

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-99-75**

PANEL: Mr. J. F. Reeh Taylor, Q.C., Chairman
Mrs. Lila Goodspeed
Mr. Colon C. Settle, Q.C.

APPEARANCES: the Appellant, [text deleted], appeared on her own behalf
Manitoba Public Insurance Corporation ('MPIC')
represented by Mr. Keith Addison

HEARING DATE: October 5th, 1999

ISSUE: Self-employed Appellant's income reduced, allegedly due to
MVA - whether entitled to Income Replacement Indemnity
('IRI').

RELEVANT SECTIONS: Section 81(1)(a) and 81(2)(a)(ii) of the MPIC Act ('the Act'),
Section 8 of Manitoba Regulation 37/94 and Section 9 of
Manitoba 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

[The Appellant] is a full-time, self-employed real estate agent, working under the banner of [text deleted]. She was so employed at the time of her motor vehicle accident, which occurred on May 19th, 1997 when the vehicle she was driving was rear-ended by another vehicle.

For the purposes of these Reasons, we shall take the medical facts and the financial data presented to us by [the Appellant] as uncontested. [The Appellant] entered the real estate industry in 1993. Using rounded figures for the purposes of simplicity, her net pre-tax, cash income from the sales of real estate in that first year were \$60,000.00, much the same in 1994 and 1995, \$70,000.00 in 1996, \$50,000.00 in 1997 and \$80,000.00 in 1998. It is clear from those oversimplified figures that [the Appellant's] cash earnings in 1997, the year of her accident, were some 20% below her average earnings during the preceding three years. She explains this by saying that, due the injury to her neck and shoulder, she was unable to sit for any length of time, using the telephone in order to made so-called 'cold calls', whereby she would have been able to solicit new listings.

One may speculate about other, possible causes for that drop in income but, without evidence, we decline to do so.

[The Appellant] submits that she was reduced to working only about six or seven hours a day which, she testified, was about half her normal working capacity.

Section 81(1) of the Act makes provision for a full-time earner to be paid income replacement indemnity ('IRI') if she is unable to continue the full-time employment. In that event, Section 81(2)(a)(ii) provides the basis upon which IRI is to be calculated. Copies of those sub-sections are attached as a Schedule to these Reasons.

The decision of MPIC's Internal Review Officer, [text deleted], and the arguments submitted to us were directed primarily to the proper meaning of Section 8 of Manitoba Regulation Number 37/94, which reads as follows:

Meaning of unable to hold employment

8. A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

That Regulation is not relevant to this appeal. [The Appellant] has never suggested that she was unable to hold employment; she continued to work without taking time off, despite her injuries and resultant pain.

[MPIC's Internal Review Officer], in his decision of May 25th, 1999 denying [the Appellant's] claim, says that, to qualify for IRI under Section 81(1) of the Act, a claimant must have been 'totally unable to continue your employment' and that MPIC is normally given proof that, during a given timeframe, 'the claimant was totally unable to perform the required duties of their particular employment'. [MPIC's Internal Review Officer] goes further: he says that a cessation of activity is compensable under the Personal Injury Protection Plan but that reduction of activity is not. We respectfully disagree; we are of the view that [MPIC's Internal Review Officer] goes too far. Section 81(1) does not limit a full-time earner's entitlement to IRI to those periods when he or she is unable to hold any employment; it speaks only of an inability "to continue the full-time employment". The intent of the legislators to make provision for a full-time earner who, due to a motor vehicle accident, is reduced to part-time work, seems clear from Section 9 of

Manitoba Regulation 39/94, of which a copy (along with a copy of Schedule D to that Regulation) is also reproduced in the Schedule to these Reasons.

Having said that, we are not of the view that [the Appellant's] working hours were reduced by her motor vehicle accident to the extent contemplated by the Act and Regulations. What was changed was the 'mix'. The Appellant was still able to perform all of the duties related to her work but, because using a telephone in the office for a number of consecutive hours exacerbated the pain in her neck and shoulder, she spent less time making cold calls to solicit new business. There are other methods whereby the kinds of stress imposed upon the neck and shoulder by a standard telephone can be minimized and largely eliminated. We have in mind the kind of extremely light-weight headset used by busy office receptionists, as well as the ubiquitous hand-held cellular phone that frees the user from the captivity of the office chair and desk, enables her to move around at will and places no weight or stress on the neck, shoulder or head at all. No evidence was adduced to tell us whether [the Appellant] tried either of those devices, but we have to assume that she did not. Had she done so, her telephone problem would, in our view, have been alleviated to a great extent.

DISPOSITION:

Because [the Appellant] was able (although not without discomfort) to continue working at her pre-accident employment, and because the formula provided by Section 9 of Manitoba Regulation 39/94 is of no practical application for her, there is no part of the Act nor of the

Regulations that might entitle [the Appellant] to income replacement indemnity for any period after May 19th, 1997. We are therefore obliged to dismiss her appeal and to confirm the decision of MPIC's Internal Review Officer of May 25th, 1999.

Dated at Winnipeg this 2nd day of November, 1999.