AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-99-112

PANEL:	**Mr. J. F. Reeh Taylor, Q.C. (Chairman)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation ('MPIC')** **represented by Ms Joan McKelvey;** **the Appellant appeared on his own behalf, accompanied by [text deleted]**
HEARING DATE:	**January 25th, 2000**
ISSUE:	**Whether Appellant able to hold pre-accident employment as of August 26th, 1999, when MPIC terminated his IRI benefits.**
RELEVANT SECTIONS:	**Sections 70(1), 83(1), 85(1)&(3), 86(1), 106,107, 109 & 110(1) of the Manitoba Public Insurance Corporation Act ('the 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:

On October 10th, 1996, the Appellant's vehicle was rear-ended while stopped for a red light. The force of the impact broke his seat and threw him into the back of the automobile. He noted pain in his lower back and attended at the Emergency Department of [hospital]. The pain continued in his low back as well as down his right leg; that interfered with his walking ability. X-rays taken of his lower spine on October 23rd, 1996, showed degenerative changes in the lumbar spine with

moderately severe narrowing of the L4-5 disc and mild narrowing of the L5-6 disc. There were arthritic changes noted in all of the lumbar vertebral bodies. [Text deleted], [the Appellant's] family doctor, reported that these degenerative changes preceded the accident but that they did not prevent him from carrying out his normal work duties prior to the rear-end collision. [The Appellant] was provided with a five-month physiotherapy course, including a program of exercises and pain control, which helped his condition improve.

[The Appellant] was a crane operator by trade. He had operated his own crane business for about twenty years and sold it in 1991 or 1992. He did not work regularly thereafter but did occasional jobs for others up to the time of his accident. Shortly after the accident, MPIC inquired about his past work experience to determine what, if any, income replacement indemnity ('IRI') he was entitled to receive. [The Appellant] provided the Corporation with a letter dated February 16th, 1996 addressed to himself and signed by [text deleted], a general contractor, reading as follows:

> This is a personal employment contract for the period March 1/96 to April 30/96 for assistance in my consulting activities, duties to include estimating, construction costing and construction supervision.
>
> It is expected that further employment will be offered for the period Sept 15/96 to Dec20 on site as a crane operator and materials clerk.
>
> I will pay on invoice at the rate of $5,000.00/per mo.

[The Appellant] worked for the months of March and April, 1996, as set out in [general contractor's] letter and did receive the stipulated payment of $10,000.00. He testified that he never returned to work for [general contractor], nor for anyone else, after April, 1996. In answer to the question on his Application for Compensation form, [the Appellant] described his job title while working for

[general contractor] as "Construction Supervisor".

MPIC asked for and received written permission from [the Appellant] to obtain copies of his personal income tax returns for the five years preceding the accident. Revenue Canada sent them copies of his 1990, 1991, 1992 and 1993 tax returns but advised MPIC that they did not have [the Appellant's] 1994, 1995, 1996 and 1997 tax returns on file - the evidence seems to indicate that he did not file any. This is borne out by [the Appellant's] own acknowledgement that, in the years after the sale of his business, he "…worked off and on as a crane operator for different companies - not steadily but occasionally - always on a cash basis 'under the table'".

Upon reviewing this information MPIC concluded that [the Appellant] was a self-employed, full-time earner as defined in Section 81(2)(ii) of the Act at the time of his accident. They determined that his gross yearly income was $60,000.00 by annualizing the two, $5,000.00 monthly payments he had received from [general contractor]. Section 8 and Schedule C of Regulation 39/94 required the Corporation to determine a job classification and salary for [the Appellant] at the time of his accident in order to determine the amount of IRI he would be entitled to receive. MPIC placed him in the job classification of "Management Occupation, Construction Operations" with a presumed salary of $66,085.00 because of more than ten years experience in this field.

The Act sets $55,000.00, indexed upon the basis of the Consumer Price Index for Manitoba, as the maximum amount that can be used to calculate insurable earnings. By the date of [the Appellant's] accident that maximum had risen to $56,500.00. Once all of the statutory deductions were taken off,

MPIC paid [the Appellant] IRI of $1,324.93 bi-weekly, starting October 18th, 1996 and ending August 26th, 1999.

Unfortunately, [the Appellant] was involved in a second automobile accident on September 19th, 1997. Another vehicle struck his driver's side door, causing his left shoulder and head to strike the door. He fractured two ribs and required the assistance of the Fire Department to extract him from his automobile.

[The Appellant] was provided with another six-month physiotherapy program to help him recover from the second accident. In December of 1999, MPIC referred [the Appellant] to [text deleted], a specialist in physical medicine and rehabilitation. In an extensive report dated January 11th, 1999, [Appellant's physical medicine and rehabilitation specialist] concludes that the Appellant's main difficulties were a myofascial pain syndrome in his shoulder girdle and sleep disorder. [The Appellant] had advised [Appellant's physical medicine and rehabilitation specialist] that, amongst other problems, he had fairly constant low back pain that varied in intensity and pains in his right leg. On these latter two points [Appellant's physical medicine and rehabilitation specialist] reports:

> There is no indication of low back pain, neurological deficits or findings typical of spinal stenosis (i.e. increased back pain with spinal extension, no lower extremity symptoms with exertion, no need to flex spine with increased low back symptoms, and 'pain' described as 'low back pressure' that is consistent with muscle tension from physical exertion). There is no evidence of neurogenic claudication.

MPIC, based on [Appellant's physical medicine and rehabilitation specialist's] report and a review by its Medical Services Unit, advised [the Appellant] on July 26th, 1999, that no physical impairment

of function arising from his motor vehicle accident had been identified that would prevent him from safely returning to his occupation of a self-employed crane operator, construction site supervisor, manager, consultant or other related position such as costing and estimating. His IRI benefits were terminated effective August 26th, 1999.

THE ISSUE(S):

(i) Was [the Appellant] self-employed, a part-time earner or a non-earner at the date of his accidents?

(ii) Was [the Appellant] physically capable of returning to his pre-accident employment when MPIC terminated his IRI benefits on August 26th, 1999?

The Commission , after reviewing the evidence available to MPIC, is of the view that the insurer was wrong in determining that [the Appellant] was a self-employed full-time earner at the time of his first accident. He had been self-employed, working as an independent contractor for [general contractor] for $5,000.00 per month for March and April, 1996, but the letter from [general contractor] dated February 16th, 1996 to [the Appellant] states merely that he expects to offer him further employment from September 15th to December 20th, 1996. There is no evidence to indicate that he had started work on September 15th nor that he was working for anyone at the time of the accident - indeed, his own evidence is to the contrary. [The Appellant] was clearly a non-earner at the time of the accident and was not entitled to receive IRI benefits for the first 180 days thereafter.

[General contractor] testified at the hearing that, two weeks prior to Thanksgiving in the fall of 1996, he had hired another individual, [text deleted], to do the work formerly done by [the Appellant]. [Text deleted] moved to the construction site in northern Manitoba four days after Thanksgiving. Thanksgiving fell on October 15th that year, which means that [general contractor] must have hired [text deleted] on or about October 1st, 1996. [The Appellant] was available at that time as his accident did not occur until October 10th, 1996. [General contractor's] evidence confirms that [the Appellant] was not working for him at the time of that first accident, and [the Appellant's] own evidence confirms that he had not re-entered the work force by the date of his second accident on September 19th, 1997; he was still receiving IRI from the insurer.

[The Appellant] did not have a job to go to with [general contractor] on or after his first accident, as the position they had discussed back in February had already been filled by [text deleted].Therefore Section 85(1)(a) of the Act does not apply.

We were provided with a letter dated December 2nd, 1996, purportedly addressed by [general contractor] to [the Appellant], which reads as follows:

> This is a renewal of my existing personal contract (employment) with [the Appellant] dated Feb 16/96 as crane operator and materials clerk.
>
> The same terms and conditions to apply. This contract covers the period Dec 20/96 - June 30/97.

We have to say that this letter lacks any credibility, since by that date [text deleted] had been hired and [the Appellant] was, to the knowledge of [general contractor] and by the testimony of them both, incapable of doing the work. Not only that, but [general contractor] testified that "if the contract between me and [the Appellant] **had** resumed in the Fall, he would have been laid off after

December 22nd for at least a couple of months". We can only assume that this letter of December 2nd, 1996, was produced in order to persuade this Commission that, but for his accident, [the Appellant] would have been employed at $5,000 per month from December through June of 1996/7.

We are of the view that MPIC also erred in determining that [the Appellant's] job classification fell within the "Management Occupations, Construction Operations" category and that he was entitled to the maximum presumed salary. The evidence to determine the correct job classification can be found in the adjuster's Report of Investigation/Discussion dated 16/12/96. A breakdown of [the Appellant's] duties for the work performed for [general contractor] were as follows:

Crane Operator	25 %
Office Duties	25 %
Foreman	25 %
Other	25 %
Total	100 %

When only 25 % of the job function involves supervision, one can hardly classify the job description as being one that fits into the category of "Managerial Occupation-Construction Operations". At that time there was no evidence for the five-year period prior to the accident that [the Appellant] was employed in any capacity.

[The Appellant] was entitled to receive IRI upon the 181st day after his accident, as he was not able to work at his chosen occupation due to his injuries. Section 86(1) gives [the Appellant] this benefit and stipulates that his employment shall be determined by Section 106 of the Act. The factors MPIC shall consider in determining [the Appellant's] employment are the Regulations, and his education, training, work experience and physical and intellectual abilities immediately before the accident.

[General contractor's] evidence confirmed that [the Appellant's] primary job during March and April, 1996, was that of a crane operator and that [the Appellant] had helped [general contractor] prepare the estimates for the next phase of the job. [The Appellant] confirmed [general contractor's] evidence. We find that [the Appellant's] proper classification was that of a crane operator, with supplemental skills as a construction foreman and as an assistant cost estimator. MPIC should have classified [the Appellant's] job category as coming within the Construction Trades Occupation group contained in Schedule C of Regulation 39/94. There is no specific job description that fits [the Appellant's] background exactly, and we therefore apply the category in the Regulation that most closely approaches that of [the Appellant], namely "Excavating, Grading and Related Occupations". Due to his length of experience, [the Appellant] would qualify at a Level 3, giving him a deemed income level of $41,396.00. The indexing factor provided by Section 165 of the Act raises that deemed annual income to $42,638.00. There is no evidence to support [the Appellant's] contention that he was earning upwards of $60,000 per annum; if he was, he was certainly not reporting it to Revenue Canada.

MPIC has, in our unanimous view, paid [the Appellant] more IRI benefits than those to which he was entitled, but in light of Section 190 of the Act we do not give any direction in that regard.

[The Appellant] testified that at the time his IRI benefits were cut off, and at the time of the hearing, he still had low back pain and pains down his right leg. These problems, he says, especially in his leg pains, prevent him from walking even short distances or climbing stairs. At times he had no control

over his right leg. He did not believe he could operate a crane safely because of the loss of control with his right leg. This evidence is at odds with that of [Appellant's doctor #2] of the [text deleted] Clinic, who speaks of "low back pain…..which radiates into his **left** leg.

[Appellant's doctor #1], in a report dated November 5th, 1999 advised that [the Appellant] was attending a [text deleted] Clinic for treatments of his back. [Appellant's doctor #1], relying in part upon his own observations and in part upon a report from [Appellant's doctor #2], the expert at the [text deleted] Clinic, expresses the view that [the Appellant] had an ongoing disability that would prevent him from returning to his normal work as a crane operator without significant risk to himself and his fellow employees.

Section 107 of the Act requires MPIC to determine an employment for a victim after the second anniversary of the accident, if the victim can still not return to work. In making that determination, the insurer is required to consider the insured's education, training, work experience and physical and intellectual abilities at the time of the determination. We do not find enough objective evidence to enable us to decide whether [the Appellant] was capable of returning to his former occupation by the time his IRI benefits were terminated on August 26th, 1999, or even at the time of the hearing of his appeal.

MPIC shall do a two-year determination on [the Appellant] and that time shall run from the date of the second accident on September 19th, 1997. In fairness to [the Appellant], the second accident may have been the one that set him back the most, since the medical evidence after first accident

indicated that he had been making some recovery. In making the two-year determination MPIC shall obtain new medical evidence and, if deemed appropriate, evidence from a qualified physiotherapist or occupational therapist, or both, to determine objectively [the Appellant's] current physical abilities as of September 19th, 1999. We recognize the difficulty of completing a retroactive functional capacity evaluation or medical examination but, fortunately, not too many months have elapsed since September of last year and, in the meantime, [the Appellant] has been examined by [Appellant's doctor #1] and [Appellant's doctor #2]. In sum, a new Functional Capacity Evaluation is required in order to enable the insurer to decide whether [the Appellant] is, or is not, entitled to further benefits and, if he is found definitively to be unable to return to his former occupations, to decide upon a proper classification for him.

MPIC shall give [the Appellant] the names of two independent practitioners, from whom [the Appellant] shall then select the one by whom he wishes to be examined and assessed in the context of the preceding paragraph.

This Commission will remain seized of the matter until the foregoing decisions have been made by MPIC and accepted by [the Appellant], so that any further dispute arising from the foregoing may be referred back to this Commission for a further decision at the request of either party.

DISPOSITION:

The Acting Review Officer's decision of September 24th, 1999 is hereby rescinded and the foregoing substituted therefor.

Dated at Winnipeg this 1st day of March, 2000.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED