

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-111**

PANEL: Ms Laura Diamond, Chairperson
Ms Jean Moor
Ms Sandra Oakley

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

HEARING DATE: March 30, 2011

ISSUE(S): Whether the Appellant was properly classified as a full-time
earner.

RELEVANT SECTIONS: Section 70(1) of The Manitoba Public Insurance Corporation
Act ('MPIC Act') and Sections 3(1) and 3(3) of Manitoba
Regulation 39/94.

**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 November 13, 2006 and, as a result of his injuries, which prevented him from returning to his full-time employment, was in receipt of Income Replacement Indemnity ("IRI") benefits.

At the time of the motor vehicle accident, the Appellant was working at a [text deleted] business.

On May 9, 2007, the Appellant's case manager wrote to him classifying him as a full-time earner, employed with [text deleted]. The Appellant's gross yearly employment income ("GYEI") was calculated on this basis at \$16,640, providing a bi-weekly entitlement of \$565.23, based upon his 2005 Tax Return.

This calculation was changed, by the case manager's letter of June 1, 2007, to \$17,628.16, on the basis of his 2006 Tax Return. This resulted in a bi-weekly entitlement of \$598.31.

The Appellant sought an Internal Review of this decision. His Application for Review stated:

"My Income Replacement was based upon my tax returns and min. Wage. Financially my wife is listed as the owner of the business. We are married and legally it is my business as well. I would like this reviewed and changed to self employed to reflect this."

On July 17, 2007, an Internal Review Officer for MPIC upheld the case manager's decision. The Internal Review Officer referred to Section 3(1) of Manitoba Regulation P215-39/34 which defines GYEI derived from self-employment or a Canadian-controlled private corporation. He also reviewed Section 3(3) of that Regulation and determined that the Appellant did not fall within the definition of a "significant influence shareholder" as he did not hold 20% or more of the voting rights in the corporation.

Accordingly, the Internal Review officer found that the Appellant did not fall within the definition of self-employment stipulated by the legislation and dismissed the Appellant's Application for Review, finding that he was an employee.

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 had purchased a [text deleted] business, called [text deleted], in 1987. He ran the business through his own name until June 1, 1992.

In 1992, the business was transferred. This was because the Appellant had some financial difficulties. He had co-signed a loan for his nephew, who had reneged on the deal and left the Appellant on the hook. He indicated that bailiffs were chasing him for payment of almost \$120,000 and he was at risk of losing everything he had.

The Appellant testified that at that point he consulted with a bankruptcy lawyer and attempted to negotiate some settlements with the bank. He obtained legal advice advising him not to go into bankruptcy, but instead to dispose of anything he had. As a result, he sold his business to his wife for \$1.00.

The Appellant then continued on with the business, as he had operated it prior to the problems. He testified that by signing the business over to his wife, he was given some protection from creditors. He continued on in this way for the next 22 years. He testified that he had de facto control of the business ever since it opened and continued to do so. His wife has deteriorating discs in her back and cannot work, so he does everything from buying, selling and producing the goods, with no employees.

At the time of the motor vehicle accident, he was working in this way. He testified that he didn't understand that he could be considered an employee of the corporation and believed that he was paying income tax as a self-employed person.

However, the motor vehicle accident had made it difficult for him to work as he was, and continuing difficulties with his shoulder may make an operation necessary.

He submitted that he required higher IRI benefits to reflect the work that he had been doing for the business.

Submission for MPIC:

Counsel for MPIC submitted that the Appellant was properly classified as a full-time earner. She reviewed the Appellant's Income Tax forms from 2004 through 2006, which showed that the Appellant had filed and paid taxes as an employee.

On his T1 General Form in 2004 the Appellant had left the section dealing with self-employment blank, and declared employment income of \$9,000. The same pattern held true for his T1 General Income Tax and Benefit return filed in 2005, upon which he also left the self-employment section blank and declared employment income of \$13,000. This pattern was repeated for his T1 Income Tax and Benefit return form filed for 2006.

Counsel also noted that the Appellant participated in the Old Age Security and CPP benefit programs.

Accordingly, despite the Appellant's evidence that he was a self-employed person, all of his income tax forms filed for the tax years before the motor vehicle accident, show that he was treated as an employee.

The Appellant was employed by the [text deleted] and the documents on file confirm that his wife owns 100% of that corporation. The Appellant did not own any shares of the corporation.

Therefore, MPIC's due diligence in verifying the Appellant's employment, led it to conclude that he was not self-employed.

Counsel noted that pursuant to Regulation 39/94, and in particular Section 3 of that Regulation (which defines GYEI from self-employment or business income), the Appellant had not met the onus of showing that he fell into this category. Section 3(3) of the Regulation defines a significant influence shareholder of a Canadian-controlled private corporation as one who owns 20% of the voting rights and can demonstrate an active, authoritative influence over the day to day financial and administrative operations of the corporation.

Even if the Appellant was able to meet the second part of the test and show an active authoritative influence, it was submitted that he definitely does not meet the first part of the test as he is not a significant influence shareholder holding 20% or more of the voting rights in the corporation.

Rather, the Appellant falls within the definition of a full-time earner who holds regular employment on a full-time basis pursuant to Section 70(1) of the MPIC Act.

The Appellant intended to and did give up ownership of the company because of his potential financial obligations. He had legal representation and made that conscious decision. Counsel submitted that the Appellant cannot then pick and choose which parts of incorporation he likes

and doesn't like. It is incumbent upon him to live by the decision he made, with legal representation, not only when it is beneficial to him.

Counsel noted that the Appellant was sophisticated, had spoken to a bankruptcy lawyer and made the decision to incorporate, in order to avoid financial obligations. He knew that he had de facto control of the business, but at the relevant time, it was clear that it was his wife who was the sole shareholder of the company.

The T4 forms he filed with Revenue Canada were consistent with his status of being an employee.

Accordingly, under the circumstances, counsel submitted that the Appellant had failed to discharge the onus upon him to show that MPIC did not properly classify him as a full-time earner. His appeal should be dismissed and the Internal Review Decision confirmed.

Discussion:

Manitoba Regulation 39/94 provides that:

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).

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);

"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.

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Decision was not correct and that he was not properly classified as a full-time earner.

The panel has reviewed the evidence of the Appellant as well as his submission and the submission of counsel for MPIC, along with the documentary evidence on the file.

The panel finds that the Appellant was credible regarding his evidence that he was actively running the business. We find that he was the sole worker, responsible for all aspects of the [text deleted] business.

However, the evidence shows that the legal structure under which the business operated was one where the Appellant was an employee.

The evidence contained in the Appellant's T4 and other Income Tax forms showed that he was in receipt of employment income. No self-employment was declared. A search with the Corporations Branch showed that the Appellant's wife held all of the voting shares for the corporation.

The Appellant argued that he had de facto control of the corporation. However, that is not the sole test under the MPIC Act and Regulations. Rather, a two-prong test is set out in Section 3(3) of Regulation 39/94.

The evidence established that the Appellant was able to meet the second prong of the definition of “significant influence shareholder” under Section 3(3) of the Regulations. He did demonstrate an active, authoritative influence over the day to day financial and administrative operations of the corporation.

The problem arises in the Appellant’s failure to establish that he meets the criteria for the first prong of that test, found in Section 3(3)(a). He did not establish that he holds 20% or more of the voting rights in the corporation.

As counsel for MPIC pointed out, the Appellant had legal representation and made a conscious decision to structure the share ownership in the way that he did, for the reasons he explained to the panel. However, as counsel for MPIC submits, the Appellant cannot pick and choose which parts of incorporation that he likes and doesn’t like. It is incumbent upon him to live by the decision he made.

It is the panel’s view that both aspects of the test set out in Section 3(3) of the Regulations for a significant influence shareholder must be met in order for the Appellant to establish that his income was “business income” pursuant to Section 3(1) of the Regulations. Had the Appellant retained 20% control of the corporation he may well have been able to meet both the tests established by Section 3(3) to show that he was self-employed and that his GYEI should be based upon business income, pursuant to Section 3(1) of the Regulations. However, the

Appellant did not meet both tests, and as a result, the decision of the Appellant's case manager and the Internal Review Officer classifying him as a full-time employee are correct. Accordingly, the Internal Review Decision dated July 17, 2007 will be upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 4th day of May, 2011.

LAURA DIAMOND

JEAN MOOR

SANDRA OAKLEY