



3. You had only been working for the [text deleted] since November 2000. Accordingly, you were correctly classified as a “temporary earner” in accordance with the definition provided by Regulation 37/94.
4. In early August 2001, the Corporation was required, pursuant to Section 84(1) of the Act to do a 180-day determination of employment for you. You received IRI based on the orderly’s job for six months of your claim. Section 84(2) requires the Corporation to determine only one employment for you. The employment chosen was that of a teacher’s assistant. Since you had, in fact, been doing this work on a full-time basis prior to your car accident, this was a reasonable choice.
5. The Corporation accepted medical evidence indicating that you were unable to return to work in September 2001. You received IRI appropriate to the determined employment (i.e. a teacher’s assistant).
6. You complain that 90% of your combined net income from the two jobs you had prior to this car accident was more than the IRI you are receiving. You believe that your IRI should be based on the combined incomes of those two occupations.

The relevant provisions of the legislation in respect of the payment of IRI after the first 180 days for a part-time worker are as follows:

Section 84 of the Act:

**Entitlement to I.R.I. after first 180 days**

**84(1)** For the purpose of compensation from the 181<sup>st</sup> day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

**Where victim held several employments**

**84(2)** If the temporary earner or part-time earner held more than one employment immediately before the accident, the corporation shall determine only one employment under section 106.

**Determination of I.R.I.**

**84(3)** The corporation shall determine the income replacement indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment, considering

- (a) whether the victim could have held the employment on a full-time or part-time basis;
- (b) the work experience and earnings of the victim in the five years before the accident; and
- (c) the regulations.

Section 106 of the Act:

**Factors for determining an employment**

**106(1)** Where the corporation is required under this Part to determine an employment for a victim from the 181<sup>st</sup> day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

**Type of employment**

**106(2)** An employment determined by the corporation must be an employment that the victim could have held on a regular and full-time basis or, where that would not have been possible, on a part-time basis immediately before the accident.

Section 2(b)(i) of Manitoba Regulation 39/94 provides:

**GYEI not derived from self-employment**

**2** Subject to this regulation, a victim's gross yearly employment income not derived from self-employment at the time of the accident is the sum of the following amounts:

- (b) in the case of a temporary earner or part-time earner, the salary or wages that are received or receivable with respect to employment that the temporary earner or part-time earner held or would have held, if the accident had not occurred, and that are the greater of
  - (i) the salary or wages received or receivable for the pay period in which the accident occurred, divided by the number of weeks in the pay period and then multiplied by 52.

In his response to the Appellant's argument that MPIC's disposition of her claim was fundamentally unfair and deprived her of income in respect of her inability to continue to be employed as an orderly due to the motor vehicle accident, The Internal Review Officer stated in his decision:

As I explained to you at the hearing, Section 84(2) precludes the Corporation from accepting your position that we should be paying an IRI for you based on two occupations. What you regard as the shortfall in your IRI is primarily due to the sequence of events outlined above. If the car accident had incapacitated you from doing both of your pre-accident jobs, you would have received an IRI based on the combined income from those two jobs during the first 180 days following your car accident. You would still have been determined into the teacher's assistant position, but Section 84(1) would then have maintained your IRI at the levels you had received during the first 180 days after your accident. You were, however, never disabled from both of your pre-accident occupations until after the date when the determination was to be done. Accordingly, Section 84(1) does not apply, but Section 84(2) does.

At the appeal hearing, the Appellant submitted that she had been unfairly dealt with by MPIC and requested that the Commission direct MPIC to continue to pay her IRI in respect of her job as an orderly, which she was unable to perform after the 180-day period. The Appellant argued that she was prejudiced by her decision to continue to work as a teacher's aide during the 180-day period, and it would have been financially to her advantage to have refused to work during that period because of the injuries she sustained in the motor vehicle accident and to have collected IRI in respect of her loss of employment as a teacher's aide.

The Appellant further asserted that if she had not worked as a teacher's aide during the 180-day period, MPIC would have been obligated, after the 180-day period, to continue to pay her loss of income as an orderly and, as well, her loss of income as a teacher's aide. She also asserted that it was unfair and unreasonable that on the 181<sup>st</sup> day, MPIC would rescind the IRI she had been receiving in respect of her job as an orderly and, as a result, reduce her income because she chose to continue to work as a teacher's aide during the 180-day period. She complained to the Commission that this loss of income adversely affected her financial circumstances.

In response to the Appellant's submission, counsel for MPIC argued that the Internal Review Officer had correctly interpreted and applied the provisions of the legislation that the Appellant's

position should be rejected. MPIC's legal counsel asserted that the function of MPIC is to administer the payment of the benefits provided under the Act and that the officers of MPIC had no authority to create a coverage that does not exist under the legislation.

### **Discussion**

It is clear from an examination of Section 84(1) of the Act that the Legislature intended to protect victims (temporary earners or part-time earners) of motor vehicle accidents from the loss of income that the victim would suffer as a result of the accident. Section 84(1) provides that the determination of compensation from the 181<sup>st</sup> day after the accident shall be not less than any IRI a temporary earner or part-time earner was receiving during the first 180 days after the accident. Unfortunately, the guarantee under Section 84(1) of the Act does not address the circumstances where a victim who has more than one job would continue to work on one of these jobs during the first 180 days but after the 181<sup>st</sup> day would be unable to continue to work on that job, due to the motor vehicle accident.

The minimum provided in Section 84(1) has limited application to the Appellant. Since the Appellant was receiving only IRI during the first 180 days for her loss of income as an orderly, the protection provided under Section 84(1) of the Act did not fully protect the Appellant from a loss of income due to the motor vehicle accident when, after the 180-day period, she was unable to continue her employment as a teacher's aide. Pursuant to Sections 84 and 106 of the Act and Section 2(b)(i) of Manitoba Regulation 39/94, MPIC determined that the Appellant's employment on the 181<sup>st</sup> day would be that of a teacher's aide. As a result, MPIC rescinded the IRI that the Appellant was receiving in respect of her inability to carry on her job as an orderly as a result of the accident during the 180-day period following said accident, resulting in a loss of income to the Appellant.

**Decision**

The Commission notes that the minimum guarantee under Section 84(1) guarantees continuation of the minimum amount that the Appellant would receive from IRI during the 180-day period but does not guarantee that the Appellant would receive, on the 181<sup>st</sup> day after the motor vehicle accident, at a minimum, the total amount of compensation that the Appellant received during the 180-day period from both IRI and employment income she earned as a teacher's aide during that period. The Appellant was, therefore, justified in complaining to the Commission that Section 84(1) of the Act was inadequate to protect her from a loss of income, due to the motor vehicle accident.

The Commission concludes that Section 84(1) of the Act is not of sufficient scope to protect the Appellant from her loss of income due to the motor vehicle accident. It is, therefore, with regret that the Commission must dismiss the Appellant's appeal and confirm the decision of the Internal Review Officer dated December 19, 2001.

Dated at Winnipeg this 14<sup>th</sup> day of May, 2002.

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**MEL MYERS, Q.C.**

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**WILSON MacLENNAN**

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**GUY JOUBERT**