Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-42

PANEL:	**Mr. Mel Myers, Chairperson** **Mr. Trevor Anderson** **Ms Lorna Turnbull**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman;** **[Text deleted], Crown Counsel for the Department of Justice.**
HEARING DATE:	**August 18, 2009**
ISSUE(S):	**1. Whether the Appellant is entitled to Income Replacement Indemnity benefits.** **2. Whether the Appellant's Permanent Cognitive Impairment benefit was properly assessed and calculated.**
RELEVANT SECTIONS:	**Sections 105 and 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Manitoba Regulation 41/94 (as amended by 41/2000) Div. 2(1) # 4.7(e)**

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 20, 2003. The Appellant stepped off the centre boulevard of [text deleted] and was struck by a northbound [vehicle]. The Appellant suffered the following injuries:

- "Intracranial hemorrhage and intraventrical hemorrhage requiring temporal craniotomy;
- Ruptured bladder;
- Right fracture of acetabulum and inferior ramus;
- Fracture of L1 transverse process;
- Abdominal scarring;
- Cerebral concussion;
- Cognitive impairment"

On April 28, 2003, the Appellant made an application for compensation in respect of the injuries he sustained in the motor vehicle accident in respect of Income Replacement Indemnity ("IRI") benefits and permanent impairments.

Case Manager's Decision - IRI:

On May 29, 2006, the case manager rejected the Appellant's application for IRI benefits pursuant to Section 105 of the MPIC Act which provides:

> **No entitlement to I.R.I. or retirement income**
>
> 105 Notwithstanding sections 81 to 103, a victim who is regularly incapable before the accident of holding employment for any reason except age is not entitled to an income replacement indemnity or a retirement income.

As a result, on June 12, 2006, the Appellant made an application to have this decision reviewed by an Internal Review Officer.

Internal Review Officer's Decision - IRI:

The Internal Review Officer issued a decision dated April 24, 2008 rejecting the Appellant's application for IRI on the grounds that the Appellant was unable to establish that he was not regularly incapable before the motor vehicle accident of holding employment pursuant to Section 105 of the MPIC Act.

In her decision dated April 24, 2008, the Internal Review Officer stated in part:

> "3. In an Arrest Record [text deleted] dated August 5, 2004, the following was noted:
>
> [The Appellant] has a lengthy continuous criminal record spanning from September of 1979 to August of 2004. [The Appellant] has been arrested 252 times under the intoxicated Persons Detention Act and another 200 times under the Criminal Code for a total of 452 charges against him in only 25 years…
>
> 8. It is noted in [the Appellant's] criminal record that on April 21, 2004 and June 2, 2004, he entered into a recognizance with both Judge [text deleted] and Judge [text deleted] with some of the conditions to not use hair spray, gasoline, glue or a similar substance, in a way that would make him intoxicated. He was ordered to be at his home address 24 hours a day except in a medical emergency involving himself or a member of his immediate family or for alcohol anonymous meetings with a representative of his mission."

The Appellant's legal counsel stated during the Internal Review hearing:

> "10. During the hearing you repeatedly asked [the Appellant] why he drank, what he drank, and whether he felt he was employable prior to the accident. With respect to the issue of whether [the Appellant] felt he was capable of employment prior to the accident, he answered, "No, because of the drinking…"

The Internal Review Officer further stated:

> "In my opinion, there is ample evidence on [the Appellant's] file to support that he was regularly incapable of holding employment before his motor vehicle accident of February 20, 2003. The fact that he was incarcerated on and off for a total of approximately 20 years [text deleted], his severe addiction disorder, hepatitis C, and the fact that he has had a total of 452 charges against him in the last 25 years, in my opinion, supports the decision that [the Appellant] was not capable of gainful employment at the time of his motor vehicle accident."

Case Manager's Decision – Cognitive Impairment:

On March 20, 2007, the case manager issued a decision awarding a permanent impairment award to the Appellant of $30,316.24 based on an impairment of 25.65% which is comprised of the following:

- "Post-traumatic alteration of tissue, intracerebral hematoma 2.0%

➢ Post-traumatic alteration of tissue, subdural hematoma	2.0%
➢ Post-traumatic bony alteration – following a craniotomy	2.0%
➢ Abdominal scarring	1.15%
➢ Loss of range of motion, right hip, flexion/extension	1.0%
➢ Loss of range of motion, right hip, internal/external rotation	5.0%
➢ Loss of range of motion, right hip, abduction/adduction	3.0%
➢ Cerebral concussion	2.0%
➢ Cognitive impairment	7.5%
Total	25.65%"

(underlining added)

The Appellant made application on April 12, 2007 to have the case manager's decision reviewed by an Internal Review Officer in respect of cognitive impairment.

Internal Review Officer's Decision – Cognitive Impairment:

The Internal Review officer issued a decision on April 24, 2008 rejecting the Appellant's application for review and concluded that the case manager had correctly applied the provisions of Division 2, Subdivision 1, #4.7(e) of Manitoba Regulation 41/94 and therefore dismissed the Appellant's application for review.

Notice of Appeal:

On April 28, 2008 a Notice of Appeal was filed wherein the Appellant stated:

1. He was capable of employment prior to the motor vehicle accident and therefore Section 105 had no application.
2. [Appellant's doctor #1] stated the Appellant was employable prior to the motor vehicle accident.
3. Section 105 is unconstitutional as it violates Section 15 of the Charter of Rights discriminating against the disabled.
4. In regard to cognitive impairment, the Appellant was assessed as having 35% impairment by [Appellant's psychologist] but only awarded 7.5% impairment by MPIC. The award for cognitive impairment should be increased.

Appeal:

The relevant Sections of the Act and Regulations are:

> **No entitlement to I.R.I. or retirement income**
>
> 105 Notwithstanding sections 81 to 103, a victim who is regularly incapable before the accident of holding employment for any reason except age is not entitled to an income replacement indemnity or a retirement income.
>
> **Lump sum indemnity for permanent impairment**
>
> 127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than $500. and not more than $100,000. for the permanent impairment.
>
> **Regulation 41/94 – Division 2(1) #4.7(e)**
>
> 4.7 Alterations of consciousness (Posttraumatic cataplexy, coma, epilepsy, narcolepsy, syncope and other neurological disorders and disturbances of consciousness)
>
> (e) cognitive disorder that minimally disrupts the performance of the activities of daily living, without the need for supervision, including the side effects of medication . 7.5%

The appeal hearing took place on August 18, 2009 in Courtroom No. 1 of the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba. At the time of the hearing, the Appellant was an inmate in a federal penitentiary, but he was present for the hearing. The Appellant was represented by [text deleted] and MPIC's legal counsel was Mr. Morley Hoffman The Department of Justice was represented by [text deleted].

The parties agreed at the appeal hearing that the Appellant's appeal in respect of the unconstitutionality of Section 105 would be adjourned until after the Commission issued its decision in respect of the Appellant's appeals relating to entitlement to IRI and entitlement to an increase in the permanent cognitive impairment benefits awarded to the Appellant by MPIC.

At the request of the Appellant's legal counsel, MPIC obtained a report from [Appellant's psychologist], a psychologist who carries on his practice in [text deleted]. With the assistance of [Appellant's psychologist's associate], [Appellant's psychologist] provided a report to the Appellant's legal counsel dated March 3, 2006. This report essentially reviews the history of the Appellant's employment, incarceration, alcohol and drug addiction, and anti-social behaviour.

In this report, [Appellant's psychologist] indicates that the Appellant had been incarcerated at [text deleted], having been transferred there from [text deleted] for the purpose of being seen by [Appellant's psychologist] and [Appellant's psychologist's associate]. [Appellant's psychologist's associate] conducted psychological testing in this case and interviewed the Appellant along with [Appellant's psychologist]. The Appellant was seen on September 17th, 18th and 23rd and a number of psychological tests were administered to him at that time. [Appellant's psychologist] also conducted an extensive interview with the Appellant in respect of his background. This extensive report discusses the following matters:

1. the Appellant's employment history;
2. the Appellant's history of incarceration; and
3. the Appellant's problems relating to drugs and alcohol.

1. Employment History:

[Appellant's psychologist], in his report, reviews the Appellant's employment history. The Appellant stated that at age [text deleted] he dropped out of school and had a grade [text deleted] standing. [Appellant's psychologist's associate] interviewed the Appellant about his work history and asked the Appellant what was the longest stretch of time that he had worked. The Appellant replied that the longest time was for approximately 1½ years during a period he spent on the [text deleted]. At that time he was [text deleted] years of age and he worked at a [text

deleted]. When asked about his next longest job the Appellant remembered that he had been employed for about six months in [text deleted] for a [text deleted]. He estimated that he was about [text deleted] years of age at that time. He subsequently worked for about 1½ years at a [text deleted] when he was [text deleted]. The Appellant further reported that subsequently, while living in [text deleted] as an adult, he did some odd jobs for his brother-in-law who would pay him under the table because the Appellant was receiving welfare. His brother-in-law worked for a contractor and the Appellant assisted his brother-in-law working as a labourer.

2. Incarceration and Alcohol and Drug Addition:

In his report [Appellant's psychologist] reviews the Appellant's history of incarceration as well as his alcohol and drug addition and states:

1. In his interview with [Appellant's psychologist's associate], the Appellant discussed his addiction and treatment issues. The Appellant reported that he started drinking at age [text deleted] and began consuming alcohol seriously in a problematic fashion around age [text deleted]. At that time, the Children's Aid Society no longer had "a hold on me". Since then he asserted every single legal or criminal charge he had received involved his being under the influence of alcohol. He further stated that he had been clean and sober for about one and half years during a time he was out of jail and legally married. Among the drugs the Appellant had used he admitted to trying crack and regular cocaine now and then experimentally, but alcohol had always been his main drug of choice.
2. In his discussions with [Appellant's psychologist's associate], the Appellant reported that he had failed to finish most of the treatment programs he had participated in and would typically stay two to four days and then would leave. The Appellant could not

say how many different treatment programs he had attempted in his lifetime, but estimated that he had been in every program available in Manitoba, including an intensive one in [text deleted]. The Appellant concluded that none of these treatment programs helped him and that AA was not beneficial to him at all.

3. The Appellant's largest impediment to working appears to be his addiction disorder; which was seen by [Appellant's psychologist] as a major pre-morbid mental health issue. [Appellant's psychologist] concluded that the Appellant did not present as intent on tackling his problems with alcohol or his chronic unemployment pattern.

On the employment issue, [Appellant's psychologist] saw little evidence of the Appellant being able to find and hold a job as an adult, primarily because of his severe alcohol addiction, pre and post accident.

[Appellant's doctor #2], in an undated report which was received by MPIC on August 24, 2005, stated:

> "According to my records [the Appellant] was seen by me on Nov 16 '02. He appears to be suffering from symptoms of a recent alcoholic syndrome with stomach symptoms and malaise.
>
> …on that that (sic) date I would consider [the Appellant] to be unemployable." (underlining added)

[Appellant's doctor #1], the Appellant's physician, provided two reports dated June 26, 2004 and March 7, 2005.

[Appellant's doctor #1] in his report dated June 26, 2004 stated that he agreed that prior to the motor vehicle accident of February 20, 2003 the Appellant was capable of gainful employment. However, [Appellant's doctor #1] also commented that when the Appellant attended the clinic on

a regular basis he would appear in a dishevelled and sloppy like dress and as well he had cautioned the Appellant to be on his best behaviour when sitting in the waiting room so as not to disturb the other patients or members of the public and that the Appellant did improve his conduct in this respect. [Appellant's doctor #1] further stated that the Appellant's not being well-dressed or well-groomed could preclude him from gainful employment and from being hired. [Appellant's doctor #1] also stated that it was not unusual for the Appellant to get into fights and assaults on an intermittent basis.

In a further report of March 7, 2005, [Appellant's doctor #1] noted that after performing a complete physical examination of the Appellant he found no treatment was required. In this report [Appellant's doctor #1] also comments on the Appellant's alcohol addiction, his anti-social behaviour and his dishevelled appearance. On July 23, 2002 [Appellant's doctor #1] reported that the Appellant attended at his office on a number of occasions in a dishevelled state, appeared somewhat intoxicated and proceeded to disturb the other patients in the waiting room. He further stated in this report that the Appellant's living conditions and socio-economic condition "makes it difficult for him to obtain employment and to perform his activities of daily living in a productive fashion."

The Appellant testified at the hearing and stated that:

1. at the time of the motor vehicle accident he was [text deleted] years of age and his total employment prior to age [text deleted] was at [text deleted] when he was [text deleted] years of age and at the [text deleted] when he was [text deleted];
2. he did not have any regular employment after age [text deleted] except when he had worked during the construction season for several days with his brother-in-law;

3. he was [text deleted] years of age at the date of the hearing and estimated he had spent 20 years in jail; and
4. when he was out of jail he spent most of his time drinking.

In his testimony, the Appellant essentially confirmed his addiction to alcohol and the use of other drugs and the adverse impact that the alcohol and the use of other drugs had on his ability to obtain regular employment.

MPIC's legal counsel did not call any witnesses to testify.

Submissions:

In his submission, the Appellant's legal counsel submitted that the Appellant was readily capable before the motor vehicle accident of holding employment based on the medical opinion of [Appellant's doctor #1]. In his report of March 7, 2005, [Appellant's doctor #1] noted that after performing a complete physical examination of the Appellant, he found no treatment was required. As a result, the Appellant's legal counsel submitted that the Appellant prior to the motor vehicle accident was physically capable of holding employment and that MPIC erred in failing to provide the Appellant with IRI benefits.

The Appellant's legal counsel referred to the following two authorities in his submission:

1. **Colin Rankin Smallwood v Minister of Human Resources Development, CP09274**
2. **Erskine v. Saskatchewan Government Insurance (2001) S.J. No. 768 (214 Sask.R. 198)(Q.B.)**.

The Appellant's legal counsel concluded his submission by stating that the Appellant had established, on the balance of probabilities that he was not regularly incapable before the motor

vehicle accident of holding employment. As a result, he submitted that the Commission should allow the appeal and order MPIC to provide IRI benefits.

In his submission, MPIC's legal counsel adopted the position of the Internal Review Officer and stated that there was ample evidence that the Appellant was regularly incapable of holding employment before the motor vehicle accident of February 20, 2003. He further submitted that:

1. The Appellant, from the time he was [text deleted] years of age, had not demonstrated he was regularly employed since he had only worked for several days each month during construction season and the only other income he had received was from welfare.
2. The longest the Appellant had ever worked was when he was [text deleted] and he was employed at [text deleted].
3. The Appellant had been incarcerated on and off for a total period of 20 years and that when he was not incarcerated, he was not employed but spent his time drinking.
4. The Appellant had been arrested 252 times under the *Intoxicated Persons Detention Act* and 200 times under the *Criminal Code* for a total of 452 charges against him in only 25 years.

In support of his position, MPIC's legal counsel referred the Commission to the decision of Laing J. in **Bogdanoff v. Saskatchewan Government Insurance, (1999) 181 Sask. R. 220 (Q.B.), aff'd 2001 SKCA 35, 203 Sask. R. 161**.

Discussion:

The Commission rejects the submission of the Appellant's legal counsel that [Appellant's doctor #1] found the Appellant had the physical capacity to work and therefore was capable of gainful

employment. An analysis of the two reports provided by [Appellant's doctor #1] supports the position that the Appellant was not capable of gainful employment. [Appellant's doctor #1] observed that:

1. the Appellant's living conditions and socio-economic conditions made it difficult for the Appellant to perform his activities of daily living in a productive fashion and obtain employment;
2. the Appellant attended his office on a number of occasions somewhat intoxicated and disturbed other patients in the waiting room;
3. the Appellant attended the clinic on a regular basis with a dishevelled and sloppy appearance and he had cautioned the Appellant not to disturb other patients in the waiting room;
4. since the Appellant was not well dressed, this would make it difficult for him to secure gainful employment;
5. it was not unusual for the Appellant to get into fights and assaults on an intermittent basis.

[Appellant's doctor #1's] comments, rather than supporting the Appellant's position that he was employable, are consistent with the opinions of [Appellant's psychologist] and [Appellant's doctor #2] that the Appellant was unemployable.

[Appellant's psychologist] extensively reviewed the Appellant's situation and found little evidence to support that the Appellant was able to find and hold a job as an adult, primarily because of his severe alcohol addiction before and after the motor vehicle accident.

In his report [Appellant's doctor #2] stated that according to his records when he was seen on November 16, 2002, the Appellant appeared to be suffering from symptoms of recent alcoholic syndrome with stomach symptoms and malaise. On that date, [Appellant's doctor #2] would consider that the Appellant was unemployable.

The Appellant's legal counsel in his submission referred to two legal authorities in support of his position. The first case was **Colin Rankin Smallwood v Minister of Human Resources Development (supra).** The second case was a decision of Mr. Justice Allbright in **Erskine v. Saskatchewan Government Insurance (supra)**.

The Commission finds that the Smallwood case has no application to the issue before this Commission. In that case the Review Tribunal denied the Appellant's application for disability benefits. The Pension Appeals Board reversed the decision of the Review Tribunal and found that the Appellant did suffer from the disability of alcoholism. As a result, the Appellant was entitled to receipt of disability benefits.

In Smallwood the issue was whether or not the Appellant suffered from a disability as a result of alcohol which would have entitled him to a Pension. The Minister of Human Resources Development took the position that Mr. Smallwood had not suffered from a disability as a result of his alcoholism. The Pension Appeals Commission disagreed and allowed the Appellant's appeal. In the present appeal there is no dispute by either party that the Appellant suffered from alcoholism. The issue in this appeal is not whether the Appellant has established on a balance of probabilities that he suffered from alcoholism but whether pursuant to Section 105, he was able to establish, on a balance of probabilities, that he was not regularly incapable before the motor vehicle accident of holding employment.

The Appellant's legal counsel also referred to the decision in Erskine (supra). The head note in **Erskine** cites:

> "Application by Erskine for income replacement benefits from Saskatchewan Government Insurance. Erskine was involved in a motor vehicle accident. Erskine was 59 years old at the time of the accident. She suffered from numerous medical disabilities. Her doctor indicated that she was about to return to employment at the time of the accident. As a result of the accident, she developed fibromyalgia, which made it impossible for her to return to work. Saskatchewan claimed that Erskine was incapable of holding employment at the time of the accident and was not entitled to income replacement benefits.
>
> HELD: Application allowed in part. Erskine was entitled to 60 per cent of full income replacement benefits. Erskine was a credible witness. She was capable of holding employment prior to the accident. The motor vehicle accident was 60 per cent responsible for her inability to work, and her pre-existing disabilities were responsible to the extent of 40 per cent."

Saskatchewan Government Insurance relied on Section 130 of the *Saskatchewan Automobile Accident Insurance Act* denying benefits to the Appellant. Section 130 states:

> "130 Notwithstanding any other provisions of this Division, a victim who, before an accident, is regularly incapable of holding employment for any reason except age is not entitled to an income replacement benefit."

The Commission notes that this provision is identical to Section 105 of the MPIC Act, which MPIC is relying on to deny IRI benefits to the Appellant.

The Court in Erskine (supra) stated:

> "On a balance of probabilities I am satisfied that the applicant was capable of holding employment within the contextual meaning of the provisions of The Automobile Accident Insurance Act, supra. I accept the evidence of Ms. Erskine, Dr. Oleksinski and Dr. Marcoux. Based upon their collective evidence, I have concluded that it is probable that Ms. Erskine would have been able to return to work in the health care field, a vocation which she had pursued prior to the accident. While there is the possibility that the targeted date of return to work may not have seen her in fact do so, the best evidence indicates that mentally and physically by that date, while she would undoubtedly have continued to have experienced some difficulties, she would have been capable of working at a health care facility in Prince Albert. In my view, this

> removes the applicant from the disentitling rationale contained in s. 130 of The Automobile Accident Insurance Act, supra."

A review of Erskine indicates that the Applicant, Joyce Erskine, had a long history of employment prior to the motor vehicle accident and that although she suffered from diabetes and depression she continued to work on a regular basis. In finding the Applicant to be a thoughtful and credible witness, the Court accepted her testimony and concluded that she would have returned to work in the health care field but for the motor vehicle accident. The evidence of the Applicant was corroborated by testimony of her caregivers, Dr. Oleksinski and Dr. Marcoux.

The Commission finds that the decision in Erskine does not support the Appellant's position in the present appeal. In Erskine, the Applicant had a long history of work while in the present appeal the Appellant has no history of work. The Appellant is [text deleted] years of age and has not had any regular employment since he was [text deleted] years of age, which is a period of 31 years. [Appellant's psychologist] and [Appellant's doctor #2] concluded that the Appellant was unemployable.

In support of his position, MPIC's legal counsel referred the Commission to the decision of Laing J. in **Bogdanoff v. Saskatchewan Government Insurance (supra)**. This was an appeal under the *Saskatchewan Automobile Accident Insurance Act* ("Saskatchewan Act") in which the Applicant challenged a ruling of the Saskatchewan Government Insurance for terminating his rehabilitation benefits and denying him permanent impairment benefits and income replacement benefits.

The Court reviewed the relevant legislation under the Saskatchewan Act relating to no-fault personal injury benefits. In respect of the Appellant's claim for income replacement the Court

concluded that the Appellant was a "non-earner" by reason of being unemployed at the time of the accident. The Court referred to Section 100(1)(q) of the Saskatchewan Act which defines "non-earner" as follows:

> "(q) "**non-earner**" means a victim who, at the time of an accident, is not employed and who is able to work, but does not include a student or a youth."

The Commission notes that this definition is identical to the definition of "non-earner" under Section 70(1) of the MPIC Act.

The Court also referred to Section 130 of the Saskatchewan Act which is identical to Section 105 of the MPIC Act.

At paragraph 41 of Bogdanoff the Court stated:

> "The position of the applicant as set out in the foregoing is that he was again looking for work at the time of the accident, and that he was capable of performing this work at least on a part-time basis if not a full-time basis. The evidence he offered with respect to his ability in this respect is the complete restoration of two vehicles, one in the year 1992 and one in the year 1994, as well as assorted repair work he had done on other vehicles. He points to the fact he was actively seeking employment in the year 1993, but without success. He stated in his opinion, the fact he had a back problem was the major reason employers would not hire him, without considering whether he was able to perform the work."

The definition of employment in the MPIC Act is set out in Section 70(1) as follows:

> **"employment"** means any remunerative occupation

The Commission notes that the definition of employment in Section 100(1) of the Saskatchewan Act is identical to the definition of employment in the MPIC Act.

At paragraph 44 of Bogdanoff the Court stated:

> "Employment is defined in s. 100(1)(l) as meaning any remunerative occupation. The sporadic work performed on automobiles by the applicant including two of which he

> owned in the period of time between 1992 and 1994 did not amount to his occupation during that period of time. *Black's Law Dictionary,* 5th ed. (St. Paul, Minn.: West Publishing Co., 1979), defines "occupation" as follows:
>
> > That which principally takes up one's time, thought, and energies, especially, one's regular business or employment; also, whatever one follows as the means of making a livelihood. Particular business, profession, trade, or calling which engages individual's time and efforts; employment in which one regularly engages or vocation of his life.
>
> The evidence the applicant gave with respect to his efforts in repairing or restoring automobiles is more consistent with the same being his hobby, and not his occupation. Certainly he was not able to point to any remuneration of any significance that he earned during the period of time. The fact is he did not hold employment as the term is defined, and he was regularly incapable of doing so for whatever reason (mental or physical) for a period of six and one-half years prior to the accident. On the basis of s. 130 of the Act the applicant has failed to prove on the balance of probabilities he is entitled to an income replacement benefit."

The Commission notes that the Saskatchewan Court of Appeal affirmed the decision of Justice Laing in Bogdanoff (supra).

The Commission determines that the Bogdanoff case does not support the Appellant's position, but supports MPIC's position that the Appellant was regularly incapable before the motor vehicle accident of holding employment within the meaning of Section 105 of the MPIC Act. In Bogdanoff the Court concluded that because the Appellant had not held regular employment for a period of 6½ years prior to the motor vehicle accident, the Appellant had failed to establish on a balance of probabilities that he was entitled to IRI benefits pursuant to Section 130 of the Saskatchewan Act. In the present appeal the Appellant did not hold any regular employment after the age of [text deleted] for a period of 31 years. Unlike the evidence in the present appeal, there was no evidence in Bogdanoff that the Appellant was unable to work on a regular basis before the motor vehicle accident due to an alcohol addiction or due to periods of incarceration or that he exhibited any anti-social behaviour.

Decision:

The Commission rejects the Appellant's appeal for entitlement to IRI for the following reasons:

A. Compensable Injury:

The Commission adopts the comments of the Manitoba Court of Appeal in **David Menzies vs Manitoba Public Insurance Corporation and Automobile Injury Compensation Appeal Commission, 2005 MBCA 97**. At page 14 of this decision the Court stated:

> "Words in a statute are to be given "the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction" (R. v. D.A.Z., [1992] 2 S.C.R. 1025 … a p. 1042 [S.C.R]). The Act is intended to provide compensation based on "real economic loss" (Bill 37, The Manitoba Public Insurance Corporation Amendments and Consequential Amendments Act, Manitoba, 1993) and see McMillan v. Thompson (Rural Municipality) (1997), 115 Man.R. (2d) 2 … (C.A.), where Helper, J.A., said the legislature in the Act: "created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile" (at para. 54)."

The Commission finds that:

1. As a result of the motor vehicle accident the Appellant did not suffer any real economic loss and therefore in accordance with the purpose of the MPIC Act, he was not entitled to receive any compensatory benefits, such as IRI.
2. When the Appellant was not in jail he was on Social Assistance, was unemployed and earned little or no salary. The history of the Appellant's lack of employment since the age of [text deleted] years demonstrates that he was regularly incapable before the motor vehicle accident of holding remunerative employment.
3. Since the Appellant did not have any regular remunerative employment within the meaning of Section 105 of the MPIC Act prior to the motor vehicle accident he was not entitled to receive any IRI benefits.

B. Regular Employment:

In Webster's New World College Dictionary, Fourth Edition, the word regular is defined to include:

> "**4** consistent or habitual in action [a *regular* customer]"

In The Concise Oxford Dictionary, Tenth Edition, defines the word regular:

> "**1 …>**recurring at short uniform intervals.
> **2.** doing the same thing often or at uniform intervals: *regular worshippers*. >done or happening frequently."

The Dictionary of Canadian Law, Second Edition, defines regularly employed:

> "A person employed on a continuous basis with allowance for recognized leave periods. *Pacific Pilotage Regulations,* C.R.C., c. 1270, s. 2."

It is reasonable for the Commission to presume that for a person to have regular employment, that person could be able to meet the following expectations of an employer:

1. Regular attendance at work without significant absenteeism.
2. Regular attendance at work without significant lateness.
3. Having the capacity to carry out the essential duties of the employment.
4. Not demonstrate any anti-social behaviour on the job, such as bothering other employees or fighting with them.

The Commission finds that on the balance of probabilities the Appellant could not meet these standards and as a result he has not established that he was not regularly incapable before the motor vehicle accident of holding employment. Therefore, pursuant to Section 105 of the MPIC Act he would not be entitled to IRI benefits.

The Appellant acknowledged in his testimony that when he was not in jail he spent his time drinking. He also informed [Appellant's psychologist] after attending a number of treatment centres that he was unable to overcome his alcohol addiction. As a result of the Appellant's alcohol addiction and use of other chemicals or drugs the Commission finds that prior to the motor vehicle accident he would have been:

1. unable to regularly attend work;
2. unable to regularly be on time for work; and
3. unable to carry out the essential duties of his employment.

The Appellant has exhibited a consistent pattern of anti-social behaviour. In her decision dated April 24, 2008, the Internal Review Officer stated:

> 1. "In an Arrest Record received from the [text deleted] dated August 5, 2004, the following was noted:
>
> [The Appellant] has a lengthy continuous criminal record spanning from September of 1979 to August of 2004. [The Appellant] has been arrested 252 times under the intoxicated Persons Detention Act and another 200 times under the Criminal Code for a total of 452 charges against him in only 25 years."

[Appellant's doctor #1] reported that the Appellant attended his office on a number of occasions appearing somewhat intoxicated and disturbing other patients. He was cautioned by [Appellant's doctor #1] not to disturb the other patients. [Appellant's doctor #1] also stated that it was not unusual for the Appellant to get into fights and assaults on an intermittent basis.

The Commission finds that the Appellant's consistent pattern of anti-social behaviour would have prevented the Appellant from holding regular employment prior to the motor vehicle accident pursuant to Section 105 of the MPIC Act.

The Appellant is [text deleted] years of age and has spent 20 years in and out of jail for a variety of offences. He has not established that when he was out of jail he was capable of being employed on a regular basis. The Appellant has not held a regular job since he was [text deleted] years of age. [Appellant's psychologist] and [Appellant's doctor #2], as a result of their examination of the Appellant concluded that he was unemployable.

The Commission finds, having regard to his history of incarceration, the Appellant would not have been able to hold regular employment prior to the motor vehicle accident pursuant to Section 105 of the MPIC Act.

The Commission determines that in order for the Appellant to be regularly capable of being employed, the Appellant would have been required to have attended work on a regular basis and in a timely fashion, carry out the essential duties of the position and not cause disruptions in the workplace in arguing or fighting with other employees. The Commission finds that the Appellant has not met these standards and as a result has failed to establish on a balance of probabilities that he was not regularly incapable before the motor vehicle accident of holding employment within the meaning of Section 105 of the MPIC Act.

Conclusion:

Based on the reasons set out herein, the Commission confirms the decision of the Internal Review Officer dated April 24, 2008 in respect of rejecting the Appellant's entitlement to IRI benefits and dismisses the Appellant's appeal.

Cognitive Impairment:

The Internal Officer's Review dated April 24, 2008 reports:

'On March 20, 2007, [the Appellant] was provided with a decision letter and given a Permanent Impairment award of $30,316.24 based on an impairment of 25.65%, which is comprised of the following:

➢ "Post-traumatic alteration of tissue, intracerebral hematoma	2.0%
➢ Post-traumatic alteration of tissue, subdural hematoma	2.0%
➢ Post-traumatic bony alteration – following a craniotomy	2.0%
➢ Abdominal scarring	1.15%
➢ Loss of range of motion, right hip, flexion/extension	1.0%
➢ Loss of range of motion, right hip, internal/external rotation	5.0%
➢ Loss of range of motion, right hip, abduction/adduction	3.0%
➢ Cerebral concussion	2.0%
➢ Cognitive impairment	7.5%
Total	25.65%"

In the Appellant's Notice of Appeal, the Appellant's counsel stated:

> "In regard to cognitive impairment, the Appellant was given 35% impairment by [Appellant's psychologist] but only awarded 7.5% impairment by MPIC. The award for cognitive impairment should be increased."

In the Internal Review Officer's hearing, the Appellant's legal counsel referred to [Appellant's psychologist's] report dated March 3, 2006 which noted the following:

> "On the Cognitive Function Impairment Scale, we see [The Appellant] as fitting a Class 3 profile, with 35% impairment, but with at least one half of that impairment attributable to his chronic alcoholism and one half or less (approximately) that is likely accident and head injury-related".

The Commission notes that [Appellant's psychologist] was referring to the Class 3 profile set out in Division 11: Cognitive Function of Manitoba Regulation 41/94. The Class 3 profile states:

DIVISION 11: COGNITIVE FUNCTION

Mental Functioning System

Class	Symptom or condition Impairment	Rating
Class	A psychiatric condition, syndrome or phenomenon	35%

3	that causes an impairment in activities of daily living, social functioning or sense of well-being sufficient to require supervision in an institutional setting less than 50% of the time. Any adverse effects of medical treatment contributing to impairment should be considered.	

The Commission notes that the Class 3 profile describes a psychiatric condition requiring supervision in an institutional setting less than 50% of the time. [MPIC's psychologist], in his interdepartmental memorandum to MPIC dated March 9, 2007, reviews [Appellant's psychologist's] report relating to Cognitive Impairment and stated:

> "The claimant was seen by psychologist, [Appellant's psychologist] for neuropsychological testing on March 3, 2006. This report was reviewed in its entirety. [Appellant's psychologist] identified cognitive deficits in a number of areas. He noted that despite some concern regarding dissimilation on some tests, there was evidence of cognitive impairment. [Appellant's psychologist] commented on the claimant's pre-MVA status, and the role of alcohol use as a factor affecting the claimant's cognition. He concluded that the claimant exhibited evidence of cognitive dysfunction with relatively greater compromise of functioning associated with the right hemisphere of the brain. He offered the opinion that at least 50% of the claimant's cognitive impairment was as a result of chronic alcoholism, with the remainder (less than 50%) likely due to the motor vehicle accident in question. [Appellant's psychologist] did not attribute the claimant's psychiatric difficulties to the MVA in question…(underlining added)
>
> With regard to permanent impairment for cognitive disorder, there is no evidence that the claimant requires supervision for activities of daily living because of cognitive conditions resulting from the MVA in question." (underlining added)

MPIC correctly assessed the Appellant's cognitive impairment pursuant to the classification set out in Manitoba Regulation 41/94 (as amended by 41/2000) Div. 2 (1) #4.7(e) which states:

> 4.7 Alterations of consciousness (Posttraumatic cataplexy, coma, epilepsy, narcolepsy, syncope and other neurological disorders and disturbances of consciousness
>
> (e) cognitive disorder that minimally disrupts the performance of the activities of daily living, without the need for supervision, including the side effects of medication . . 7.5%

The Commission notes the Appellant was not claiming compensation in respect of a psychiatric condition caused by the motor vehicle accident. Instead, the Appellant was claiming

compensation in respect of a permanent cognitive impairment pursuant to a cognitive impairment schedule under Manitoba Regulation 41/94 (as amended by 41/2000) Div. 2 (1) #4.7(e).

The Commission notes that in his report [Appellant's psychologist] was referring to the Appellant's psychiatric condition and was not referring to the cognitive disorder that the Appellant suffered as a result of the motor vehicle accident.

Conclusion:

The Commission therefore concludes that the Internal Review Officer, in his decision dated April 24, 2008 was correct in adopting [MPIC's psychologist's] opinion when awarding an impairment award of 7.5%, pursuant to Division 2, Subdivision 1, #4.7(e). For these reasons, the Commission dismisses the Appellant's appeal in respect of the cognitive impairment award and confirms the decision of the Internal Review Officer dated April 24, 2008 in respect of the cognitive impairment award of 7.5%.

Dated at Winnipeg this 29th day of September, 2009.

MEL MYERS, Q.C.

TREVOR ANDERSON

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