Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-85

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Ms. Deborah Stewart** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf, assisted by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Dianne Pemkowski.**
HEARING DATE:	**May 17, 2004**
ISSUE(S):	**1. Entitlement to Income Replacement Indemnity benefits beyond July 18, 1999;** **2. Whether Income Replacement Indemnity benefits were correctly calculated.**
RELEVANT SECTIONS:	**Section 81(1)(a) and 81(2) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act') and Section 8 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

The Appellant, [text deleted], was involved in a motor vehicle accident on January 20, 1999. Due to the injuries which the Appellant sustained in that motor vehicle accident, he became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act. The Appellant has appealed from the Internal Review decision dated March 5, 2003, with respect to the following issues:

1. Entitlement to Income Replacement Indemnity benefits beyond July 18, 1999; and

2. Whether Income Replacement Indemnity benefits were correctly calculated.

1. Entitlement to Income Replacement Indemnity benefits beyond July 18, 1999

The Internal Review decision dated March 5, 2003 dismissed the Appellant's Application for Review of the case manager's decision of October 1, 1999. The Internal Review Officer determined that the Appellant had failed to establish any further entitlement to income replacement indemnity ('IRI') benefits beyond July 18, 1999, on account of any injuries arising out of the motor vehicle accident of January 20, 1999.

At the time of the motor vehicle accident, the Appellant was self-employed, operating a mattress manufacturing company. At the hearing of his appeal, the Appellant testified that he began to draw his usual salary from the business as of July 19, 1999, despite his diminished capacity to participate fully in running his business, to the same extent that he had prior to the motor vehicle accident.

Section 81(1)(a) of the MPIC Act provides that:

> **Entitlement to I.R.I.**
> **81(1)** 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.

Section 8 of Manitoba Regulation 37/94 provides that:

> **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.

Based upon the Appellant's testimony that he began to draw his full salary from his business as of July 19, 1999, we find that as of that date, the Appellant was substantially able to perform the essential duties of his pre-accident employment. The fact that he reinstated himself on his company's payroll leads us to the conclusion that he had regained a significant amount of his functional capacity, so as to justify his return to his company's payroll. Additionally, we find that since there was no longer a loss of income attributable to the motor vehicle accident beyond July 18, 1999, an entitlement to IRI benefits could not be triggered.

2. <u>Whether Income Replacement Indemnity benefits were correctly calculated</u>

The Internal Review Officer, in his decision dated March 5, 2003, determined that the case manager had correctly calculated the Appellant's IRI benefits and accordingly dismissed his appeal on this ground as well.

The case manager, in his decision dated October 1, 1999, determined the Appellant's IRI entitlement as follows:

> As you were only able to perform 35% of your job demands, top-up calculations were required on the maximum Gross Yearly Employment Income of $58,500.00 for the period January 28, 1999 to July 18, 1999, not withstanding the seven-day waiting period. The Application for Compensation submitted June 9, 1999, confirmed your typical average weekly hours as 80. Given you were able to perform 28 hours per week (35% of 80), the prorated net earnings was calculated at $354.03. This amount was reduced from your net regular IRI weekly payment of $693.91 ($1,387.81 ÷ 2), leaving the amount of $339.88 of Income Replacement Indemnity payable during your weeks of reduced work capacity. Over the period February 3, 1999 to July 18, 1999, your total Income Replacement Indemnity payable has been calculated at $8,333.69. A copy of the calculation sheet has been forwarded to you for your perusal.

At the appeal hearing, the Appellant submitted that from January 28, 1999 to July 18, 1999, he was not able to perform 35% of his occupational duties due to his accident-related injuries. He maintains that the Physical Demands Analysis conducted by [vocational rehabilitation consulting

company] did not accurately reflect the break-down of his duties as an owner/supervisor of a mattress manufacturing company. The Appellant claims that the extent of his administrative duties was exaggerated by the Physical Demands Analysis and the actual extent of his manual labour functions was minimized. He submits that from January 28, 1999 to July 18, 1999, he was only capable of performing ten to twenty percent of his pre-accident occupation, and as a result his IRI benefits should have been topped-up on that basis.

Counsel for MPIC submits that 35% was an accurate reflection of the administrative portion of the Appellant's job function, representing the job duties he was capable of doing after the accident. Accordingly, she maintains that the reduction of his IRI benefits on that basis was justified. Counsel for MPIC points out that the Appellant's IRI benefits were in fact improperly calculated on the basis that the 35% reduction should have been calculated on the Appellant's actual gross income, and not the maximum Gross Yearly Employment Income as set out in the case manager's decision. The resultant IRI weekly payment would have been lower for the Appellant. However, in accordance with Section 190 of the MPIC Act, counsel for MPIC confirmed that MPIC would not request reimbursement from the Appellant of the overpayment.

Upon a careful review of all of the evidence made available to us, the Commission finds that the Appellant has not established, on a balance of probabilities, that he was unable to perform at least 35% of his pre-accident duties from January 28, 1999 to July 18, 1999. We find that the Appellant's administrative functions, including bookkeeping, taking mattress orders, ordering material, scheduling staff, paying utility bills [text deleted], marketing, monitoring inventory, checking orders, insuring proper delivery of mattresses, quality assurance of mattresses, and accounting and supervisory functions, which he continued to be able to do after the motor vehicle accident, accounted for at least 35% of the Appellant's employment responsibilities.

Accordingly, the Appellant's IRI top-up was appropriately calculated on the basis that he could undertake 35% of his employment duties.

As a result, the Appellant's appeal is dismissed and the Internal Review decision dated March 5, 2003 is confirmed.

Dated at Winnipeg this 2nd day of June, 2004.

YVONNE TAVARES

DEBORAH STEWART

PAUL JOHNSTON