

AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-97-112**

PANEL: Mr. J. F. Reeh Taylor, Q.C. (Chairperson)
Mr. Charles T. Birt, Q.C.
Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('MPIC')
represented by Mr. Tom Strutt;
the Appellant, [text deleted], represented by himself

HEARING DATE: January 13th, 1998

ISSUE(S): Claim for:
1. lost commission income;
2. lost commission income due to lost corporate sales;
3. capital losses; and
4. replacement driver wages.

RELEVANT SECTIONS: Section 81 of the MPIC Act ('the 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 FACTS:

The Appellant was stopped for a red light on [text deleted], north of [text deleted] on March 5th, 1995 and when the light turned green he proceeded through the intersection. A

vehicle proceeding east bound did not stop for his red light and struck the Appellant's automobile in the intersection. The Appellant suffered bruised ribs, back and neck injuries.

At the time of the accident [the Appellant] resided in [text deleted], Alberta and consulted his family physician, [text deleted], on March 8th, 1995. He was diagnosed as having acute muscle strain to his lumbar spine and left anterior chest wall. [Appellant's doctor] prescribed pain medication and physiotherapy. On March 15th he saw [Appellant's doctor] about chest pains but these seemed to have cleared up on their own. [The Appellant] did not see [Appellant's doctor] again until June 12th when it was found that he had normal range of movement in his lumbar spine but there was some slight tenderness. He advised [Appellant's doctor] that he was attending physiotherapy but did not feel it was helping.

During the period from May 23rd to June of 1995 [the Appellant] also consulted [text deleted], a chiropractor, for his constant low and mid-back pain and pain in his left shoulder. He received eight treatments and did not see [Appellant's chiropractor] again until April 1996, complaining he had difficulty driving for more than six hours at a time and after examination he was advised to restrict his driving to a maximum of four hours. We were not told how many treatments he received in 1996 nor how long he was under the care of his chiropractor.

[The Appellant] only missed about eight days from his regular job at the [text deleted] as a result of the injuries sustained in the auto accident. However, when he returned to work he found that he could not drive an automobile or truck for any length of time and this ability

was a very important part of his job function and other economic activities that will be discussed later.

[The Appellant] was one of the incorporators of [text deleted] in 1994 and invested money in the company, became a shareholder, officer and Vice-President of Sales. His job was to handle all of the sales of the company's product from Alberta to [Ontario]. His primary method of covering this territory was by car. He was on company business when he was involved in this accident. [The Appellant] was receiving a monthly salary of \$2,000.00 plus commission which averaged \$676.00 per month at the time of the accident.

Due to the injuries sustained he could not drive his car and it was necessary for the company to hire a salesman to do [the Appellant's] sales work in the field. This replacement salesman was hired in early April 1995 and earned about \$6,000.00 commission income by November 1995 when [text deleted] was placed into receivership. [The Appellant's] evidence is that the number of business leads that he gave to this salesman resulted in at least \$4,000.00 of the latter's \$6,000.00 earnings. [The Appellant] contends that if he hadn't been injured he would have earned the \$4,000.00 and wants to be compensated for this loss. [The Appellant] received his monthly salary of \$2,000.00 throughout this period as he continued to work for the company in an office capacity.

[Text deleted] was placed into receivership in November of 1995 and then into bankruptcy in December of that year. [The Appellant's] position is that [text deleted's] failure related directly to his car accident as it prevented him from generating the sales that were needed to

keep the company operating. He advised that the company had budgeted for sales of \$1,280,000.00 for the period of April to September, 1995 but only realized \$618,013.00 leaving the company with a shortfall in sales of \$533,987.00. Had the company made the additional sales the Appellant would have been entitled to a commission of 2.5 % of \$533,987.00 or \$13,350.00. [The Appellant's] position is that if he had not been involved in the accident he would have generated the extra \$533,987.00 in sales and would have received \$13,350.00 in additional compensation.

[The Appellant] contends that due to the lost sales [text deleted] could not meet its financial obligations and was placed into bankruptcy. He lost all of his investment in the company and claimed a business investment loss of \$75,000.00 on his personal income tax return for 1995. He wants MPIC to pay for this loss as it relates directly to his car accident because, he argues, if he had been able to generate the projected sales revenue referred to above the company would have been in a good financial position and would not have folded and he would not have lost his investment.

At the time of the accident [the Appellant] was the sole owner and operator of [text deleted]. He started this company in 1988 and he employed drivers to haul freight. Once a month for approximately one week he would drive a truck to California and back and would also make two trips per month to [Alberta]. He made these runs to help with the cash flow of the company. The trucking company never showed a profit from 1988 till 1995 and [the Appellant] did not take out any salary from the company during this period. When he was injured he had to hire an additional driver to make the trips to California and [Alberta]. As it turned out, [the

Appellant] was able to devote the time he would have been driving to producing additional business for the trucking company. The additional driver not only filled [the Appellant's] runs but was able to make additional runs due to the extra business.

The evidence adduced at the hearing was that the loss suffered by the trucking company was less in 1995 with the additional driver than its loss in the previous year of operation.

[The Appellant] wants MPIC to pay [text deleted] the sum of \$17,120.00 for the period of March 5th, 1995 to April 30th, 1996. This sum is for the cost of the wages for the substitute driver at \$1,000.00 per trip to California for 14 trips (one trip per month) and \$120.00 per trip to [Alberta] twice a month for 14 months less \$240.00 for two trips made by the Appellant during this period. The total being claimed is \$17,120.00.

THE LAW:

1. Claim for Lost Commission Income:

[The Appellant] wants reimbursement for the \$4,000.00 of commission income that he had to give to the replacement salesman when he was not able to drive. Section 81 of the Act reads as follows:

"81(1) A full time earner is entitled to an income replacement indemnity if.....as a result of the accident:

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

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
 - (i) the full-time earner holds an employment as a salaried worker, on the basis of the gross income the full-time earner earned from the employment."

Considering all of the evidence we are of the opinion that [the Appellant] was a full-time earner and that his gross income included salary of \$2,000.00 per month and commission income of \$676.00 per month. He continued to receive his salary from the date of the accident until the company was placed into receivership in November 1995 but was not able to earn any commission income because he was not able to drive.

The replacement salesman was hired April 1st, 1995 and the medical evidence indicates that [the Appellant] had recovered to the point at which he was capable of driving a car, and was doing so, by June of 1995. We are of the view that except for the accident [the Appellant] would have earned the \$4,000.00 in commission income. Due to his recovery and ability to drive a car by June 1995, three months after the accident we are prepared to award [the Appellant] \$2,000.00 for only part of the lost commission. We find that he could have resumed his normal business functions by sometime in June 1995 and been able to earn the additional commission income from sales.

2. Claim for lost commission due to lost corporate sales:

We have no evidence to substantiate that [the Appellant's] injuries caused the loss to [text deleted] of \$533,987.00 in corporate sales to [text deleted]. The sales figures provided were mere projections and there was no historical data nor any other evidence adduced to substantiate the claim that [the Appellant] would or could have generated this volume of sales. We are not persuaded by this argument and therefore reject this part of [the Appellant's] claim for lost commission income of \$13,350.00.

3. Claim for capital losses:

The Act does not permit any compensation for this type of loss - i.e. loss of investment capital after [text deleted] became bankrupt, and therefore we must reject this part of [the Appellant's] claim.

4. Claim for wages of the replacement driver:

The salary of the replacement driver for [text deleted]. in an amount of \$17,120.00 was paid by the company and not personally by [the Appellant]. He did not pay for the wages out of his pocket but out of the corporate treasury. There is insufficient evidence upon which to base any award to [the Appellant] personally for the wages of the substitute driver and this part of the claim is rejected as well.

DISPOSITION:

For the foregoing reasons, we vary the acting review officer's decision of September 10th, 1997 only to the extent of awarding [the Appellant] \$2,000.00 for IRI due to lost commission income.

Dated at Winnipeg this 11th day of March 1998.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED