

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-190**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Mary Lynn Brooks
Ms Linda Newton

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: December 20, 2007

ISSUE(S): Whether Income Replacement Indemnity benefits have been properly calculated

RELEVANT SECTIONS: Sections 81(1) and 81(2) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Section 3 and Schedule C of Manitoba Regulation 39/94

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant, [text deleted], is appealing the Internal Review decision dated September 26, 2006, with respect to the calculation of his Income Replacement Indemnity ('IRI') benefits.

On April 29, 2006, [the Appellant] was involved in a motor vehicle accident wherein he sustained a broken wrist, an abrasion to his right lower leg and a sore shoulder. Due to the

bodily injuries which the Appellant sustained in this accident, he became entitled to Personal Injury Protection Plan (“PIPP”) benefits pursuant to Part 2 of the MPIC Act.

At the time of the accident, the Appellant was self-employed as an acrylics specialist/plasterer, in the business of installing and repairing exterior home insulation and acrylic systems. Since he was unable to carry out his employment duties after the motor vehicle accident due to the injuries which he sustained, he became entitled to Income Replacement Indemnity (“IRI”) Benefits in accordance with ss. 81(1) and 81(2) of the MPIC Act.

In a decision dated June 14, 2006, MPIC’s case manager advised the Appellant of his entitlement to IRI benefits as follows:

The calculation of your GYEI is the greater of your business income as per Section 3(2) of the Manitoba Regulation, or the average gross income for the class of employment as determined by Schedule C.

...

As per Schedule C, your class of employment is defined as a Level 2, Lather. The information on file supports that your self employment commenced in 1998, which qualifies you for Level 2 of Schedule C. For your reference, Level 1 is less than 36 months of experience, Level 2 is greater than 35 months but less than 120 months of experience and Level 3 is greater than 119 months of experience.

Based on the information you have provided, the greatest of any calculation to determine your GYEI will be based upon Schedule C with a GYEI of \$[text deleted], resulting in a net biweekly entitlement of \$799.88. This decision is based on Section 111(1) of The Manitoba Public Insurance Corporation Act (copy attached).

The Appellant disagreed with that decision and sought an Internal Review. The Internal Review decision of September 26, 2006 confirmed the case manager’s decision of June 14, 2006 and dismissed the Appellant’s Application for Review. The Internal Review Officer found that the

calculation of the Appellant's IRI had been done in accordance with the MPIC Act and Regulations and accordingly the Appellant's IRI benefits had been properly determined.

The Appellant has now appealed from that decision to this Commission. The issue which requires determination in this appeal is whether the Appellant's Income Replacement Indemnity benefits have been properly calculated.

Upon hearing the testimony of the Appellant and upon a careful review of all of the documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant's representative and of counsel for MPIC, the Commission finds that the Appellant's IRI benefits should have been calculated based upon Level 3 of the class of employment set out in Schedule C of Manitoba Regulation 39/94 as National Occupational Classification ('NOC') H019.7219 - Contractors and Supervisors, Other Construction Trades, Installers, Repairers and Servicers.

Section 3(1) of Manitoba Regulation 39/94 governs the determination of a self-employed earner's income. That section defines business income as the income derived from the self-employment less any expense that relates to the income and is allowed under the *Income Tax Act*. Business income is comprised of reported revenues, less related expenses which are allowed as deductions by the applicable income tax legislation, plus certain adjustments provided specifically for in Section 3(1). Subsection 3(2) of Manitoba Regulation 39/94 provides that a victim's income from self-employment prior to the accident is to be calculated with regard to various time frames, or in accordance with Schedule C of the Regulation.

In the Appellant's case, after calculating all options, the most beneficial to him was the amount determined by Schedule C; it was that amount that was used to determine his IRI. However, the case manager classified the Appellant pursuant to Level 2 of the classification corresponding to Plasterers, Drywall Installers and Finishers and Lathers. Based upon the totality of the evidence before it, including the Appellant's sworn testimony at the appeal hearing, we find that the Appellant had:

1. greater than one hundred twenty (120) months of experience as a plasterer and therefore should have been classified pursuant to Level 3 of Schedule C; and
2. we find that the Appellant was a self-employed construction trade contractor who owned and operated his own business. Due to his expertise, the Appellant supervised and co-ordinated the activities of various tradespersons and was responsible for other tradespersons who might be involved in plastering on a specific job site. Accordingly, the Appellant should have been determined as a contractor/supervisor and classified under NOC H019.7219 - Contractors and Supervisors, Other Construction Trades, Installers, Repairers and Servicers of Schedule C of Manitoba Regulation 39/94.

As a result, the Appellant's appeal is allowed. His IRI benefits shall be based upon the GYEI determined pursuant to Level 3 of NOC H019.7219 of Schedule C of Manitoba Regulation 39/94. Accordingly, the Internal Review decision dated September 26, 2006 is therefore rescinded.

Dated at Winnipeg this 10th day of January, 2008.

YVONNE TAVARES

MARY LYNN BROOKS

LINDA NEWTON