Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-85

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Yvonne Tavares** **Mr. F. Les Cox**
APPEARANCES:	**The Appellant, [text delted], participated by way of teleconference;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**March 28, 2002**
ISSUE(S):	**1. Classification of Appellant at a Level 2 Classification in occupations related to music and musical entertainment;** **2. Quantum of Income Replacement Indemnity ('IRI').**
RELEVANT SECTIONS:	**Section 81(2)(a)(ii) of The Manitoba Public Insurance Corporation Act ('the Act') and Section 3(2) of Manitoba Regulation 39/94.**

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

On October 16, 2000, the Appellant, [text deleted], was involved in a motor vehicle accident and suffered injuries. He received chiropractic treatments, and his chiropractor informed MPIC that the Appellant was capable of returning to work on November 19, 2000.

The Appellant, who is self-employed in the music industry, made an application for Income Replacement Indemnity ('IRI') benefits for the period October 16, 2000 to November 19, 2000.

The case manager determined, on material provided by the Appellant, that the Appellant was a self-employed earner. The calculation of the amount of IRI for a self-employed earner is governed by the following provisions of the Act and Manitoba Regulations:

Section 81(2)(a)(ii):

> **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 3(2) of Manitoba Regulation 39/94:

> **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;
>
> or according to Schedule C.

Pursuant to Section 81(2)(a)(ii) of the Act, the entitlement of a self-employed earner to IRI is determined on the Gross Yearly Employment Income (GYEI), calculated in one of two

prescribed ways (the Appellant gets the benefit of whichever calculation turns out to be the most favourable). The first method of calculation is set out in Section 3(2) of Regulation 39/94. This prescribes that the IRI for a self-employed earner has to be calculated on the basis of income "received or to which the victim was entitled" either:

- in the 52 weeks before the date of loss; or
- in the victim's fiscal year immediately preceding the date of loss; or
- on average over either the two, or the three, fiscal years preceding the date of loss.

It should be noted that all reference periods are before the accident.

The second method of calculating GYEI involves Section C of Regulation 39/94. This method summarizes Statistics Canada information on average income levels for different occupational groups.

The case manager, having regard to the pre-accident income information provided by the Appellant, determined that the most advantageous method of calculating the IRI for the Appellant was in the application of the second method, pursuant to schedule C.

On December 8, 2000, the case manager wrote to the Appellant and advised him as follows:

> Based on the available information you are entitled to an IRI of $656.27. This is based upon Section 111(1) of the Manitoba Public Insurance Corporation Act, which reads:
>
> **IRI is 90% of net income**
>
> **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.
>
> After applying the seven (7) day waiting period, you are entitled to IRI from October 26, 2000 until November 19, 2000 when your chiropractor indicated you

> were capable of returning to work. The total IRI that you qualify for is $1,171.91 which has already been paid to you.

The Appellant applied for a review of the case manager's decision, and the Internal Review Officer issued his initial decision on March 30, 2001.

In his decision, the Internal Review Officer modified the case manager's decision by changing the occupational classification under Schedule C of Regulation 39/94 from "Sound and Video Recording and Reproduction Operators" to "Occupations Related to Music and Musical Entertainment, not elsewhere classified." As a result of this modification of the classification, the Gross Yearly Employment Income upon which the IRI was based was changed from $25,311 to $30,373. The Internal Review Officer informed the Appellant in his decision that the case manager would arrange to have the IRI re-calculated, and the amount owing would be paid to the Appellant, together with the appropriate interest.

The Internal Review Officer rejected the Appellant's request for a recalculation of the IRI benefit payable to him, having regard to a written agreement that the Appellant had entered into with [text deleted]. In his decision dated March 30, 2001, the Internal Review Officer stated:

> You dispute [text deleted's] assessment of the quantum of the Income Replacement Indemnity ("IRI") payable to you. There is no dispute about the length of time you were entitled to IRI. You agree that it was one month. You understand that there is a seven-day waiting period, that we cover 90% of earnings, and that other deductions are applicable.
>
> The dispute arises because you want your IRI calculated on the basis of the earnings called for by the agreement you had with [Text deleted]. The effective term of the agreement was to commence on October 16, 2000 and continue to January 15, 2001. In other words, you want your benefits calculated according to work you would have done, and payments you would have received, after your accident. By contrast, [text deleted] classified you as a "full time self-employed earner" and based your benefits on your earning history up to the date of the accident.

The Internal Review Officer determined that the case manager had correctly approached the manner in which IRI should be calculated, which is based on the earning history of the Appellant before the motor vehicle accident and further determined that the case manager had applied the appropriate provisions of the Act and Regulations in calculating the IRI. The Internal Review Officer also found that the case manager had correctly classified the Appellant at the Level 2 in respect to experience.

Upon receipt of the Internal Review Officer's decision, the Appellant made further submissions to the Internal Review Officer. The Internal Review Officer, in his decision dated April 26, 2001, rejected these submissions and confirmed his previous decision of March 30, 2001.

The Appellant filed an appeal in respect of the Internal Review Officer's decision and provided the Commission with additional documentation. In one of the Appellant's undated documents, received by the Commission on July 11, 2001, the Appellant claimed the following losses from MPIC:

a) the ability to perform choreography duties at my previous [Text deleted] championship form due to related injures[*sic*] of the vertebra in my neck and ongoing lower back pain
b) the equivalent of $5,000 (Canadian funds). Due to mobility and performance issues as they relate to a legal and binding contract with [Text deleted] in [Text deleted]
c) Derogatory abuse and devaluation on facts of education and experience relating to a life time of building the Sole proprietorship of [Text deleted] as a full time Composer, Conductor, Arranger, Producer, Programmer, and Engineer

The appeal hearing in this matter took place on March 28, 2002, by teleconference. During the course of the appeal hearing, the Appellant was physically present in [Text deleted], while MPIC's legal counsel and members of the Commission were physically present in Winnipeg, and

all of the parties communicated with each other by telephone which was connected to a loudspeaker in the Commission's hearing room in Winnipeg.

At the appeal hearing, the Appellant only pursued his claim as set out in paragraph b) of the undated document referred to above, wherein the Appellant requested the sum of $5,000 in Canadian funds. In his verbal submission to the Commission during the appeal proceedings, the Appellant relied on a written agreement between himself and [Text deleted], entered into on October 1, 2000. This agreement, a copy of which was provided to the Commission, was duly executed by the Appellant and [text deleted], on behalf of [Text deleted]. This agreement was for a term of three months, commencing on October 16, 2000, and terminating on January 15, 2001. During this term, the Appellant agreed to deliver to [Text deleted] no less than ten compositions, which must be deemed commercially and technically satisfactory by [Text deleted] for commercial exploitation, manufacture and sale of records. The Appellant also agreed to provide [Text deleted] with no less than three choreography routines applicable to no less than three compositions, with each routine being deemed, at [Text deleted] sole discretion, suitable for commercial video and stage performance exploitation. In addition, the Appellant agreed to provide [Text deleted] with certain other services. In consideration of full and faithful performance by the Appellant with the terms of the agreement, the Appellant was to receive the sum of $10,000 by way of monthly advances of $3,333, commencing on October 16, 2000.

The Appellant submitted that because of the injuries he sustained in the accident, he had been unable to carry out the terms of the above-mentioned contract for the first month because of the accident, and as a result lost the sum of US $3,333, which was equivalent to the sum of $5,000 in Canadian funds.

In their reply, legal counsel for MPIC submitted that there are no provisions under the Act or Regulations to compensate the Appellant for his loss of income pursuant to the above-mentioned contract for the four-week period in question. Legal counsel for MPIC further submitted that the decision of the Internal Review Officer was correct in determining that the Appellant was entitled to IRI based on his classification as a full-time self-employed earner, and based on benefits from his earning history up to the date of the accident. Legal counsel for MPIC also submitted that the Internal Review Officer was correct in concluding that the IRI benefits could not be calculated according to the work that the Appellant would have done and payments he would have received pursuant to the contract after the accident.

During the course of the hearing, the Appellant indicated that [text deleted], who was present with him in [Text deleted], wished to confirm the loss suffered by the Appellant under his contract with [Text deleted]. [Text deleted] testified before the Commission and confirmed that there was a contract between the Appellant and [Text deleted] for a three-month period. [Text deleted] also testified, in response to questions from the Commission, that although the Appellant was unable to initially provide the services he had contracted to [Text deleted], the Appellant had not suffered any loss. [Text deleted] testified that he and the Appellant had worked out a satisfactory arrangement in respect of the contract and that the Appellant had received payment in kind.

At the conclusion of the hearing, the Commission indicated to the Appellant and to legal counsel for MPIC that the hearing was adjourned and that in due course the Commission would issue its Decision. Subsequently, the Appellant communicated with the Commission's Director of Appeals and requested the opportunity to provide further written submissions to the Commission. This request was granted by the Commission and, on April 18, 2002, the

Commission received a two-page document dated April 17, 2002, and signed by [text deleted] of [text deleted]. A copy of this document was forwarded to MPIC's legal counsel, with the request that he provide the Commission with any reply, if he so desired. Mr. Kumka replied to [text deleted's] submission by letter dated April 29, 2002, a copy of which was mailed to the Appellant. As [the Appellant] requested, the letter was sent to him in care of his mother's address in [Text deleted]. In his reply, Mr. Kumka asserts that [text deleted's] submission should be disregarded because the matters arising out of [text deleted's] submission are not relevant to the issues under appeal.

A review of [text deleted's] document dated April 17, 2002, asserts that the Appellant has not been compensated for the loss of income as a result of the automobile accident while he was visiting his family in Canada. The Commission notes that this assertion contradicts [text deleted's] testimony to the Commission during the course of the appeal hearing that the Appellant had suffered no loss in respect of the contract the Appellant had with [Text deleted], due to the motor vehicle accident.

The Commission agrees with the submission of legal counsel for MPIC that there are no provisions under the Act or Regulations to compensate the Appellant for any purported loss of income in respect to his inability to carry out the terms of the written contract that the Appellant had with [Text deleted]. As a result, the Commission finds that the issue of whether the Appellant lost or did not lose any income arising out of his contractual arrangements with [Text deleted] is not a relevant factor in order to determine the IRI to which he is entitled.

The Commission is satisfied that the Internal Review Officer correctly applied the provisions of Section 81(2)(a)(ii) of the Act and Section 3(2) and Schedule C of Manitoba Regulation 39/94.

The Commission confirms the decisions of the Internal Review Officer dated March 30, 2001, and April 26, 2001 and dismisses the appeal.

Dated at Winnipeg this 9th day of May, 2002.

MEL MYERS, Q.C.

YVONNE TAVARES

F. LES COX