Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-17-017, AC-18-019, AC-19-032

PANEL:	**Pamela Reilly, Chairperson** **Janet Frohlich** **Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Ken Kalturnyk from the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATES:	**October 7, 2020; October 8, 2020**
ISSUE(S):	**Whether the Appellant's Income Replacement Indemnity ("IRI") benefit was calculated correctly, as it related to the classification of the Appellant's employment based on the National Occupational Classifications ("NOC").** **Whether the Appellant's Income Replacement Indemnity ("IRI") benefit was calculated correctly, in accordance with the Act and its Regulations, following the Appellant's entitlement on June 1, 2015 to Canada Pension Plan ("CPP") Disability benefits, because of the Appellant's motor vehicle accident related injuries.** **Whether the Appellant's Income Replacement Indemnity ("IRI") benefit was calculated correctly after the Appellant's eligibility to a Disability Tax Credit ("DTC"), because of his MVA related injuries.**
RELEVANT SECTIONS:	**The Manitoba Public Insurance Corporation Act (the "Act"), Section 81(1); section 81(2)(a)(ii); section 82(1); section 112(1); section 113; section 149; section 197. Manitoba Regulation 39/94, section 3 and section 10.**

Reasons for Decision

Background:

The Appellant suffered injuries caused during his motor vehicle accident ("the MVA") of November 6, 2013, when the Appellant collided with another motorist on [text deleted], Manitoba. The MVA aggravated the Appellant's pre-existing shoulder condition, which left him unable to continue working. He was therefore eligible for the Personal Injury Protection Plan IRI benefit, pursuant to Part 2 of the MPIC Act. Subsequent psychological reports determined that the Appellant would be unable to hold any employment.

At the time of the MVA, the Appellant operated his own business known as [text deleted]. In his Application for Compensation, the Appellant described his full-time self-employment duties as "sell equipment and install [text deleted]". The Appellant's Income Tax Returns showed his gross business income for the three years preceding his MVA, as follows:

[text deleted]

MPIC's decision of June 11, 2014 described the Appellant's occupation at the time of his MVA as "self-employed as a [text deleted]". MPIC classified the Appellant as a full-time earner as defined under section 4 of Manitoba Regulation 37/94.[1] The decision stated:

> As a self-employed earner, your Gross Yearly Employment Income (GYEI) is calculated in accordance with Sections 3(1) and 3(2) of the Manitoba Regulation 39/94.

Pursuant to Regulation 39/94, MPIC determined that the Appellant's class and level of employment was National Occupation Classification ("NOC") code #7441 (Residential

[1] Definitions and Interpretation (Universal Bodily Injury Compensation) Regulation

and Commercial Installers and Servicers). The GYEI for this classification was $47,331.00. MPIC calculated and paid the Appellant a bi-weekly IRI benefit of $1,287.57.

On November 12, 2015 (the 2-year anniversary of the MVA), MPIC completed a Residual Capacity Determination ("RCD"). Based upon the Appellant's level of function in 2017, MPIC alternately classified the Appellant's employment as NOC #6411 (Sales Representative, Wholesale Trade (non-technical)), with a GYEI of [text deleted].

The Appellant provided MPIC with a copy of his Power Engineer's Certificate and argued that MPIC should change his classification to NOC #7247 ([text deleted]). On December 30, 2015, MPIC accepted the Appellant's qualifications and agreed to determine his employment as NOC #7247. This allowed a GYEI of [text deleted] and bi-weekly IRI of $1,688.73.

On September 23, 2016, MPIC accepted a medical opinion, which stated that the Appellant suffered from a pain disorder making his return to work unlikely. MPIC therefore rescinded the RCD letter of November 12, 2015. The December 30, 2015 determined employment of NOC #7247 remained in place.

In July 2017, the Appellant argued that as the owner of his business, MPIC should further upgrade his classification to NOC #7212[2] (Contractors and Supervisors, Electrical Trades and Telecommunications). MPIC disagreed that the Appellant's reported essential work tasks matched the main duties listed for NOC #7212. MPIC rejected the Appellant's request in an Internal Review Decision (IRD) dated January 22, 2019, which the Appellant appealed.

[2] The Appellant referenced NOC #7202 from the 2016 version of the NOC codes. The corresponding code in Reg. 39/94 Schedule C, Table B is NOC #7212. **This Decision will reference NOC #7212.**

Based upon the injuries he suffered from his MVA, the Appellant applied for and received CPP Disability benefits, retroactive to June 1, 2015. In turn, and pursuant to section 197 of the Act, MPIC reduced the Appellant's IRI by the amount of his CPP Disability benefit. MPIC continued to deduct income tax and employer/employee CPP contributions when calculating the Appellant's bi-weekly IRI. The Appellant argued that because he was in receipt of CPP Disability benefits, which, pursuant to tax law, excused him from making CPP contributions, then MPIC was wrong in continuing to calculate and deduct an employer/employee CPP contribution from his GYEI. In MPIC's IRD dated January 27, 2017, MPIC maintained its method of calculation, which the Appellant appealed.

Based upon the injuries he suffered from his MVA, the Appellant became eligible for a Disability Tax Credit ("DTC"). MPIC did not apply this tax credit when reconciling the Appellant's IRI. The Appellant argued that Regulation 39/94 section 10(3)(c) allowed any credit or deduction from tax allowed under 'The Income Tax Act' of Manitoba. Therefore, MPIC should apply his DTC to reduce his tax consequences, and correspondingly increase his net income and bi-weekly IRI. In its IRD dated February 26, 2019, MPIC maintained that it had correctly calculated the IRI benefit in accordance with the legislation and regulations, which the Appellant appealed.

Issues:

The Appellant appealed three Internal Review Decisions of the Manitoba Public Insurance Corporation that involved the calculation of his Income Replacement Indemnity benefits. In particular, the Appellant disagreed with:

1. MPIC's treatment of the Appellant's CPP contributions in calculating his IRI (IRD January 27, 2017);
2. MPIC's determination of the Appellant's NOC code (IRD January 22, 2018); and,
3. MPIC's treatment of the Appellant's CPP DTC in calculating his IRI (IRD February 26, 2019).

Decision:

The Commission found that MPIC treated the Appellant's CPP contributions appropriately when calculating the Appellant's IRI benefit.

The Commission found that MPIC correctly determined the Appellant's National Occupation Classification as NOC #7247.

The Commission found that MPIC treated the Appellant's CPP DTC appropriately when calculating the Appellant's IRI benefit.

Evidence for the Appellant:

The Appellant detailed his employment history between 1984 and 1997. He described his managerial role as Purchasing Manager for a meat packing plant. His duties included instruction on and negotiation of contracts, and implementing procedures to reduce operating costs. He realized his aptitudes were better suited to sales and testified to employment with two insurance companies, which involved a quick promotion to District Manager where he oversaw sales agents, and sales managers. His duties included establishing work assignments for the agents and other managers. He provided daily training and motivational sales techniques, which involved training for door-to-door sales. This employment ended because of a conflict with his manager. He lost interest in the insurance business and started his own business known as [text deleted].

The Appellant started [text deleted] in 1995 with another individual whom he bought out within the first 1 ½ years. Within the 1 ½ years, the business consisted of two installers, five salespeople and two office staff. The Appellant said that he instructed the installers, arranged sales areas to canvass, co-ordinated installations of satellites, and provided all materials for the installations. He instructed the office staff on the day-to-day operation of the business.

The Appellant said that in 1997, he began to defend the business, as a self-represented litigant from the first of two, multi-million-dollar lawsuits. This caused him to downsize the business. After many years, the lawsuits were either dismissed or withdrawn, but while ongoing, took most of the Appellant's time and resources. Between the years 2003 to 2007, the Appellant was a part-owner/operator/partner in both a computer and restaurant business. He said that his responsibilities in these businesses were administrative; that is, purchasing, regulatory work, obtaining permits, and teaching and training staff. Additionally, he taught sales technique to staff at two other computer businesses. The Appellant summarized by saying that throughout his career, he has "always been a manager giving direction to other people".

The Appellant testified that in about 2010 he started to get [text deleted] running again. He said that he solicited all [text deleted] customers, and he resolved any customer problems. He ordered materials, brought materials to the job site, complied with regulations, and completed all the bookkeeping and tax returns. The Appellant said that the lawsuits had left him wary about creating significant overhead, and "between 2010 to mid-2013 I used sub-contractors to keep overhead low." He testified that in 2013 he was "in the midst of negotiations with a broadband provider" when his November 2013 MVA occurred and because of his injury (pointing to his shoulder); he shelved the negotiations.

When asked 'who did most of the installations?' the Appellant said that he did "one to two per day. But if I was too busy, or dealing with other issues, I would get other sub-contractors." The Appellant could not recall the last names of two sub-contractors stating "it's a long time ago". The Appellant testified about an email from the Director General of the Labour Market Information Directorate within the Department of Employment and Social Development, who opined that the Appellant qualified for NOC #7212.

In cross-examination, the Appellant was asked how many installations he would do in an average week prior to his MVA. He replied "2, 3 sometimes 4".[3] When reminded that in his direct examination he testified to performing '1-2 installations per day', the Appellant responded "2 would be pushing it. Yeah, but I didn't do it every day. I could do 1-2 per day, but I didn't do it everyday."

In cross-examination, the Appellant was referred to the April 7, 2014, Percentage of Duty/Job Demands Analysis Report ("JDA Report") completed by an occupational therapist ("OT"). The report stated that "prior to the accident, [the Appellant] would usually complete one satellite system installation (approximately 2 hours) and one satellite system adjustment…per day." When asked to explain the inconsistent statements about the number of daily installations the Appellant replied, as follows:

> That was when I was able to do one per day. If I did not have any sales, then I couldn't do one per day. I would do one install and one adjustment per day. So, if I did not do sales, I did not install. You do one or the other.

The JDA Report stated that prior to the MVA, the Appellant "was responsible for completing 100% of the job tasks". After his MVA, but prior to his rotator cuff shoulder repair surgery on March 19, 2014, the Appellant reported to the OT that he was able to complete 40% of his job tasks. When asked if he had told the OT that he hired contractors prior to his MVA, the Appellant replied "I don't remember". When asked if he told the OT that he scheduled contractors, the Appellant replied "I don't know". When asked if he told the OT that supervising was part of his pre-MVA duties, the Appellant replied "to be honest, I don't remember the interview."

The Appellant then testified that the JDA meeting was after his shoulder surgery, and its purpose was to qualify him for Personal Care Assistance ("PCA"). The Appellant stated that the PCA exams were painful, and the meeting caused him a lot of pain. When asked further if during his meeting with the OT, he told her that he trained workers or

[3] This would be less than one per day in an average 5-day workweek.

supplied them with equipment, the Appellant replied “I don’t know if she asked, I don’t know if I told her.”

In cross-examination, MPIC’s counsel referred the Appellant to the Initial Assessment (the “Assessment”) from Pure Lifestyle dated August 15, 2014, and in particular, the Appellant’s job description and job duties, described in the Assessment, as follows:

> …satellite receiver sales associate and installer full time…in charge of sales as well as installing satellites on roofs…
>
> …In an average day, he would install 2 satellite receivers.

Counsel questioned why there was no mention of sub-contractors or supervision in the Assessment. The Appellant replied that it was a brief description, which left out other duties such as completing tax returns and dealing with lawsuits.

The Appellant confirmed his statement in the Assessment, which stated that “if he cannot install, it serves no purpose to make a sale.” MPIC’s counsel asked the Appellant to explain why, if he had contractors to install the equipment, there was no point in making a sale. The Appellant replied “my pain level was so high I was not able to make sales.” The Appellant further stated:

> If I’m not making money through installations there’s no point in making sales. But I couldn’t make sales anyway because of the pain.

MPIC’s counsel questioned the Appellant about an email to his case manager dated March 7, 2014, which stated, as follows:

> I, [appellant] have been self-employed since 1990. I’ve been running the [text deleted] business under the name [text deleted] since 1996. I have 18 year [sic] experience in satellite sales and installations. [text deleted] is my full time occupation, which I typically spend 40 hours a week. My weekly duties are on average, 1 installation a day, bookkeeping, contacting customers, and ordering equipment. I can continue all my

> duties with the exception of installing satellite dishes, which is costing me about $100 per day in profits.

When asked why, if they were part of his regular duties, he did not mention hiring, supervising and co-ordinating work schedules, the Appellant replied, as follows:

> When I said 'I installed' that did not mean I did it. That means one installation a day. Nowhere does it say that I was the one doing the installation. It was a given that I had contractors, but I just didn't say that.

When further pressed to confirm whether other duties described by the Appellant, such as, providing supplies to contractors, resolving issues between contractors and clients, and site inspections, were intended to be included in the wording of his March 7th email, the Appellant responded, as follows:

> Yes, but I didn't put it in there. That was – at that time, April 2014 - - March 7, 2014. That was after my surgery.[4] That was when I was in extreme pain. At that point, I realized I didn't think I'd ever get back to installing…

When asked why he did not advise his case manager of any supervisory duties before his email of July 12, 2017, the Appellant replied, as follows:

> In July 2017, I became more informed about how MPI worked. I read the sections in the Act; you have to take past – previous experience into consideration. **I supervised in prior jobs**…I had contractors after the lawsuit. Why I did not answer? I cannot say why I didn't mention it. I assume at one time or another I did. I don't know. [emphasis]

The Appellant responded to cross-examination questions about his supervisory duties in general. When asked if there were different supervisory duties between his contractors, the Appellant replied "yes", and spoke of one contractor who was very proficient, but more expensive, and therefore the Appellant "did not use him as much". The Appellant

[4] The Appellant's surgery date was March 19, 2014. See "Pure Lifestyle Initial Assessment", August 15, 2014, page 2.

did not elaborate on supervisory duties provided in relation to specific contractors, other than to state that each contractor “had their own personal quirks”.

The Appellant spoke specifically about his working relationship with [Appellant witness 1] (later called as the Appellant’s witness). The Appellant said that [Appellant witness 1] was a contractor who installed satellite equipment whenever the Appellant called him, which, he said was usually about once per week. He said that he provided [Appellant witness 1] with instruction over the phone or attended to the site. In response to questions about safety, the Appellant said that he always inspected the job site to mitigate any safety issues. The Appellant said that he supplied [Appellant witness 1] with quite a bit of tools, including a satellite meter for finding the signal.

When cross-examined about his supervision of [Appellant witness 1], the Appellant testified as follows:

> I did several installs with [Appellant witness 1], taught and trained as systems improved; explained the difference between a regular receiver and a DVR receiver; provided tips on how to keep customers happy; and, how to use the remote so [Appellant witness 1] could explain it to the customer.

The Appellant said that he advised [Appellant witness 1] of what type of ladders he would need (i.e., whether it was a two-story or bungalow residence), but that [Appellant witness 1] needed very little guidance because he used to work construction. The Appellant stated that [Appellant witness 1] did his job very proficiently and that there was no point in him receiving additional training from others.

When cross-examined about whether his business expenses on his 2010 Income Tax return included amounts paid to contractors, the Appellant said “I did a barter system, so not included.” When asked if he used the barter system in reporting his 2011 and 2012 tax years, the Appellant said “yes, I didn’t pay him cash, but he was reimbursed in different ways.” The Appellant said he provided [Appellant witness 1], in particular, with

free satellite T.V. and supplied [Appellant witness 1] with any costs to facilitate any installations; i.e., cash for expenses such as gas or screws.

The Appellant said that [Appellant witness 1] occasionally collected cash directly from the customer. The Appellant also variously testified that he would "pay [Appellant witness 1] cash; meet up with him later and collect the difference; and, if I collected the cash, I'd reimburse him or use the barter system." When asked if this was his practice with all his contractors, the Appellant replied:

> Some, - - the customer paid them directly. Some had the - - one other, I had the same agreement with. But the others were paid directly by the customer.

The Appellant said that he took a minor amount from his contractor in the form of a kick-back, and when asked if he included this amount in his taxes, the Appellant replied that he could not recall.

When asked if he had a record of how many times he had hired contractors, the Appellant replied that he recorded the scheduling in his day-timers, which he kept for seven years, as required by law. Upon further questioning as to why he did not provide these documents for his hearing, the Appellant replied that he no longer had them. He then revised the period he retained records to, "maybe four years, I don't have them anymore. They're day timers".

In cross-examination, the Appellant testified that he did not prepare a Statement of Business Expenses for income tax purposes, stating that it was not required. MPIC's counsel referred the Appellant to his letter dated August 1, 2018, addressed 'To whom it may concern', which referenced his income tax returns. This letter set out, in part, as follows:

> It was my understanding at the time, that when an amount collected as income and paid out as an expense (pass through expense) did not

> require recording on the income portion and the expense portion of my income statement. [sic]

The Appellant explained his reason for creating the above letter, as follows:

> The money I collected for the contractors was paid out, but I was told this was an incorrect bookkeeping process. So, I have to correct my previous answer. I must have paid my contractors with cash.

The Appellant recalled that he did in fact collect all money from the customer; paid his installation contractor; and received a $25 fee. Contrary to his earlier testimony, he said that he did disclose this cash receipt on his tax returns. When asked why he did not provide a copy of his Notice of Re-Assessment to MPIC or the Commission, the Appellant said "to be honest, I didn't think about it. I forgot about it until just now."

The Appellant testified that at the time of his MVA he had 2 dependants, aged 17 and 15. He said that he no longer declared these children as dependents for federal income tax purposes. The Appellant said that in about 2014, he asked his case manager to clarify changes to his IRI benefit with respect to his children. The Appellant said that his case manager explained that the Appellant's children had aged out (implying that MPIC no longer applied the child tax credit when calculating the Appellant's IRI).

[Appellant witness 1]

[Appellant witness 1] confirmed that he did satellite installations for the Appellant in the first six months of 2013. He also completed installations for family or friends, separate from those requested by the Appellant. [Appellant witness 1] said that he had his own tools, but the Appellant provided the technical equipment. [Appellant witness 1] said that he installed satellites for the Appellant "whenever [the Appellant] needed my assistance". [Appellant witness 1] described the frequency of work, as follows:

> Up and down, it's hard to say. Sometimes once per week, sometimes once every two weeks. It wasn't consistent. I never kept a record.

[Appellant witness 1] said that he paid his own expenses, and that he never received money for the installations. He testified that the Appellant provided him with personal satellite service, which he considered to be worth more than the work he provided for the Appellant.

In response to the question about what information the Appellant provided, [Appellant witness 1] replied that the Appellant "basically told [me] what I was supposed to do; given the address, customer name, all information that was required, including equipment as well." In response to questions about what supervision and training the Appellant provided, [Appellant witness 1] replied, as follows:

> At times, it was a little bit complicated, I needed his assistance. Once in a while, not very often. If it was a little bit more than my expertise, then he would come and help me with it; the technical part...basically he would instruct me over the phone, tell me how to do things, whatever, guide me through it.

In response to the MPIC's counsel's question about addressing safety, [Appellant witness 1] replied:

> Yeah, he would instruct me of any safety concerns and, any of them came up - we would work up prior to the job. We had discussions on stuff like that.

[Appellant witness 1] admitted that the Appellant stopped calling him in 2013. [Appellant witness 1] said the Appellant gave him the following explanation:

> He said his customer base was going down and he was getting out of the business.

Evidence for MPIC:

[Income Replacement Supervisor]

[IR Supervisor] testified that he has held the position of Income Replacement Supervisor with MPIC for the past 15 years. He supervised a unit of nine employees (the"Unit").

[IR Supervisor] main duties were to review and approve calculations for IRI benefits,

provide guidance to case managers and staff, train and develop training for case managers, and respond to customer questions and concerns. He was familiar with the Appellant's case.

[IR Supervisor] explained that, in general, "the purpose of the IRI is to compensate all Manitobans as a result of economic loss because of their motor vehicle accident." Specifically, if you lose income then the income replacement benefit is there to replace the lost income. [IR Supervisor] explained that there are two types of claimant, either employed or self-employed. For an employed claimant, the Unit simply required verification from an employer as to what the claimant was earning. The Unit based the IRI entitlement upon that income, minus notional deductions for CPP, EI premiums and income tax.

[IR Supervisor] said that a self-employed claimant must provide three years of tax returns for the Unit to determine the average gross yearly income. He explained that the Unit would then compare the average gross income with Schedule C gross incomes.[5] He explained that if the Schedule C income amount is higher than the average gross earnings of a claimant, then the legislation mandated that the Unit apply the Schedule C amount.

The Unit then deducted from the Schedule C gross income amount, notional amounts for income tax and CPP contributions. A self-employed claimant scenario required that the Unit calculate and deduct both the employer and employee CPP deductions. However, the Unit would not deduct EI premiums, because a self-employed claimant did not pay EI premiums. [IR Supervisor] explained that MPIC pays ninety percent of this net income[6], divided by 26, to determine the bi-weekly payment to a claimant. [IR

[5] [Appellant Witness 1] explained that Schedule C is a chart of incomes based upon market research for comparable classes of employment. MPIC's economics department created Schedule C, provided in the Regulations.

[6] MPIC Act, s.111 (1): The income replacement indemnity of a victim under this Division is equal to 90% of his or her net income computed on a yearly basis.

Supervisor] said that, in this case, upon comparing the Appellant's income from three years' income tax returns, with the Schedule C income values, Schedule C came out as the winner, with a GYEI of $47,331.00. In addition, in accordance with the Act, the Unit applied the Consumer Price Index to the IRI on each anniversary date of the Appellant's MVA.

[IR Supervisor] confirmed the December 30, 2015 letter in which MPIC accepted the Appellant's argument to change the NOC code to #7247. The Unit calculated the NOC #7247 GYEI as $65,656.00 and [IR Supervisor] confirmed that the Unit applied the same calculation process described above, to calculate the Appellant's higher bi-weekly entitlement of $1,688.73.

[IR Supervisor] explained, generally, how the Unit calculated a claimant's CPP Disability benefits: The Unit deducted the CPP Disability benefit from a claimant's GYEI, pursuant to section 197 of the Act. The Unit also continued to deduct a claimant's CPP contribution. The Unit, in fact, calculated the Appellant's IRI benefit in this manner. [IR Supervisor] explained that the CPP contribution, for the purposes of an IRI benefit calculation, is a notional deduction. By way of example, [IR Supervisor] explained that an individual who made a gross income of $50,000 per year was subject to deductions for tax, CPP contributions and EI premiums, which resulted in a net, take home pay closer to $35,000 a year. This net amount reflected the true economic loss to a claimant. Paying the gross amount without deductions, resulted in overcompensation. Therefore, because the Unit treated the Appellant as if he were still in the work force, the Unit applied these notional deductions to his GYEI.

Furthermore, [Text Deleted] explained that the bi-weekly IRI benefit is not taxable, and the Appellant did not claim this as income on his tax return. This corresponded with why the Unit made notional deductions; that is, the IRI benefit was insurance income and was not taxable to the Appellant. The Unit also applied the annual consumer price index to the Appellant's GYEI using the previous year's tax rate. The Unit used its own

internal computer tax program (like “Turbo Tax” according to [IR Supervisor]) which it updated annually to calculate IRI benefits.

On the question of MPIC’s treatment of the Disability Tax Credit (“DTC”), [IR Supervisor] explained that Canada Revenue Agency administered the DTC, while a separate administration administered the CPP Disability payment. The CPP disability payment was a monetary receipt. Conversely, the DTC was not. The DTC was a non-refundable tax credit, which the Appellant could use to reduce his federal and provincial tax liability. [IR Supervisor] explained that, at the date of loss, the Appellant did not receive a DTC; therefore, the Unit did not apply this tax credit in its calculation of the Appellant’s IRI. Again, going forward, the Unit calculated the Appellant’s IRI as if he were still in the work force. Furthermore, [IR Supervisor] pointed out that the Appellant received the DTC because of the injury he suffered in the MVA.

[IR Supervisor] was questioned about the application of sections 112(1) and 113 of the Act, which stated that for determining net income, MPIC “shall take into account the number of dependants of the victim on the day of the accident.” Section 112(1) referred to regulations that allow for tax credits, and in particular “any credit or deduction from tax allowed under ‘The Income Tax Act of Manitoba’.” The Appellant’s representative put to [IR Supervisor] that the Unit apparently allowed an override of section 113 because despite the specific reference to the day of the accident, the Unit later stopped applying this tax credit when the dependants aged out. [IR Supervisor] said that a change in dependants *would happen regardless [of whether] the MVA happened or not*, and agreed that this resulted in a change of the Appellant’s IRI calculation on his annual indexation date.

[IR Supervisor] reiterated that if a claimant was a full-time earner on the date of the accident, the Unit based the calculation on what the claimant was earning on that date. [IR Supervisor] continued, as follows:

> Section 113 relates to the date of the accident. We would include the dependent. As far as I know, we do update on the number of dependents. It's no different than if at the date [of the MVA] a dependent is under 18, they would qualify for dependent credit, but once they reach age 18, they no longer qualify. So, we remove that dependent. That's why we add it in for when a dependent is born; we can't include it as of the date of the accident.

When asked what section of the Act allowed MPIC to add or subtract dependants, [IR Supervisor] admitted that he could not speak to that exactly.

The Appellant's representative characterized the Unit's deduction of both the notional CPP contribution and the Appellant's CPP Disability benefit from GYEI, as 'double-dipping'. [IR Supervisor] rejected this characterization and explained that the Appellant's CPP Disability benefit resulted from his MVA and now represented his taxable income. This income was a lower amount than his employment income would have been, thereby resulting in lower tax consequences. Further, the Appellant could also reduce his tax liability by applying his DTC to his taxable income.

The Appellant's representative asked [IR Supervisor] why the DTC did not fall within Regulation 39/94 section 10(3)(c) for tax credit treatment. Mr. To reiterated that the Unit based the IRI calculation upon the Appellant's pre-MVA circumstances and income, which in this case, did not include a DTC, and therefore only those deductions that applied pre-MVA would notionally apply to the IRI calculation.

Argument:

Appellant's Submission – NOC code

The Appellant argued that MPIC had rescinded its RCD decision and therefore the panel must consider the Appellant's pre-MVA employment. The Appellant submitted that the appropriate legislation was section 81 and, arguably, section 82 of the Act.

The relevant portions of sections 81(1) and 81(2) are as follows:

Entitlement to I.R.I.
81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment;

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, …

Section 82 states as follows:

I.R.I. based on more remunerative employment
82(1) Subject to subsection (2), where the corporation is satisfied that a full-time earner who is entitled to an income replacement indemnity would have held a more remunerative employment at the time of the accident but for special circumstances, the full-time earner is entitled to receive an income replacement indemnity determined on the basis of the gross income for that employment.

The Appellant referred to the Transferable Skills Analysis Report ("the TSA Report") dated February 6, 2015, and completed for determining an alternate employment for the Appellant. The TSA Report referred to the Appellant's occupation with [Text Deleted] as NOC #7219/7441[7]. The Appellant offered the TSA Report's classification as evidence that the Appellant's pre-MVA employment was Contractor/Supervisor and Installer.

[7] NOC #7219 is Contractors and Supervisors, Other Construction Trades, Installers, Repairers and Servicers. NOC #7441 Residential and Commercial Installers and Services is the code upon which the Unit based the Appellant's GYEI in February 2016, and which the Appellant requested the Unit revise in about November 2015 to NOC #7247

The Appellant submitted that MPIC did not dispute that he owned and operated his own business. The Appellant argued that he frequently subcontracted work as evidenced by [text deleted], and submitted that whether he had employees other than himself prior to the MVA, was not a factor when considering NOC #7212. He argued that MPIC excluded NOC #7212 solely on the basis that the Appellant had no employees. He argued that the evidence showed that he performed at least 9 out of 10 duties listed under NOC #7212. The Appellant referred to the Director General, Labour Market Information Directorate email, which concluded that NOC #7212 applied to his pre-MVA occupation.

The Appellant submitted that while he may perform all the main duties under NOC #7247, he did much more. He argued that he performed these additional (i.e. 'much more') duties himself, because he managed the operations of his own company. None of these 'management' duties appears in NOC #7247.

The Appellant then raised the issue of section 82(1) and argued that the section was applicable based upon his historical employment record which included the multi-million-dollar lawsuit, which caused him to downsize his business. The Appellant implied that these were special circumstances that would lead MPIC to find that he would have held more remunerative income at the time of the accident. The Appellant again referred to the TSA Report and concluded that his previous experience and training puts him in the category of Manager, rather than just employee. He submitted that NOC #7212 was the appropriate code to apply.

Appellant's Submission – Treatment of CPP Disability Contribution

The Appellant argued that MPIC's practice of deducting both a notional CPP contribution, as well as his CPP Disability benefit, constituted 'double dipping' by MPIC. He pointed out the distinction between CPP Disability benefits versus CPP pension benefits and the fact that an individual in receipt of CPP Disability benefits can no longer contribute to the plan. Nonetheless, the Appellant submitted, an individual was still

allowed to earn several thousand dollars per year without it affecting their entitlement to benefits. The Appellant argued that because he received CPP Disability benefits, which MPIC deducted from his notional GYEI, MPIC must discontinue deducting a notional amount for CPP contributions.

Appellant's Submission – DTC/Manitoba Tax Credit

The Appellant submitted that MPIC inconsistently applied 'the day of the accident' criteria when making deductions from GYEI. He referred to sections 112(1) and 113 of the Act, which read as follows:

> **Determination of net income**
> **112(1)** A victim's net income is his or her gross yearly employment income… less an amount determined, in accordance with the regulations, for income tax under 'The Income Tax Act' and the "Income Tax Act (Canada)'… and contributions under the Canada Pension Plan.

And,

> **Deductions to include effect of dependants**
> **113** For the purposes of determining the deductions under section 112, the corporation shall take into account the number of dependents of the victim on the day of the accident.[8]

By way of examples, the Appellant argued that when his children 'aged-out' (i.e. reached their 18th birthdays) a few years after his MVA, MPIC no longer applied the Manitoba Child Tax Credit to reduce his tax liability. Conversely, a few years after his MVA (i.e. 2017) when Canada Revenue Agency provided him with the DTC, MPIC refused to apply the credit to reduce his tax liability, despite the regulations allowing such a credit. Further, he argued that MPIC used a 3-year average of gross income

[8] Per the Act definitions, **"dependent" means**: (a) the spouse; (a.1) the common-law partner; (b) the person who is married to the victim but separated from him or her de facto or legally; (c) a person whose marriage to the victim has been dissolved by a final judgment of divorce or declared null by a declaration of nullity of marriage, and who, at the time of the accident, is entitled to receive support from the victim under a judgment or agreement; **(d) a child of the victim (i) who was under the age of 18 years at the**

and not his actual gross business income as of the date of the accident[9]. Lastly, the Appellant argued that MPIC's annual adjustment by the Consumer Price Index was also contrary to its position that it used the GYEI from the time of the accident.[10]

The Appellant said that "MPI maintains that everything remains the same as on the date of the accident, and that either the claimant's status on the date of the accident determines everything, or it doesn't." Further, he submitted that the Act and Regulations do not "single out probable CPP contributions as being frozen on the date of the accident." The Appellant referenced Regulation 39/94 section 10(3)(c) and argued that "nowhere in either the MPIC Act or the Regulations is [it] stated that section 10(3) only applies to the date of the accident." Therefore, the Appellant submitted, MPIC must consider the actual circumstances of the Appellant at the time of the calculation or recalculation of his IRI. He referenced section 113 as proof that the amount of benefits is not restricted to the circumstances of the claimant at the time of the accident. The Appellant argued that tax law recognized both the increased costs of dependents and the increased costs for a disability by allowing for tax credits in each of these circumstances. Therefore, MPIC's refusal to apply his DTC in the calculation of his IRI benefit was inherently unfair.

In summary, the Appellant submitted that the Act and Regulations were silent about the date on which to calculate a deduction of the CPP contribution and DTC. Further, he argued that section 149 required him to notify MPIC of any change in his situation that might affect his right to an indemnity or the amount of the indemnity. The Appellant argued that there is ambiguity in the Act and Regulations, which MPIC arbitrarily applied to its benefit. The Appellant asked that the panel accept his position and reverse the IRDs.

---

time of the accident, or (ii) who was substantially dependant on the victim at the time of the accident, and (e) a parent of the victim who was substantially dependant on the victim at the time of the accident.

[9] See, Reg 39/94, section 3(2)(d)

[10] See, Act section 165(1), Reg 39/94 section 5

MPIC's Submission – IRI calculation and CPP Disability benefit

MPIC submitted that questions of statutory interpretation were involved to determine these issues, and the panel must consider both the purpose and context of the Act and Regulations. MPIC submitted that the purpose of IRI benefits was to replace the income lost by a victim due to a motor vehicle accident, and the Act and Regulations must be considered within the entire PIPP context. In this context, the panel should consider that the Appellant's IRI benefit was not subject to income tax, CPP contributions or IE premiums because MPIC regulations already required MPIC to make these deductions from the Appellant's GYEI. Without these deductions, the Appellant would have received tax-free income, which would not be a true reflection of his MVA income loss.

In response to the Appellant's submission that the relevant sections of the Act and Regulations do not refer to 'the time of the accident', MPIC referred the panel to a number of sections, including section 3(2) of Regulation 39/94, which states, as follows:

> **GYEI from self-employment**
> 3(2) Subject to section 5, a victim's gross yearly employment income derived from self-employment that was carried on **at the time of the accident** is the greatest amount of business income that the victim received or to which the victim was entitled within the following periods of time: [emphasis]
>
> …
>
> (d) where the victim has operated the business for not less than three fiscal years before the date of the accident, for the 156 weeks before the fiscal year end **immediately preceding the date of the accident** divided by three; [emphasis]
>
> …
>
> or according to Schedule C.

MPIC submitted, as follows:

> …for the purpose of IRI benefits, the key day on which entitlement crystallizes is the date of the accident. The purpose of IRI is to replace income loss from that date forward, based on what the Appellant would have earned had the accident not occurred.

MPIC referred to sections 10(4) and 10(6) of Regulation 39/94, as follows:

> **GYEI is pensionable and insurable earnings**
> 10(4) For the purpose of subsections (5) and (6), the gross yearly employment income of a victim, as determined under this regulation, **are the pensionable earnings of the victim for the purpose of the Canada Pension Plan**, and the insurable earnings of the victim for the purpose of the Unemployment Insurance Act (Canada), not derived from self-employment. [emphasis]

And,

> **Contributions payable under Canada Pension Plan**
> 10(6) For the purpose of this regulation, the contributions payable under the Canada Pension Plan are the amounts payable by the victim as an employee's contribution for the year under the Canada Pension Plan **in respect of the victim's pensionable earnings**, not exceeding the maximum amount by him or her for the year under the plan. [emphasis]

MPIC submitted that CPP contributions were based upon the Appellant's pensionable income, which as defined in the Regulation, is GYEI and not actual income. Therefore, in the context of income replacement within the statutory scheme outlined above, a proper interpretation required that the CPP deductions reflect those that the Appellant would have made, but for the MVA. MPIC argued that this ensured that the IRI benefit best reflected the income that the Appellant would have earned but for the MVA.

In response to the Appellant's argument that MPIC was 'double-dipping', counsel pointed out that section 197 of the Act reduced CPP Disability benefits paid only as a result of an accident. He argued that without this reduction the Appellant would receive his IRI benefit because of his MVA injury, in addition to his CPP disability benefit because of his MVA injury. MPIC submitted that if the Appellant's reasoning (that his CPP contributions should not be deducted) were applied this would result in overcompensation.

<u>MPIC's Submission – IRI calculation and DTC</u>

MPIC submitted that its position was the same as above: The Appellant was not entitled to a DTC because including it in the calculation of the Appellant's IRI benefit resulted in overcompensation to the Appellant. MPIC referred to Regulation 39/94 sections 10(2) and 10(3), which defined taxable income as GYEI, minus certain deductions. Again, the Unit based the Appellant's GYEI upon his circumstances as of the date of loss. MPIC submitted that the DTC was not available to the Appellant at the date of loss, and therefore should not apply to his post-MVA taxable income calculated from his GYEI.

In response to the Appellant's argument that MPIC did not apply the 'date of accident' criteria to tax credits when calculating his IRI after his children 'aged out', MPIC submitted that this treatment was consistent with Regulation 39/94 section 10(3) as MPIC was required to calculate the tax payable on taxable income. [IR Supervisor's] testimony supported this position when he stated that the number of dependants will change irrespective of a MVA, therefore adjusting the IRI calculation to include those changes was appropriate. Conversely, the DTC resulted from accident related injuries and was not an appropriate credit allowed to the Appellant's taxable income, post-MVA.

MPIC's Submission – NOC code

MPIC did not dispute that the Appellant was self-employed. MPIC argued that the purpose of sections 3(2)(a) through 3(2)(e) of Regulation 39/94 was to determine the Appellant's actual self-employed GYEI and then find the NOC code in Schedule C that most closely matched the Appellant's employment at the time of the accident. More specifically, MPIC looked at the Appellant's job duties at the time of the accident for comparison purposes. MPIC submitted that this process was distinct from determining employment based upon criteria under section 107 or 108 of the Act where MPIC would look to the Appellant's entire history of skills, education, and work history. MPIC argued that the codes could not be perfectly matched, as they merely approximate broad, general work categories. MPIC determined which code most closely corresponded to the actual job duties of the Appellant at the time of the accident.

MPIC argued that, based upon the information provided by the Appellant, NOC #7247, Cable Television Service and Maintenance Technician, best fit the job duties provided by the Appellant. Further, the evidence showed that the Appellant did not mention managerial/supervisory duties to his case manager, and during the Appellant's JDA, he did not mention installation contractors pre-MVA. MPIC submitted that its review of the documentary evidence did not reveal supervisory or managerial duties performed by the Appellant. MPIC's counsel argued that the Appellant's documented installation duties and absence of supervisory duties, supported MPIC's choice of NOC #7247.

MPIC submitted that the Appellant's testimony was at times evasive, contradictory, and implausible. MPIC referred, among other examples, to the Appellant's testimony about his day-timers no longer being available and pointed out that the Appellant's tax documents from 2010-2012 did not disclose expenses related to contractors. The Appellant said that he submitted corrected information about these expenses to CRA but did not explain why he did not provide the panel with Notices of Re-assessment. MPIC also submitted that it was not plausible that the Appellant would improperly report his business expenses to CRA and neglect to report supervisory duties after testifying to how important and prevalent these roles and duties were to his employment.

MPIC submitted that while the Appellant may have owned and operated [text deleted], it had to consider the actual job duties of the Appellant at the time of the accident to determine the appropriate code. MPIC submitted that the Appellant's job duties at the time of the accident best fit those described in NOC #7247.

Discussion:

The onus of proof for any appellant appearing before the Commission is proof on a balance of probabilities. The panel must be satisfied that the Appellant proved each of his appeals on a balance of probabilities. The panel addressed the issues as follows.

NOC #7247 vs. NOC #7212

The National Occupational Classification ("NOC") in Regulation 39/94 means the classification as established by Statistics Canada and the major occupational group in Regulation 39/94 means an occupational group assigned a two character code in Table B of Schedule C.[11] Table B lists the various unit groups within occupational group #72 of Trades, Transport and Equipment Operators and Related Occupations. The Introduction to Edition 2016 of the NOC states as follows:

> In general, it is best to let the description of the work performed predominate over titles when coding.[12]

Each NOC code describes the main duties that workers typically perform. MPIC considered the main duties when designating a unit group for the Appellant. The Appellant argued that NOC #7212 rather than NOC #7247 most appropriately fit his duties.[13] He said that he performed all the supervisory and management duties listed in NOC #7212, and that his history of employment proved special circumstances, which put him within section 82 of the Act. MPIC countered that the issue of "special circumstances" for more remunerative employment was not applicable, and the Appellant had not previously raised this issue. Since the MVA, MPIC had consistently applied section 3(2) and Schedule C (Table B) of Regulation 39/94, to determine the Appellant's GYEI.

The panel found that MPIC's application of Regulation 39/94 consistently flowed from section 81 of the Act. If MPIC had used section 82 of the Act, then sections 4, 6 and 7 of Regulation 39/94 would have applied, all of which employed Schedules A and B for calculating GYEI. Further, section 8 of Regulation 39/94 states as follows:

---

[11] Reg 39/94. Definitions section 1.
[12] Attachment "J" to Appellant's Notice of Appeal, page 20 of 23.
[13] NOC #7212 - Contractors and supervisors, electrical trades, and telecommunications occupations. This unit group includes telecommunications and electrical trade contractors who own and operate their own businesses. This group also includes supervisors who supervise and co-ordinate the activities of workers classified in the following unit groups: … #Cable Television Service and Maintenance Technicians (7247). They are employed in a wide range of establishments…

> **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) sub clause 81(2)(a)(ii) (full-time earner**): [emphasis]
> (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)

Section 8 of the Regulation does not refer to section 82 as a provision of the Act to which Schedule C applied. Conversely, Section 8 includes section 81(2)(1)(ii) of the Act, and MPIC had consistently applied Schedule C when determining the Appellant's occupation, a process about which he raised no issue.

At the hearing, the panel expressed its surprise when presented with the Appellant's section 82 argument. In a post-hearing email, the Appellant's representative referred the panel to the Appellant's documentation that referred to sections 81 and 82, and requested a post-hearing case conference out of concern that the panel had summarily dismissed an important aspect of the Appellant's argument. The panel was satisfied that the oral and written submissions of both parties had addressed the issue, and declined the request for a case conference. Despite expressing surprise at the hearing, the panel did not summarily dismiss the Appellant's argument. The panel considered the argument and found that section 82 (the issue of 'more remunerative employment' and 'special circumstances') did not apply to the facts in this case.

The panel considered the opinion in the February 26, 2015 TSA Report (classifying the Appellant's occupation as NOC #7219/7441) and the March 16, 2018 Director General of the Labour Market Information Directorate opinion (classifying the Appellant's occupation as NOC #7212). As evidenced by those documents, the classification opinion varied depending upon the foundational facts. Therefore, without knowing the

foundational facts for each opinion, the panel placed little weight on this evidence.

The panel found that to determine the appropriate NOC it must focus on the duties performed by the Appellant at the time of the accident and compare those duties with the main duties listed under each unit group in question. The panel considered the documentary evidence of the Appellant's March 7, 2014 email to his case manager in which the Appellant stated that he had 18 years experience in satellite sales and installations, and that his weekly duties involved 1 installation a day, bookkeeping, contacting customers, and ordering equipment. This is consistent with the Appellant's work duties set out in the JDA Report.

The panel did not find the Appellant's testimony of his supervisory duties to be credible. The panel found the Appellant's responses exaggerated, inconsistent and evasive. He did not provide a cogent explanation for the inconsistencies. The Appellant's witness contradicted much of the Appellant's testimony. (For example, [Appellant Witness 1] contradicted the Appellant's testimony that he provided [him] with tools, or that he sometimes paid [Appellant Witness 1] cash.) The panel found it unlikely that the Appellant failed to speak of supervisory duties (which he alleged were, at least, 50 percent of his daily duties) simply because he was not asked. The panel found it unlikely that the OT conducted the PCA interview at the same time as the JDA, or that the OT failed to document the level of pain alleged by the Appellant. The panel noted that the Appellant's email to his case manager was before the surgery that allegedly resulted in such pain, and therefore did not unexplain the Appellant's failure to describe any supervisory duties at that time.

The panel found that the testimony of [Appellant Witness 1] did not establish the Appellant's supervisory role at the time of the accident. [Appellant Witness 1] had previously worked in construction and had performed satellite installations separate from the Appellant. The Appellant had stopped contracting with [Appellant Witness 1] months prior to the MVA. Assuming any pre-MVA contract work by [Appellant Witness

1], the Appellant ‘guessed’ that he provided [Appellant Witness 1] 10 hours of teaching and training per month. On the other hand, [Appellant Witness 1] testified that his work for the Appellant was not consistent… sometimes once per week, sometimes once every two weeks, and that the Appellant would help with a technical issue “once in a while, not very often… once in a month.” The Appellant instructed [Appellant Witness 1] over the phone.

The Appellant emphasized his managerial role in [text deleted] as exemplified by the fact that he performed all the bookkeeping, and requisitioned materials and supplies.[14] While he may have managed his operations, the panel found that he must show on a balance of probabilities that he performed the main duties listed by a classification. Most of the duties listed under NOC #7212 involved supervising, scheduling, co-ordinating, resolving work problems, hiring, training, evaluating, and promoting other workers. The panel found that providing customer contact information, giving advice over the phone, or advising [Appellant Witness 1] how many ladders to bring to a job, did not reach the level of supervision, training, or assurance of safety standards that the list of main duties required.

Significantly, [Appellant Witness 1] testified to the reason he had not worked much in 2013: The Appellant said his customer base was going down and he was getting out of the business. This is inconsistent with the Appellant’s testimony that he was in the middle of negotiating a contract with a broadband provider. The panel preferred the evidence of [Appellant Witness 1] to that the Appellant and found it more likely that the Appellant was getting out of the business. In his submission, the Appellant himself focused on **his previous experience and training**. The panel found that the Appellant exaggerated the nature of his business and that at the time of the MVA, the Appellant’s main duties were the sale and installation of satellite receivers, as stated by him to his case manager and the JDA occupational therapist in the early months of 2014.

NOC #7247, Cable television service and maintenance technicians is described as follows:

> Cable television service technicians install, maintain and repair cable and satellite television and Internet signal and associated equipment in homes and commercial buildings. Cable television maintenance technicians maintain and repair cable television transmission and distribution systems and associated hardware. They are employed by cable and satellite television companies.

Some of the main duties listed under NOC #7247 involved:

> Communicating with subscribers, connecting, disconnecting and relocating satellite equipment, inspecting, testing and repairing cable and satellite television signals and associated equipment at subscriber's premises, climb and work aloft on ladders or other support structures, and communicate with other workers to co-ordinate the preparation and completion of work assignments.

Disposition:

The panel considered and compared the lists of duties in NOC #7247 and NOC #7212. The panel considered the evidence of the Appellant and [Appellant Witness 1] in respect of the Appellant's work duties and found that the testimony did not support the Appellant's position that he performed supervisory duties listed in NOC #7212. The panel agreed with the Appellant's statement that he performed all of the duties set out in NOC #7247. The panel concluded that MPIC correctly designated the Appellant's employment as NOC #7247 and upheld IRD January 27, 2017.

MPIC's treatment of CPP contributions/DTC when calculating IRI benefits

The panel dealt with these issues together because of their interconnection. The relevant section of the Act was section 81(2)(a)(ii), and the relevant sections of Regulation 39/94 were 3(2)(d), 10(1)(a), 10(3), 10(4) and 10(6). Regulation 39/94 defined gross yearly employment income (GYEI) as meaning gross income[15] found in Part 2 of the Act.

---

[14] One of the duties listed under NOC #7212 is "may manage the operations of their own companies."
[15] See, for example, section 81(2)(a)(ii).

The panel agreed that it must interpret the above referenced sections of the Act and Regulations within the purpose and context of the Act. The panel accepted the testimony of [IR Supervisor] that the Act intended to compensate Manitobans for income loss resulting from injury suffered because of a MVA. The compensation is a tax-free benefit calculated within a context meant to simulate the Appellant's losses as of the time of the MVA and going forward.

It followed that the fundamental starting point for calculating the IRI benefit was the date of the MVA. Regulation 39/94, section 3(2) confirmed that a victim's GYEI was derived from self-employment that was carried on at the time of the accident. Subsection 3(2)(d) established that the Appellant's business income shall be averaged over 3 years[16] before the fiscal year end immediately preceding the date of the accident. MPIC was then obliged to take the greater of either that average business income or the amount in Schedule C. In this case, Schedule C income was greater.

Regulation 39/94, section 10 established the calculation for net income. This started with GYEI, as determined above, from which the Unit deducted income tax and CPP contributions and perhaps applied certain tax credits pursuant to section 10(3).[17] Section 10(4)[18] deemed the GYEI to be pensionable earnings. Section 10(6)[19] stated

---

[16] That is, 156 weeks before the fiscal year end immediately preceding the date of the accident divided by three [See sub-section 3(2)(d)supra page 21]

[17] 10(3) For the purpose of this regulation, the income tax payable by a victim is the tax payable upon the taxable income of the victim calculated in accordance with the 'Income Tax Act (Canada) and 'The Income Tax Act' of Manitoba, and allowing only the following credits: […] (ii) the contributions payable in respect of the Canada Pension Plan, as determined under subsection (6) of this section; […] (c) any credit or deduction from tax allowed under 'The Income Tax Act' of Manitoba, except under subsection 5(5) (deductions for property taxes) of that Act, without any reduction in the credit or deduction in respect of the income of a dependant referred to in section 113 of 'The Manitoba Public Insurance Corporation Act'.

[18] 10(4) For the purpose of subsections (5) and (6), the gross yearly employment income of a victim, as determined under this regulation, are the pensionable earnings of the victim for the purpose of the Canada Pension Plan, and the insurable earnings of the victim for the purpose of the 'Unemployment Insurance Act (Canada)', not derived from self employment.

[19] 10(6) For the purpose of this regulation, the contributions payable under the Canada Pension Plan are the amounts payable by the victim as an employee's contribution for the year under the Canada Pension

that CPP contributions are payable as an employee's contribution, calculated in respect of the victim's pensionable earnings.

Pursuant to section 197 of the Act, the calculation of net income first required that MPIC deduct the Appellant's actual CPP Disability benefit from GYEI. That ensured that the Appellant did not receive a double benefit from two insurance schemes, for the same injury. The Appellant did not take issue with that principal. MPIC then deducted the statutory income tax and CPP contribution. The Appellant argued that MPIC should not deduct his CPP contribution in addition to his CPP Disability benefit.

The panel disagreed with this argument because, just prior to his MVA, the Appellant's gross income constituted pensionable earnings from which he paid statutory CPP contributions. Post-MVA, the Regulations deemed the Appellant's GYEI to be pensionable earnings and therefore MPIC calculated and deducted CPP contributions. That calculation is consistent with simulating the Appellant's pre-MVA circumstances. The panel kept in mind that the Appellant's post-MVA CPP Disability income remained available to him, and while this income is taxable to him, it is not subject to a CPP contribution. The panel found that MPIC's deduction of the Appellant's CPP contribution was a correct calculation for establishing his tax-free IRI benefit and consistent with the goal of compensating the Appellant for his MVA losses.

On the issue of how MPIC treated the Appellant's DTC (which resulted from his MVA injury), the Appellant argued that either the claimant's status on the date of the accident determines everything or it doesn't. He used the example of dependant tax credits to illustrate that MPIC applied the legislation inconsistently; that is, to MPIC's benefit, and against the benefit of the Appellant. The Appellant argued that MPIC should apply his DTC to increase his net income, in accordance with the regulations. However, the panel found that this would not be an accurate simulation of the Appellant's pre-MVA

Plan in respect of the victim's pensionable earnings, not exceeding the maximum amount by him or her for the year under the plan.

circumstances. The Appellant was not entitled to a DTC pre-MVA. Further, the Appellant would also be able to apply his DTC to his actual post-MVA income situation and benefit a second time from the DTC. The panel found that to require MPIC to apply the Appellant's DTC to his notional net income, while also allowing the Appellant to use his DTC against his actual income, would result in overcompensation to the Appellant. The panel found that this scenario would be inconsistent with the Act's purpose of fairly compensating a victim for his MVA losses.

The panel disagreed with the Appellant's argument that MPIC inconsistently applied the 'date of the MVA' criteria in respect of tax credits. Had the accident not occurred, the Appellant's circumstances in respect of applying family tax credits would have changed over time, depending upon who his dependants were, whether a spouse, dependant parents or children who had been born or adopted.[20] Likewise, pre-MVA, the Appellant would have lost his tax credit as his children aged-out. In compensating the Appellant for his MVA losses, MPIC simply replicated what the Appellant's situation would have been pre-MVA, and discontinued the tax credit.

The panel found that discontinuing the tax credit was consistent with section 113 of the Act, which required MPIC to **take into account** the number of dependants of the victim on the day of the accident. MPIC took into account that each child eventually aged out over time, which changed the number of dependants and correspondingly changed the tax credit calculation.[21] The panel found that MPIC was consistent in applying the legislative criteria to the Appellant's circumstances.

Disposition:

The panel found that the Appellant failed to prove, on a balance of probabilities, that

[20] [IR Supervisor] testified that had the Appellant adopted another child post-MVA, MPIC would have allowed this child tax credit because pre-MVA the Appellant would have been entitled to the tax credit.
[21] The panel noted that the Appellant's pre-MVA income would have adjusted for inflation. This is also simulated in Reg. 39/94, Schedule C, section 5 that stated that MPIC shall index the Appellant's GYEI by the CPI.

MPIC incorrectly calculated the Appellant's IRI benefit by deducting both the CPP contribution and CPP Disability benefit from the Appellant's GYEI. The panel also found that the Appellant failed to prove, on a balance of probabilities, that MPIC incorrectly applied the legislation when it refused to apply the Appellant's DTC to increase his IRI benefit.

Conclusion:

Accordingly, the Internal Review Decisions dated January 27, 2017, January 22, 2018 and February 26, 2019 are upheld and the Appellant's appeals are dismissed.

Dated at Winnipeg this 3rd day of December, 2020.

PAMELA REILLY

JANET FROHLICH

SANDRA OAKLEY

APPENDIX

LEGISLATION

The MPIC Act provides as follows:

Entitlement to I.R.I.
81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment;

…

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, and

…

I.R.I. based on more remunerative employment
82(1) Subject to subsection (2), where the corporation is satisfied that a full-time earner who is entitled to an income replacement indemnity would have held a more remunerative employment at the time of the accident but for special circumstances, the full-time earner is entitled to receive an income replacement indemnity determined on the basis of the gross income for that employment.

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) and contributions under the Canada Pension Plan.

Deductions to include effect of dependants
113 For the purposes of determining the deductions under section 112, the corporation shall take into account the number of dependents of the victim on the day of the accident.

Claimant to advise of change in situation
149 A person who applies to the corporation for compensation shall notify the corporation without delay of any change in his or her situation that affects, or might affect, his or her right to an indemnity or the amount of the indemnity.

C.P.P. or other disability benefit reduces I.R.I.
197 Where, as a result of an accident, a victim is entitled to an income replacement indemnity under this Part and a disability benefit under the *Canada Pension Plan* or any similar program in a jurisdiction outside Manitoba other than the *Employment Insurance Act* (Canada), the corporation shall reduce the income replacement indemnity by the amount of the disability benefit payable to the victim.

Sections 3 and 10 of Regulation 39/94 provide as follows:

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, by way 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).

GYEI from self-employment

3(2) Subject to section 5, a victim's gross yearly employment income derived from self-employment that was carried on at the time of the accident is the greatest amount of business income that the victim received or to which the victim was entitled within the following periods of time:

(a) for the 52 weeks before the date of the accident;

(b) for the 52 weeks before the fiscal year end immediately preceding the date of the accident;

(c) where the victim has operated the business for not less than two fiscal years before the date of the accident, for the 104 weeks before the fiscal year end immediately preceding the date of the accident divided by two;

(d) where the victim has operated the business for not less than three fiscal years before the date of the accident, for the 156 weeks before the fiscal year end immediately preceding the date of the accident divided by three;

(e) the business income derived by a significant-influence shareholder in a Canadian-controlled private corporation that was declared for income tax purposes in the calendar year prior to the accident;

or according to Schedule C.

Definitions

3(3) For the purposes of this section,

"Canadian-controlled private corporation" means a Canadian-controlled private corporation as defined in subsection 125(7) of the *Income Tax Act* (Canada); (« société privée sous contrôle canadien »)

"significant influence shareholder" means a shareholder in a Canadian-controlled private corporation who

(a) holds 20% or more of the voting rights in the corporation, and

(b) can demonstrate an active, authoritative influence over the day to day financial and administrative operations of the corporation. (« actionnaire exerçant une influence considérable »)

Net income is GYEI less certain deductions

10(1) For the purpose of this regulation, the net income of a victim is the gross yearly employment income of the victim determined under this regulation, less the following:

(a) the income tax payable by the victim, as determined under subsection (3);

(b) the premiums payable by the victim in respect of unemployment insurance, as determined under subsection (5);

(c) the contributions payable by the victim in respect of the Canada Pension Plan, as determined under subsection (6);

except in the case of a victim who is claiming a loss of unemployment insurance benefits, where the only deduction shall be the income tax payable as determined under subsection (3).

Taxable income is GYEI less deductions

10(2) For the purpose of this regulation, a victim's taxable income is the gross yearly employment income of the victim determined under this regulation less the following:

(a) any amount allowable to the victim under clauses 60(b), (c) and (c.2) (maintenance) of the *Income Tax Act* (Canada), in the calendar year before the year for which the taxable income is calculated; and

(b) any amount of the gross yearly employment income that would have been exempt from the victim's income tax under clause 81(1)(a) (statutory exemptions) of the *Income Tax Act* (Canada) as that clause was at the time of the accident.

Income tax is tax on taxable income less credits

10(3) For the purpose of this regulation, the income tax payable by a victim is the tax payable upon the taxable income of the victim calculated in accordance with the *Income Tax Act* (Canada) and *The Income Tax Act* of Manitoba, and allowing only the following credits:

(a) the credit allowed under section 118.7 of the *Income Tax Act* (Canada), where "B" in the formula set out in that section is the total of

(i) the premiums payable for unemployment insurance , as determined under subsection (5) of this section, and

(ii) the contributions payable in respect of the Canada Pension Plan, as determined under subsection (6) of this section;

(b) the credits allowed in subsections 118(1) (personal credits) and (2) (age credit) of the *Income Tax Act* (Canada), without any reduction in the credits in respect of the income of a dependant referred to in section 113 of *The Manitoba Public Insurance Corporation Act*;

(c) any credit or deduction from tax allowed under *The Income Tax Act* of Manitoba, except under subsection 5(5) (deductions for property taxes) of that Act, without any reduction in the credit or deduction in respect of the income of a dependant referred to in section 113 of *The Manitoba Public Insurance Corporation Act*.

GYEI is pensionable and insurable earnings
10(4) For the purpose of subsections (5) and (6), the gross yearly employment income of a victim, as determined under this regulation, are the pensionable earnings of the victim for the purpose of the Canada Pension Plan, and the insurable earnings of the victim for the purpose of the *Unemployment Insurance Act* (Canada), not derived from self employment.

Premiums payable under Unemployment Insurance Act
10(5) For the purpose of this regulation, the premiums payable under the *Unemployment Insurance Act* (Canada) are the amounts payable by the victim as an employee's premium for the year under that Act in respect of the victim's insurable earnings, not exceeding the maximum amount payable by him or her for the year under that Act.

Contributions payable under Canada Pension Plan
10(6) For the purpose of this regulation, the contributions payable under the Canada Pension Plan are the amounts payable by the victim as an employee's contribution for the year under the Canada Pension Plan in respect of the the (sic) victim's pensionable earnings, not exceeding the maximum amount by him or her for the year under the plan.