



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-15

PANEL: Ms Yvonne Tavares, Chairperson
Ms Deborah Stewart
Mr. Neil Cohen

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATES: January 5, 2005, February 23, 2005 and April 12, 2005

ISSUE(S): Determination of Level of Experience in Class of Employment.

RELEVANT SECTIONS: Section 83(1) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act') and Section 3 and Schedule C 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, [text deleted], was involved in a motor vehicle accident on June 7, 2002, when he slipped and fell off the trailer connected to the truck he was driving. As a result of this accident, the Appellant sustained injuries to his lower back and he became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was self-employed as a truck driver. Since he was unable to continue working due to the injuries sustained in the motor vehicle accident, he became entitled to Income Replacement Indemnity ('IRI') benefits.

MPIC's case manager assessed the Appellant's entitlement to IRI as a full-time self-employed truck driver pursuant to Section 3 of Manitoba Regulation 39/94, which provides that:

GYEI derived from self-employment

3(1) In this section, "business income" means the income derived from self-employment, by way of a proprietorship or partnership interest, less any expense that relates to the income and is allowed under the *Income Tax Act* (Canada) and *The Income Tax Act* of Manitoba but not including the following:

- (a) any capital cost allowance or allowance on eligible capital property;
- (b) any capital gain or loss;
- (c) any loss deductible under section 111 (losses from other years) of the *Income Tax Act* (Canada).

GYEI from self-employment

3(2) Subject to section 5, a victim's gross yearly employment income derived from self-employment that was carried on at the time of the accident is the greatest amount of business income that the victim received or to which the victim was entitled within the following periods of time:

- (a) for the 52 weeks before the date of the accident;
- (b) for the 52 weeks before the fiscal year end immediately preceding the date of the accident;
- (c) where the victim has operated the business for not less than two fiscal years before the date of the accident, for the 104 weeks before the fiscal year end immediately preceding the date of the accident divided by two;
- (d) where the victim has operated the business for not less than three fiscal years before the date of the accident, for the 156 weeks before the fiscal year end immediately preceding the date of the accident divided by three;

or according to Schedule C.

MPIC determined that the greatest GYEI applicable to the Appellant was in accordance with Schedule C. Based upon the employment information he provided, MPIC determined the Appellant's IRI as a Level 1 Truck Driver. Section 1 and Section 2 of Schedule C of Manitoba Regulation 39/94 provide that:

**SCHEDULE C
CLASSES OF EMPLOYMENT**

Determination of level of experience

1 For the purpose of the following Table, the corporation shall determine the level of experience that the victim has in the class of employment determined for the victim, in accordance with the following:

- (a) **“Level 1”** means less than 36 months of experience;
- (b) **“Level 2”** means 36 months or more but less than 120 months of experience;
- (c) **“Level 3”** means 120 months or more of experience.

Calculation of months

2 For the purpose of calculating the number of months of experience under section 1 of this schedule, a month in which an employment begins or ends is deemed to be a complete month of experience.

The Appellant disagreed with the determination of his level of experience as a truck driver at Level 1 and sought an Internal Review of that decision.

The Internal Review decision dated October 31, 2003 amended the case manager's decision of October 17, 2002. The Internal Review Officer determined that the Appellant should be classified as a truck driver with Level 2 (rather than Level 1) experience. The Internal Review Officer found that the available evidence supported that the Appellant had truck driving experience totaling seventy-three (73) months and thus justifying classifying him at Level 2 experience for purposes of determining his IRI entitlement pursuant to Schedule C.

The Appellant has now appealed from the Internal Review decision dated October 31, 2003 to

this Commission. The issue which requires determination in this appeal is the Appellant's level of experience as a truck driver for purposes of determining his entitlement to IRI benefits.

At the hearing of this matter, the Appellant and counsel for MPIC agreed that the Appellant had the following experience:

<u>DATES</u>	<u>EXPERIENCE</u>	<u>EMPLOYER</u>
09/90 – 09/91	13 months	[text deleted]
10/91 – 08/92	11 months	[text deleted]
<p>(The Internal Review Officer, in an e-mail dated February 21, 2005 agreed that the Appellant should be given twenty-three (23) months "credit" for the period between September 1990 and August 1992 instead of the fifteen (15) months which he had allowed in the "Analysis" attached to the Review decision. However, this was clearly a calculation or clerical error and this period would actually account for <u>twenty-four</u> (24) months experience.)</p>		
10/93 – 02/94	5 months	[text deleted]
03/94 – 02/95	5 months	[text deleted]
06/95 – 02/97	13 months	[text deleted]
	3 months	[text deleted]
04/97 – 09/97	5 months	[text deleted]
04/98 – 07/98	4 months	[text deleted]
08/98 – 03/99	8 months	[text deleted]
01/01 – 06/02	16 months	[text deleted]
	2 months	[text deleted]
TOTAL:	85 months	

At the hearing of this matter, the Appellant testified that he started truck driving at [text deleted] years of age, in 1979. He obtained his Class 1 beginner licence in June 1988 and began working at [text deleted] where he received on the job training in order to gain experience and prepare for

the Class 1 licence requirements. He received his Class 1 licence in April 1989. The Appellant continued to work for [text deleted] on a full-time basis from April 1989 to March 1990. He therefore submits that this period accounts for a further twenty-two (22) months of truck driving experience.

The Appellant also testified that prior to April 1988, when he obtained his Class 1 beginners permit, he was employed as a truck driver. In his submission to the Commission dated February 20, 2005, and in his testimony before the Commission, the Appellant advised that from 1979 to 1990, he had a further forty-seven (47) months of experience (at a minimum) as a truck driver.

This included jobs with:

- ◆ [text deleted] from 1979 to 1980 (for approximately 12 months);
- ◆ [text deleted] from 1983 for a minimum of 18 months;
- ◆ [text deleted] for August and September of 1984 (2 months);
- ◆ [text deleted] for 12 months from 1986 to 1987; and
- ◆ [text deleted] from June 1990 to August 1990 (3 months).

As a result, the Appellant submits that he clearly has in excess of the one hundred twenty (120) months experience needed to qualify for Level 3 set out in Schedule C and his IRI should be increased accordingly.

Counsel for MPIC submits that the Appellant has not met the onus of proof required in the circumstances to establish that he has the requisite experience to qualify for IRI as a truck driver at Level 3 of Schedule C. Counsel for MPIC argues that the evidence submitted by the Appellant is largely unsubstantiated and therefore unsatisfactory. He insists that the Appellant should have submitted more evidence in support of his work experience and that his sworn

testimony is insufficient to meet the standard of proof required in this case. In support of his argument, counsel for MPIC submitted legal authorities to support the proposition that a judge should not act on unsatisfactory evidence on the ground that it is the only evidence available.

Counsel for MPIC maintains that the Internal Review Officer provided a detailed analysis of the Appellant's work experience as a truck driver, that this analysis was largely agreed to by the Appellant and therefore that the Internal Review decision dated October 31, 2003 should be confirmed and the Appellant's appeal dismissed.

Upon a review of all of the evidence made available to it, both oral and documentary, the Commission finds that, on a balance of probabilities, the Appellant has at least one hundred twenty (120) months of experience as a truck driver. Therefore, the Appellant should be classified at Level 3 experience as a truck driver for purposes of determining his IRI entitlement pursuant to Schedule C of Manitoba Regulation 39/94.

The Commission found that the Appellant was a credible individual and that he testified in a truthful and forthright manner. Although his recollection of his past employment experience was not overly precise, we find that his evidence does meet the standard of proof, i.e. the balance of probabilities, required in these circumstances.

Specifically, the Commission finds that, in addition to the eighty-five (85) months of experience agreed to between the Appellant and MPIC, the Appellant had another twenty-two (22) months of experience as a truck driver for the period June 1988 to March 1990. The period when the Appellant had his Class 1 beginners permit (June 1988 – March 1989), had initially been ignored by MPIC as a training period and therefore not included as part of his experience as a truck

driver. The rest of that period (April 1989 – March 1990) was disregarded by the Internal Review Officer since there was no supporting documentation to substantiate the Appellant's claims. However, counsel for MPIC acknowledged that for the purposes of determining the level of experience as a truck driver, pursuant to Schedule C, a claimant did not need to possess a Class 1 driver's licence.

Upon a consideration of the totality of the evidence, the Commission accepts the Appellant's sworn testimony that he was employed as a truck driver for the period June 1988 to March 1990 and that he should be given credit for twenty-two (22) months of truck driving experience. In addition to the Appellant's testimony, he did provide confirmation that he held a "Class 100" B.C. licence from April 1989 and a Class 1 Manitoba driver's licence from May 1990. We are satisfied that the Appellant would have required training prior to April 1989 in order to qualify for his Class 1 licence. These facts lend support to the oral testimony provided by the Appellant and as a result the Commission accepts the Appellant's testimony.

Additionally, the Commission is persuaded that the Appellant had a minimum of thirteen (13) months of truck driving experience in the years prior to June 1988. We accept the Appellant's sworn testimony to the fact that he held several truck driving positions prior to June 1988. We find that the Appellant's evidence as to his job experience is satisfactory and convincing. Although his evidence was not completely specific or exceedingly detailed, it was neither contradictory nor inconsistent. Rather, it was the Appellant's best recollection of a diverse history of numerous employments as a truck driver and reflected frequent job changes. The fact that the Appellant did not have documentation to substantiate all of his employment history, does not prevent the Commission from evaluating the credibility of his sworn testimony and determining whether that evidence alone satisfies the burden of proof required in the

circumstances. In this case, the Commission is satisfied on a balance of probabilities that the Appellant had a minimum of one hundred twenty (120) months experience as a truck driver prior to the motor vehicle accident of June 7, 2002. Therefore, for the purposes of determining his IRI entitlement pursuant to Schedule C of Manitoba Regulation 39/94, he should be classified as a truck driver with Level 3 experience. Interest shall be added to the sum awarded to the Appellant by virtue of the foregoing decision in accordance with Section 163 of the MPIC Act.

As a result, the Appellant's appeal is allowed and the Internal Review decision dated October 31, 2003 is therefore rescinded.

Dated at Winnipeg this 27th day of April, 2005.

YVONNE TAVARES

DEBORAH STEWART

NEIL COHEN