E.I., upon the basis that he was self-employed at all material times. M.P.I.C. will then furnish [the Appellant] and this Commission with a copy of its worksheet detailing how that calculation was arrived at and, if the end product differs from that contained in the revised calculation which showed total 'tax deductions' of $5,877.13, the appropriate adjustment between the parties shall be made.

Dated at Winnipeg this 19th day of December 1996.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED