

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-11-011**

PANEL: Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Mr. Neil Margolis

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Matthew Masklanka.

HEARING DATE: November 29, 2012

ISSUE(S): Whether the Income Replacement Indemnity benefits were
correctly terminated effective October 15, 2010.

RELEVANT SECTIONS: Sections 83(1), 83(2) and 110(1)(f) of The Manitoba Public
Insurance Corporation Act ('MPIC Act') and Section 6 of
Manitoba Regulation 37/94.

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH
INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER
IDENTIFYING INFORMATION.**

Reasons For Decision

The Appellant was injured in a motor vehicle accident on October 6, 2010. As a result of the accident, he sustained a soft tissue injury to his neck, back and left shoulder, along with headaches and nausea. At the time of the accident he was employed with [text deleted] as a shop helper.

As a result of the injuries sustained in the motor vehicle accident, the Appellant was unable to continue at his employment. He was provided with Income Replacement Indemnity ("IRI") benefits up to and including October 15, 2010. On November 16, 2010, the Appellant's case

manager wrote to him setting out his entitlement to IRI benefits as a temporary earner. The case manager indicated that at the time of the accident, he was employed as a shop helper at [text deleted] on a temporary basis. Thus, in accordance with Section 6(a) of MPIC Regulation 37/94, he was classified as a temporary earner and his entitlement to IRI benefits was governed by Section 83(1), Section 83(2)(a)(ii) and Section 111(1) of the MPIC Act. The case manager indicated that MPIC had received information from [text deleted] that the Appellant's employment was to be for a two week duration on a part-time basis and that his employment was scheduled to cease on October 15, 2010. As a result of this scheduled end date of employment, the case manager indicated that there was no further entitlement to IRI benefits beyond October 15, 2010, in accordance with Section 110(1)(f) of the MPIC Act.

The Appellant sought an Internal Review of this decision.

On January 11, 2011, an Internal Review Officer for MPIC found that the Appellant had been correctly assessed as a temporary earner for the purposes of calculating his entitlement to IRI. Although the Appellant advised that there had not been an agreement or discussion with the employer prior to the accident to establish that his employment would end on October 15, 2010, the Internal Review Officer spoke with officials from the employer corporation. They confirmed that the Appellant's employment with them was to cease on October 15, 2010, and that this had been agreed upon prior to the motor vehicle accident. Accordingly, the Internal Review Officer upheld the case manager's decision, indicating that the totality of information on the Appellant's file did not establish that he would have held employment beyond October 15, 2010.

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

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He indicated that he began working at [text deleted] on October 5, 2010. He worked full days, from 8:00 a.m. to 4:30 p.m., with a half-hour for lunch. He did this for two days, until he was injured in a motor vehicle accident on his way home from work. He described the motor vehicle accident and his injuries. At first, he attempted to go back to work, in spite of his pain, but then realized that, due to a previous motor vehicle accident, his re-injury in the October 2010 accident prevented him from doing the physical labour of lifting heavy doors and windows. He went home sick, and attended at a chiropractor for assessment and treatment. He also received physiotherapy.

The Appellant explained that he was surprised when the decision from MPIC regarding his IRI benefits indicated that he was only supposed to be employed with [text deleted] for two weeks. He said that this was news to him.

The Appellant testified that he was able to return to work at full duties, as of November 15, 2010, and that he began work at a new job a couple of days before this, for training. However, he maintained that he was prevented from working at [text deleted] from October 15, 2010 to November 15, 2010, due to motor vehicle accident injuries and was seeking IRI benefits for the period between October 15 and November 15, 2010.

He maintained that his agreement to work at [text deleted] had not been for him to work on a part-time basis and was not limited to a two week period. He was fully employed with [text deleted] and they wrongfully terminated him, for whatever reason. He pointed to the fact that he was not able to obtain a proper separation slip from [text deleted] as evidence of their reluctance to deal with him in a proper fashion. The Appellant indicated that although he had made various

efforts to obtain a record of employment from [text deleted], he had been unable to do so, as his entire relationship with the company had degraded. He described a past history with the company where they installed windows for him and he was working for them in part to pay off this debt. He then found that the quality of the windows was very bad.

The Appellant maintained that the document that [text deleted] provided (showing that he was only supposed to work for a two week period) was fraudulent and had not been signed by him. Although he admitted that he had provided MPIC with authorization to contact [text deleted] regarding his employment information and that he was aware of the contents of the information which [text deleted] had provided to MPIC, he still disputed that information. The Appellant believed that [text deleted] had terminated him because he was in a motor vehicle accident and that they would not admit this because this was improper.

The Appellant also testified regarding the employment which he began shortly before November 15, 2010, as a casual worker with [text deleted]. He indicated that this employment had been previously arranged by agreement on July 26, 2010, with a start date for November 2010. He testified that when he met with the Executive Director at [text deleted], he indicated to her that he was not yet available to work, but did not want to spook her by giving her personal medical history regarding his motor vehicle accident when he told her his availability. On cross-examination, he admitted that this meeting had occurred prior to the motor vehicle accident in October, as the agreement to work at [text deleted] was made on July 26, 2010, and the accident occurred in October 2010.

The Appellant submitted that he was not hired at [text deleted] for only two weeks on a part-time basis, but rather he was employed as a full-time regular employee, and as a result, he should be entitled to IRI benefits between October 15, 2010 and the day he attended for his training and started employment at [text deleted].

Evidence and Submission for MPIC:

MPIC provided a letter dated October 27, 2010 from [text deleted] of [text deleted]. The letter addressed the employer's verification of earnings for the Appellant and stated that he:

“...was employed with [text deleted] from October 5, 2010 to October 8, 2010 as a shop helper. His employment with the company was to be for a duration of two weeks on a part time basis. In the four days he was employed with us he completed a total of 29 working hours at a rate of \$10.00 per hour. His gross earnings were \$290.00.

[The Appellant's] employment with [text deleted] was scheduled to cease on October 15, 2010 as agreed upon prior to the accident...”

An undated file note indicated that the Appellant told MPIC that this was not the case and that he was told that he was supposed to be working until January but they would try him out first.

The Commission was also provided with a fax dated April 20, 2012 from [text deleted] at [text deleted]. The letter indicated that:

“As per conversation, attached are documents you requested for [the Appellant].

I am also providing a letter from our company which was given to [text deleted] regarding Employment information...”

The fax attached the letter dated October 27, 2010 as well as a copy of an employment agreement between the Appellant and the office manager at [text deleted] stating:

“The Employee will commence employment with [text deleted] on 5 day of *Oct, 2010*.

Any other pertinent information must be documented here:
Hired for two weeks – part time.”

The employment agreement bore the initials “[the Appellant]” and was dated October 6, 2010, at the bottom of the page.

Counsel for MPIC reviewed the circumstances surrounding the motor vehicle accident and indicated that MPIC did initially provide IRI benefits to the Appellant. Based on the information that the Appellant gave to the case manager when he filled out the Application for Compensation, he began receiving IRI benefits after the seven day legislated waiting period.

However, based upon a telephone conversation the case manager held with the employer on November 5, 2010, the case manager determined that the Appellant had been employed as a shop helper on a temporary basis and met the definition of a temporary earner under Section 6 of Regulation 37/94 under the MPIC Act. Therefore, Section 83 would determine his entitlement to IRI benefits. The case manager’s determination was based on the information she received from the employer, [text deleted]. Based upon this contact she made the determination of the period for which IRI benefits should be provided. Section 110(1)(f) of the MPIC Act provided the basis for the termination of benefits, as the Appellant ceased to be entitled with the expiration of the fixed time of employment.

Counsel noted that the issue was not whether the Appellant was able to return to work before November 15, 2010. The question was what job the Appellant was unable to do. MPIC had made numerous attempts to ascertain the duration of his employment at [text deleted] and concluded it would not have been available to the Appellant during this period.

The letter dated October 27, 2010 was obtained subsequent to the case manager's confirmation with the employer and reconfirmed the temporary nature of the employment which was to cease on October 15, 2010.

Following the Appellant's Notice of Appeal, counsel for MPIC once again contacted the employer to inquire regarding the duration of the Appellant's employment. At that time, [text deleted] provided him with the employment agreement which set out, in the agreement, the period for which the Appellant was employed.

The Appellant had argued that [text deleted] had repeatedly provided false information to MPIC, but did not provide any explanation for this allegation. MPIC had no option but to rely on the information provided by [text deleted] as to what the Appellant's employment would have been. Even at the appeal hearing, the Appellant did not call any evidence beyond his own testimony, to support his position that the employer's information was false. His submission at the appeal hearing that he still would have been employed at [text deleted] today, on a permanent full-time basis, had it not been for the motor vehicle accident, was unsubstantiated and contradictory, as by his own indication, he had been hired by [text deleted] to repay a debt he had incurred with the installation of windows, and not on a permanent basis.

Counsel submitted that the Appellant had failed to meet the onus of proof upon him to contradict the information which the employer had provided and which had not been disputed by any third party, aside from the Appellant. He submitted that the appeal should be dismissed and the decision of the Internal Review Officer upheld.

Discussion:

The MPIC Act provides

Entitlement to I.R.I. for first 180 days

[83\(1\)](#) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:

- (a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;
- (b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

Basis for determining I.R.I. for temporary earner or part-time earner

[83\(2\)](#) The corporation shall determine the income replacement indemnity for a temporary earner or part-time earner on the following basis:

- (a) under clause (1)(a), if at the time of the accident
 - (i) the temporary earner or part-time earner holds or would have held employment as a salaried worker, the gross income that he or she earned or would have earned from the employment,
 - (ii) the temporary earner or part-time earner is or would have been self-employed, the gross income determined in accordance with the regulations for an employment of the same class, or the gross income that he or she earned or would have earned from the employment, whichever is the greater, and

Events that end entitlement to I.R.I.

[110\(1\)](#) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (f) the expiration of a time that is fixed under Subdivision 1 (sections 81 to 105);

Manitoba Regulation 37/94 provides:

Meaning of temporary employment

- 6** A person holds a regular employment on a temporary basis where the person
- (a) has held the employment for less than one year before the day of the accident;
 - (b) during the course of the employment, has been employed for not less than 28 hours per week, not including overtime hours; and
 - (c) is not covered by clause 4(b).

The panel has reviewed the evidence of the Appellant and the documentary evidence on the Appellant's indexed file, as well as the submission of the Appellant and submission of counsel for MPIC.

The Appellant maintains that were it not for the motor vehicle accident, his employment with [text deleted] would have continued beyond October 15, 2010. An examination of the evidence overall can only lead the panel to conclude that, were it not for the motor vehicle accident, his employment may have continued. However, the panel is not in a position to determine, based upon the evidence, whether or not that would have happened. Aside from the Appellant's own testimony, the only evidence before the Commission are the letters from the employer. This is the same evidence that was before MPIC, who made a determination on that basis.

At the appeal hearing, the Appellant did not bring forward any evidence, aside from his own testimony and allegations, to establish that the evidence from [text deleted], which indicated that his employment was of a temporary nature and would have ceased on October 15, 2010, was false. This is the evidence upon which the Appellant's case manager and the Internal Review Officer relied.

While the panel appreciates the Appellant's own conviction that the evidence from the employer, [text deleted] was faulty and unreliable, he has failed to provide documentary or other evidence to show that, on a balance of probabilities, his job at [text deleted] would have continued past October 15, 2010. Without further evidence, the panel finds that the Appellant's submission is mere speculation and there is not enough evidence before the panel to determine that he is correct.

Accordingly, the Commission finds that the Appellant has failed to meet the onus upon him of showing, on a balance of probabilities, that the decision of the Internal Review Officer dated January 11, 2011 is incorrect and that the Appellant should not have been classified as a temporary earner. The decision of the Internal Review Officer is upheld and the Appellant's appeal is dismissed.

Dated at Winnipeg this 19th day of December, 2012.

LAURA DIAMOND

NEIL COHEN

NEIL MARGOLIS