Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-33

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Deborah Stewart** **Mr. Wilfred De Graves**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ("MPIC") was represented by Ms Dianne Pemkowski.**
HEARING DATE:	**May 26, 2009**
ISSUE(S):	**Whether the Appellant is entitled to further Income Replacement Indemnity ("IRI") benefits (in 2006)**
RELEVANT SECTIONS:	**Section 110(1)(e) of The Manitoba Public Insurance Corporation Act ("MPIC Act") and Section 3(1) 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 was injured in a motor vehicle accident on March 11, 2005. At the time of the accident he was a self-employed farmer. His approximate annual income varied, pursuant to a partnership with his sons. The Appellant received IRI benefits from MPIC as a result of his inability to perform his employment.

The Appellant's case manager reviewed his Income Tax Returns for his farming operation in 2006, and concluded that his income earned from the farming operation was greater than the

Initial Gross Yearly Employment Income ("GYEI") established for him based on his pre-accident earnings. As a result, his entitlement to an IRI ended, based on Section 110(1)(e) of the MPIC Act which provides that entitlement to IRI benefits ends when the victim is able to hold an employment from which the gross income is equal to or greater than the gross income on which his or her IRI is determined. Accordingly, the Appellant was not entitled to IRI benefits in 2006.

The Appellant sought an Internal Review of this decision. The Appellant indicated that he had been unable to work since the accident. The gross income that was reported in 2006 was received pursuant to the partnership with his sons. In January 2008, an Internal Review Officer for MPIC confirmed the case manager's decision. The Internal Review Officer found that under Section 110(1)(b) of the Act (sic), the Appellant had ceased to become entitled to IRI by holding an employment from which the gross income was equal to or greater than the gross income on which the victim's IRI was determined.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

A hearing into the Appellant's appeal was heard on May 26, 2009.

At the appeal hearing, Counsel for MPIC indicated that the reference to Section 110(1)(b) by the Internal Review Officer was a typographical error and that the appropriate section was Section 110(1)(e).

Subsequent to the appeal hearing, the panel wrote to the parties on July 23, 2009. The panel questioned whether the application of Regulation 39/94 under the MPIC Act had been fully reviewed and considered in argument by both parties and invited the parties, should they so

desire, to submit written argument dealing with the specific issue of the applicability of the Regulation.

Counsel for the Appellant responded on August 31, 2009. She indicated that it was the Appellant's position that Regulation 39/94 is applicable to the determination of his IRI under Section 110(1)(e) of the Act. She submitted that based upon the Appellant's Income Tax Returns for the years preceding the accident (2003, 2004, and 2005) his average income was $9,288.53, which is less than the Schedule "C" amount of $23,651 applied by MPIC in determining GYEI and IRI. She then concluded:

> "[The Appellant's] farming income for 2006 is $13,238.63. We have argued that the income is derived from a partnership and not from employment as [the Appellant] did not work during 2006. However, even if it is determined by the Commission that [the Appellant] did derive this income from employment, he would still be entitled to an IRI based on the difference between $23,651.00 and $13,238.63."

Counsel for MPIC replied in a letter dated October 19, 2009. She noted that it had been understood that the case manager's decision with respect to the calculation of GYEI had not been appealed and was not at issue on this appeal. Therefore, the issue to be decided on was whether the Appellant's 2006 income exceeded the calculated GYEI and as a result disentitled him to IRI according to Section 110(1)(e) of the Act.

In addressing the question of whether Regulation 39/94 is applicable, counsel for MPIC noted that the issue had been dealt with in the appeal decision of *[text deleted], AICAC File No. AC-08-65.* In that decision, the Commission had concluded that Regulation 39/94 is very important to defining all occurrences of the term gross income in the Act. Gross income under Section 110(1)(e) should include business income as defined as defined under Section 3(1) of Regulation 39/94. She stated:

> "As you will note, the above section includes a partnership. Applying the definition of gross income found in regulation 39/94 and s.3(1) of that Regulation shows that the Internal Review officer correctly calculated the income of the Appellant for 2006. As a result, the Appellant became disentitled to IRI with the operation of Section 110(1)(e) as his 2006 income exceeds his GYEI."

Counsel for the Appellant indicated that she did not wish to provide a reply to the written submission of counsel for MPIC. The panel then met again to review the submissions of the parties.

Evidence and Submission for the Appellant:

It was agreed by the parties at the hearing that the Appellant was in a farm partnership with his sons, and that his share of the partnership was 33.4%.

The Appellant testified at the hearing into his appeal. He described his occupation prior to the motor vehicle accident as farming on a mixed farm of cattle, hay and grain. He farmed with his two sons in a three-way partnership.

Prior to the motor vehicle accident, he had suffered in the past from a disability involving his back. However, he was able to go back to work in July of 2004 without any difficulty. He worked eight to ten hours a day, although the hours varied somewhat and he would divide the workday into shorter periods with breaks in between.

Following the motor vehicle accident in March 2005, the Appellant fractured his back and was in hospital for about 1½ months. After that, he was in a full body cast for quite a while. He had physiotherapy after the cast was removed, but still was not able to do many of the activities he was accustomed to. He could not stand for more than a couple of minutes and could not walk for more than a couple of hundred yards. He can't lift anything over 20 pounds.

The Appellant has not been able to return to farming since the motor vehicle accident.

The Appellant gave evidence regarding the three-way partnership with his sons. He indicated that although his 2006 Income Tax Return showed a net income of $13,238 as a share of income from the farm allocated to him, he had not received this income in 2006. He testified that he had instructed his business consultant to remove him from the partnership, but this instruction was not carried out. When this was discovered prior to filing his 2006 Income Tax Return it was too late to correct it. He said that he had not done any of the work on the farm and that he had stopped being a partner, although the income was shown on his 2006 tax return. He confirmed on cross-examination that he had filed this Tax Return and that he had never corrected it with Revenue Canada to advise that he had not received the income.

Counsel for the Appellant submitted that Section 110(1)(e) of the MPIC Act only disentitles the victim who holds an employment when the income from that employment is greater than that from the GYEI. However, she submitted that the Appellant did not hold an employment from which he receives income. He did not really receive the income in 2006. As well, he had not worked on the farm in 2006 and so had not held that employment. Accordingly, Section 110(1)(e) does not apply in this case and the Appellant should be entitled to IRI benefits for 2006.

Evidence and Submission for MPIC:

Counsel for MPIC pointed out that the Appellant had not, before testifying at the appeal hearing, ever indicated that he had not received the income in 2006 which was reflected on his Tax Returns. He had never made that assertion to the case manager, to the Internal Review Officer, or to the Commission prior to the hearing.

Although he came to the hearing to say that he had never received that income, his Income Tax Returns say that he did. Now, in 2009, he had never corrected that information to Revenue Canada, as is the duty of every citizen to correct incorrect Tax Returns.

Counsel for MPIC submitted that, as the Appellant's Tax Returns reflect, he did receive an income in 2006 from the farm partnership. Therefore, he had not suffered an economic loss in 2006 as a result of the motor vehicle accident of March 2005. As such, the IRI calculations were correct. They found that the Appellant had a gross adjusted net income of $27,984.11, which was higher than his GYEI indexed at $27,000.

Counsel referred to Section 112(1) of the MPIC Act as well as Section 3(1) of Regulation 39/94 under the MPIC Act, to show the importance of Income Tax Act considerations in calculating IRI entitlements, as well as the factors to be taken into account in calculating income.

While the Appellant may not have been able to participate in farming duties at the time, Counsel submitted that the Commission should take a looser interpretation of farming. Whether or not the Appellant was performing these duties, he was entitled to an income from it as a member of the partnership. To provide IRI to someone who was receiving an income from their previous employment, whether working or not, would be to reward the Appellant two-fold when he had suffered no economic loss as a result of the motor vehicle accident.

Therefore, Counsel for MPIC urged the panel to find that the Appellant did receive income from the farm and had not suffered an economic loss. The decision of the Internal Review Officer should be confirmed.

Discussion:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

> (e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;

The onus is on the Appellant to show that the Internal Review Officer was in error, and that the Appellant should be entitled to receive IRI benefits for 2006.

The Appellant asserted that although he declared income on his 2006 tax return, he had not ever in fact received this income. Although the Commission recognizes that payment or non-payment of Income Tax is only one of the factors which MPIC may consider in determining whether or not an Appellant is entitled to IRI as a result of injuries sustained in a motor vehicle accident, the panel, having reviewed the Appellant's evidence and the evidence on the indexed file, is unable to conclude that the Appellant did not receive the claimed income.

The panel has considered the 2006 Income Tax Returns found on the indexed file as well as his testimony that he never corrected this alleged error. Although implications to the tax status of all three partners flowed from these forms, the Appellant never corrected them. Further, Counsel for MPIC was correct in stating that the Appellant had never told his case manager, the Internal Review Officer or the Commission, prior to the hearing, that he had not received these funds. No notice of this assertion was ever brought to the attention of MPIC prior to the hearing.

Nor did the Appellant bring any supporting evidence from his accountant, business manager or other partners to corroborate this assertion. The onus is on the Appellant to show, on a balance of probabilities, that the findings of the Internal Review Officer were in error and we find that, based upon the factors noted above, he has not met this onus and we cannot conclude that he did not receive the claimed income. The Appellant failed to establish a reasonable and credible explanation for this discrepancy in the evidence.

Section 110(1)(e) of the Act disentitles a victim to an IRI benefit when he or she holds an employment from which the gross income is greater than the determined IRI.

In this regard, the panel has considered the effect of Regulation 39/94 upon the factors to consider in calculating income under Section 81(2) and/or Section 110(1)(e) of the Act. We have carefully reviewed the decision of the Commission in the *[text deleted]* appeal, referred to by counsel for MPIC in her written and supplementary submission. While that decision concerned business income of an appellant derived from a significant influence shareholder interest in a Canadian controlled private corporation, the analysis of the application of Regulation 39/94 to the concept of "gross income" in Section 110(1)(e) is also relevant when considering business income from a partnership interest.

The panel in the *[text deleted]* case considered the application of Regulation 39/94 to both Section 81(2) and Section 110(1)(e) of the Act.

> "When examining whether a claimant qualifies for IRI, Section 81(2)(a)(ii) applies to a full-time self-employed earner.

Determination of I.R.I. for full-time earner

81(2) The corporation shall determine the income replacement indemnity for a full-time earner on the following basis:

(a) under clauses (1)(a) and (b), if at the time of the accident

(ii) the full-time earner is self-employed, on the basis of the gross income determined in accordance with the regulations for an employment of the same class, or the gross income the full-time earner earned from his or her employment, whichever is the greater,

Under this provision, the operative element in calculating a claimant's IRI is his or her "gross income". This is to be determined according to one of two alternative formulas. One formula is "the gross income determined in accordance with the regulations for an employment of the same class". The other formula is "the gross income of the full-time earner earned from his or her employment". The higher amount will prevail. In the Appellant's case the calculation of gross income was determined in accordance with the regulations for an employment of the same class.

In assessing whether an Appellant ceases to qualify for IRI, Section 110 of the Act identifies the circumstances when a claimant will cease to qualify. Section 110(1)(e) provides:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;

In the appeal before us, the central issue is the meaning of "gross income" in Section 110(1)(e).

Counsel for MPIC has argued that any discussion about the meaning of "gross income" in these provisions is incomplete if it does not include a reference to the Determination of Income and Employment (Universal Bodily Injury Compensation) Regulation, Manitoba Regulation 39/94. Counsel for the Appellant argues that much of that regulation is dedicated to the notion of Gross Yearly Employment Income ("GYEI"). By contrast, the Act never refers to that concept, referring only to "gross income". Accordingly, the Regulation does not assist in interpreting s.110(1)(e).

The panel is of the view that a careful reading of the Act and Regulations suggests that the Regulation is very important to defining all occurrences of the term "gross income" in the Act. The regulation includes a definition that clarifies that, wherever the Regulation refers to the concept of "GYEI", it is intended to have the same meaning that "gross income" has in the Act.

Regulation 39/94:
Definitions
1 The following definitions apply in this regulation.

*"**gross yearly employment income**" has the same meaning that "**gross income**" has in Part 2 of the Act*

In other words, the two concepts are meant to be referring to the same thing.

As well, Section 81(2)(a)(ii) references Regulations for an employment of the same class. This is a reference to the subject matter of Section 8 of the Regulation.

Regulation 39/94:

GYEI for classes of employment
8 The classes of employment and the corresponding gross yearly employment incomes set out in Schedule C apply in respect of the following provisions of the Act:
(a) subclause 81(2)(a)(ii) (full-time earner);
(b) subclause 83(2)(a)(ii) (temporary earner or part-time earner);
(c) subclause 89(2)(a)(ii) (student);
(d) subclause 95(2)(a)(ii) (minor);
(e) section 106 (factors for determining employment);
(f) section 107 (determination of employment after second anniversary of accident).

However, the remainder of the Regulation is not dedicated specifically to classes of employment. It is more generally relevant to all occurrences of the term "gross income". For example, Section 3 of the Regulation consists of three subsections that explain the notion of GYEI from self-employment, and there is nothing about these provisions that has anything to do with classes of employment.

The Act expressly confers upon MPIC the authority to make regulations addressing several points regarding the notion of gross income, with such authority found under Section 202 of the Act.

Regulations

202 Subject to the approval of the Lieutenant Governor in Council, the corporation may make regulations for the purpose of this Part

(a) defining a word or expression used and not defined in this Act;

(b) enlarging or restricting the meaning of a word or expression used in this Act;

(f) respecting gross incomes, including determining gross incomes for salaried workers and self-employed workers, establishing classes of employment, and determining the amount of gross incomes on a weekly or yearly basis;

(u) respecting any other matter that is incidental or conducive to the attainment of the objects and purposes of this Part.

The panel does not agree that Regulation 39/94 should be disregarded when it comes to understanding the concept of "gross income" in Section 110(1)(e). Generally speaking, regulations are to be presumed to be valid on their face and the panel does not accept the notion that it should ignore Regulation 39/94.

The panel has also had regard to the principle of statutory interpretation regarding the "Presumption of Consistent Expression". The essential point of this principle is that, whenever the legislature uses the same word or phrase in different provisions of a statute, it is presumed that the Legislature intended the word or phrase to have the same meaning. This is a rebuttable presumption, but in this case, the panel finds that it is reasonable to conclude that the Legislature did not intend for the meaning of "gross income" to shift between the time a person qualifies for IRI to the time they cease to qualify for it."

The decision of the Commission in *[text deleted]* was the subject of an appeal to the Manitoba Court of Appeal on September 21, 2009. Leave to appeal was granted by the Court of Appeal on October 22, 2009 under File No. AI 09-30-07236.

The Commission has also considered the object of the MPIC Act, and a purposive approach to the Personal Injury Protection Plan. The purpose of the Act is to reimburse victims for losses suffered. Since the Appellant was in receipt of income connected with his former occupation of farming the Appellant would be in a position to receive a double payment should he also be entitled to receive IRI for the same period. This would go beyond the purpose of the Act of

reimbursing claimants for losses suffered in motor vehicle accidents, and would not be a reasonable interpretation of the statute in this case.

As the Commission found in the [text deleted] decision above, this panel finds that gross income under Section 110(1)(e) should be interpreted consistently with the interpretation of that term under Section 81(2)(a) of the Act and Regulation 39/94. The income of the Appellant to be taken into consideration under Section 110(1)(e) should be defined as including income from a partnership interest, as set out in Section 3(1) of Manitoba Regulation 39/94.

> **GYEI derived from self-employment or a Canadian-controlled private corporation**
>
> 3(1) In this section, "business income" means the income derived from self-employment or a Canadian-controlled private corporation, byway of proprietorship, **partnership interest**, or significant influence shareholder 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). (emphasis added)

The panel finds that MPIC was correct in interpreting this regulation to calculate the gross income received by the Appellant under Section 110(1)(e) as including partnership income. In this way, gross income under Section 110(1)(e) is interpreted consistently with the interpretation of that term under Section 81(2) of the Act and Regulation 39/94.

Accordingly, pursuant to Section 110(1)(e) of the Act, the panel finds that the Appellant is not entitled to receive IRI benefits for the period in 2006 during which he received partnership farming income in excess of his established gross yearly employment income. Accordingly, the decision of the Internal Review Officer dated January 2, 2008 is hereby confirmed and the Appellant's appeal dismissed.

Dated at Winnipeg this 26th day of January, 2010.

LAURA DIAMOND

DEBORAH STEWART

WILFRED DE GRAVES