

# **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]**

**AICAC File No.: AC-02-76**

**PANEL:** Mr. Mel Myers, Q.C., Chairperson  
Ms. Yvonne Tavares  
Mr. Wilson MacLennan

**APPEARANCES:** The Appellant, [text deleted], was represented by his father and Committee, [text deleted], and by legal counsel, [text deleted];  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

**HEARING DATE:** March 24, 2003

**ISSUE(S):** Method of determination of Income Replacement Indemnity Benefits

**RELEVANT SECTIONS:** Sections 89 to 92 of the Manitoba Public Insurance Corporation Act ("MPIC 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 Appellant, [text deleted] was involved in a motor vehicle accident ("MVA") on September 18, 1999. As a result of that accident, the Appellant sustained severe head and musculoskeletal injuries. At the time of the MVA, the Appellant was [text deleted] years of age and enrolled as a full-time student in his final year of [text deleted] studies at [text deleted]. Those studies were scheduled to be completed in April of 2000. The Appellant had to withdraw from his courses on September 21, 1999, due to the MVA.

The Appellant was not employed at the time of the MVA and has been unable to work since the MVA and will be unable to work for the foreseeable future.

For the purposes of the MPIC Act, the Appellant was determined to be a “student” at the time of the MVA. Section 70(1) of the MPIC Act, provides the definition of a student as follows:

**Definitions**

**70(1)** In this Part,

**"student"** means a victim who is 16 years of age or older and attending a secondary or post-secondary educational institution on a full-time basis at the time of the accident.

In accordance with the MPIC Act, the Appellant is entitled to receipt of ongoing Income Replacement Indemnity (“IRI”) benefits from the scheduled completion date of his studies. In a letter dated June 20, 2000, MPIC’s case manager wrote to the Appellant’s Committee, [text deleted], to advise him as follows with respect to the Appellant’s entitlement to an IRI benefit:

The [text deleted] has confirmed [the Appellant] would have completed his second term on April 26, 2000. The commencement of IRI, based on the Average Industrial Wage (AIW) of \$28,311.40 is therefore payable, effective April 27, 2000, in accordance with Section 91(3), which reads as follows:

**Amount of indemnity after scheduled end of studies**

**91(3)** A student whose studies end on or after the scheduled day is entitled to an income replacement indemnity computed on the basis of the industrial average wage for each of the 12 months before July 1 that precedes the day on which his or her studies end.

The Appellant sought an internal review of that decision. In a decision dated May 16, 2002, the Internal Review Officer confirmed the case manager’s decision and dismissed the Application for Review. Relying on Section 91(3) of the MPIC Act, the Internal Review Officer concluded that the Appellant’s ongoing IRI should be paid in accordance with the industrial average wage.

The Appellant has now appealed the decision of the Internal Review Officer, dated May 16, 2002, to this Commission, regarding the method of determining his ongoing IRI benefits beyond April 27, 2000.

Counsel for the Appellant submits that the Appellant's ongoing IRI benefits should not be based on the industrial average wage, but rather, based on the income which the Appellant could have earned at the date of the accident, since that amount is greater than the industrial average wage. Counsel for the Appellant contends that, at the time of the MVA, the Appellant could have earned between \$35,000.00 and \$40,000.00 per annum, if employed at the [text deleted], as reflected in the acknowledgement from the [text deleted] that they would have offered the Appellant employment in this salary range.

Counsel for the Appellant submits that the relevant section of the MPIC Act which governs the determination of IRI for a student in the Appellant's situation is Section 89. Section 89(1)(a) provides as follows:

**Entitlement to I.R.I.**

**89(1)** A student is entitled to an income replacement indemnity for any time after an accident that the following occurs as a result of the accident:

- (a) 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.

Section 89(2)(a)(i) provides as follows:

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

**89(2)** The corporation shall determine the indemnity to which the student is entitled on the following basis:

- (a) under clause (1)(a), if at the time of the accident
  - (i) the student holds or could have held an employment as a salaried worker, the gross income the student earned or would have earned from the employment.

Counsel for the Appellant maintains that, in interpreting Section 89(1)(a) of the MPIC Act and the use of the words “would have held”, the Appellant need not establish that he in fact was working or had a bona fide offer in hand, but merely sufficient evidence must be led, that in all likelihood he would have been employed in his chosen occupation, had he so desired. Counsel for the Appellant maintains that the evidence of the [text deleted] clearly establishes this fact. He also maintains that further support for this broad interpretation of Section 89(1) can be gleaned from the wording of Section 89(2). In his written submission, counsel for the Appellant states that:

This section, which specifically applies to students who fall within Section 89(1)(a), makes reference to “holds or **could have held** an employment as a salaried worker”. This direct reference to “**could have held**” helps make sense of Section 89(1)(a); that is, the choice of the word “would” has to be given a broad liberal interpretation such as was done in *Re Pressey*, so that all that is required is that a student prove he was able to hold a job and to obtain such job at the date of his injury, which would pay more than the AIW.

Since the IRI of a student is otherwise determined under Section 90(2) as being the AIW, the purpose of Section 89(2) must by implication be to provide additional or better benefits than the AIW, which is the lowest basis upon which benefits are based under the MPIC Act. In fact, Section 92 makes it clear that a student is entitled to an IRI based on the greater of the determination under Sections 89, 90 and 91.

Lastly, counsel for the Appellant submits:

It is respectfully submitted that the only reasonable interpretation of Section 89 is to cover those students who have the skills and qualifications that would at the date of their accident enabled them to have obtained employment at a salary greater than AIW and to have their IRI based on what they would have earned. In this case, that IRI should be based on a salary of \$35,000.00 to \$40,000.00.

Counsel for MPIC maintains that the Appellant’s IRI benefits have been properly calculated and that the Internal Review decision was correct in this regard. In MPIC’s written submission, counsel for MPIC states that:

In our submission, the Appellant's circumstances do not bring him under s. 89. In order for [the Appellant's] argument to succeed, we submit that he would have to have been either working full-time for the [text deleted] at the time of the accident or the evidence would have to show that he could have been working full-time for the [text deleted] at the time of the accident. Neither of these fact situations apply to [the Appellant].

The entitlement portion of s. 89 is found in subsection 1. A student is entitled to an IRI for any time after the accident that 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 evidence from the [text deleted] is talking about a hypothetical situation – one where [the Appellant] would, absent the accident, abandon his last year of studies and seek full-time employment with [text deleted]. In response to such a suggestion, [text deleted] of the [text deleted] says "... hypothetically, had [the Appellant] expressed an interest in obtaining a permanent [text deleted] position in September 1999 rather than returning to university, I believe we would have offered him a job.

...

There is a time element to understanding s. 89 also. The meaning of the relevant time period for determining when [the Appellant] had to fit into the "would have held employment" scenario can only be ascertained, in our submission, by reading the entire s. 89. Subsection 2 deals with the manner in which one determines the basis for calculating an IRI for a student who has an entitlement pursuant to subsection 1.

- "... *if, at the time of the accident,*
- (i) *the student holds or could have held an employment as a salaried worker, the gross income the student earned or would have earned from the employment . . . (emphasis ours)."*

### **Disposition:**

The relevant sections of the MPIC Act which govern the determination of an IRI for a "student" are Sections 89 to 92, copies of which are attached hereto as Appendix 1. Upon a careful reading of those sections, the Commission has determined that subsections 89(1) and 89(2) of the MPIC Act, when read together, provide an IRI for a student who held or would have held employment as a salaried worker "**at the time of the accident**". The facts of the case at hand do not lend themselves to application in those circumstances. The Appellant was not employed, and did not lead evidence of any intention to hold employment, as a salaried worker, "at the time of the accident". Accordingly, the Commission accepts the position advanced on behalf of MPIC

and finds that the Appellant's IRI benefits were correctly determined pursuant to subsection 91(3) of the MPIC Act.

As a result, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer bearing date May 16, 2002.

Dated at Winnipeg this 8<sup>th</sup> day of April, 2003.

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**MEL MYERS, Q.C.**

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**YVONNE TAVARES**

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**WILSON MACLENNAN**