Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-55

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Yvonne Tavares** **Ms. Laura Diamond**
APPEARANCES:	**The Appellant, [text deleted] was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Joan McKelvey.**
HEARING DATE:	**August 28, 2001**
ISSUES:	**a) New Information** **b) Entitlement of a non-earner to Income Replacement Indemnity ('IRI') during the first 180 days after an accident** **c) New Evidence – common law**
RELEVANT SECTIONS:	**Sections 85(1)(a) and 171(1) of *the Manitoba Public Insurance 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

1. The Appellant, [text deleted], appealed the decision of the Review Officer dated September 27, 2000, wherein the Review Officer rejected [the Appellant's] Application for Review. In his review, the Review Officer determined that pursuant to Section 171(1)

of the Act, there was no new information available to permit MPIC to make a fresh decision with respect to [the Appellant's] claim for Income Replacement Indemnity (IRI) in the first 180 days following a motor vehicle accident which occurred on July 21, 1998.

2. [Text deleted] situated at [text deleted] in [text deleted], had placed advertisements in the [text deleted] between July 18 and July 20, 1998, offering employment for persons seeking work as [text deleted] sales personnel. [The Appellant], in response to this advertisement, telephoned the General Sales Manager, [text deleted], and as a result of their telephone discussion, an appointment was arranged between them for July 22, 1998 at 2:30 P.M. at the [text deleted].

3. Unfortunately, on July 21, 1998, [the Appellant], while riding his bicycle, was injured when he was in a collision with a vehicle, and suffered personal injuries. As a result of these injuries, [the Appellant] was unable to attend the appointment he had with [General Sales Manager] on July 22, 1998.

4. [The Appellant's] request for IRI compensation because of his inability to commence employment with [text deleted] after the accident was rejected by MPIC, and as a result thereof, [the Appellant] appealed the denial of compensation to the Commission.

5. The Commission conducted a hearing on May 13, 1999, and dismissed [the Appellant's] claim for compensation in a decision dated May 14, 1999. During the course of that hearing, the following documents were filed in evidence:

    a) a letter from [General Sales Manager] dated December 23, 1998 as follows:

> December 23, 1998
>
> To Whom It May Concern,
>
> In July of 1998 [the Appellant] replied to an ad I had running in the [text deleted] for employment as a Sales rep. After interviewing [the Appellant] I felt he would be an enhancement to our sales team and told him to join our training session the following week. The next day I received a fax from [the Appellant] informing me that he had been hit by a car while cycling and would not be able to accept the job at this point in time.
>
> If you have any further questions please do not hesitate to call me. Thank you for your time.
>
> Yours truly
>
> [text deleted]
> General Sales Manager

b) a memorandum from [text deleted], an employee of MPIC, setting out a telephone conversation he held with [the Appellant] on January 20 and January 21, 1999 (attached hereto and marked as Appendix A).

c) a memorandum from [text deleted], a case manager employed by MPIC, dated January 28, 1999, setting out a telephone discussion she had with [the Appellant] (attached hereto and marked as Appendix B).

6. The Commission issued its decision on May 14, 1999, dismissing the appeal and adopted the reasons outlined in the Internal Review Officer's decision dated March 12, 1999. [the Appellant] requested reasons for the Commission's decision and the Commission issued reasons dated May 28th, 1999, which stated, in part:

> "The Internal Review Officer ('IRO') denied your claim for income replacement indemnity ('IRI') during the first 180 days immediately following your accident. You have been provided with copies of Section 85(1) of the MPIC Act. You were a non-earner, within the meaning of that statute, at the time of your accident and,

> in order to qualify for IRI, you needed to show that, on a reasonable balance of probabilities, you would have been gainfully employed during that 180 days. Little purpose will be served in a regurgitation of the two pages that the IRO devotes to this particular point. It is, perhaps, enough to say this: although this Commission was not impressed by what seemed to us to be rather obvious manipulation of [General Sales Manager] by personnel of MPIC's Special Investigation Unit, and we have therefore disregarded that report, we concluded that you had not, in fact, been offered employment. Rather, you were offered an interview and, had the interview been successful, an opportunity to receive training at the [text deleted] in question. We also concluded that, had the [text deleted] seen fit to check your references the chances were strong that you would not have been hired." (underlining added)

7. The Commission in determining this appeal is required to deal with the following matters:
   a) New Information – Section 171(1) of the Act;
   b) New Evidence – Common Law guidelines;
   c) Entitlement to IRI – Section 85(1)(a) of the Act;

NEW INFORMATION

8. Subsequently [the Appellant] sought to reopen the whole question of his entitlement to Income Replacement Indemnity in the 180 days following his motor vehicle accident pursuant to Section 171(1) of the Act which provides:

> Corporation may reconsider new information
>
> 171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

9. The definition of "new" as set out in the Concise Oxford Dictionary, Tenth Edition, is as follows:

> **new** adj. 1. not existing before; made, introduced, or discovered recently or now for the first time, not previously used or owned.

The definition of "new" as set out in the Webster's New World College Dictionary is as follows:

> never existing before; appearing, thought of, developed, made, produced, etc. for the first time;
>
> 2a) existing before, but known or discovered for the first time.

10. In respect of "information" the Concise Oxford Dictionary defines as

> facts or knowledge provided or learned as a result of research or study.

In respect of "information" the Webster's New World College Dictionary defines as

> an informing or being informed; a telling or being told of something;
> something told; news; intelligence; word;
> knowledge acquired in any manner; facts, data; learning; lore.

11. The Review Officer, in arriving at his decision in respect of new information, interpreted Section 171(1) of the Act as follows:

> 2. Issue and Section 171(1) of the Manitoba Public Insurance Corporation Act
>
> Your object in the present Review is to reopen the whole question of your entitlement to IRI in the 180 days immediately following your motor vehicle accident. This is not possible. Section 188 of the Manitoba Public Insurance Corporation Act ("the Act") makes a decision of the Commission "final and binding". We cannot question that decision and neither can you. (And neither can the Appeal Commission, for that matter, since it cannot sit in appeal on its own decisions.) As you know Section 171(1) of the Act sets out the one qualification to the finality of the Commission's decisions. This section provides that "The Corporation may at any time make a fresh decision in respect of the claim for compensation where it is satisfied that new information is available in respect of the claim." Please note that this section is permissive. The Corporation may make a fresh decision. It is not required to do so. We would never consider reopening a matter that had been resolved by a decision of the Appeal Commission unless there was some compelling reason to do so. Secondly, before the Corporation has any discretion to take a second look at such a matter, it must be satisfied that there is "new information" that justifies doing so.

12. The Application for Review was rejected on a number of grounds by the Internal Review Officer in a written decision dated September 27, 2000. In this decision, the Internal Review Officer found there was nothing new in respect that the alleged new information, since this information had pre-dated both the review decision and the appeal decision by

many months and formed part of the material that had been previously filed in the proceedings before the Internal Review Officer and the Appeal Commission.

13. The Appellant subsequently filed an appeal to the Commission dated December 14, 2000, alleging that the Internal Review Officer erred in denying his claim based on Section 171(1) of the Act.

14. Subsequent to filing the Appeal, dated December 14, 2000, [the Appellant] filed with the Commission a new letter from [General Sales Manager] dated May 23, 2001, as follows:

> May 23, 2001
>
> To Whom It May Concern
>
> Re: Statements made to [text deleted] and [text deleted] of MPI.
>
> Upon reviewing my telephone statements made to these two individuals on or about January of 1999, I feel that these statements are the facts in this particular matter.
>
> My statement that was handwritten by the retired RCMP fellow, [text deleted], was signed by me in haste after he had written it out, without enough time for me to ponder the exact wording and content.
>
> Trusting this is satisfactory.
>
> [text deleted]
>
> General Sales Manager

15. An examination of the contents of this letter indicates that the two statements referred to by [text deleted] in this letter from [text deleted] (Appendix A) and [text deleted] (Appendix B) had been previously filed in the 1999 proceedings before the Internal Review Officer and the Appeal Commission.

16. In the present appeal hearing, [General Sales Manager] testified in respect of the employment contract between [text deleted] and [the Appellant] [General Sales Manager] had not been called at the initial hearing before the Commission in 1999 and the panel members of that Commission never had the opportunity to hear the direct testimony of [General Sales Manager] and cross-examination of him by counsel for MPIC.

17. The threshold issue before the Commission was whether or not the letter of May 23rd, 2001 (referred to earlier in paragraph 13 hereof) and any portion of the *viva voce* testimony given by [General Sales Manager] at the hearing constituted new information pursuant to Section 171 of the Act which would permit the Commission to make a fresh decision in respect of [the Appellant's] claim for compensation. [The Appellant] withdrew from consideration by the Commission, all other documents in respect of new evidence that he had previously presented for consideration to the Internal Review Officer during the review process.

18. [General Sales Manager] testified that several steps were taken by him before any applicant was hired permanently as a member of the sales staff at the [text deleted]. The process, [General Sales Manager] testified, was as follows:

    a) Applicants would contact [General Sales Manager] as a result of the advertisements placed in the news media inviting applications for employment.
    b) [General Sales Manager] would determine as a result of the telephone interview whether a personal interview was warranted.

c) If the telephone interview was not satisfactory, the telephone interview would be concluded without [General Sales Manager] inviting the applicant to attend to the [text deleted] to be personally interviewed.

d) If the telephone interview was satisfactory, [General Sales Manager] would invite the applicant to meet personally with him. The purpose of this interview was to permit [General Sales Manager] to make a personal assessment of the applicant in question in respect of appearance, dress, driver's qualifications.

e) When the personal interview was deemed satisfactory by [General Sales Manager], the applicant would then be permitted to participate in a training session which would last one or two weeks. The purpose of the training session was to permit the applicant to obtain product knowledge in order to assist them in selling [text deleted]. As well, the training situation gave [General Sales Manager] the opportunity to assess the applicant in order to determine whether or not the applicant was capable of being employed on a permanent basis as a sales person. During the training period, the applicant would be paid the minimum wage.

f) If the applicant was not satisfactory during the training session, [General Sales Manager] would terminate the employment relationship prior to the conclusion of the training period. [General Sales Manager] testified that on many occasions, applicants who commenced the training session would for a variety of reasons not continue to complete the training session. [General Sales Manager] further stated that only after the applicant had successfully completed the training session to his satisfaction, would he offer the applicant the opportunity for permanent employment on a commission basis.

g) [General Sales Manager] testified that during the first month of employment, if the sales person was unable to produce, he would be paid the minimum wage. If the sales person was able to sell [text deleted] and earned a commission, the sales person would not receive the minimum wage.

h) Thereafter, if the sales person was productive they would be maintained in their employment by the [text deleted], but if sales did not continue, the employment of that person would be terminated.

19. [General Sales Manager] further testified that he could never predict when an applicant who was placed on a training session would satisfactorily pass the training session and then continue employment with the firm.

20. [General Sales Manager] further testified that there was a serious shortage of sales personnel at the [text deleted] in the month of July 1998 and [General Sales Manager] was extremely anxious to hire sales people. As a result, advertisements were placed in the news media.

21. In respect of [the Appellant], [General Sales Manager] testified that he was sufficiently impressed with the telephone interview he had with [the Appellant] that he waived the mandatory personal interview with [the Appellant] and he hired [the Appellant] during the telephone interview and invited him to attend a training session. He testified having regard to the shortage of sales personnel he was prepared to look for ways to hire [the Appellant] rather than look for ways not to hire [the Appellant]. [General Sales Manager] indicated that he was not concerned about appearance or dress or lack of driver's qualifications prior to offering [the Appellant] employment for the training period only.

22. [General Sales Manager] testified that [the Appellant] was hired for the purpose of participating in the training session only and that no offer of permanent employment was made to [the Appellant] for the period after the training session had been completed. [General Sales Manager] testified, he could not predict whether or not [the Appellant] would be satisfactory after completing the training session and therefore [General Sales Manager] could not offer [the Appellant] permanent employment during their telephone interview.

23. It should be noted that in the reasons provided by the previous panel dismissing the appeal, dated May 28, 1999, that that panel indicated:

> .....we concluded that you had not, in fact, been offered employment. Rather, you were offered an interview and, had the interview been successful, an opportunity to receive training at the [text deleted] in question.

24. The new information which the Commission received from [General Sales Manager] was that in his telephone discussions with [the Appellant] he waived the mandatory personal interview and offered [the Appellant] the opportunity of participating in the training session only.

25. The Commission determines that this information constitutes new information within the meaning of Section 171(1) of the Act. Although this information existed prior to the time [General Sales Manager] testified before the Commission, it was only when [General Sales Manager] testified that the Commission learned for the first time that [General Sales Manager] waived the requirement of a mandatory personal interview and invited

[the Appellant] to participate directly in the training session as a result of their telephone discussions.

ADMISSIBILITY OF NEW EVIDENCE

26. The next issue that the Commission has to determine is whether or not the new evidence was admissible at the appeal hearing. The leading decision in Canada on this issue is *Palmer vs. R.* (1980) 1 S.C.R. 759. This case was considered and applied by Rothstein, J. in *Attorney Canada (Attorney General) v. Lambie* 30 Admin. L.R. (2d). Rothstein, J. noted that McIntyre J. stated in *Palmer v. R.* (supra) at page 775:

> ....Application of this nature have been frequent and courts of appeal in various provinces have pronounced upon them.... From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> > 1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen.
> >
> > 2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> >
> > 3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > 4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Rothstein, J. further stated:

> The Palmer principles have been described as guidelines for the admission of new evidence by an appeal court. In Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.) (1994), 165 N.R. 161 (S.C.C.), at p. 183, L'Heureux-Dube J. states:
>
> > The criteria which have guided the courts in the exercise of their discretion to admit fresh evidence on appeal have been examined in a number of cases, both criminal and civil, from which guidelines have emerged.

> Certainly, the second, third and fourth of the Palmer principles are framed in mandatory language, i.e. (at p. 775, S.C.R.) "(t)he evidence must be relevant....(t)he evidence must be credible....(i)t must be such that if believed it could reasonably ....be expected to have affected the result." Indeed, it is not easy to envisage a reason for the admission of new evidence if the new evidence did not meet these three criteria. However, the due diligence principle is worded somewhat less stringently (at p.775, S.C.R.):
>
> > The evidence should generally not be admitted...provided that this general principle will not be applied as strictly in a criminal case as in civil cases...
>
> The words suggest a greater degree of latitude in the application of the due diligence principle than the other three principles.
>
> Further, a due diligence determination has been described as discretionary in the broadest terms. In Lo v. Canada (Human Rights Commission), Federal Court of Appeal, October 6, 1994, Hugessen J.A., (unreported) (A-399-93), the learned Justice states at p. 3:
>
> > Even though there is no doubt that we could, as a matter of discretion, overlook the "discoverable with reasonable diligence" requirement...
>
> It appears from the words of Hugessen J.A. that in exercising its discretion with respect to due diligence, a court may even overlook this consideration.
>
> Having regard to this approach to the question of due diligence, I have no difficulty concluding that the Review Tribunal did not err in adopting a more relaxed approach to the due diligence requirement, having satisfied itself that the other Palmer principles had been met in this case.

27. On the issue of due diligence, [the Appellant] did not adduce any evidence to satisfy the due diligence guideline. However, in this case, [the Appellant], was unrepresented by counsel for the Commission at his initial appeal hearing. In the Commission's view any competent practitioner, if he/she had represented [the Appellant] at the initial hearing, would have determined that it was essential having regard to the statements given by [General Sales Manager] dated December 23, 1998 as set out in paragraph 5 hereof, and the statements [General Sales Manager] provided to [text deleted] (Appendix A) and [text deleted] (Appendix B), that [General Sales Manager] should have been called to testify as to the exact nature of the employment contract he entered into with [the Appellant].

28. The Commission is of the view that [the Appellant] may not have appreciated the need to call [General Sales Manager] to testify at the original hearing. [The Appellant] is not a lawyer, familiar with the rules of evidence, i.e. onus of proof, balance of probabilities, and the practices and procedures before courts and administrative bodies.

29. In the interests of justice and having regard to the particular circumstances of this case, the Commission exercises its discretion and adopts a relaxed approach to the due diligence guideline.

30. The Commission always mindful and respectful of the guidelines that have been established by courts of law in respect of the admission of evidence, is not bound by said guidelines. Section 183(2) of the MPIC Act states:

> Commission not bound by rules of evidence
>
> 183(2) Evidence may be given before the commission in any manner that the commission considers appropriate, and the commission is not bound by the rules of law respecting evidence applicable to judicial proceedings.

31. In exercising its discretion, the Commission wishes to indicate that it is not establishing a precedent, that in each case where an applicant is unrepresented by counsel, that it will waive the due diligence guideline pursuant to an application under Section 171(1) of the Act. In respect of Section 171(1) applications, the Commission will in every case examine the circumstances of that case, and on a case-by-case basis determine the approach it will take in respect of the exercise of its discretion regarding the due diligence guideline.

32. In respect of the new evidence provided by [General Sales Manager] the Commission is satisfied that it meets guideline number two in that this new evidence is relevant and bears upon the decisive issue in the trial i.e. but for the accident, [the Appellant] would have been employed for a period of one or two weeks in a training session.

33. In respect of guideline number three, the Commission is satisfied that [General Sales Manager] gave his evidence in a very direct straight-forward manner and accepts his evidence as credible.

34. In respect of guideline number four, [General Sales Manager's] evidence on a material issue has satisfied the Commission that this new information would affect [the Appellant's] claim for compensation.

35. It is for the above-mentioned reasons that the Commission exercises its discretion to permit the new evidence to be admissible in the present hearing.

NON-EARNER – IRI

36. The Commission has previously dealt with the issue of how a non-earner qualifies for IRI under Section 85(1)(a) of the Act in the [text deleted] AC-96-10 decision decided May 6, 1996. The Commission in that case stated:

> THE LAW.
>
> The section of the Act that sets out the entitlement of a 'non-earner' to IRI is Section 85(1)(a), which reads as follows:
>
> Entitlement to IRI for first 180 days.

> 85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:
>
> 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;.....
>
> [The Appellant] was a 'non-earner', within the meaning of the Act, at the time of his accident, in that he was capable of working but was not then gainfully employed. The question to be decided, then is whether he was unable to hold an employment that he would have held had the accident not occurred. The operative word, in this context, is '*would*'; the statute does not say '*might* have held', nor does it say '*could* have held'. Our task is to ascribe the correct meaning to that section. The 6th edition of Black's Law Dictionary defines *would* as 'a word sometimes expressing what might be expected or preferred or desired. Often interchangeable with the word *should* but not with *could'*.
>
> The Oxford Universal Dictionary defines *'would'* as 'the feeling or expression of a conditional or undecided desire or intention'; the New Lexicon, Webster's Dictionary of the English Language, 1991 edition, expresses it this way: '*past of* WILL: *auxiliary v.* used to express condition, as in *she would go if you would:* used to express the future in indirect speech, as in *he said he would come:* used in polite request, as in *would you please get me my hat:* used, rhetorically, to express a wish, as in *would she were here!* used to express doubt, as in *it would appear to be the case*.'
>
> Section 12 of the Interpretation Act of Manitoba, being Chapter I 80 of the Revised Statutes of Manitoba, 1987, provides that:
>
> "12. Every enactment shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects."

37. The Commission in the [text deleted] AC-96-10 decision then reviewed an earlier decision it had rendered in respect of Section 85(1) of the Act and concluded that its previous decision was too narrow and stated that the more appropriate interpretation of Section 85(1)(a) was:

> .....in order to qualify for Income Replacement Indemnity during the first 180 days following injury in an automobile accident, a 'non-earner', as defined in the Act, must establish upon a reasonably strong balance of probabilities that, but for the accident, he or she would have been employed in an occupation for which, at the time when the employment would have become available, he or she was qualified. The onus is also upon the claimant to adduce sufficient evidence from which the insurer may determine a proper level of income replacement since, in

> the absence of that evidence, the claimant runs the risk of being placed at the lowest income level of the chosen category.

38. The Commission has applied the principles in [text deleted] AC-96-10 in its decisions in *[text deleted] AC-96-26* decided July 23, 1996, and *[text deleted] AC-97-20*, decided June 18, 1998.

39. In the present case [the Appellant] was a non-earner within the meaning of the Act because at the time of his accident he was capable of working but was not gainfully employed. Applying the principle set in *[text deleted] AC-96-10* the Commission is satisfied on a balance of probabilities, having regard to the new information referred to above, that [the Appellant] would have been employed by the [text deleted] for two weeks to participate in the training period at the minimum wage which existed at that time.

40. The Commission further determines that the new information does not establish on a balance of probabilities that [the Appellant] would have been employed with [text deleted] after the training period had been completed. [General Sales Manager] testified that [the Appellant] was hired only for the training period and that before [the Appellant] could be hired on a more permanent basis, [the Appellant] would have to satisfactorily complete the training period. [General Sales Manager] further testified that he was unable to state that following the training period [the Appellant] would probably continue to be employed with [text deleted] on a permanent basis.

41. The Commission determines that the new information establishes that it was possible that [the Appellant] may have been hired subsequent to the training period, but there was no evidence that it was probable that [the Appellant] would continue to be employed on a permanent basis by the [text deleted]. As a result, [the Appellant] has not met the onus of establishing on a balance of probabilities that but for the accident, he would have been employed as the [text deleted] as an [text deleted] sales person after the completion of the training session.

42. In conclusion, the Commission determines that:

a) the decision of the Internal Review officer dated September 27, 2000 be varied to provide that [the Appellant] receive compensation for the two-week period of the training session at the minimum wage prevailing at that time, less the seven (7) day waiting period pursuant to SS. 152(2) of the Act, together with interest at the prescribed rate to the date of payment;

b) the Commission retains jurisdiction in this matter and if the parties are unable to agree as to the amount of the Income Replacement Indemnity benefits, then either party may refer this dispute back to this Commission for final determination; and

c) in every other respect, the Commission confirms the decision of the Internal Review Officer dated September 27, 2000.

Dated at Winnipeg this 19th day of September 2001.

MEL MYERS, Q.C.

YVONNE TAVARES

LAURA DIAMOND