



## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]**  
**AICAC File No.: AC-04-43**

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
Ms. Deborah Stewart  
Mr. Paul Johnston

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

**HEARING DATE:** January 19, 2005

**ISSUE(S):** The classification of the Appellant as a Service Station  
Attendant, Level III  
Calculation of Income Replacement Indemnity benefits.

**RELEVANT SECTIONS:** Sections 107, and 109 (1) and (2), of The Manitoba Public  
Insurance Corporation Act ('MPIC Act') and Section 115 of  
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] was involved in a motor vehicle accident on February 13, 1998 and suffered motor vehicle accident injuries. The Appellant, between 1985 until 1996, owned and operated a [text deleted] gas bar but, as a result of the injuries sustain in a motor vehicle accident he was unable to continue that employment and was in receipt of Income Replacement Indemnity ('IRI') benefits based on his previous employment. On August 21, 2002, in accordance with Section

107 of the MPIC Act, the case manager made a determination of the employment of the Appellant as a Service Station Attendant, Level III. In this decision the case manager stated:

Based upon the Transferable Skills Analysis and given your level of function, skills, and abilities you have been determined as a Service Station Attendant, Level III. This is done in accordance with Schedule C of Manitoba Public Insurance Regulations 39/94. Schedule C is a table of classes of employment wherein gross employment income by occupation is listed based on average earning levels supplied by Human Resources Development Canada. The category of employment stated has the potential annual income of \$21,527.00 at Level III.

The Case Manager further stated:

It is noted that the classification of a Service Station Attendant is light in physical demands and that there is a high demand for this occupation both on a part-time and full-time basis. You have stated that from 1985 until 1996 you owned and operated a [text deleted] gasbar and as you have in excess of 119 months experience in automotive service stations that this would qualify you for Level III Service Station Attendant in accordance with Schedule C. (underlining added)

From the date of this letter, you have one year to secure employments in accordance with Section 110 (1) (d) of the Manitoba Public Insurance Act (attached).

As a result of this decision the Appellant's employment was reduced from \$1,187.45 bi-weekly to an ongoing bi-weekly payment of \$440.45 effective August 21, 2003. The Appellant made Application for Review of the case manager's decision dated September 20, 2003. The Internal Review Officer issued his decision on March 10, 2004 wherein he rejected the Appellant's Application for Review and confirmed the decision of the case manager in respect of the classification of the Appellant as a Service Station Attendant, Level III and in respect to the calculation method used to determine the Appellant's IRI entitlement.

### **Appeal**

The Appellant filed a Notice of Appeal on April 7, 2004 and the appeal hearing took place on January 19, 2005. The Appellant represented himself and Mr. Mark O'Neill represented MPIC.

## **Classification of Employment**

The relevant provisions relating to the appeal of this matter are set out in Sections 107, 109 (1) and (2) and Schedule C, Section 1 (c), Table of Classes of Employment, Section 9-Service Station Attendants, Manitoba Regulation 39/94.

### **New determination after second anniversary of accident**

**107** From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

### **Considerations under section 107 or 108**

**109(1)** In determining an employment under section 107 or 108, the corporation shall consider the following:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved under this Part;
- (c) the regulations.

### **Type of employment**

**109(2)** An employment determined by the corporation must be

- (a) normally available in the region in which the victim resides; and
- (b) employment that the victim is able to hold on a regular and full-time basis or, where that is not possible, on a part-time basis.

## **Manitoba Regulation 39/94**

### **Schedule C**

**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 III**” means 120 months or more of experience.

### **9 Sales Occupation**

Services Station Attendants	10,403	15,018	18,740
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It should be noted that the Regulation, in Section 3, provides for indexation of the Gross Income when the occupation of an Appellant is determined in accordance with Schedule C.

At the appeal hearing the Appellant testified that he was unable to obtain employment as a Service Station Attendant and therefore asserted that he should continue to receive IRI. During the course of his testimony the Appellant indicated that when he commenced employment as an owner/operator of the [text deleted] gas bar in 1985, his primary duties for the first three or four months of 1985 was to work as a Service Station Attendant. The Appellant further testified that after the first three months of working as a gas bar operator he hired employees and thereafter worked only as a supervisor.

The case manager in determining the level of experience of the Appellant as a Service Station Attendant concluded that the Appellant had an excess of 119 months of experience as a Service Station Attendant and, as a result, classified the Appellant as a Level III Service Station Attendant in accordance with Schedule 3.

The Commission finds that:

1. the definition of a Level III Service Station Attendant under Section 1 of Manitoba Regulation 39/94 means 120 months or more of experience in the employment classification;
2. the Appellant only had three or four months experience as a Service Station Attendant in 1985 and thereafter until the date of the accident was employed only as a Service Station Manager;
3. the Appellant was correctly classified as a Service Station Attendant in accordance with Section 9 of the Table of Classes of Employment under Manitoba Regulation 39/94 but

MPIC incorrectly determined the Appellant's level of experience in this employment classification as Level III

4. the Appellant was employed in the capacity of a Service Station Attendant for a period of less than 36 months and, as a result, MPIC should have classified the Appellant as having a work experience of Level 1.

The Commission therefore finds that MPIC incorrectly determined the level of the Appellant's work experience and directs MPIC to reclassify the Appellant as a Service Station Attendant Level 1 in accordance with Schedule C of Manitoba Regulation 39/94 as of August 21, 2003. The commission further directs that this matter be referred back to the case manager for the purpose of calculating the Appellant's IRI as of August 21, 2003 and upon that determination pay the Appellant the correct amount of his IRI entitlement together with interest.

### **Calculation of IRI**

The Appellant submitted that his entitlement to IRI should be based on his gross income and not on his net income. The Commission rejects the appeal of the Appellant on this issue and accepts the decision of the Internal Review Officer who stated in his letter to the Appellant on March 10, 2004:

The calculations provided in [text deleted's] decision are arrived at correctly, taking into account the provisions of the legislation. In particular, Section 115 of The Manitoba Public Insurance Corporation Act provides the following:

#### **I.R.I. for reduced income from determined employment**

**115** If a victim becomes able to hold employment determined for him or her under section 107 or 108 but, because of bodily injury caused by the accident, earns from the employment a gross income that is less than the gross income used by the corporation to compute the income replacement indemnity that the victim was receiving before the employment was determined, the victim is entitled, after the end of the year referred to in clause 110(1)(d), to an income replacement indemnity equal to the difference between the income replacement indemnity the

victim was receiving at the time the employment was determined and the net income the victim earns or could earn from the employment.

This decision provides that the net income you earned or could earn from your determined employment is to be deducted from your ongoing IRI. The meaning of net income is prescribed in Section 112 of the Act which states:

**Determination of net income**

**112 (1)** A victim's net income is his or her gross yearly employment income, to a maximum of the maximum yearly insurable earnings established under section 114, less an amount determined, in accordance with the regulations, for income tax under *The Income Tax Act* and the *Income Tax Act* (Canada), premiums under the *Unemployment Insurance Act* (Canada) and contributions under the Canada Pension Plan.

You should be aware that factors that effect the amount of the net income from your determined employment include the fact that the tax which would be deducted would be at a lower rate than the rate which would be applied in calculating you the amount of your ongoing IRI entitlement.

Therefore, having reviewed your file, I am of the view that the calculations provided by [text deleted] are done correctly in accordance with the Act and Regulations. Therefore, I am upholding her decision and dismissing your Application for Review with respect to this issue as well.

The Commission therefore confirms the decision of the Internal Review Officer with respect to this issue in his decision dated March 10, 2004 and dismisses the Appellant's appeal in this respect.

Dated at Winnipeg this 27<sup>th</sup> day of January, 2005.

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**MEL MYERS, Q.C**

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**DEBORAH STEWART**

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**PAUL JOHNSTON**