Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-90

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Ms. Laura Diamond** **Mr. Wilson MacLennan**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Jim Shaw.**
HEARING DATE:	**November 25, 2002 and March 9, 2004**
ISSUE(S):	**1. Whether the Appellant was properly classified as a part-time earner;** **2. Whether it was appropriate to reduce the Appellant's Income Replacement Indemnity Benefits by 50%;** **3. Entitlement to Income Replacement Indemnity Benefits beyond July 31, 2001.**
RELEVANT SECTIONS:	**Sections 70(1), 83, 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 of Manitoba Regulation 37/94**

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

On December 3, 2000, the Appellant was involved in an incident while driving his car, when he was required to brake suddenly in order to avoid a collision. As a result of this incident, the Appellant complained of lower back pain and made a claim with MPIC for Personal Injury

Protection Plan ('PIPP') benefits. The Appellant has appealed from two Internal Review decisions with respect to the following issues:

1. Whether the Appellant was properly classified as a part-time earner;
2. Whether it was appropriate to reduce the Appellant's Income Replacement Indemnity Benefits by 50%;
3. Entitlement to Income Replacement Indemnity Benefits beyond July 31, 2001.

1. Whether the Appellant was properly classified as a part-time earner

The Appellant is appealing the decision of the Internal Review Officer dated July 23, 2001 which confirmed his classification as a part-time earner.

The Appellant submits that as a self-employed business owner, he devoted more than twenty-eight hours per week to running his business, and therefore he should have been classified as a full-time earner rather than a part-time earner. The Appellant claims that by November 2000, he was extending his store hours from Wednesday or Thursday to Saturday, from 11:00 a.m. to 5:00 p.m., as evidenced by various advertisements which he had placed in local newspapers. The Appellant advises that in addition to the regular store hours which he maintained, he spent time tracking down [text deleted]. He also spent time running the internet portion of his business, and doing all of the administrative and accounting functions necessary to any business operation.

The Appellant insists that his store hours represented only one-third to one-half of the total amount of time which he dedicated to running his own business. He claims that his work load would vary from week to week, but he consistently worked more than twenty-eight hours per week and should have been classified as a full-time earner for purposes of determining his Income Replacement Indemnity (IRI) benefits.

Counsel for MPIC submits that the Appellant has not established, on a balance of probabilities, that the Internal Review decision was incorrect. Counsel for MPIC carefully reviewed the information provided by the Appellant to the case manager, including his hours of work and his income. Counsel for MPIC maintains that the information provided on the Application for Compensation ('AFC') clearly justifies the determination of the Appellant as a part-time earner. This information was provided by the Appellant and the AFC was signed by the Appellant indicating his acceptance of the information contained therein. Accordingly, counsel for MPIC submits that the Appellant was properly classified as a part-time earner for the purposes of calculating his IRI benefits.

Section 70(1) of the MPIC Act provides the following definition:

> **70(1) In this Part,**
>
> **"part-time earner"** means a victim who, at the time of the accident, holds a regular employment on a part-time basis, but does not include a minor or a student;

Section 5 of Manitoba Regulation 37/94 provides the following:

> **Meaning of part-time employment**
> **5** A person holds regular employment on a part-time basis where the person is employed for less than 28 hours per week, not including overtime hours.

Upon a careful review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant has not established, on a balance of probabilities, that he was incorrectly classified as a part-time earner, for the purposes of calculating his IRI entitlement.

Although we acknowledge that as a self-employed business owner, the amount of hours that an

individual might devote to his or her business operations could exceed the posted hours of business, we find that the Appellant has not established, on a balance of probabilities, that he was working more than fifteen to twenty hours per week in early December 2000, operating all aspects of his [text deleted] store. The Appellant's oral testimony at the hearing, more than three years after the motor vehicle incident, did not rebut the statements made to his case manager and in his AFC that he worked fifteen to twenty hours per week at that time. We note that the circumstances surrounding the Appellant's AFC were carefully considered by the Internal Review Officer in his decision of July 23, 2001, where he noted that:

> On December 21, 2000 you completed your Application for Compensation in front of the Case Manager [text deleted]. In the Part 6 of the Application you confirmed you carried on the business [text deleted]. In the number of hours worked per work and the ordinary work week in the business you indicated 15-20. You indicated as well that your yearly gross income arising out of the business was $26,000.00. It was also indicated thereon that your business hours were Saturday – 11-5:00 p.m. or by appointment only. The following notes were created by [MPIC's case manager] following her meeting with you:
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> > "[The Appellant] has owned and operated [text deleted] since March 2000. The [text deleted] store is open only on Saturday or by appointment only. Monthly he does the company books and will send me the sales reports, a business card, invoices, rent receipts and the Yellow Pages ad. He applied for a business licence in June or July 2000. He is thinking of selling this business. [The Appellant] R.T.W. on December 9/2000 doing regular hours but modified duties. He estimates he's working at 50% capacity and having problems reaching, crouching, carrying boxes of [text deleted]. He has a flat cart with wheels that he can use to assist him.
> >
> > I left with [the Appellant] my card. Recovery and Guide brochures, medical expenses and travel forms and explained the benefits to which he is entitled including the IRI 7-day W.P. as he estimates he's working at 50% capacity at his self-employment, will pay 50% IRI".

Upon our own review of the AFC, we note that in Part 6 of the AFC, the Appellant noted that he worked fifteen to twenty hours per week. A separate notation was made respecting the Appellant's store hours, being Saturday 11-5 p.m. or by appointment only. In Part 7 of the AFC, the Appellant also reported that he worked fifteen to twenty hours per week.

We find that the Appellant's recollection of his business activities would have been most accurate, closest to the time of the motor vehicle incident. As such, we find that the AFC is the best evidence of the Appellant's business activities at the relevant time. The AFC did contain a distinction between the Appellant's store hours and the total hours he worked per week. He reported to the case manager that his total hours per week did exceed his store hours at that time and his IRI benefits were based upon fifteen to twenty hours per week, being the greater figure for his weekly hours worked.

With respect to the Appellant's contention that his judgment was compromised when he completed the AFC and met with his case manager, due to the medication that he was taking at the time, we find that there is no evidence in the file, or in the medical reports to establish this fact.

As a result, the Appellant's appeal is dismissed and the Internal Review decision dated July 23, 2001 is confirmed.

2. Whether it was appropriate to reduce the Appellant's Income Replacement Indemnity Benefits by 50%

In his decision dated July 23, 2001, the Internal Review Officer made the following decision:

> Your comments to [MPIC's case manager] about your return to work completing 50% of your duties justifies a further reduction of your IRI entitlement in my view. During the course of the hearing you indicated that information that you provided to [MPIC's case manager] about your typical weekly average hours worked and the amount of your duties you were capable of completing was an error due to the fact that your mental faculties was compromised by the medication you were taking as at December 21, 2000. This not established by the information in the file in my view. In arriving at that determination I

> have reviewed the medical reports and noted your description of the accident as follows in the Application for Compensation:
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> > "I was driving on [text deleted] approaching [text deleted] from [text deleted]. At a certain point [text deleted] comes together with both [text deleted] and [text deleted]. I passed through the first stop successfully (@[text deleted]) as I proceeded to right turn onto [text deleted] I noticed a car driving rapidly into my turning lane. I braked suddenly and managed to avoid a collision. No part of my body came into contact with the vehicle".
>
> Accordingly I am of the view that [MPIC's case manager]'s reduction of your IRI entitlement by a further 50% was appropriate under the circumstances.

At the appeal hearing, the Appellant submitted that the determination that he was able to do fifty percent of his work activities, which justified the reduction of his IRI benefits by fifty percent, was incorrect. The Appellant claims that the low back complaints which he endured following the motor vehicle incident prevented him from doing many of the activities connected with his business. He testified that as a result of the motor vehicle incident, he could not lift boxes over ten pounds. Although he was able to maintain his store hours, he encountered difficulties sorting, lifting, carrying [text deleted] and even helping customers find [text deleted]. He also insisted that due to the pain and fatigue from his low back problems, he was not able to go out and search out as many [text deleted] as before. He curtailed his efforts to go out and procure [text deleted], limiting his visits to [text deleted]. Also, he screened [text deleted] more cautiously after the motor vehicle incident, due to his decreased endurance. The Appellant submits that he was able to do thirty to thirty-five percent of the total business activity after the motor vehicle incident, and therefore his IRI benefits should be adjusted to reflect his actual level of participation in the business.

Upon a careful review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant was able to complete at least fifty percent of his job related

functions, and accordingly the reduction of the Appellant's IRI benefits by fifty percent in these circumstances was fair and appropriate.

The evidence before the Commission was that the Appellant was able to maintain his store hours after the motor vehicle incident. He was still able to assist customers. He was able to sit at a computer and conduct the internet portion of his business. He was having problems reaching, crouching and carrying boxes and as a result, he did have to minimize his activities with respect to his purchasing and procurement of [text deleted]. We find that the Appellant's testimony in the above regard is entirely consistent with his comments to his case manager that he was working at fifty percent capacity in December 2000. Accordingly, we find that the Appellant's appeal should be dismissed and the Internal Review decision dated July 23, 2001 confirmed.

3. Entitlement to Income Replacement Indemnity Benefits beyond July 31, 2001

With regard to the termination of the Appellant's IRI benefits, in his decision dated July 31, 2001, the Internal Review Officer found that:

> Having noted that when [Appellant's doctor] last saw you on July 17, 2001 he felt that you were still having some difficulty performing the essential duties of your employment due to the symptoms related to the move of your business. In accordance with [Appellant's doctor]'s remarks, I am prepared to allow your Application for Review and direct payment of that IRI be extended up until the end of July, 2001. This would provide for five weeks of further coverage with respect to the flare-up caused by the move. Any extension of IRI coverage beyond this date cannot be justified based upon the existing information in your file. The file will be returned to the Case Manager for further processing of the further IRI entitlement and handling.

At the appeal hearing, the Appellant submitted that his IRI benefits were arbitrarily terminated and he was entitled to a continuation of IRI benefits beyond July 31, 2001. He indicated that he was not at full capacity as of July 31, 2001 and the termination of his IRI benefits on that date was premature.

Section 110(1)(a) of the MPIC Act provides as follows:

> **Events that end entitlement to I.R.I.**
> **110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
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> (a) the victim is able to hold the employment that he or she held at the time of the accident.

Upon a careful review of all of the evidence made available to it, both oral and documentary, the Commission finds that the Appellant has not established, on a balance of probabilities, that any injuries which he sustained in the motor vehicle incident of December 3, 2000 prevented him from resuming his full employment duties beyond July 31, 2001.

The case manager's decision dated July 12, 2001 determined that the Appellant's IRI benefits should cease on June 24, 2001, since at that time he was capable of resuming his pre-accident work hours and duties, albeit with certain work modifications and adaptations.

The Internal Review Officer subsequently found that the case manager's decision did not take into account that the Appellant suffered a flare-up of his lower back pain due to the move of his business on June 17, 2001. It was on the basis of this flare-up that the Internal Review Officer provided an additional five weeks of IRI benefits.

We find that the Appellant was capable of performing his pre-accident duties as of June 24, 2001, when his IRI was originally terminated by the case manager. While the Internal Review Officer granted an additional five weeks of IRI to the Appellant, due to an apparent exacerbation of the Appellant's low back problems, there was little evidence to connect these ongoing back

problems to the motor vehicle incident of December 3, 2000. Given the Appellant's significant history of pre-existing back problems, we find it just as likely that he exacerbated his pre-existing back condition during the course of moving his business. In any event, there was no medical evidence presented by the Appellant as to the duration of this exacerbation, and we find that the Internal Review Officer was more than fair in his assessment and his decision to provide an additional five weeks of IRI benefits for this Appellant.

As a result, the Appellant's appeal is dismissed and the Internal Review decision dated November 7, 2001 is hereby confirmed.

Dated at Winnipeg this 8th day of April, 2004.

YVONNE TAVARES

LAURA DIAMOND

WILSON MACLENNAN