Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-103

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Mary Lynn Brooks** **Ms Irene Giesbrecht**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.**
HEARING DATE:	**January 24, 2013**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits.**
RELEVANT SECTIONS:	**Sections 70(1), 89(1), 89(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

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 injured in a motor vehicle accident on August 24, 2009. He reported injuries to his face, head, arm, leg, eye, neck, back, and chest.

At the time of the accident the Appellant was a high school student who had been working part-time as a labourer for [text deleted].

On October 18, 2009, the owner of [text deleted] provided an Employer's Verification of Earnings noting that the Appellant's employment had begun on August 18, 2009 and the projected end of employment was August 26, 2009.

However, the Appellant indicated that his employment would have been extended beyond August 26, 2009, due to the availability of work, but that he could not continue in this work due to the accident.

On March 2, 2010, the Appellant's case manager provided him with a case management decision indicating that he had been classified as a student at the time of the accident. As the Employer's Verification of Earnings ("EVE") form indicated that his employment had been seasonal and projected to end as of August 26, 2009, and his employment was terminated as of August 24, 2009, there was no entitlement to Income Replacement Indemnity ("IRI") benefits. As a student, the Appellant's entitlement to IRI benefits would be based on the employment he would have held if not for the accident, and the information obtained from his employer indicated that his employment was seasonal. Although scheduled to end as of August 26, 2009, his employment was terminated on the day of the accident, because he had left the job site without permission.

An Internal Review Officer for MPIC considered the Appellant's Application for Review and his position that he had not left the job site without permission. The Appellant had indicated to the Internal Review Officer that the job had taken longer than originally anticipated but that it had always been clear that he and his father would have to return to [City #1] on August 24, 2009 as his father had a medical appointment and he was scheduled to return to school in September.

On June 10, 2010, an Internal Review Officer for MPIC concluded that she could not find that the Appellant would have continued working for [text deleted] if the accident had not occurred, as the employer had made it clear that it was his position that the Appellant was terminated for leaving the job site.

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

Evidence and Submission for the Appellant:

The Appellant's father, [text deleted], testified at the hearing into the Appellant's appeal. He explained that he had received a telephone call from [text deleted], a supervisor/employee of [text deleted], asking if he could go to [town #1] to do a job for three or four days, towards the end of August. When he said yes, [text deleted] also asked if his son, [the Appellant], would also go and work for a few days.

Before leaving for [town #1], the Appellant and his father met with [text deleted] and a few other employees at the shop in the [city #1]. They also discussed [text deleted's] upcoming contract in the [city #1] which was to start after the employees' return from [town #1] and would continue until "freeze-up".

[Appellant's father] indicated that although his son [the Appellant] was going back to school, he was asked if he would be available to work, after school and evenings, and he had answered that he would.

[Appellant's father] also indicated that he had made it clear from the very beginning that he had to return to [city #1] for a medical appointment on August 24, 2009.

Both went to [town #1] and began to work. Delays caused by equipment failure occurred. A piece of equipment broke down and [appellant's father] and [the Appellant] agreed to bring it back to [city #1]. That is when the motor vehicle accident happened. [Appellant's father] indicated that this is when both he and his son were dismissed from the job. However, if everything had gone according to plan, his son would have most likely, (99%), been working for [text deleted] after school. He was not able to work, due to the motor vehicle accident, and even had to delay going back to school for grade 12. He would have worked through the summer, right until the end of November, working a double shift after school, starting about noon or 1:00 p.m., until midnight each weekday. However, his son missed this opportunity because of the motor vehicle accident.

The Appellant also testified at the hearing into his appeal. He indicated that he was at home when a phone call came to his father from [text deleted], of [text deleted], looking for experienced workers for a couple of days for a job in [town #1]. The Appellant agreed to go with his father, but indicated that he did not feel comfortable staying out of town without his father, and so wanted to come back to [city #1] when his father came back for his doctor's appointment. According to the Appellant, [text deleted] indicated that this was no problem as the job should be done by then. So, the Appellant testified that he agreed to go out there as the supervisor agreed he could come back with his father.

The Appellant described going to meet up with other employees at the shop in [city #1]. They were standing in a circle and he asked [text deleted] whether there would be any work when he came back from [town #1]. The Appellant understood [text deleted] to indicate that [text deleted] another contract in the [city #1]. They talked about him joining the workforce for that

contract on [text deleted] and the Appellant indicated that he had in fact worked with [text deleted] during the earlier summers.

The Appellant testified that [text deleted] then gave him a puppy which he took home, dropped off, and came back to the shop to head out of town to [town #1].

The Appellant explained that once in [town #1] they found that there was quite a bit of work to be done and that the job was falling behind. He reminded [text deleted] that although there was more work to do, he still planned to leave the site when his father did, and [text deleted] told him that was alright because more workers were coming up.

The night before they left, the Appellant was working at the airport all night. He then went back to the hotel to sleep. When he woke up, he was advised that the company had a truck ready for him to drive back to the City, as his father was going to take some equipment back. The Appellant agreed to drive the truck, had supper and left. He was driving, following his father, who was driving a separate vehicle. The Appellant had a woman passenger. They stopped near [town #2], and then the motor vehicle accident occurred near [city #2]. The Appellant was taken to the hospital and released. His father took him back to [city #1] in the vehicle he was driving; he dropped the Appellant off at home and went to the shop to drop off equipment.

His father later came home and told him that the employer was upset and that they had both been fired.

The Appellant maintained, however, that prior to going to [town #1] it had been agreed that he was going to be working for [text deleted] after school and that even which crew he was to be on had already been figured out.

On cross-examination, he admitted that no written agreement to work at this particular job had been signed, and indicated that it had just been agreed to verbally.

The Appellant submitted that there was no written agreement setting out that he was only going to work until August 26. The testimony provided on behalf of the Appellant made it clear that had it not been for the motor vehicle accident, the Appellant would have been working part-time for the employer in the [city #1] until freeze up.

From the date of the motor vehicle accident he has not been able to work in that kind of industry, as he gets injured all the time whenever he starts that kind of work. Back problems, stemming from the motor vehicle accident, have prevented him from holding a full-time job. He may work three or four weeks at a time but then end up on Workers' Compensation benefits because of back problems and missing time. However, he submitted that he knows for a fact that had it not been for the motor vehicle accident, he would have been working until November 28 or 29 of that year, when freeze-up occurred, for [text deleted] in the [city #1].

Submission for MPIC:

Counsel for MPIC noted that this appeal requires the panel to make a finding of fact. The documentary evidence from the employer indicates that the Appellant's employment would have ended on August 26, 2009. Documented conversations between the case manager and the employer show that the employer stated that the Appellant had left the job site without

permission, leaving people behind, and had been told that if he did so, his employment would be terminated. The employer indicated that he would provide something in writing to confirm this, but MPIC did not receive anything in writing from the employer.

Although it does not appear that the Internal Review Officer contacted the employer directly, she did accept the case manager's documentation of her conversation with him.

Counsel emphasized that the evidence heard from both the Appellant and his father involved a lot of hearsay and that they had not brought any independent witnesses to verify their account. She submitted that the employer had no interest in thwarting the Appellant's ability to obtain IRI benefits and no reason to lie in either the Employer Verification of Earnings or in his documented conversation with the case manager, regarding when and why the Appellant was terminated.

Accordingly, counsel for MPIC submitted that the panel ought to prefer the documentary evidence on file as opposed to the evidence heard in the testimony at the hearing, and the appeal should be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities that he is entitled to further IRI benefits on the basis of employment he held or could have held at the time of the accident.

The MPIC Act provides:

Entitlement to I.R.I.

89(1) A student is entitled to an income replacement indemnity for any time after an accident that the following occurs as a result of the accident:

(a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;

(b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

Determination of I.R.I.

89(2) The corporation shall determine the indemnity to which the student is entitled on the following basis:

(a) under clause (1)(a), if at the time of the accident

(i) the student holds or could have held an employment as a salaried worker, the gross income the student earned or would have earned from the employment,

(ii) the student is or could have been self-employed, the gross income that is determined in accordance with the regulations for an employment of the same class, or that the student earned or would have earned from the employment, whichever is the greater, and

(iii) the student holds or could have held more than one employment, the gross income the student earned or would have earned from all employment that he or she is unable to hold because of the accident;

(b) under clause (1)(b), the benefit that would have been paid to the student.

The panel has reviewed the oral testimony provided at the appeal hearing by the Appellant and his father, as well as the documentary evidence on the Appellant's indexed file.

The Employer's Verification of Earnings form completed by the employer shows information consistent with the Appellant holding a full-time temporary job which was scheduled from August 18 to August 26, 2009, but ended on August 24, 2009, the date of the motor vehicle accident.

However, the Appellant gave evidence regarding a new job that was to continue through the fall, with the same employer. His evidence was that he had promised employment of an after school job with [text deleted], working on their [city #1] fall contract.

The Appellant's father gave evidence and confirmed the logistics of the additional, after school work, which the Appellant testified he would have held. He indicated that the Appellant would have been finished school most days by noon or 1:00 p.m. and would have been able to begin work by 2:00 p.m. He also testified that the company was running double shifts and that the Appellant would have been able to work until midnight, up until approximately November 28 or 29, 2009, when the job was completed.

The Appellant provided detailed evidence regarding a conversation with the supervisor during which he was promised this employment.

The Employer's Verification of Earnings form was completed months after the motor vehicle accident, and does not specifically address the reason for the termination of employment.

A memorandum created by the Appellant's case manager on January 6, 2010 does specifically address the reason for termination of employment, but as a recording of a phone conversation the case manager held with the employer, [text deleted]. The notes indicate that they will be confirmed in writing with a letter from the employer. However, no such letter was provided. The Appellant's indexed file does not set out any examples of MPIC, either through the case manager, Internal Review Officer or legal counsel, writing to the employer to seek written confirmation of the case manager's notes, as the employer had promised to do.

The panel finds that the Appellant provided credible testimony, which was consistent with evidentiary details provided by his father, to establish that he had an offer of continued employment with [text deleted] on a part-time basis in the [city #1].

Had MPIC sought or obtained the promised written confirmation of the information contained in the case manager's memorandum of January 6, 2010, this might have been weighed against the Appellant's credible evidence regarding his job prospects with [text deleted], working under the [city #1] contract.

Without such clear, specific evidence to contradict the Appellant's credible testimony, the panel finds that the Appellant would have continued with his employment with [text deleted] had the motor vehicle accident not occurred. The evidence showed that this employment would have lasted through November of 2009.

Accordingly, the Appellant's appeal is allowed and the Internal Review decision of June 10, 2010 overturned. The Appellant will be entitled to IRI benefits for the employment with [text deleted] in the [city #1] that he would have held had the accident not occurred. Calculation of the IRI benefits to which the Appellant is entitled as a result will be referred back to his case manager for determination.

Dated at Winnipeg this 6th day of March, 2013.

LAURA DIAMOND

MARY LYNN BROOKS

IRENE GIESBRECHT