Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-151

PANEL:	**Ms Jacqueline Freedman, Chairperson** **Mr. Tom Freeman** **Ms Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Ellery Strell;** **Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Steve Scarfone.**
HEARING DATES:	**October 27 and 28, 2015**
ISSUE(S):	**Whether the Appellant was properly classified as a student for the purposes of her entitlement to Income Replacement Indemnity benefits.**
RELEVANT SECTIONS:	**Subsections 70(1), 83(1) 84(1), 87(1), 87(2), 89(1), 89(2) 90(1), 90(2) and 106(1) and section 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

Background:

The Appellant,[text deleded], was injured in a motor vehicle accident on April 11, 2011 (the "MVA"). The Appellant suffered injuries to her neck, back, jaw, right arm, right leg, right hip, and chest. At the time of the MVA, the Appellant was in her fourth and final year of studies in the [text deleted] program at [University]. As well, she held part-time employment at the [text

deleted]. The Appellant was entitled to benefits under the MPIC Act in respect of her injuries, including Income Replacement Indemnity ("IRI") benefits. For IRI purposes, MPIC classified the Appellant as a "student".

The case manager advised the Appellant as follows, by decision letter dated March 28, 2014:

> "1. You are classified as a "student" for the purposes of determining your IRI entitlement pursuant to the Manitoba Public Insurance Corporation Act ("the Act") and Regulations since you were attending an educational institution on a full-time basis at the time of the accident;
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> ...
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> 4. You are not entitled to an indemnity pursuance (sic) to section 88 of the Act since your accident related injuries did not interfere with the completion of your studies.
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> ...
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> 5. You are entitled to, and have received IRI pursuant to section 89 of the Manitoba Public Insurance Corporation Act ("the Act") for the employment that you held at the time of the accident as an [text deleted] with the [text deleted]. Section 89 necessarily applies only to employment that you held while a student since there are other provisions in the Act specifically dealing with entitlements after the scheduled end of studies.
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> ...
>
> 6. You completed your studies but remain unable to hold employment therefore, you are entitled to an IRI based on the industrial average wage pursuant to sections 91(3) and 92 of the Act, since the industrial average wage is greater than the IRI you received for the employment you held while a student."

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer, in a decision dated September 12, 2014, upheld the decision of the case manager and agreed that the Appellant was correctly classified as a student for the purposes of IRI benefits. The Internal Review Officer stated as follows:

> "[The Appellant] met all the requirements of a [professional] graduate at the time of the accident. She had been attending a post-secondary education institution for four years and was 16 days short of completing the program. Because of her outstanding academic and clinical achievement, she was not required to complete the last three shifts of her

> clinical practice. She received official notice of "program completion" and the eligibility to begin work as a graduate [professional] as of April 28, 2011. In all probability, [the Appellant] would not have had any difficulty securing employment as a graduate [professional], had the accident not occurred.
>
> There are times when a case presents a unique situation where the entitlement to Income Replacement Indemnity benefits may need to be decided on its own merit. [The Appellant's] situation was presented as such; however, in keeping with the provisions of the legislation, [the Appellant] was correctly classified as a "student" at the time of the accident because she was still attending a post-secondary education institution.
>
> Accordingly, the Injury Claim Decision of March 28, 2014 is confirmed."

The Appellant disagreed with the Internal Review decision and filed this appeal with the Commission. The issue which requires determination on this appeal is whether the Appellant was properly classified as a student for the purposes of determination of her entitlement to IRI benefits.

Decision:

For the reasons set out below, the panel finds that the Appellant has met the onus of establishing, on a balance of probabilities, that she was not properly classified as a student for the purposes of her entitlement to IRI benefits.

Evidence for the Appellant:

The Appellant testified regarding her [text deleted] program at [University] (the "program"). She stated that the program was comprised of both academic courses and clinical practicum components. She started the program in the fall of 2007. The Appellant testified that prior to the MVA, she had completed all of the academic coursework and she was involved in the final component of the program, her eight week practicum at [text deleted]. The MVA occurred when the Appellant was on her way home from a shift at [text deleted]. At the time of the MVA, on April 11, 2011, she was scheduled to complete three more shifts. The last shift was scheduled

for April 18, 2011. Due to the Appellant's injuries, she was not able to complete the last three shifts of her practicum at [text deleted] and they were waived.

The Appellant testified that she spoke to her proctor, [text deleted], after the MVA when her medical status prevented her from doing anything further. The Appellant said that [Appellant's proctor] advised her that all her course requirements had been met and in fact exceeded, and that [Appellant's proctor] told her that the last three shifts would be waived. The Appellant testified that she believed that [Appellant's proctor] got back to her within a few hours to confirm that.

The Appellant testified that there is a course syllabus which outlines the skills required to be achieved through the program and the students know the course requirements. When questioned by the panel as to whether she was managing a full case load prior to the MVA, the Appellant indicated that this is the objective of the practicum components of the program. She indicated that she was doing all the [text deleted], all the [text deleted] and all the care for her assigned patients [text deleted].

The Appellant testified that after the MVA, there was nothing else that she was required to do in order to complete the program; no further coursework and no further practicum shifts. The Appellant stated that nothing further was required in order for her to get her degree. She graduated from the program and received her Bachelor of Science in [text deleted] on June 3, 2011. The Appellant testified that she received the Gold Medal in her program, in recognition of her having the highest grade point average in the program. As well, she was invited to join the [text deleted], which is an invitation extended only to the top students in all programs at the University. In addition, she was invited to be the [text deleted], which is another honour extended to students who achieve a high grade point average.

The Appellant also testified regarding her employment with [text deleted]. She indicated that she was employed there for seven years. Initially, she worked there full-time after graduation from high school, while she was making a decision as to what career to embark upon. Once she decided to enter the program, she maintained her employment at the [text deleted] as a casual job. The Appellant testified that it was a good part-time job because they allowed her to adjust her hours, depending on how busy school was and there were always hours available to her. In addition, she intended to work there on a casual basis after graduating from the program. The Appellant testified that she anticipated that even when she was employed full-time as a [professional], she would be able to work some part-time hours for the [text deleted]. She testified that she was a really hard worker and she needed the additional income from a part-time job, even if she would be working Monday to Friday as a [professional].

The Appellant testified regarding her prospects for employment as a registered [professional]. She indicated that before embarking on the program, she had researched employment opportunities and her research indicated that registered [professionals] were in high demand in Manitoba. In order to become a registered [professional], upon graduation, all that was required of her was to write the licensing exam. She was registered to do so in mid-May of 2011. Until then, upon graduation from the program she would have been qualified to work as a graduate [professional]. The [Appellant's professional licensing body] notified her that as of April 28, 2011 she was so qualified. The Appellant testified that she had no concerns about passing the licensing exam, given that she received the Gold Medal and had the highest grade point average in the program.

The Appellant testified that the salaries and benefits for graduate and registered [professionals] were fixed due to collective agreements with the employers. She was familiar with these agreements when she entered into the program. She indicated that she is a planner and that there is a certain level of job security that she wanted. Some facilities also offered a signing bonus in addition to these salaries. In addition, depending on whether you work evenings, nights or weekends, there would be a premium for shift work. The Appellant stated that in her practicum she was working a variety of shifts. The Appellant testified that immediately prior to the MVA she was looking at various jobs. She said that she would have been employable as of April 28, 2011 as a graduate [professional] and right after the scheduled exam in mid-May as a registered [professional], assuming that she passed. She had not yet applied for any jobs as of the time of the MVA, because she knew she would be hired immediately on application.

The Appellant testified that since the MVA, she has not been able to write the licensing exam. Her physical injuries have prevented her from being able to do so. She stated that some of the worst things for her physically are sitting and reading, and she has not been able to study. She testified that it has been difficult for her to see her peers proceed with their careers. She saw everyone in her program at graduation and they indicated to her that they had successfully gained employment. The Appellant testified that she is not working at this time. She is receiving IRI pursuant to the "student" provisions of the MPIC Act, at an amount equal to the industrial average wage.

Evidence for MPIC:

MPIC did not call any witnesses but did cross-examine the Appellant.

Counsel for MPIC confirmed with the Appellant that her first job after high school was at the [text deleted]. The Appellant also confirmed that she has still not been employed since the MVA, whether at the][TEXT DELETED] or otherwise.

Counsel for MPIC questioned the Appellant about the nature of the program. The Appellant stated that the program is comprised of academic courses and practicum sections. The practicum sections are intended to give the students work experience as well as practical experience. The Appellant stated that there are practicum components in the second, third and fourth years of the program. There is a significant six week practicum in third year as well as an eight week practicum in fourth year. The Appellant stated that the eight week practicum at [text deleted] was her final practicum of the program. The Appellant referred to a performance review provided by her preceptor at [text deleted] in June of 2010 from her six week practicum there, in which she received excellent performance reviews. She indicated that there is a similar performance review from her practicum at [text deleted]. The Appellant indicated that her proctor, [Appellant's proctor], indicated that she met and exceeded all requirements.

Counsel for MPIC questioned the Appellant regarding the three remaining shifts from her program that were waived. The Appellant stated that her last scheduled shift was April 18, 2011. The official end date of the program was April 22, 2011. The Appellant confirmed that all course work was completed prior to the beginning of the eight week practicum. Counsel for MPIC pointed to the various forms completed by the Appellant and indicated that she had identified herself as a student on those forms. For example, on her Application for Compensation, the Appellant checked a box that identified that she was "in full time attendance at an educational institution". The Appellant acknowledged this, but noted that she had added to the form additional information regarding the waiver of her final shifts.

Counsel for MPIC questioned the Appellant as to who waived the final three shifts and the manner in which that was done. The Appellant testified that she contacted [Appellant's proctor] shortly after the MVA. She stated that she provided [Appellant's proctor] with a document from her physiotherapist. The Appellant indicated that there was probably a few hours' delay. The Appellant wasn't certain whether [Appellant's proctor] provided the waiver by phone or by email. She was not able to provide any written confirmation from [Appellant's proctor] although she did point to the later Confirmation of Program Completion form received on April 27, 2011, from the [Appellant's professional licensing body].

Counsel for MPIC questioned the Appellant as to whether she had completed any applications for employment at the time of the MVA. The Appellant indicated that at the time of the MVA, she was doing a job search and completing her resume, because if she applied at a place that was heavily recruiting she would be accepted right away. She stated that she would have been able to start applying for jobs as of April 22, 2011. The Appellant said she could have worked as a graduate n[professional] as of April 27, 2011, on the understanding that she would write the licensing exam. The Appellant stated that she didn't have any pending offers at that time because she hadn't applied for any jobs. The Appellant confirmed that she would not be able to point to any lost employment income as a graduate or licensed [professional] because she had not yet been employed as such at the time of the MVA, but she would be able to provide the union pay scale.

Counsel for MPIC questioned the Appellant as to whether her future income would have been certain. The Appellant stated that graduate [professionals] and registered [professionals] are both in the union. She stated that it was a virtual certainty that she would become a registered

[professional] at some point. The licensing authority was very accommodating to her. She was allowed to postpone the licensing exam several times and would have been permitted to work as a graduate [professional] until she wrote it, until she had to postpone it indefinitely. She presumed she would have passed it when she wrote it, given her excellent grades in the program.

Submission for the Appellant:

Counsel for the Appellant submitted that the issue to be determined is whether the Appellant was correctly classified as a student for the purposes of determining her IRI benefits. He submitted that she was not correctly classified as a student, and therefore she is entitled to greater IRI benefits under another classification. He further submitted that even if she was correctly classified as a student, she is still entitled to greater IRI benefits.

Counsel for the Appellant referred to the definition of "student" in subsection 87(2) of the MPIC Act. In that subsection, a "student" falls within that definition "until the day the student completes, abandons or is expelled from his or her current studies". Counsel for the Appellant submitted that the Appellant completed her studies as of the date of the MVA. He further submitted that this is accepted in the Internal Review decision of September 12, 2014, by the Internal Review Officer who stated as follows, at page 6: "[The Appellant] met all the requirements of a [professional] graduate at the time of the accident".

Counsel for the Appellant also pointed to the March 28, 2014, decision of the case manager, which states "your accident related injuries did not interfere with the completion of your studies". He submitted that this was consistent with the Appellant's evidence that after the MVA there were no further steps she had to take and nothing further that she had to do in order to complete the program.

Counsel for the Appellant submitted that the fact that the Appellant received the official notice of program completion several days after the MVA does not detract from the fact that the program was in fact completed as of the date of the MVA. The MPIC Act is a snapshot that can be clarified by subsequent events to determine the Appellant's status at the time of the MVA.

Counsel submitted that since the Appellant had completed her studies at the time of the MVA and therefore did not fall within the definition of a student, the Appellant thus met the definition under subsection 70(1) of a part-time earner, because at the time of the MVA she was working on a part-time basis for the [text deleted]. Counsel for the Appellant submitted that the Appellant was unable to continue to hold the employment with the [text deleted] and accordingly, pursuant to the provisions of the MPIC Act applicable to part-time earners, the Appellant would be entitled to IRI based on the loss of income from her employment with the [text deleted] and as well the loss of income from her future employment as a registered [professional].

Although the Appellant was not employed as a registered [professional] at the time of the MVA, counsel for the Appellant submitted that she had a strong probability of employment in that field, and on this basis IRI could be awarded to her. Counsel referred the panel to a decision of AICAC from May 6, 1996, which found that "the claimant needs only to establish the likelihood of those earnings on a reasonably strong balance of probabilities". Counsel for the Appellant submitted that based on that case, the Appellant does not need to have had a promised job; rather, there only needs to be a strong probability of employment, and the evidence is more than sufficient here. He pointed to the Appellant's Gold Medal and the fact that she graduated at the top of her class; the Appellant's evidence of her discussions with her classmates at graduation regarding their success in gaining employment; the Appellant's testimony regarding the quick hiring

process; and the acknowledgement in the Internal Review decision that "in all probability [the Appellant] would not have had any difficulty securing employment as a graduate [professional], had the accident not occurred".

Counsel for the Appellant submitted that under the provisions applicable to part-time earners, after 180 days a determination would be made under section 106 of the MPIC Act as to a determined employment for the Appellant. He submitted that the logical determined employment for the Appellant would be as a registered [professional].

In the alternative, counsel for the Appellant submitted that even if the Appellant was properly classified as a student, rather than as a part-time earner, then she should be entitled to a greater IRI than what she is receiving. Counsel for the Appellant referred to the decision of the case manager that the Appellant was properly classified as a "student", which resulted in the Appellant receiving IRI at the rate of the industrial average wage ("IAW"). Counsel submitted that the IAW is typically applied in a situation where the victim is a high school student whose career path has not been established. Counsel submitted that in this case, we know the exact career path of the Appellant.

Counsel for the Appellant referred the panel to subsection 89(1) of the MPIC Act, which is contained in the student provisions. That subsection provides, in part, 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; ...

Counsel for the Appellant submitted that this provision should be given a broad interpretation and that it could be applied with respect to any employment which the Appellant is unable to hold at any time after an accident. He submitted that this section could be interpreted to provide the Appellant with IRI in respect of her lost wages as a registered [professional]. He argued against the narrow interpretation imposed on this provision by MPIC, which applied it only until the scheduled end date of the program.

Counsel for the Appellant referred the panel to section 92 of the MPIC Act, which provides that "a student who is entitled to an income replacement indemnity under section 89 and under section 90 or 91 shall receive whichever is the greater". Counsel submitted that this section is reflective of a philosophy in the legislation to allow the greatest possible IRI to appellants generally. He submitted that the Commission should embrace this philosophy and interpret section 89 broadly and equitably.

Counsel for the Appellant submitted that there is no real doubt that, but for the MVA, the Appellant would have been employed as a registered [professional]. Counsel for the Appellant noted that the Appellant's intention was to work casual hours with the [text deleted] after her graduation and obtain full time employment as a registered [professional] after taking the licensing exam. He submitted that the Commission is not bound to treat the Appellant as a student and that the legislation should be interpreted broadly to produce an equitable result.

Counsel for the Appellant submitted that his primary argument is that the Appellant was not a student at the time of the MVA because she did not meet the definition at that time, since she had completed her studies. As a result, she falls within the definition of a part-time earner. Counsel submitted that his secondary argument is that even if she is properly classified as a student, she is

still entitled to further IRI based on the provisions of section 89 of the MPIC Act. As a third alternative, counsel for the Appellant submitted that section 108 of the MPIC Act could be applied to result in additional IRI for the Appellant, based on equitable principles, using the philosophy of providing the greatest IRI to appellants. Counsel for the Appellant submitted that his goal is to demonstrate the facts of the Appellant's situation and review the legislation and achieve an equitable result. He submitted that based on the evidence, it is clear that but for the MVA, the Appellant would have been employed as a registered [professional] and the legislation must be applied in a just and equitable manner. He submitted that the Internal Review decision is wrong and cannot be upheld.

Submission for MPIC:

Counsel for MPIC submitted that although MPIC sympathizes with the Appellant, the law doesn't allow for any finding other than that she was a student. Benefits under Part II of the MPIC Act are tied to the time of the MVA, which is the moment at which benefits are crystallized.

Counsel for MPIC submitted that the beginning point is the definition of "student" in subsection 70(1) of the MPIC Act, which is someone who is attending school "on a full-time basis". Counsel submitted that the Appellant, at the time of the MVA, was on her way home from her practicum at [text deleted]. At that moment, nothing had yet been waived and she had not yet graduated. Counsel submitted that at the time of the MVA, the Appellant was fully intending on finishing those three final shifts of her practicum.

Counsel for MPIC submitted that although the Appellant did not attend the three final shifts of her practicum, she was required to speak to her proctor, who had to get permission from the

University to waive the shifts, and without that permission she would not graduate. In other words, something had to be done in order for her to graduate. Counsel for MPIC submitted that therefore, the Appellant was still a student at the time of the MVA. Counsel also pointed to the forms that the Appellant had filled out in which she identified herself as a student, as supporting his position.

Counsel for MPIC submitted that the earliest date that the Appellant's studies could be considered to be completed could be the date that the proctor waived the three shifts. Although the evidence on this is unclear, in that it may have happened very quickly, within a day or two of the MVA, it was definitely at a point in time which was after the MVA. Counsel for MPIC submitted that other possible dates which could be considered for the completion of studies are the official end date of the program, April 22, 2011, or the convocation, which was in June, 2011, or possibly the date on the forms when she identified herself as a student (for example the Application for Compensation, which was dated May 26, 2011). In any event, all of the foregoing dates are after the date of the MVA, which lead to the conclusion that as of the date of the MVA the Appellant still met the definition of "student" contained in subsection 87(2) of the MPIC Act.

Counsel for MPIC submitted that the phrase that is fatal to the Appellant's position is "at the time of the accident" which is contained in the definition of "student" in subsection 70(1) of the MPIC Act. He submitted that there is nothing in the MPIC Act that would allow retroactivity or that would allow the panel to look at what happens after the accident. He submitted that there needs to be a cut-off, a date when benefits crystallize. Counsel for MPIC submitted that otherwise the panel will enter onto a slippery slope, as one can imagine, for example, a student in their first year of studies, or their second year of studies, up to their final year of studies and

counsel submitted that this would lead to a difficult situation as it would be hard to know where the cut-off is if the panel does not use the date of the accident.

With respect to section 89 of the MPIC Act, counsel for MPIC submitted that this section is only applicable to students, and in the Appellant's case it ceased having application upon the official end date of the program, April 22, 2011. Counsel for MPIC further submitted that there was not a strong probability of employment for the Appellant as a registered [professional]. He submitted that in fact it was speculative. He submitted that based on the evidence, the Appellant did not have an updated resume, she had not had any job interviews, she had not yet passed the licensing exam. Therefore, her chances of a job were remote. She had no job offers and no applications for employment had even been sent out. In fact, she was still thinking about where she wanted to apply. Counsel for MPIC submitted that it may even be possible to interpret the Employer's Verification of Earnings form as indicating that the Appellant may work full-time at the [text deleted] after her graduation, although he acknowledged that he did not question the Appellant about this. Counsel for MPIC submitted that it would be difficult to impute to the Appellant the occupation of registered p[professional] with the union wages and he disagrees with the comments in the Internal Review decision on that point. In any event, counsel submitted that there would be no relevance to imputing the wages of this occupation to the Appellant since section 89 is inapplicable.

Counsel for MPIC submitted that the panel is bound by the MPIC Act and submitted that there is no getting around the fact that at the time of the MVA the Appellant was a student. He submitted that a student is never entitled to anything greater than the industrial average wage, and nothing more can be imputed to them. The purpose of the student provisions of the MPIC

Act is to get injured students rehabilitated and back into the workforce. Counsel for MPIC submitted therefore that the Internal Review decision should stand.

Reasons for Decision:

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer dated September 12, 2014, is incorrect. In particular, the Appellant needs to show, on a balance of probabilities, that the decision to classify the Appellant as a "student" for the purposes of her entitlement to IRI benefits was not made in accordance with the applicable statutory provisions. Those provisions are as follows:

> **Definitions**
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> 70(1) In this Part,
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> ...
>
> **"part-time earner"** means a victim who, at the time of the accident, holds a regular employment on a part-time basis, but does not include a minor or a student;
>
> **...**
>
> **"student"** means a victim who, at the time of the accident, is
>
> (a) 18 years of age or older and attending a secondary or post-secondary educational institution on a full-time basis, or
>
> (b) a minor who has met the requirements for receiving a high school diploma or provincial certificate of completion and is attending a post-secondary educational institution on a full-time basis;
>
> ...
>
> **Entitlement to I.R.I. for first 180 days**
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> 83(1) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;
>
> (b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

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

84(1) For the purpose of compensation from the 181st 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.

Interpretation of sections 87 to 92

87(1) For the purpose of sections 87 to 92 (students),

"current studies" means studies that are part of a program of studies at the secondary level or post-secondary level that, at the time of the accident, the student has admission to begin or continue at an educational institution;

"school year" at the secondary level means the period commencing July 1 and ending on June 30 in the following year;

"secondary level" means grades 9 to 12.

Student at secondary, post-secondary institution

87(2) For the purpose of sections 87 to 92 (students), a student is considered to be attending a secondary or post-secondary educational institution on a full-time basis from the day the student is admitted by the educational institution as a full-time student in a program of that level until the day the student completes, abandons or is expelled from his or her current studies, or no longer meets the requirements of the educational institution.

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;

(b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

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,

(ii) the student is or could have been self-employed, the gross income that is determined in accordance with the regulations for an employment of the same class, or that the student earned or would have earned from the employment, whichever is the greater, and

(iii) the student holds or could have held more than one employment, the gross income the student earned or would have earned from all employment that he or she is unable to hold because of the accident;

(b) under clause (1)(b), the benefit that would have been paid to the student.

I.R.I. for student unable to begin or resume studies

90(1) A student who, after the day scheduled at the time of the accident for completion of his or her current studies, is unable because of the accident to begin or to continue the studies or to hold employment, is entitled to an income replacement indemnity for as long as he or she is unable to hold employment because of the accident.

Determination of I.R.I.

90(2) The corporation shall determine the income replacement indemnity of the student on the basis of a gross income equal to a yearly average computed on the basis of the industrial average wage for each of the 12 months preceding July 1 of the year before the scheduled day of completion of his or her current studies.

Student entitled to greater I.R.I.

92 A student who is entitled to an income replacement indemnity under section 89 and under section 90 or 91 shall receive whichever is the greater.

Factors for determining an employment

106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st 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.

After a careful review of all the reports and documentary evidence filed in connection with this appeal, and after hearing and giving careful consideration to the evidence of the Appellant and the submissions of counsel for the Appellant and counsel for MPIC and taking into account the provisions of the relevant legislation, the Commission finds as follows:

Discussion:

At the time of the MVA, the Appellant was on her way home from a shift of her practicum at [text de;eted]. Counsel for MPIC submits that because the Appellant still had three shifts left in her practicum, she falls within the definition of "student" contained in subsections 70(1) and 87(2) of the MPIC Act. Counsel for the Appellant submits that since those shifts were waived shortly after the MVA and since the Appellant was not required to do anything further in order to graduate, therefore at the time of the MVA the Appellant had completed her studies and no longer met the definition of "student". Although the parties made submissions with respect to the interpretations of various other sections of the MPIC Act, their primary arguments relate to the interpretation of subsection 87(2) of the MPIC Act and so those will be addressed first.

A starting point for the interpretation of the legislation in Manitoba is the Interpretation Act, which applies to the interpretation of all legislation. Section 6 of that Act provides as follows:

> **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.

Subsection 87(2) of the MPIC Act provides that a student ceases to be a student for the purposes of the IRI student provisions when "the student completes, abandons, or is expelled from his or her current studies". The issue here is whether the Appellant had "completed" her studies at the time of the MVA. Webster's New World College Dictionary, fourth edition, provides the following definition for the word "complete": "to end; finish; conclude".

The Appellant's evidence was that as of the time of the MVA, she had met and in fact exceeded all of the requirements of the program. She testified that she knew the course requirements from the syllabus, and that prior to the MVA, she had been managing a full case load in her practicum.

The Appellant further testified that shortly after the MVA she called her proctor, [text deleted], who advised, after checking with the University, that she was not required to complete her final three shifts. [Appellant's proctor] advised her that at the time of the accident, she had done everything that she needed to do in order to complete her studies. She received confirmation of program completion on April 27, 2011. With no further work being done by the Appellant after the MVA, she graduated from the program and received the Gold Medal for having the highest grades in the program.

The Appellant, in filling out MPIC's Verification of School Attendance Form, which was signed by her on May 12, 2011, and by [text deleted] from the program's Registration/Records department on May 20, 2011, appended the following note:

> "*I am providing this information to help explain where I was at with my studies at the time.
>
> When the accident occurred on April 11, 2011, I was near the completion of the final component of the [text deleted]. I was completing my Senior Integrated Practicum at [text deleted]. My final required shift and course evaluation were scheduled for April 18, 2011. The final day of the course was April 22/11. Due to the accident, I was not able to complete my three final clinical shifts, as supported by both the doctor and physiotherapist.
>
> My faculty advisor at [University] felt I had more than met all the course requirements and secured approval from the University that I did not have to make up these three final shifts due to the circumstances. Thus, I successfully completed my Senior Practicum and my graduation was not affected by the accident."

Counsel for MPIC submitted that the fact that the Appellant's proctor was required to receive permission from the University in order to waive the shifts, and even that the three shifts were

required to be waived, means that in fact the Appellant's program of studies was not completed until some point in time after the MVA. The panel rejects this argument and finds that the requirement for the shifts to be officially waived was merely administrative or procedural and was not related to the requirements of the program. The panel, in interpreting the provisions of subsection 87(2) of the MPIC Act in a liberal manner in order to determine whether, at the time of the MVA, the Appellant had completed the program, finds that the relevant evidence is the Appellant's testimony that she had a syllabus outlining the course requirements and that her proctor had advised her that she had met and exceeded all of them at the time of the MVA.

[Appellant's proctor] later confirmed this in a letter of reference that he wrote for the Appellant, dated May 16, 2011, addressed To Whom It May Concern, in anticipation of her eventual job applications (which she has not been able to pursue):

> "I became acquainted with [the Appellant] during her final, or senior Practicum experience in the [text deleted] Program at [University]. ...
>
> [The Appellant] worked diligently and rapidly became proficient in meeting the needs of her clients. ... [The Appellant's] performance not only met, but exceeded my expectations. She has successfully completed her program of studies.
> ...
>
> By way of background I have taught at [University] since 1990 and hold senior rank as a Full Professor. I am well acquainted with the full range of aptitude, knowledge, commitment, compassion, and skill that students bring to, and develop over the course of their program of studies. [The Appellant] was an exceptional student and is an exemplar as a professional entering the field."

Based on this evidence, the panel finds that at the time of the MVA, the Appellant had completed her studies in that all the necessary academic and clinical requirements had been concluded and therefore the Appellant did not meet the definition of a "student" under subsection 87(2) of the MPIC Act. Accordingly, the Appellant therefore did not meet the definition of a "student" under subsection 70(1) of the MPIC Act. Therefore, the Appellant, due to her part-time employment

with the [text deleted], fell within the definition of "part-time earner" under subsection 70(1) of the MPIC Act.

Although counsel for the Appellant made submissions to the panel regarding the IRI to which the Appellant might be entitled if she were found to be a part-time earner, counsel for MPIC did not make submissions in this regard. The panel therefore finds that this would be an appropriate matter to be dealt with by the case manager.

Since the panel has determined that the Appellant was not properly classified as a student, we do not find it necessary to address the secondary submissions made by the parties, with respect to whether or not the Appellant would be entitled to additional IRI under the student provisions of the MPIC Act.

Disposition:

For the reasons outlined herein, the Commission finds that the Appellant has established, on a balance of probabilities, that she was not properly classified as a student for the purposes of her entitlement to IRI benefits. The Commission directs that this matter be returned to the case manager for reconsideration on the basis that the Appellant is properly classified as a part-time earner for the purposes of her entitlement to IRI benefits.

The Appellant shall be entitled to interest upon the monies due to her by reason of the foregoing decision, in accordance with section 163 of the MPIC Act.

As a result, the Appellant's appeal is allowed and the Internal Review Officer's decision dated September 12, 2014 is therefore rescinded.

The Commission shall retain jurisdiction in this matter and if the parties are unable to agree on the amount of compensation, either party may refer this issue back to the Commission for final determination.

Dated at Winnipeg this 13th day of January, 2016.

JACQUELINE FREEDMAN

TOM FREEMAN

LINDA NEWTON