



## Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-03-81

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
Ms. Diane Beresford  
Mr. Paul Johnston

**APPEARANCES:** The Appellant, [text deleted], was represented by [Appellant's representative]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

**HEARING DATE:** September 21, 2004

**ISSUE(S):** Two-year determination of employment

**RELEVANT SECTIONS:** Sections 107, 109, 115, 138 and 150 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 issue in this appeal is set out by the Internal Review Officer in his decision dated March 14, 2003 as follows:

#### ISSUE

The central issue on this review is whether the two-year determination completed by the case manager on September 24, 2002 fulfilled all of the requirements of Sections 107 and 109 of the *Act*.

A corollary issue is the extent to which MPI is obligated to provide financial support, including Income Replacement Indemnity ("IRI") benefits and funding for tuition, books, etc., for the retraining program which [the Appellant] has undertaken.

The Internal Review also summarizes the essential facts of the appeal as follows:

1. On March 21, 1999, [the Appellant] was the driver of a car which was struck from the rear while stopped in traffic ("the first accident"). She sustained soft tissue injuries to her back.
2. [The Appellant] was [text deleted] years of age at the time of the first accident and was employed on a full-time basis as a Plastics Technician with [text deleted]. Her Gross Yearly Employment Income ("GYEI") for IRI purposes was calculated to be \$33,664.37.
3. After an extended period of rehabilitation, [the Appellant] returned to the [text deleted] payroll, doing modified duties, on October 29, 2001.
4. On December 8, 2001, [the Appellant] was the driver of a SUV which was struck from the rear while stopped in traffic and then collided with the vehicle in front of it ("the second accident"). She sustained soft tissue injuries to her left shoulder, and neck and upper back, and exacerbated the back injuries from the first accident. Her GYEI at that time was calculated at \$38,438.40.
5. By December 19, 2001, [the Appellant] was back working 3 hours per day. By early February 2002, she was almost back to full-time hours (although still on modified duties). But then a lay-off, by which she was affected, took effect on February 22, 2002. It does not appear that the lay-off was related to either of the accidents.

A review of the medical reports filed with the Commission indicates that the Appellant was seen by a number of physicians since the two motor vehicle accidents occurred and the medical opinion was divided as to whether or not the Appellant's physical complaints in whole or in part were caused by either or both of the motor vehicle accidents and, if there was such a connection, whether any of the Appellant's complaints prevented her from returning to her employment as a plastic technician with [text deleted] in [text deleted].

At the request of MPIC, [text deleted], a member of the MPIC Health Care Services Team, reviewed all of the medical reports in respect of the Appellant and provided an Inter-Departmental Memorandum to the case manager in a report dated April 30, 2002. As noted by the Internal Review Officer in his decision dated March 14, 2003, [MPIC's doctor] stated in her Inter-Departmental Memorandum:

- a. Psychological difficulties – as a barrier to recovery and to a return to work at [text deleted] – were first identified in May 2000. A diagnosis of severe depression was made in August 2000.
- ....
- d. The cause of the ongoing pain complaints was “multifactorial”, with one of the factors being the first accident.

The case manager adopted [MPIC’s doctor’s] medical opinion and, as a result thereof, decided that in accordance with Section 107 of the MPIC Act, MPIC was required, from the second anniversary date of the accident, to determine the employment of the Appellant who was able to work but unable to return to work as a Plastics Technician due to the motor vehicle accident in question. In order to assist in establishing the two year determination, MPIC referred the Appellant to [vocational rehab consulting company] to conduct a Transferable Skills Analysis.

On July 5, 2002 a Vocational Rehabilitation Consultant with [the Appellant], [text deleted], provided a Transferable Skills Analysis Report to the case manager. In this Report the consultant indicated that the purpose of the referral was to establish a list of employment options that would utilize the Appellant’s existing skills and interests, as well as to establish a list of retraining options that would involve a two-year academic program. The consultant met with the Appellant to assess her skills and abilities with respect to alternate employment/retraining options, conducted certain research in respect of finding alternative employment/retraining options and reviewed a number of medical reports including those of [Appellant’s doctor #1] and [Appellant’s doctor #2] dated April 2, 2002, [Appellant’s physiatrist] dated April 2, 2002, [MPIC’s doctor] dated April 30 and May 29, 2002 and [MPIC’s psychologist] dated June 24, 2002, all of which will be referred to subsequently in this decision.

It should be noted that while the consultant, [text deleted], was conducting her research in preparation of the Report, the Appellant had received a letter of acceptance dated June 11, 2002

from the [text deleted] which indicated the Appellant had been accepted into the Psychiatric Nursing program at [text deleted].

It should further be noted that after the first motor vehicle accident the efforts to rehabilitate the Appellant had been adversely affected by the Appellant's depression and she had been referred to [Appellant's pain management specialist] to assist her in respect of pain management. [Appellant's pain management specialist], together with the Appellant's family physician, had referred the Appellant to [text deleted], a psychologist, for treatment. In August of 2000 the Appellant had been assessed and attended for psychiatric evaluation by [Appellant's psychiatrist] on August 30, 2000. This assessment noted "*Axis I- (1)Major Depression, (2) Alcohol Abuse; . . . Axis III (1) Chronic pain post-M.V.A.*". [Appellant's psychiatrist's] recommendations included increasing anti-depressant dosage, continuation of psychotherapy with [Appellant's psychologist], as well as supporting couples therapy.

The Appellant's psychological condition worsened and, as a result of a team meeting with her family physician, psychiatrist, psychologist and [Appellant's pain management specialist], it was decided to refer the Appellant to [text deleted], a physiatrist, for treatment. As well, therapy sessions with [Appellant's psychiatrist] and [Appellant's psychologist] were to continue as well as attendance, as needed, with the family physician.

[MPIC's vocational rehab consultant] in her report to MPIC, after reviewing the Appellant's education, employment and experience, stated:

[The Appellant] had the opportunity to complete the Choices Interest Profiler in the Choices CT program. This checklist helps identify career areas related to a client's interests. Based on [the Appellant's] results, she scored highest in the following area:

1. **Social** – workers in this area like being with and around other people, helping others, working in jobs that directly affect other people. They work and socialize well with other people and, when possible, the (sic) avoid doing physical work. (underlining added)

The consultant noted a number of the Appellant's skills, including:

10. Advising and counseling people.
- ...
14. Providing services.

In respect of vocational analysis, the consultant indicated that there were a number of employment options that may be suitable and appropriate for the Appellant in respect of her work history, education and experience. The consultant considered a number of factors, including:

1. transferable skills acquired from previous employment
2. specific occupations suitable and appropriate for the Appellant
3. specific occupations that had been identified relating to the full-time employment in [text deleted]
4. physical demands of the work having regard to the Appellant's physical limitations

The consultant indicated the following further factors in determining suitable and appropriate employment options for the Appellant:

5. Employment options will reflect [the Appellant's] transferable skills and career interest assessments, physical demands, and education. (underlining added)
- ...
7. Retraining options will reflect [the Appellant's] transferable skills and career interest assessments and physical demands. (underlining added)

The report then sets out a number of employment options as described in the National Occupation Classification ('NOC'). [MPIC's vocational rehab consultant], in her conclusion in this report, states:

It was the intent of this report to identify alternate employment options for [the Appellant] based on her education and training, employment experience, transferable skills, interests and physical limitations. As such, I have identified 20 occupations that match [the Appellant's] current standing. It is noteworthy that these occupations would not require additional training, but rather, would utilize [the Appellant's] existing skills.

It was also the intent of this report to identify retraining options. In the list of retraining options, it is evident that most of these are of no interest to [the Appellant]. Also, since [the Appellant] would have to start at an entry-level salary upon graduating from these programs, she would not be earning any more than if she were to find employment that would use her existing skills.

Even though I have identified several employment and retraining options that may be suitable for [the Appellant], she has emphasized that Psychiatric Nursing is her vocational goal and is eager to pursue it. [The Appellant] is willing to relocate at her own expense; she is willing to give up the one year of paid job search assistance; she is willing to pay for the last two years of the program and any additional incurred costs; she is highly interested in the field of Psychiatric Nursing; and her attending Psychologist, [text deleted], recommends that MPI support her in this endeavor. In light of all these factors, it is unlikely that [the Appellant] would pursue anything beyond the Psychiatric Nursing program. I concur with [MPIC's psychologist's] recommendation and suggest that, should MPI support [the Appellant's] educational plan, then a formalized contract be drafted, such as a Vocational Rehabilitation Plan. (underlining added)

In preparation for graduated work re-entry, the Appellant was referred by the Nurse Case Manager of [vocational rehab consulting company] to [text deleted], a psychologist, who met with the Appellant and provided a report to [vocational rehab consulting company] on July 4, 2001.

[MPIC's psychologist] made the following diagnosis: "*Axis I- Pain Disorder, Associated With Both Psychological Factors and a General Medical Condition, Chronic, Major Depressive Disorder, In Partial Remission*".

On June 24, 2002 MPIC's consultant, [text deleted], wrote to the case manager and stated:

When I met with [the Appellant], she presented very well. Her mood was upbeat and she seemed very motivated to move to [text deleted] and attend the Nursing program. All she was waiting for at that time was confirmation that she was accepted in the program which, according to a recent phone message from her, she has now obtained. . . . .

In my opinion, MPI should support [the Appellant] in her efforts to take Psychiatric Nursing. She is very motivated and has already been accepted in to the program in [text deleted]. I think that pursuing other career options and having [the Appellant] do an assortment of other testing will simply be a waste of MPI's time and money. I believe that a formalized agreement should be drafted up by MPI's legal department outlining the commitment for retraining and addressing the other possible issues that might arise if she is unable to complete this program. I anticipate that [the Appellant] will be successful in her endeavor. (underlining added)

The case manager prepared a Cost Benefit Analysis report dated July 23, 2003 setting out three options, as follows:

OPTION #1: Starting job search immediately based on education & experience she already possesses. This option would mean one year full IRI then top up IRI until 65 and then possible RIB.

We narrowed down jobs to 3 in this option which best suited [the Appellant's] past experience & interests & ability to recoup wage earned at [text deleted]. (underlining added)

NOC 6433 - Airline industry - \$332,322 + RIB NOC 6451 - Host/Hostess - \$493,691 + RIB

NOC 6432 - Flight attendant - \$25,690 IRI only. Would require no top up, however, although industry is hiring, jobs in this field are minimal and competitive. It is also unlikely that [the Appellant] will be able to meet physical requirements of job. We do not feel this is a viable option for [the Appellant]

OPTION #2: 2 year [text deleted] College program + job search. This option would mean 3 years full IRI then top up IRI for several years or until age 65 and then possible RIB. Also included would be cost of 2 year program (tuition, books, etc). (underlining added)

NOC 0631 - Hotel & Restaurant Admin - \$459,013 + possible RIB NOC 6221 - Business Admin - \$84,309

NOC 1226 - Tourism/conference & event planner - \$151,838 + possible RIB

OPTION #3: 4 year Psychiatric Nursing Program ([the Appellant's] request) + job search. This option would mean 5 years full IRI + tuition and books.

NOC 3152.4 - Psych Nursing - \$141,938

The case manager concluded that:

The most cost effective option is NOC 6221 under Option #2: Business Administration Program at [text deleted] - for a job in Technical Sales, specifically - Industrial Supplies Sales Representative at a cost of \$84,309.

The Appellant, who had been accepted into the four year Psychiatric Nursing program at [text deleted], requested that MPIC permit her to use the funds that had been allotted by MPIC towards the two year business administration program be applied towards the Appellant's four year Psychiatric Nursing program. This proposal was accepted by MPIC and the Appellant was so advised on July 17, 2002.

### **Case Manager's Decision**

On September 24, 2002 the case manager wrote to the Appellant in respect of the two-year determination and stated:

Prior to a Two-Year Determination being completed, the majority of rehabilitation efforts are normally concluded. Rehabilitation efforts are to assist injured persons in attaining the maximum amount of functional improvement. Re-training may be an option depending on circumstances and the Gross Yearly Employment Income (G.Y.E.I.) that needs to be recouped. Factors that are taken into consideration in identifying an employment for the Two-Year Determination process include academic achievements, experience, skills and physical capabilities. (underlining added)

Factors considered regarding re-training options include the G.Y.E.I. that needs to be recouped, the length of the program, the costs that will be incurred, and the person's ability to participate and be successful in the re-training. The Two-Year Determination is implemented after the re-training. An injured party has up to one year following the determination to secure employment. After this time their Income Replacement benefits are reduced by the greater of, what they could be earning in the determined employment, or what they are actually earning in any employment they secure. This is in accordance with Section 110(1), which is attached for your reference. (underlining added)

.....

On the basis of the information gathered, a Cost Benefit Analysis was completed. On the basis of that analysis, Manitoba Public Insurance is prepared to sponsor you through a two year re-training program, and recommends a two year Business Administration program at [text deleted] that would result in a determined employment of Industrial Supplies Sales Representative. This position draws on the skills and experience that you had already obtained through your previous work history. The cost of the Business Administrative program is \$10,809.00. Should you have chosen this option, Income Replacement Indemnity benefits would have continued for the period of time you were attending the 2 year program (which typically ends in the month of June) as well as for a maximum of another one year from the end of the program, to secure that employment. (underlining added)

In summary, the decision letter offered to redirect the program costs of retraining required to qualify the Appellant for the determined employment (Industrial Supplies Sales Representative) towards the Psychiatric Nursing program. It also offered to extend her Income Replacement Indemnity ('IRI') for three years (the two-year program plus the one-year "grace period" for finding the determined employment).

### **Internal Review Officer's Decision**

Notwithstanding the initial acceptance by the Appellant of MPIC's proposal, as reflected in the case manager's letter of September 24, 2002, the Appellant made Application for Review of the case manager's decision to the Internal Review Office. The Internal Review Officer conducted a telephone hearing with the Appellant and her legal counsel, [text deleted], on February 21, 2003.

On March 14, 2003 the Internal Review Officer issued his decision confirming the September 24, 2002 decision of the case manager and rejecting the Appellant's Application for Review.

At arriving at his decision the Internal Review Officer stated:

The TSA clearly considered all of the elements of Section 109(1)(a). Much has been made of the fact that [the Appellant] was not interested in pursuing any of the options developed by [vocational rehab consulting company], but you will note that interest in, or enthusiasm for, the determined employment is not one of the required considerations.

The determined employment also took into account the skills and knowledge which would have been acquired in the approved Business Administration course, in compliance with Section 109(1)(b).

There is nothing in the regulations which assists in the evaluation of this case.

The determined employment also meets the parameters of Section 109(2).

Although replacing pre-accident earnings is a laudable goal of any retraining program, the legislation does not require that the determined employment replace those earnings. Often this simply is not possible.

Where there is a shortfall, Section 115 may apply to augment the claimant's IRI. But a shortfall does not, in and of itself, indicate that the determination was not done properly and in accordance with the legislation.

### Appeal

The Appellant filed an appeal through her legal counsel, [text deleted], on June 3, 2003 which stated.

I wish to appeal the attached decision of MPIC dated March 14, 2003 for the following reasons:

The employment options as referred to in the transferrable skills analysis report of July 5, 2002 by [text deleted] all have a starting wage between \$6.50 and \$8.25 per hour. It would take several years to achieve the high range of the salaries for all of the referred to occupations, and I would not approach my pre-injury gross earnings of \$38,438.00 which I earned at [text deleted]. Many of the jobs referred to in the analysis report are not realistic due to my physical injury or not having any natural ability for other referred to employment possibilities.

The only realistic option is the psychiatric nursing program at [text deleted], and I am requesting that I be paid for four years as I would then be earning in the range of what I was earning at [text deleted]. I am requesting that I be reimbursed for travel expenses.

The relevant provisions in respect of this appeal are Section 107, 109(1)(a)(b)(c), 109(2)(a)(b) and 115 of the MPIC Act.

### **New determination after second anniversary of accident**

**107** From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

### **Considerations under section 107 or 108**

**109(1)** In determining an employment under section 107 or 108, the corporation shall consider the following:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved under this Part;
- (c) the regulations.

### **Type of employment**

**109(2)** An employment determined by the corporation must be

- (a) normally available in the region in which the victim resides; and
- (b) employment that the victim is able to hold on a regular and full-time basis or, where that is not possible, on a part-time basis.

### **I.R.I. for reduced income from determined employment**

**115** If a victim becomes able to hold employment determined for him or her under section 107 or 108 but, because of bodily injury caused by the accident, earns from the employment a gross income that is less than the gross income used by the corporation to compute the income replacement indemnity that the victim was receiving before the employment was determined, the victim is entitled, after the end of the year referred to in clause 110(1)(d), to an income replacement indemnity equal to the difference between the income replacement indemnity the victim was receiving at the time the employment was determined and the net income the victim earns or could earn from the employment.

The Appellant testified at the hearing and indicated that initially she had accepted the case manager's proposal as set out in the case manager's letter to her dated September 24, 2002. However, after examining the Transferable Skills Analysis report she concluded that MPIC's proposal was unacceptable and she asserted that MPIC should pay her IRI benefits for the full four year period of University plus the costs of tuition and books. The practical effect of the Appellant's position would require MPIC to provide the Appellant with four years of IRI and potentially an additional period of IRI during the one year grace period.

As well, the costs involving tuition and books would significantly increase beyond the sum of \$10,809 that MPIC was prepared to provide to the Appellant in respect of the tuition and books for the Business Administration course.

In her testimony the Appellant stated that:

1. as a result of the initial motor vehicle accident she suffered from chronic back pain, was unable to return to work and further suffered from major depression.
2. funded by MPIC, she was treated for pain management by [Appellant's pain management specialist] and, as well, was treated by a psychiatrist and a psychologist.
3. during the course of these treatment programs, and prior to becoming injured in the motor vehicle accident, having regard to her circumstances, she never had the opportunity or interest in attending a professional course of study at a University;
4. as a result of the psychological problems which developed after her first motor vehicle accident, and the resulting treatment she received from psychologists and psychiatrists, she had developed a great interest in psychiatry and this motivated her to want to assist others who suffered from psychological problems;
5. as a result of these experiences she had been accepted into a Psychiatric Nursing program at the [text deleted] in the Fall of 2002 and had completed her first two years of this program successfully and was about to enter the third year of the Psychiatric Nursing program in the Fall of 2004.

The Appellant further testified that:

1. she had no desire to pursue a two-year Business Administration program to become an Industrial Supplies Sales Representative.

2. starting salaries for this position would be modest and it would take her a number of years in order to achieve a salary equivalent to the salary of \$38,438 she earned at [text deleted] as a plastic technician.
3. as a psychiatric nurse she could quickly achieve a salary equivalent to her pre-existing salary as a Plastics Technician.

She further testified that when she had an opportunity of examining the Transferable Skills Analysis report she noted that all of the employment options offered paid minimum wages and that MPIC would be required to top-up the Appellant's salary to meet the salary she earned at [text deleted] for many years after her graduation from the Business Administration course.

In cross-examination the Appellant acknowledged that she initially agreed to accept MPIC's proposal in respect of the funding of the two year Business Administration course but at that time had not examined the Transferable Skills Analysis Report prepared by [MPIC's vocational rehab consultant]. She further testified that when she had the opportunity of examining this report she was offended that MPIC refused to fully fund the Psychiatric Nursing course that she desired to take, and which would pay her a salary comparable to that which she earned at [text deleted], and would not require MPIC in the future to top up her salary.

In his submission to the Commission the Appellant's legal counsel reviewed the Appellant's testimony, referred specifically to the opinion of [MPIC's psychologist] in his letter dated June 24, 2002 and the report of [MPIC's vocational rehab consultant] who both, having regard to the Appellant's motivation and interests, supported her position that MPIC should fund the four-year program at [text deleted].

MPIC's legal counsel submitted that:

1. the Internal Review Officer's decision was correct in determining that the appeal should be dismissed.
2. the case manager had correctly evaluated and applied the provisions of Section 109(1) and (2) in arriving at her conclusion and, therefore, the decision should not be disturbed.
3. the Internal Review Officer was correct in determining that the interest in and enthusiasm of the Appellant for the determined employment was not a required consideration.
4. MPIC had acted fairly in providing three years IRI benefits to the Appellant, together with the sum of \$10,809, so that the Appellant could undertake a four year program in Psychiatric Nursing at the [text deleted].
5. the Appellant's application should be dismissed and the case manager's decision confirmed.

### **Discussion**

The Internal Review Officer in rejecting the Application for Review and confirming the case manager's decision, concluded that the case manager, in determining the employment of the Appellant, had considered all of the appropriate factors in Section 109(1) and 109(2) of the MPIC Act. However, the Commission finds that the Internal Review Officer, in arriving at his decision, failed to consider a number of important factors in determining the Appellant's employment under Section 107 of the MPIC Act.

The case manager stated in her decision:

Prior to a Two-Year Determination being completed, the majority of rehabilitation efforts are normally concluded. Rehabilitation efforts are to assist injured persons in attaining the maximum amount of functional improvement.

A review of the material filed at the hearing indicates that MPIC undertook extensive rehabilitation efforts to assist the Appellant in attaining the maximum amount of functional improvement and concluded, pursuant to Section 107, that from the second anniversary date of the first motor vehicle accident the Appellant was unable to return to her pre-employment status. As a result, the case manager was required, pursuant to Section 109, to consider certain factors in determining that employment. In this respect, the case manager stated:

. . . . Re-training may be an option depending on circumstances and the Gross Yearly Employment Income (G.Y.E.I.) that needs to be recouped. Factors that are taken into consideration in identifying an employment for the Two-Year Determination process include academic achievements, experience, skills and physical capabilities. (underlining added)

The Commission notes that Section 109(1)(a) and (b) of the MPIC Act states:

**Considerations under section 107 or 108**

**109(1)** In determining an employment under section 107 or 108, the corporation shall consider the following:

(a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination; (underlining added)

(b) any knowledge or skill acquired by the victim in a rehabilitation program approved under this Part; (underlining added)

The case manager, in determining the two year employment of the Appellant, pursuant to Section 109 of the MPIC Act, failed to consider the intellectual abilities of the Appellant in accordance with Section 109(1)(a) of the MPIC Act, and the knowledge that the Appellant had acquired in a rehabilitation program approved by MPIC, pursuant to Section 109(1)(a) of the MPIC Act.

**Intellectual Abilities – Section 109(1)(a) of the MPIC Act**

The case manager in her decision specifically refers to the Appellant's physical abilities in determining her employment but fails to specifically refer to or address the Appellant's intellectual capabilities at the time of determination. The case manager was aware the Appellant had requested MPIC to consider sponsoring her in a four year Psychiatric Nursing program offered at the [text deleted]. The case manager was also aware the Appellant had received a letter of acceptance from the [text deleted] permitting her to register for a maximum of 30 credit hours in the first regular session in the 2002 year, in the four year Psychiatric Nursing program of studies.

The case manager had also received a letter from [MPIC's psychologist], a registered psychologist, dated June 24, 2002, who had been asked by the case manager to assess the psychological status of the Appellant. [MPIC's psychologist] interviewed the Appellant and in his report to the case manager stated:

In my opinion, MPI should support [the Appellant] in her efforts to take Psychiatric Nursing. She is very motivated and has already been accepted in to the program in [text deleted]. I think that pursuing other career options and having [the Appellant] do an assortment of other testing will simply be a waste of MPI's time and money.

[MPIC's psychologist's] opinion was corroborated by the report of [text deleted], [MPIC's vocational rehab consultant], in her Transferable Skills Analysis Report dated July 5, 2002. Prior to writing this report, [MPIC's vocational rehab consultant] had met with the Appellant and had reviewed a number of medical reports she received from MPIC in respect of the Appellant. [MPIC's vocational rehab consultant] had been requested by MPIC to identify alternative employment options for the Appellant and, after doing an extensive review, she concurred with [MPIC's psychologist]' recommendation that MPIC should support the Appellant's training as a Psychiatric Nurse.

The Commission notes that the [text deleted] had concluded that the Appellant, whose formal education ended after Grade 12, who had taken several short courses at [text deleted] between 1995 and 1997, and who had worked in a variety of different routine jobs, had the intellectual ability to be accepted in the Psychiatric Nursing four year program.

As well, the Commission had the opportunity of hearing the Appellant testify, both in examination-in-chief and cross-examination, and concluded that the Appellant was a very impressive witness, who demonstrated a keen intelligence in her examination-in-chief and cross-examination. Having regard to the decision by the [text deleted] in accepting the Appellant in to the Psychiatric Nursing program, the opinions of [MPIC's psychologist] and [MPIC's vocational rehab consultant], and the Commission's own assessment of the Appellant, the Commission is satisfied that the Appellant has established, on a balance of probabilities, that she did have the intellectual abilities to attend the university program.

Unfortunately, the Internal Review Officer erred in his Internal Review Decision dated March 14, 2003 when he concluded that the case manager considered all of the relevant statutory requirements in arriving at the two-year determination. There is no consideration given by the case manager or the Internal Review Officer in their decisions that either of them considered whether or not the Appellant had the intellectual abilities to successfully complete the Psychiatric Nursing course. The Commission therefore finds that the Internal Review Officer erred in failing to consider the factor of intellectual abilities of the Appellant at the time of the two year determination pursuant to Section 109(1)(a) of the MPIC Act.

**The knowledge acquired in a rehabilitation program, Section 109(1)(b) (of the MPIC Act)**

The Commission notes that the case manager in her decision determining the Appellant's two year employment as an Industrial Supplies Sales Representative stated "*This position draws on the skills and experience you have already obtained through your previous work history.*" Unfortunately, the case manager failed to consider the factor of knowledge in Section 109(1)(b) in arriving at her decision.

The Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. As a result, the Internal Review Officer, like the case manager, considered factors such as education, work experience and skill that the Appellant acquired prior to the motor vehicle accident in arriving at his decision but failed to consider the knowledge the Appellant acquired subsequent to the motor vehicle accident in the rehabilitation program in accordance with Section 109(1)(b) of the MPIC Act.

An examination of the documentary material filed at the appeal hearing demonstrates that MPIC made efforts to rehabilitate the Appellant to attempt to return her to the skill and psychological status prior to the first motor vehicle accident. [MPIC's doctor], in her Inter-Departmental Memorandum dated April 30, 2002, stated:

The claimant attended an initial assessment at the [rehab clinic #1] on December 1, 1999. The results of this evaluation indicated readiness to attend a six-week work hardening program involving physical conditioning, work simulation and educational sessions. A counsellor was also suggested to assist with establishing effective coping mechanisms.

The rehabilitation report of June 13, 2000 reviews the work hardening program components, noting the incorporation of a variety of schedule changes and modifications. The claimant experienced difficulty participating in programming due to increase in low back pain. Eventually, it was noted that the claimant's emotional status declined and as a result, the program was discontinued on May 17, 2000. The goal of return to work as a plastics technician was not obtained at that time. The claimant was encouraged to continue with a home-based activity program. A referral to [Appellant's pain

management specialist] was recommend (sic) to assist the claimant with pain management.

An external case manager, [text deleted], because (sic) involved in June 2000 to assist in coordinating rehabilitation and eventual return to work. In her report of July 10, 2000, [Appellant's external case manager] reviewed the history of treatment, noting the claimant having recently attended two appointments with [Appellant's pain management specialist] where she received acupuncture. [Appellant's pain management specialist] had recommended an increase in antidepressant medications. Following her initial meeting with [Appellant's external case manager], the claimant agreed to a referral to a psychologist. It was felt that depression presented as a major barrier to physical recovery. It was [Appellant's external case manager's] understanding that the physical injuries would have good rehabilitation potential. It was hoped that addressing depression and pain would facilitate recovery and return to work.

The Appellant was referred to [text deleted], a psychiatrist, who assessed that the Appellant suffered from a major depression and subsequently the Appellant entered into therapy sessions with [text deleted], who is a psychiatrist, and [text deleted], who is a psychologist. Subsequently, the Appellant was referred to MPIC's consultant, [text deleted], a psychologist, who in his report to MPIC made the following diagnosis:

. . . Axis I- Pain Disorder, Associated With Both Psychological Factors and a General Medical Condition, Chronic, Major Depressive Disorder, In Partial Remission; Axis II Borderline Personality Disorder;

The Appellant then entered a graduated return to work program in July of 2001 under the auspices of MPI. Unfortunately, the Appellant was involved in a second motor vehicle accident on December 8, 2001 and suffered a back injury. As a result, the Appellant then attended [rehab clinic #2] for rehabilitation assessment and a functional capacity evaluation on March 2, 2002, and subsequently continued with treatment by [Appellant's psychiatrist].

The Appellant testified at the appeal hearing that, as a result of the initial motor vehicle accident, she suffered from a severe depression and was treated by both psychologists and psychiatrists over several years under the auspices of MPIC. She further testified that:

1. as a result of her personal experience with depression, her contact with psychologists and psychiatrists, and meeting other persons who suffered from psychological or psychiatric problems, she developed a keen interest in psychiatry and a strong desire to help other persons who suffer from psychological problems; and
2. due to the knowledge she obtained during the MPIC rehabilitation process, desired to become a psychiatric nurse.

The Commission concludes that the Appellant's illness, her contact with caregivers in the field of psychiatry and psychology, as well as her contact with people who had psychological problems, had a profound impact on the Appellant's interests, her values, her view of life, her aspirations and the nature of the employment she wished to carry out for the rest of her working career.

The Commission notes that [MPIC's vocational rehab consultant], concluded in her report to MPIC that the Appellant had the social skills necessary to be a Psychiatric Nurse.

The Commission is satisfied that, having regard to the knowledge that the Appellant gained while participating in the MPIC rehabilitation program, together with her high interest in the social realm, the Appellant was highly motivated to become a Psychiatric Nurse, and was admitted into the program at the [text deleted] at the time the two year determination was made by MPIC. The Commission also finds that the Appellant was a credible witness and accepts her testimony in respect of the impact the rehabilitation program had upon herself and the knowledge she gained from this program.

It is for these reasons that the Commission determines that the case manager's decision in determining the Appellant's two year employment as an Industrial Supplies Sales Representative was flawed. The Commission determines that the Internal Review Officer, in confirming the case manager's decision and in rejecting the Appellant's Application for Review, failed to consider, pursuant to Section 109(1)(b) of the MPIC Act, the knowledge in the rehabilitation program she had participated in.

### **Cost Benefit Analysis**

The Commission finds that the case manager in determining the two year employment of the Appellant as a Industrial Supplies Sales Representative placed a great deal of weight upon a faulty Cost Benefit Analysis.

The case manager, in arriving at her decision, stated:

On the basis of the information gathered, a Cost Benefit Analysis was completed. On the basis of that analysis, Manitoba Public Insurance is prepared to sponsor you through a two year re-training program, and recommends a two year Business Administration program at [text deleted] that would result in a determined employment of Industrial Supplies Sales Representative. This position draws on the skills and experience that you had already obtained through your previous work history.

The case manager, based on a Cost Benefit Analysis, determined that the most economical program was the two year Business Administration course at [text deleted]. However, an examination of the case manager's Cost Benefit Analysis, dated July 23, 2002, does not demonstrate to the Commission that the most economical program would be the two year Business Administration program rather than the four year Psychiatric Nursing program. The case manager, in her decision, stated:

You had requested that Manitoba Public Insurance consider sponsoring you in a four year Psychiatric Nursing program offered at the [text deleted]. It is your option to choose an alternate educational program, however, Manitoba Public Insurance is not

able to sponsor you for the full period of time, given the results of the cost benefit analysis done that indicates the recommended two year program, which would be sufficient to recoup your G.Y.E.I. (underlining added)

The Appellant in her testimony challenged MPIC's Cost Benefit Analysis and testified that in her view the option chosen by MPIC is not the most economical program. The Appellant acknowledged that initially the two year Business Administration program would be cheaper than the four year Psychiatric Nursing program. However, the Appellant testified that:

1. she was not interested in business or in sales and would not be interested in participating in the Business Administration program at [text deleted] and becoming an Industrial Supplies Sales Representative.
2. as a result, during the rest of her working career as an Industrial Supplies Sales Representative she would not be successful and probably not earn more than the minimum amount payable within this job classification.
3. as a further result thereof, MPIC would be required, over the balance of her working career, to top up her income in order to achieve a comparable salary to that which she was earning as a Plastics Technician prior to the motor vehicle accident of approximately \$38,000.
4. however, upon graduation as a Psychiatric Nurse she would be able, immediately, to earn a salary comparable to that which she previously earned as a Plastics Technician and, as a result, MPIC would not be required to top-up her income over the course of her working career.

The case manager prepared a Cost Benefit Analysis on July 23, 2002 wherein three options in respect of the two year employment for the Appellant were set out. In respect of option numbers two and three, the case manager stated:

OPTION #2: 2 year [text deleted] program + job search. This option would mean 3 years full IRI then top up IRI for several years or until age 65 and then possible RIB. Also included would be cost of 2 year program (tuition, books, etc).

NOC 0631 – Hotel & Restaurant Admin - \$459,013 + possible RIB

NOC 6221 – Business Admin \$84,309

NOC 1226 – Tourism/conference & event planner - \$151,838 + possible RIB

OPTION #3: 4 year Psychiatric Nursing Program ([the Appellant's] request) + job search. This option would mean 5 years full IRI + tuition and books.

NOC 3152.4 – Psych Nursing - \$141,938

The most cost effective option is NOC 6221 under Option #2: Business Administration Program at RRC – for a job in Technical Sales, specifically – Industrial Supplies Sales Representative at a cost of \$84,309.

The Commission notes that initially the Appellant accepted MPIC's two year determination for employment as an Industrial Supplies Sales Representative and obtained MPIC's agreement to apply her entitlement to three years of full IRI, plus the cost of the two year program (tuition and books) for her Psychiatric Nursing program. The Appellant, in her testimony, indicated that she subsequently reversed her position and requested that MPIC fully fund the four year Psychiatric Nursing program, plus the cost of the program (tuition and books). The Appellant in her testimony explained that she had reversed her position after having the opportunity of examining the Cost Benefit Analysis report, dated July 23, 2002, prepared by the case manager, which determined that the two year [text deleted] program was the most cost effective option available for the Appellant.

The Appellant further testified that upon examination of the Cost Benefit Analysis she discovered that MPIC would be required to top-up her salary if she became an Industrial Supplies Sales Representative for the rest of her working life but would not be required to top-up her salary if she became a Psychiatric Nurse. The Appellant concluded that the Cost

Benefit Analysis report was flawed and, as a result, reversed her position and requested MPIC to fully fund the Psychiatric Nursing program. The Commission accepts the Appellant's explanation as to the reasons why she initially accepted and then rejected MPIC's two year employment determination.

The Commission, having considered the Cost Benefit Analysis prepared by the case manager in her report dated July 23, 2002, and having considered the testimony of the Appellant, is satisfied that the Appellant is correct in asserting that the most cost effective option available to MPIC was the Psychiatric Nursing program and not the Business Administration program.

The Commission accepts the Appellant's testimony that:

1. she had no interest in pursuing a business career;
2. she had no interest in taking the Business Administration program at the [text deleted];
3. she had no interest in becoming an Industrial Supplies Sales Representative
4. she therefore would not be successful in this job classification;
5. she would be unable, within a reasonable period of time, to earn a salary comparable to the salary she earned as a Plastics Technician prior to the occurrence of the motor vehicle accident.

The Commission therefore determines that the Appellant would not have been successful in this occupation, would earn a modest salary if she pursued this occupation, and that MPIC would be saddled with a significant cost over the Appellant's working life to top-up her salary to a salary comparable to that which she earned prior to the motor vehicle accident.

The Commission therefore concludes that the cost benefit analysis, which was an extremely important factor in the case manager determining the two year employment of the Appellant and rejecting her request to fund a four year Psychiatric Nursing program was flawed. The Internal Review Officer, in his decision to dismiss the Appellant's Application for Review, erred in failing to reject the case manager's Cost Benefit Analysis as flawed.

### **Applications of Sections 109, 115 and 150 of the MPIC Act**

The Internal Review Officer, in his decision dated March 14, 2003, states:

Although replacing pre-accident earnings is a laudable goal of any retraining program, the legislation does not require that the determined employment replace those earnings. Often this simply is not possible.

Where there is a shortfall, Section 115 may apply to augment the claimant's IRI. But a shortfall does not, in and of itself, indicate that the determination was not done properly and in accordance with the legislation.

The Internal Review Officer's decision is inconsistent with MPIC's policy as set out in a document entitled "Personal Injury Protection Plan" published by Manitoba Public Insurance and available to the public. It should be noted that this document clearly states:

***This Guide provides information, not advice or legal interpretations.***

This Guide describes the coverages and benefits available under the Personal Injury Protection Plan (PIPP). If any differences arise over interpreting what this Guide says and what the law says, the law applies.

At page ii, this document states:

#### **How this Guide can help you**

This Guide is a sincere effort to explain PIPP in plain language.

The Commission notes that the contents of this document are subject to the limitations outlined above but also notes that the document does reflect the policy of MPIC in respect of providing benefits to members of the public under the Act.

In respect of determining employment after two years, the guide states that a job search is conducted during the next year and when this job search is over there are three possibilities:

1. You have work that pays the same or more than the income replacement you have been receiving. Income replacement ends.
2. You have work that pays less than the income replacement you have been receiving. You'll continue to receive some income replacement to "top up" your new employment income. (underlining added)
3. You have not found work. Income replacement will be reduced by the income set for your determined employment.

Section 110(1)(d), Section 115 and Section 150 of the MPIC Act state:

**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:

.....

(d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;

**I.R.I. for reduced income from determined employment**

**115** If a victim becomes able to hold employment determined for him or her under section 107 or 108 but, because of bodily injury caused by the accident, earns from the employment a gross income that is less than the gross income used by the corporation to compute the income replacement indemnity that the victim was receiving before the employment was determined, the victim is entitled, after the end of the year referred to in clause 110(1)(d), to an income replacement indemnity equal to the difference between the income replacement indemnity the victim was receiving at the time the employment was determined and the net income the victim earns or could earn from the employment.

**Corporation to advise and assist claimants**

**150** The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

The Commission finds that the Internal Review Officer erred in interpreting Section 109 in respect of topping up new employment income. The Commission acknowledges that read in isolation, the Internal Review Officer is correct in determining that Section 109 does not require that the determined employment replace pre-accident earnings. However, when interpreting provisions of an Act, the Act as a whole must be considered. As a result, in the Commission's view, Section 109 must be read together with Section 115, and Section 150 in determining the compensation that an Appellant should receive as a result of the two-year determination and the Internal Review Officer failed to do so.

The Internal Review Officer, when arriving at his decision, considered only Section 109 and failed to consider the relationship between Section 109, 115 and Section 150 of the MPIC Act. Where as a result of a two year determination under Section 109 there is a shortfall of employment income, Section 115 requires MPIC to augment the Appellant's IRI. As well, Section 150 requires MPIC to advise, assist the Appellant and endeavor to ensure that the Appellant was informed and receives the compensation to which the Appellant is entitled to under the Act. The Commission finds that when MPIC is determining the two year employment MPIC must, where it is reasonable to do so, endeavor to determine an appropriate employment that will not require a top up of income rather than an employment which will require a top up of income. The Commission therefore concludes that had the Internal Review Officer rejected the case manager's faulty Cost Benefit Analysis and considered the relationship between Section 109, 115 and Section 150 that the Internal Review Officer would have accepted the Appellant's Application for Review, he would have determined that the Appellant's two year employment should be that of a Psychiatric Nurse and he failed to do so.

**Application of Section 109(1)(a) of the MPIC Act**

The Commission finds that the Internal Review Officer in determining the two year employment pursuant to Section 109(1)(a) of the MPIC Act erred in failing to consider the Appellant's interest, enthusiasm and motivation in becoming a Psychiatric Nurse were relevant factors.

The Internal Review Officer, in his decision confirming the case manager's decision, stated:

The TSA clearly considered all of the elements of Section 109(1)(a). Much has been made of the fact that [the Appellant] was not interested in pursuing any of the options developed by PRO, but you will note that interest in, or enthusiasm for, the determined employment is not one of the required considerations.

The Commission notes that the Internal Review Officer found that the Appellant's interest or enthusiasm for employment as a Psychiatric Nurse was not a factor specifically set out in Section 109 and, therefore, the case manager was not required to consider this factor in determining the two year employment. It should also be noted that the case manager based her decision on the Appellant's previous skills, work experience, and the Cost Benefit Analysis. An examination of Section 109 of the MPIC Act does not specifically set out as a factor the cost of the retraining program in deciding the determined employment.

However, the Commission finds that although the cost of the retraining program is not set out in Section 109, it is reasonable for the case manager in applying Section 109 to have conducted a Cost Benefit Analysis and consider this Analysis as an important factor in determining the Appellant's employment. Although Section 109 does not specifically require MPIC to consider the costs of a retraining program, it would in the Commission's view be unreasonable for MPIC to ignore the cost of retraining the Appellant. If for example MPIC determined that an Appellant, as a result of a two year determination, was entitled to a certain kind of

employment, MPIC would be entitled as a result of a Cost Benefit Analysis, to determine the educational institution where the training would occur. If retraining for that program was available at an educational institution in Manitoba, the Appellant could not demand that the training occur in some educational institution in the United States where the cost of the program would be significantly higher than the cost in Manitoba. In these circumstances it would be appropriate for MPIC to consider the cost of retraining and reject the Appellant's request to be retrained in the United States rather than in Manitoba.

The Commission is therefore of the view that it is not only reasonable for MPIC in interpreting Section 109 to consider the costs of retraining, but also it was reasonable for MPIC to consider the interests and motivation of the Appellant in a particular career in determining the two year employment. The Commission finds that if the Internal Review Officer had conducted a purposive analysis of Section 109 he would have concluded that the interest and enthusiasm of the Appellant for a career in Psychiatric Nursing were relevant factors to consider in respect of the two year employment.

The case manager did properly consider that costs were a relevant factor in determining the Appellant's two year employment but unfortunately failed to address the Appellant's interest and motivation to participate successfully in the Psychiatric Nursing program. The Internal Review Officer therefore erred in concluding that the case manager had considered all relevant factors when determining the Appellant's two year employment as an Industrial Supplies Sales Representative.

The Internal Review Officer's comments that the Appellant's interest or enthusiasm in determining the two year employment, is not one of the required considerations under Section

109(1)(a), are inconsistent with both the comments of MPIC's two consultants, [MPIC's psychologist] and Ms. [MPIC's vocational rehab consultant]. [MPIC's psychologist], in his report to the case manager dated June 24, 2002, stated:

When I met with [the Appellant], she presented very well. Her mood was upbeat and she seemed very motivated to move to [text deleted] and attend the Nursing program. All she was waiting for at that time was confirmation that she was accepted in the program which, according to a recent phone message from her, she has now obtained. We discussed her history of physical and psychiatric problems and the possible difficulties these may pose for her in such a program. She appeared realistic in her approach to these concerns and noted that her mood has been consistently good over the past year. . . .

In my opinion, MPI should support [the Appellant] in her efforts to take Psychiatric Nursing. She is very motivated and has already been accepted in to the program in [text deleted]. I think that pursuing other career options and having [the Appellant] do an assortment of other testing will simply be a waste of MPI's time and money. I believe that a formalized agreement should be drafted up by MPI's legal department outlining the commitment for retraining and addressing the other possible issues that might arise if she is unable to complete this program. I anticipate that [the Appellant] will be successful in her endeavour. (underlining added)

[MPIC's vocational rehab consultant] stated in her report to the case manager, dated July 5, 2002:

5. Employment options will reflect [the Appellant's] transferable skills and career interest assessments, physical demands, and education. (underlining added)

. . . .

7. Retraining options will reflect [the Appellant's] transferable skills and career interest assessments and physical demands. (underlining added)

. . . .

It was the intent of this report to identify alternate employment options for [the Appellant] based on her education and training, employment experience, transferable skills, interests and physical limitations. (underlining added)

. . . .

Even though I have identified several employment and retraining options that may be suitable for [the Appellant], she has emphasized that Psychiatric Nursing is her vocational goal and is eager to pursue it. [the Appellant] is willing to relocate at her own expense; she is willing to give up the one year of paid job search assistance; she is willing to pay for the last two years of the program and any additional incurred costs; she is

highly interested in the field of Psychiatric Nursing; and her attending Psychologist, [text deleted], recommends that MPI support her in this endeavor. In light of all these factors, it is unlikely that [the Appellant] would pursue anything beyond the Psychiatric Nursing program. I concur with [MPIC's psychologist's] recommendation and suggest that, should MPI support [the Appellant's] educational plan, then a formalized contract be drafted, such as a Vocational Rehabilitation Plan.

[MPIC's vocational rehab consultant] further stated in her report:

#### Appendix B

Throughout my meetings and conversations with [the Appellant], she has indicated that she is highly interested in pursuing the Psychiatric Nursing Degree program at [text deleted]. [the Appellant] has officially been accepted in to the program which commences September 4, 2002. . . . .

A career in Psychiatric Nursing identifies a high interest in the social realm. As noted in my analysis, [the Appellant] scored high in the social realm.

#### **Purposive Analysis**

The Internal Review Officer in interpreting Section 109 relied on the plain meaning of the words set out in Section 109 and failed to consider the purpose of the legislation in arriving at his conclusion and, as a result, rendered an unreasonable interpretation in respect of Section 109.

*Thorsteinsson v. Gimli School District No. 585*, (1962) 67 M.R., p. 247.

*Dauphin-Ochre School Division Area No. 1 v. Dauphin-Ochre Division Association No.*

*33 of the Manitoba Teachers' Society*, [1971] 4 W.W.R. 139.

The Manitoba Worker's Compensation Appeal Commission, in Victims' Rights Decision No. 2/03, [text deleted], succinctly reviewed a decision by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.*, 1998 1 S.C.R. 27, in respect of statutory interpretation. The

decision by the Worker's Compensation Appeal Commission considered not only this Supreme Court case but also the comments of Professor Ruth Sullivan, in the textbook *Sullivan and Driedger on the Construction of Statutes*, Fourth Edition, (Butterworths, 2002). Professor Sullivan, in this textbook, discusses the so called "Modern Principle" as described by Driedger in his first edition of this textbook. He wrote:

Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (ibid., at p. 1)

Professor Sullivan reviewed this decision and noted that the Ontario Court of Appeal had relied on the plain meaning of the words in the relevant statute. The Supreme Court rejected this interpretation as a unacceptable approach as it is incomplete. Mr. Justice Iacobucci, in a unanimous decision on behalf of the Supreme Court of Canada, adopted the "Modern Principle" approach the statutory interpretation based, at least in part, on Driedger's recognition "*that statutory interpretation cannot be founded on the wording of the legislation alone.*" (supra at p. 41). Mr. Justice Iacobucci also relied on Section 10 of the Ontario Interpretation Act, RSO 1980, c. 219, which "*provides that every Act 'shall be deemed to be remedial' and directs that every Act shall 'receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.'*" (supra p. 41).

Professor Sullivan further noted that in analyzing the purpose of the Act, Mr. Justice Iacobucci considered the consequences that would flow from adopting the plain meaning, pointing out that "*it is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.*" Professor Sullivan further stated: "*Finally, he noted that benefit-conferring legislation such as the ESA [Employment Standards Act] attracts a*

*liberal interpretation, such that any doubt arising from difficulties of language should be resolved in favour of the claimant.*” (Sullivan and Driedger on Constitutional Construction of Statutes at page 11) Professor Sullivan further stated:

The Supreme Court of Canada’s approach in the *Rizzo* case is exactly what is contemplated by the modern principle. Even though the language . . . did not seem to be ambiguous, . . . the Court nonetheless looked at the entire context, including the purpose and scheme of the Act and the consequences of adopting one interpretation as opposed to another. (supra pg. 11)

The Commission finds that the decision of the Supreme Court in *Re Rizzo and Rizzo Shoes Ltd.* (supra) supports a liberal approach to statutory interpretation and requires not only that the plain language of the legislation be considered, but also a purposive analysis of the legislation must be conducted in order to arrive at the meaning of the statute.

Section 6 of *The Interpretation Act of Manitoba* states:

**Rule of liberal interpretation**

6 Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

MPIC’s document entitled “Personal Injury Protection Plan” Section IV - Rehabilitation, states:

**Your coverage**

PIPP supports your return to normal activities as quickly as possible after the accident. If the injuries from the accident are so serious that you can’t resume your pre-accident employment and your pre-accident lifestyle, PIPP helps you minimize the effects of the accident and maximize your employment and personal opportunities. (underlining added)

MPIC’s Guide, as indicated earlier, is subject to certain limitations but it does set out its policy in respect of providing benefits to members of the public under the Act. The Commission also

notes that this policy, as set out herein, is consistent with Section 150 of the MPIC Act which states:

**Corporation to advise and assist claimants**

**150** The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

The object of the legislation was to assist the Appellant in a successful return to the workplace in a meaningful job with a salary comparable to that which she earned prior to the motor vehicle accidents. The Commission finds that MPIC failed to do so by ignoring not only the Appellant's vocational interests and motivation, but also the advice of their two consultants.

MPIC's psychological consultant, [text deleted], stated that MPIC should recognize the Appellant's desire to become a Psychiatric Nurse, acknowledge that she is very motivated, and that she had been accepted into the program at the [text deleted]. He further stated that in his view it simply would be a waste of MPIC's time and money to consider other career options and conduct an assortment of other testing in respect of the Appellant.

The Vocational Rehabilitation Consultant, [MPIC's vocational rehab consultant], also concluded having regard to the Appellant's social interests, that she concurred with [MPIC's psychologist]' recommendation that the best employment option for the Appellant was Psychiatric Nursing.

The Commission agrees with MPIC's two consultants that a successful retraining program requires that the Appellant be interested in the determined employment and be motivated to undertake the training in respect of the determined employment.

Unfortunately, the Internal Review Officer failed to consider the Appellant's motivation and interest in becoming a Psychiatric Nurse and rejected her Application for Review. The Commission finds that it was unreasonable for MPIC in determining the Appellant's employment to ignore her lack of interest in a business career, in participating in a Business Administration course in becoming an Industrial Supplies Sales Representative and, as well, ignore her desire to become a Psychiatric Nurse. The Commission finds that just as costs are an important factor in considering retraining that the interest and motivation of the Appellant in the career of psychiatric nursing were relevant factors which was not considered by the Internal Review Officer in his decision.

The Commission determines that the Internal Review Officer, in determining the Appellant's two year employment, erred by ignoring:

1. the motivation and interest of the Appellant in becoming a Psychiatric Nurse;
2. the opinions of MPIC's two consultants, [MPIC's vocational rehab consultant] and [MPIC's psychologist], who both indicated that the motivation and interest of the Appellant were the key elements in ensuring her successful retraining.

The Commission finds that, having regard to the purpose of the legislation as set out in Section 150 of the MPIC Act, and having regard to Section 6 of *The Interpretation Act of Manitoba*, the Internal Review Officer considered only the plain meaning of the specific provisions of Section 109 and did not pay sufficient attention to the scheme of the Act, its object or intention of the legislation and therefore erred in arriving at his decision to confirm the case manager's decision and reject the Appellant's Application for Review.

### **Decision**

The Commission notes that the Appellant has withdrawn her appeal in respect of reimbursement for travel expenses.

For the reasons outlined herein, the Commission finds that MPIC erred in determining the two year employment of the Appellant as an Industrial Supplies Sales Representative by failing to consider all of the relevant factors set out in Sections 107, 109, 115 and 150 of the MPIC Act, as well as Section 6 of *The Interpretation Act of Manitoba*. The Commission determines that the Appellant has established, on the balance of probabilities, for the reasons outlined herein, that on a consideration of all of the relevant factors, pursuant to Sections 107, 109, 115 and 150 of the MPIC Act and Section 6 of *The Interpretation Act of Manitoba*, the two year employment of the Appellant should be that of a Psychiatric Nurse.

The Commission directs that MPIC:

1. pay the Appellant her IRI benefits during her four year Psychiatric Nursing program at [text deleted]; and
2. pay the Appellant's university costs, including the costs of her university tuition and university textbooks resulting from her participation in the Psychiatric Nursing program at [text deleted].

As a result, the Appellant's appeal is allowed and the Internal Review Officer's decision dated March 14, 2003 is therefore rescinded with the exception of the decision relating to travel expenses.

Dated at Winnipeg this 22<sup>nd</sup> day of November, 2004.

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**MEL MYERS, Q.C.**

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**DIANE BERESFORD**

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**PAUL JOHNSTON**