Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-03

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms Deborah Stewart** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], appeared on her own behalf;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.**
HEARING DATE:	**October 17, 2005 and November 16, 2005**
ISSUE(S):	**Entitlement to Income Replacement Indemnity benefits to compensate for time off work for the purpose of attending medical appointments or treatments arising from the motor vehicle accident**
RELEVANT SECTIONS:	**Sections 81(1)(a), 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

On June 8, 2004, [the Appellant] was injured when the motor vehicle in which she was the seat-belted driver was involved in an accident when another vehicle turned in front of her. She went with her three (3) children, who were in the vehicle with her, to the [hospital]. Two (2) days later, the Appellant went to the [text deleted] Clinic where she

was treated for a seat belt bruise to her left chest, bruised legs, and neck and back pain. As a result of her injuries she became eligible for benefits under the MPIC Act.

At the time of the accident the Appellant was on maternity leave from her full-time employment as an [text deleted] at the [text deleted] and was scheduled to return to work in late July 2004. The Appellant was still on maternity when, on June 16, 2004, by phone, she first contacted MPIC regarding the accident. The File Note completed by MPIC, titled *First Contact Sheet*, at the time of that call shows that the Appellant stated:

> June 10/04 – she went to her family MD.
> She is very sore on her right side, neck and shoulder.
> Her MD advised her to go to the PT.
> Seat belt bruise

On June 30, 2004, the Appellant attended the [text deleted] Clinic for an assessment and was diagnosed with a Whiplash Associated Disorder 2 with thoracic strain and was prescribed a course of physiotherapy treatments twice a week for eight (8) weeks. She began the treatment at the [text deleted] Clinic on July 5, 2004.

On July 29, 2004, shortly before returning to work, the Appellant called her case manager to seek Income Replacement Indemnity ('IRI') benefits for the time that she would lose from work while attending the necessary physiotherapy treatments for her injuries. In a file note, the Appellant's case manager reported a call from the Appellant:

> Claimant is returning to work on Aug 3/04 from a maternity leave. Claimant continues to have sore right neck and back along with headaches. Advised she is approved for 18 or less PT.
>
> Discussed the benefits of attending for treatment on a regular basis.

> Asking for income replacement re: when receiving treatment.
>
> Claimant works 7-3pm and her physiotherapist works 7-3pm at the [text deleted] clinic. ... Claimant asked if we would cover her missed time from work when she is getting a PT treatment at [text deleted] in the day time. Claimant needs to be home after work due to the baby's breast feeding schedule. Advised that I could not give her an answer and would need to consult with my supervisor.

The case manager spoke with her supervisor and then left a message on the Appellant's answering machine for her to call.

The Appellant called the case manager the next day. The case manager reported the call in a file note dated July 30, 2004:

> Advised claimant of the following
> - MPI unable to pay for missed time from work as she needs to miss an entire day of work.
> - [Text deleted] will have physiotherapists that work until 7:00 pm in the evening
> - Claimant will have to be assigned to another physiotherapist at the [text deleted] clinic.
>
> Claimant stated that this would not work ... . Claimant stated that she is away from her children all day long and does not want to be away from them any more time than needed. ... She was concerned about not getting treatments right away and that she will never get better. (emphasis added)

The case manager suggested the Appellant might speak with her supervisor.

The Appellant phoned the supervisor who reported the conversation in a File Note:

> . . . I explained that IRI is paid to individuals who are unable to perform their job duties due to their injuries but PIPP does not provide coverage for time out of the work place to attend medical appointments. I ... suggested that if she didn't want to attend for tx outside of her work hours that she speak with her physiotherapist to possibly look at a home exercise program. [the Appellant] said she was already doing home exercises but they were not enough. She stated that she has a

previous repetitive strain injury from work that has worsened from the accident and if she doesn't have physio she won't be able to work. (emphasis added)

Case Manager's Decision

On August 10, 2004 the case manager issued a decision which states in part:

> Income Replacement Indemnity is not payable for time taken off work solely for the purpose of attending medical appointments, or treatments arising from the motor vehicle accident, as there are no provisions under the Act to allow for such compensation. In order to qualify for income replacement, the injured party must have been disabled from working due to the injuries sustained in the accident.
>
> We refer to Section 81(1), (a)(b) and (c) of the Manitoba Public Insurance Corporation Act, which clarifies the entitlement to Income Replacement Indemnity benefits, which reads as follows:
>
> > **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
> > (a) he or she is unable to continue the full-time employment;
> > (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
> > (c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.
>
> We are therefore advising you that Manitoba Public Insurance will not compensate you for the time missed from work while you attend for your physiotherapy appointments. (emphasis added)

Internal Review Officer's Decision

On September 8, 2004, the Appellant made an Application for Review of the decision to deny IRI for time lost to attend physiotherapy treatments for her injuries. In her Application the Appellant stated:

- I am unable to attend physiotherapy treatments outside my working hrs. My work hrs vary from 7am – 3pm/7am-5pm including being on rotating call schedule until midnight.

- I have just returned to work from a Maternity Leave. I am unable to get paid time off for these physio apts. Due to the injuries sustained in the accident, I am working in pain. Due to the nature of my job, the pain is worsening and I would like to get some form of treatment to aleviate (sic) the pain before the pain is unbearable and I am unable to work.
- I have considered medical apts. during my lunch hour but this time is needed to pump breast milk for my [text deleted] month old. Once my work day is done, I need to get home to breast feed my baby and care to the needs of my my (sic) children.
- Unfortunately, I am a working mother and time with my children is precious. I can not be away from them longuer (sic) than a work day. When I work until 5pm, we only get 2 precious hours together before bed, I can not take that away from them. A mother's care is ESSENTIAL.
- In the near future, my hours of work will change and I will have no-one to care for my children for these apointments. (sic)
- *** I believe I should be entitled to income replacement indemnity benefits to get a few hours of compensation for time missed from work to attend apts.

On October 6, 2004 the Internal Review Officer issued her decision upholding the decision of the case manager.

> The decision of August 10, 2004 is accurate in applying the benefits prescribed by legislation.
>
> . . .
>
> There is currently no evidence on your file that you have attended medical appointments following your return to work on August 3, 2004.
>
> I can appreciate your expressed difficulty in consistent physiotherapy attendance. Unfortunately, the barriers you have expressed are not material and relevant to the coverage provided. <u>The benefits you have requested simply do not exist.</u>
>
> Accordingly, I am confirming your case manager's decision of August 10, 2004. (emphasis added)

On January 4, 2005 the Appellant sought an appeal with the Commission. The Notice of Appeal states:

> I believe I should be entitled to Income Replacement Indemnity Benefits for the time missed from work to attend medical and treatment appointments. Perhaps MPIC's policy should be reviewed or excemptions (sic) should be made in cases like mine (full-time jobs + want to work + huge parental obligations.) Since the MVA June 8, 04, I have returned to work, Aug. 3, 2004, after 6 physio treatments & no relief. I am working with extreme pain Rt. neck radiating to Rt arm. I am struggling with severe migraines and T.M jts problems. I have managed to attend 3 massage treatments during my Christmas Holidays that have given me some relief. ($210 that should be paid by MPIC. Massage by [text deleted]) I have also been assessed by [text deleted] who visited my work on lunch hour and insists my situation will get worse if left untreated. (emphasis added)

The Appellant submitted two (2) massage therapy receipts and noted that she had misplaced two (2) more and was hoping to be able to get replacement receipts from her massage therapist.

Hearing

The hearing was held October 17, 2005 and was conducted by teleconference. The Appellant appeared for herself and attended from her home in [text deleted] by telephone. Mr. Scaletta appeared for MPIC and attended the teleconference call at the Commission hearing room in Winnipeg.

At the beginning of the hearing, it was acknowledged by the parties that massage therapy is generally not covered under the Act and was not at issue at this hearing. The parties agreed the issue for determination in this appeal is the entitlement of the Appellant for IRI for time lost due to attendance during working hours at prescribed physiotherapy treatments for the injuries suffered in the motor vehicle accident of June 8, 2004. Both parties agreed that the hearing would not address the potential issues as to how much

time was lost or the amount of any benefits due to the Appellant, should the Commission decide that the Appellant did meet the qualifications to be considered for IRI benefits under the Act.

The Appellant told the Commission that she had three (3) pre-school children and was on maternity leave from work, having just given birth to the third of them when she was involved in the motor vehicle accident on June 8, 2004. Her children were with her in the car at the time and though there were some scrapes and bruises, they were not otherwise injured in the accident. Her injuries were, she explained, a Whiplash Associated Disorder 2 with pain in her neck, back and thoracic region. She received some physiotherapy treatments following the accident she told the Commission.

The Appellant testified that her doctor approved her return to work on August 3, 2004 and advised her that she was able to work but still required physiotherapy treatments in respect of her motor vehicle accident injuries. She further testified that in regard to the work schedules of both herself and her husband, and her need to be with her children in the evenings, the only time she had available to take physiotherapy treatments was during the course of her working hours. She could not continue with the treatment once back at work, she told the Commission, because, having returned from maternity leave, she had no benefits available to her at work, and MPIC had refused to pay her IRI for the wages she would lose if she were to attend for physiotherapy treatments during working hours.

She further testified that she was unable to obtain time off from work with pay to receive physiotherapy treatments and, therefore, could not afford, without receipt of IRI benefits, to attend these physiotherapy treatments. The Appellant also testified that MPIC would not provide her with IRI without medical proof that she was unable to work.

Since she could not afford to take time off work without pay, the Appellant explained, she has not received any physiotherapy treatments and, consequently, she has had no monetary loss in relation to treatment, although she did lose four (4) days of work before returning to work, that she had not claimed for. She also had taken some massage therapy which, she accepted, was not covered, but that she felt, she stated, MPIC should reimburse her for.

The Appellant stated:

1. She is concerned that if she continues to work without treating her injuries, her condition would deteriorate.
2. She had suffered a repetitive strain injury at her job in the past and feared she might suffer a recurrence.
3. If the motor vehicle accident injuries worsened, as they are almost certain to do, the cost to MPIC would be much higher and there would be a significant increase in the amount of time off she would be required to take in order to be treated in respect to these injuries and in these circumstances, MPIC would be obligated to pay her IRI.

In conclusion, the Appellant submitted that she was entitled to IRI to replace the income she must lose as a result of physiotherapy treatments she must take in the course of her working day in order to maintain her full time employment and her role as a parent. The Appellant requested that MPIC be directed to provide her with IRI benefits for any loss of wages she might suffer as a result of having to take time off work in order to attend physiotherapy treatments in respect of her motor vehicle accident injuries.

MPIC's legal counsel stated that in order for the Appellant to receive IRI benefits she must meet the requirements of s. 81(1)(a) of the Act, which reads:

> 81(1) A full-time earner is entitled to an income replacement indemnity if ... as a result of the accident:
> (a) he or she is unable to continue the full-time employment.

Since the Appellant is able to return to her work, and has done so, he argued, she is not eligible for IRI.

In a written submission MPIC's legal counsel argued that the Internal Review Officer's decision was correct and should be upheld and stated:

> Section 81(1)(a) of *The Manitoba Public Insurance Corporation Act* sets out the criteria for IRI entitlement for a full-time earner. For an entitlement to exist, the claimant must be "unable to continue" her full-time employment.
>
> Section 8 of Manitoba Regulation P215-37/94 defines the term "unable to hold employment" as meaning that the claimant is "entirely or substantially unable to perform the essential duties" of her occupation.
>
> <u>An individual who is able to return to full-time work but – for whatever reason – needs (or chooses) to schedule medical or treatment appointments during her working hours is simply not entitled to IRI for the time missed from work.</u>
>
> An individual in these circumstances cannot be said to be "unable to continue" her employment nor can she be said to be "unable to hold" that employment.

> This Commission has consistently upheld this interpretation of the legislation. (emphasis added)

MPIC's legal counsel advised the Commission that IRI is not available in this appeal and submitted five (5) decisions of the Commission, ([text deleted] AC-94-01; [text deleted] AC-95-03; [text deleted] AC-97-37; [text deleted] AC-97-122; and, [text deleted] AC-98-94), which establish, MPIC's legal counsel argued, that IRI is not available, once the claimant has returned to their full-time employment, to compensate for wages lost due to occasional absences for treatment of less than one day.

MPIC's legal counsel summarized each of the cases and submitted that:

1. Section 81(1)(a) benefits are not available to compensate for wages lost due to attending occasional absences from work for treatment.
2. MPIC has agreed to pay for her physiotherapy and for the travel expenses incurred in attending at the treatment.
3. It is not open to MPIC to amend the Act or to make exceptions to the Act.
4. MPIC must implement the Act as it is written and cannot provide benefits to the Appellant for the wages lost through having to, or choosing to, attend for treatment during her working hours.

The appeal, he submitted, should be dismissed.

At the conclusion of the hearing, the Commission adjourned the proceedings in order to give the Appellant an opportunity to review the five (5) Commission decisions that MPIC had filed. Subsequent to the adjournment, the Commission panel met to review provisions of Manitoba Regulation 37/94, its relationship to Section 81(1) of the MPIC Act and the five (5) Commission decisions. As a result, the Commission wrote to both parties stating:

> Prior to rendering any decision in this appeal the Commission will require a further submission from both parties in respect of the following issues:
>
> 1. Whether or not Section 8 of Manitoba Regulation P215-37/94, which defines the term "unable to hold employment" as meaning that the claimant is "entirely or substantially unable to perform the essential duties" of her occupation has any application to the operation of Sections 81(1)(a) and 110(1)(a) of the Act because of the provision of Section 2 of Manitoba Regulation P215-37/94 which states:
>
> > **Application**
> > **2** This regulation applies to the interpretation of a regulation enacted under the Part 2 (Universal Bodily Injury Compensation) of the Act, unless a contrary intention appears in the regulation.
>
> If the effect of Section 2 of Manitoba Regulation P215-37/94 is to prevent Section 8 of the Regulation from having any application to Sections 81(1)(a) and/or 110(1)(a) of the Act, is it open to the Commission in determining this appeal to consider the provision of Section 138 of the Act as interpreted by the Manitoba Court of Appeal in *Menzies.*

The hearing reconvened November 16, 2005 and the proceedings were again conducted by teleconference. The Appellant appeared for herself in [text deleted], by telephone, and Mr. Scaletta appeared on behalf of MPIC at the Commission Hearing Room in Winnipeg.

MPIC's legal counsel, in his submission to the Commission, stated:

1. Even if the definition in the Regulation does not define the phrase "unable to hold" employment as it is used in the Act in relation to IRI benefits, the Appellant does not qualify for IRI in that she does not meet the requirements of s. 81(1) of the Act.
2. Since she has returned to work following her maternity leave, was never during the period following the accident prescribed to be away from work, and is now able to attend at her work on a full-time basis, she is continuing in her full-time employment.
3. As such, she does not meet the requirements of s. 81(1)(a) of the Act and is not eligible for IRI.
4. In respect of s. 138 of the MPIC Act, having regard to the decision of the Manitoba Court of Appeal in *Menzies* v. *MPIC*, [2005] M.J. No. 313 (Man. C.A.), s. 138 has no application to the issue under appeal.

The Appellant, in her submission, did not comment on any of the five (5) decisions that MPIC had filed at the hearing and essentially reiterated the submission that she had made at the initial Appeal Commission hearing.

Discussion

The relationship of Section 8 of M.R. P215-37/94 to Section 81(1)(a) of the MPIC Act

The Commission rejects MPIC's legal counsel's submission that Section 8 of MR 37/94 can be used in the interpretation of the phrase "unable to continue in the full time employment" as used in Section 81(1)(a) of the Act.

The Commission notes that in *Menzies* v. *MPIC* (*supra*), [text deleted], the Manitoba Court of Appeal set out the rules governing the power of a regulation to limit or restrict the scope of a provision as follows:

- [T]he normal rule of statutory interpretation is that a statute prevails over a conflicting regulation,
- [T]he legislature may choose to make a statute subordinate to a regulation. (at para 46)

The Commission further notes that in *Friends of the Oldman River Society* v. *Canada*, [1992] 1 S.C.R. 3, LaForest J., stated the same, basic principle in terms that apply within the federal jurisdiction:

> The basic principles of law are not in doubt. ... [A]n Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. (at para 42)

The Commission, applying these legal principals to the interpretation of the relationship between Section 81(1)(a) of the Act and M.R. P215-37/94, finds:

1. Since s. 81(1)(a) is not subject to the regulations, its meaning, except pursuant to s. 202 of the Act, cannot be limited or restricted by regulations passed under the Act.

2. M.R. P215-37/94 by its own force, restricts its operation to the regulations enacted under the MPIC Act and therefore has no application to Section 81(1) of the MPIC Act. Section 2 of the Regulation states:

> **Application**
> **2** This regulation applies to the interpretation of a regulation enacted under the Part 2 (Universal Bodily Injury Compensation) of the Act, unless a contrary intention appears in the regulation.

3. Under s. 202 of the Act, the corporation is empowered to define any word used in Part 2 of the Act. The provision states in part:

> **Regulations**
> **202** Subject to the approval of the Lieutenant Governor in Council, the corporation may make regulations for the purpose of this Part
> (a) defining a word or expression used and not defined in this Act
> (b) enlarging or restricting the meaning of a word or expression used in this Act.

The Commission determines that Section 8 of MR P215-37/94, by its own terms, is not a regulation passed pursuant to s. 202(a) or (b). The Commission therefore finds that Section 8 of M.R. P215-37/94 cannot be used in the interpretation of the phrase "unable to continue in the full-time employment" as used in s. 81(1)(a) of the Act and, as a result, rejects the submission of MPIC in this respect.

Entitlement to IRI in respect of sporadic absences from work to attend medical treatments

MPIC submitted that even if the Regulation does not define the phrase "unable to hold employment" as it is used in s. 81(1)(a) of the Act, the Appellant's claim must still fail in

that, as the Internal Review Officer held, she does not meet the requirements of s. 81(1)(a). The Internal Review Officer gave two (2) grounds for his determination:

i. The benefits you have requested simply do not exist.

ii. There is currently no evidence on your file that you have attended medical appointments following your return to work on August 3, 2004.

Dealing with the first point, MPIC's legal counsel argued that IRI is not available for occasional brief absences from work for medical treatments and that the Commission has consistently interpreted the IRI provisions in this way.

Counsel for MPIC, in support of this position, provided five (5) cases where the Commission had decided that IRI benefits were not available to persons in the Appellant's situation, who must take occasional, temporary absences from work to attend for medical treatment. The Commission has reviewed these cases and has come to the conclusion that these cases are not persuasive on the point in that:

- The cases are distinguishable from the present case in that they are decided on different facts.
- In none of the cases did a rigorous examination of the statutory provision appear necessary and in none of them was it undertaken.
- In fact, the decisions raise some doubt as to weight that should be afforded them on this point.
- All of these decisions were decided prior to the decision of the Manitoba Court of Appeal in [text deleted] (supra).

[Text deleted] (AC-94-01)

In the first of the cases, [the Appellant] was seeking compensation for the "time necessarily lost from his workplace in order to attend his physiotherapist." [The Appellant] had returned to work after the accident following a twenty-five (25) day absence during which he had received IRI. He was assigned "light duties" at full pay, "pending sufficient recovery to allow him to resume his full, normal duties as a utility man." [The Appellant] was attending a physiotherapist for treatment three (3) times a week and received sick benefits under the terms of his employment to compensate for the wages lost while attending for physiotherapy treatments. Consequently, [the Appellant] was not "out of pocket".

[The Appellant]'s argument was twofold:

- he had been obliged to take time off work as a direct result of an automobile accident, that the treatments he was receiving had been prescribed professionally and were calculated ... to restore him to the full duties for which he is being paid and to which he wishes to return".
- the presence or absence of a sick-leave plan should not affect the outcome of a claim such as his: a claimant is either entitled, or not entitled, to be paid by M.P.I.C. for time necessarily lost from work in order to receive medical or paramedical treatment.

The Commission noted that:

- through s. 116 of the Act, IRI benefits are available to a victim whose gross income is less than the gross income on which the s. 81(1) benefits are calculated;

- because he was receiving sick benefits for the time lost attending treatment, [the Appellant] has not suffered a loss of income;
- [The Appellant] could not receive benefits even if he were otherwise still eligible for IRI benefits.

In relation to the claim for IRI benefits under s. 81(1)(a), the Commission held:

> [The Appellant] is not unable to continue his full-time employment since, although his duties have been lightened to accommodate his temporary disability, he is still able to work full-time at his original salary. Section 81(1) is therefore inapplicable.

In this decision the Commission conflates two (2) grounds on which [the Appellant] could be denied benefits. The Commission found that [the Appellant] was denied IRI benefits on the basis that:

i. he does not meet the criteria in s. 81(1)(a) in that he has returned to full-time work; and,

ii. he is receiving a full-time salary and would not come within s. 116.

The Commission, in [text deleted], found that the Appellant would not be eligible for benefits in either case and did not examine in any detail, the import of the provisions at issue having regard to the purpose of the Act. As well, the facts in this case are clearly distinguishable from the facts in the present appeal before the Commission.

[Text deleted] (AC-95-03)

In the second case, [the Appellant] returned to work following a motor vehicle accident after missing 3 full days of work. Through the following six (6) months, [the Appellant]

continued to attend for prescribed physiotherapy and other treatment which required him to be absent from his work for a total of seventeen (17) half days. [The Appellant] received IRI benefits in relation to these absences.

On December 19, 1994, six (6) months after the accident, the Internal Review Officer issued a decision denying IRI benefits to [the Appellant] for any future time lost at work through attending prescribed treatments. Referring to [the Appellant]'s losses as an "expense", the Commission noted that there was no evidence that [the Appellant] was "out of pocket" due to attending the treatments and dismissed [the Appellant]'s appeal stating:

> . . . since we have no evidence that [the Appellant] suffered any expense, nor anything to tell us that he will do so in the future, by taking time off work for para-medical visits, … his appeal must … fail and we confirm the decision of the internal review officer.

The facts in this case are clearly distinguishable from the facts in the present appeal before the Commission.

[Text deleted] (AC-97-37)

Following a motor vehicle accident, [the Appellant] returned to his regular work and had to lose time from work to attend physiotherapy sessions and medical examinations. Unlike the Appellant in the present appeal, but like [the Appellant in AC-94-01] and [the Appellant in AC-95-03], the Appellant, [text deleted], received paid leave for the time away from work. [The Appellant] claimed IRI for the time taken off work to attend for

treatments. The Commission simply dismissed this part of the claim without discussion. They stated:

> Since [the Appellant] was able to continue in his employment, Section 81 is of no help to him.

The Commission in this appeal did not find it necessary to analyze Section 81 of the Act. As well, the facts in this appeal are clearly distinguishable from the facts in the present appeal before the Commission.

[Text deleted] (AC-99-122)

In the fourth of the cases, [the Appellant] returned to modified duties following a motor vehicle accident and sought IRI benefits for wages lost due to his having to attend three (3) times a week for reconditioning and physiotherapy treatments. [The Appellant], who did not have a sick benefits package through his employment, lost a total of 122.5 hours for which he sought IRI benefits under s. 81(1).

The Commission dismissed the claim stating:

> . . . We have ruled earlier in the [text deleted] case that the Act does not permit IRI benefits to be paid to a person who takes off part of his or her working day to attend for medical treatment arising out of an auto accident. Section 81 only permits IRI to be paid to someone who is unable to work full-time because of an automobile accident. Unfortunately the wording in the Act does not permit payment to individuals who are working full-time but have to miss a few hours of work to attend for medical or remedial treatment.

Again, the Commission in this appeal did not conduct an investigation of the intent of Section 81 and its relation to the purpose of the Act.

[Text deleted] (AC-98-94)

In the most recent of the cases, [the Appellant] appealed a decision of the Internal Review Officer that stated:

> . . . I can advise you that there is no section in The Manitoba Public Insruance (sic) Act, and Regulations that allows for payment of portions of days missed for medical appointments.

The Commission simply adopted without discussion, the decision of the Internal Review Officer and dismissed the Appeal. Again, the Commission did not feel it necessary to conduct an investigation into the intent of Section 81(1)(a) of the Act and its relationship to the purpose of the Act.

The five cases

This Commission panel, on a review of these cases, finds that they appear on the surface to present a clear rule that IRI is not available where a claimant, who has returned to their regular employment while still convalescing, suffers a loss of income as a result of occasional brief absences from work taken in order to attend prescribed treatment. Upon examination, however, it becomes apparent that no rigorous exploration of the intent of the provisions took place. In addition, in [AC-94-01] and [AC-95-03], the Commission raised serious questions about the manner in which MPIC was denying Appellants their IRI benefits.

In [AC-94-01] the Commission commented:

> It may be viewed as something of an anomaly that M.P.I.C. is willing to pay I.R.I. under Section 116(1) of the Act for intermittent absences from work, provided that each absence is for a full day and the claimant is unable to work for that day

> as a result of the automobile accident, but is unwilling to pay for a lesser period of absence taken pursuant to a course of therapy directed towards full rehabilitation.

The Commission did not explore this point any further.

Section 116(1) reads:

> **I.R.I. reduction if victim earns reduced income**
> **116 (1)** Where a victim who is entitled to an income replacement indemnity holds employment from which the victim earns a gross income that is less than the gross income used by the corporation to compute his or her income replacement indemnity, the income replacement indemnity shall be reduced by 75% of the net income that the victim earns from the employment.

This provision permits the payment of IRI to persons who have returned to work but are earning less than they had before. It does not refer to or limit the reasons for the decrease in earnings. [The Appellant] would not have qualified under s. 116(1) because he was receiving sick benefits that made up for what would otherwise have been a lower income.

In [AC-95-03], the Commission was much more overt in its criticism. As noted above, [the Appellant] did receive payment of IRI benefits for a total of seventeen (17) half days that he was obliged to be absent from his work for treatment of his injuries. The Commission noted:

> Although [the Appellant] was only absent from his workplace for 3 full days ... , he was also away for a further 17 half-days over the course of the succeeding six months. M.P.I.C. has elected (correctly, in our view, to treat the result as an aggregate of eleven and one-half days of necessary absence and, therefore, to deal with that portion of [the Appellant's] claim as being one for I.R.I. .... (emphasis added)

The Commission continues:

> M.P.I.C.'s file regarding [the Appellant] indicates that the Corporation only decided to pay him for his 17 half-days off work because, although 'direction came from Claims Coverage Committee in July (1994) indicating that no compensation is to be paid for sporadic half- days missed from work', [the Appellant] had been advised prior to that policy direction that he was entitled to compensation for half days missed from employment.

[the Appellant in AC-95-03's] injury had occurred in May of 1994, before the change in policy was announced by MPIC to its Claims Officers. It may be noted, by way of contrast, that [the Appellant in AC-94-01's] claim for payment for partial day payments was made in August 1994, after the new policy was issued by the Claims Coverage Committee.

Of the new policy, the Commission stated:

> We find nothing in the Act or the Regulations to support the [new] policy ... which, in cases of bona fide absence resulting from the automobile injury, would in our view produce an inequity or, alternatively, encourage less responsible conduct on the part of the claimant. If a claimant can get paid by staying away for a full day but get nothing by going back to work for one half a day, he is more likely to opt for the full day's reimbursement.

The Commission continued:

> . . . we note the provisions of Section 138 of the Act, which reads as follows:
>
> > **Corporation to assist in rehabilitation**
> > **138** Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.
>
> While that Section gives the Corporation a reasonable amount of discretion, it seems clear to this Commission that part of the healing or rehabilitation process will frequently consist of a gradual return to work, initially on a part-time basis.

> The policy directive cited above seems to negate the basic intent of Section 138 and, if only for that reason, to be wrong. (emphasis added)

The Commission's strong concern with the then new policy is clearly evident.

On the decision in [AC-95-03] to treat the seventeen (17) half days as an IRI claim, the Commission commented:

> We express the view, therefore, that M.P.I.C.'s decision in this regard was the correct one, but for the wrong reason.

The correct reason, the Commission appears to suggest, is not that one should get paid because one's claim precedes a questionable policy, but that one should get paid for a *bona fide absence resulting from the motor vehicle accident*. This is precisely the argument made here by this Appellant in the present appeal.

The Appellant here was seeking assurance that she would be compensated in relation to wages she might lose as a result of occasional, regular absences from work required to attend for treatment of the injuries suffered in the motor vehicle accident. The Appellant had no sick benefits available at her employment which can compensate her for the wages she must lose if she is to take the treatments which, she testified, have been prescribed for her. Because she cannot afford to lose the wages, the Appellant has testified, she has not taken the treatment. As a result, as she stated in her Notice of Appeal, her physiotherapist is warning her that her "situation will get worse if left untreated".

This Commission finds that the precedents cited by counsel for MPIC are not decisive in relation to the claim of the Appellant before us at this time. [AC-94-01], [AC-95-03], and [AC-97-37] are all distinguishable on the facts in that each of those appellants was receiving work-related benefits which put them in the position of being unable to qualify under s. 116(1) in that they were not out-of-pocket. [AC-99-122] and [AC-98-94] simply adopt the decision in [AC-94-01] without comment and are, consequently, of little weight in ascertaining, as the Commission is required to do in this appeal, what benefits may be available to the Appellant in this case. Finally, and most persuasively, the position endorsed in the decisions was reached without a thorough examination of the intent of Section 81(1)(a) of the Act.

Purposive Analysis

MPIC has submitted in the alternative that if Section 8 of M.R. P215-37/94 has no application, the plain meaning of Section 81(1)(a) of the MPIC Act indicates that where a victim is entirely or substantially able to perform the essential duties of the employment that the victim performed at the time of the accident, that victim is not entitled to receive IRI.

The decision of the Internal Review Officer in interpreting Section 81(1)(a) of the MPIC Act, was rendered on October 6, 2004 prior to the decision of the Manitoba Court of Appeal in *Menzies,* which was decided on September 13, 2005. In *Menzies* the Manitoba Court of Appeal determined that a purposive analysis could be used to interpret the provisions of the MPIC Act. The Internal Review Officer did not have an opportunity of

considering the *Menzies* decision when issuing the Internal Review decision and, therefore, was not in a position to adopt the purposive approach as determined by the Manitoba Court of Appeal in interpreting the provisions of entitlement to benefits under the MPIC Act.

In *Menzies*, the Manitoba Court of Appeal stated:

> Words in a statute are to be given "the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction" (*R. v. Z. (D.A.),* [1992] 2 S.C.R. 1025, at p. 1042).

The court described the purpose of the Act in this way:

> The *Act* is intended to provide compensation based on "real economic loss", and see *McMillan v. Thompson (Rural Municipality)* where Helper J.A. said the legislature in the *Act:* "created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile". (authorities omitted)

The Court then reached its decision as to the meaning of the particular provisions of s. 138 at issue in *Menzies*, by giving the section its "plain and ordinary meaning, consistent with the . . . principles" of statutory interpretation.

In *Menzies*, the Manitoba Court of Appeal referred to the Supreme Court decision in *Stoddard v. Watson,* [1993] 2 S.C.R. 1069 and stated:

> In determining the legislator's intention there is a presumption of coherence between related statutes. Provisions are only deemed inconsistent where they cannot stand together. Sections 180(1) and 47 are not *prima facie* inconsistent. Section 180(1) sets the length of the limitation period. Section 47 states when the limitation period begins to run. Ther co-existence does not lead to absurd results. . . . . .

The Court of Appeal further stated in *Menzies:*

> This interpretation gives meaning not only to s. 10(1) but also to s. 138, whereas the interpretation advanced by MPIC has the effect of rendering s. 138 meaningless. The provisions should be construed so that they yield a coherent, harmonious and logical result, and [text deleted]. (underlining added)

The Commission therefore determines that in order to arrive at the meaning of a provision of the MPIC statue, MPIC must:

1. Consider the plain language of the legislation, as understood within the context of the Act.
2. Pursue a purposive analysis of the legislation in order to arrive at the meaning of the provision of the statute.
3. Apply Section 6 of *The Interpretation Act of Manitoba* CCSM, c. 180, which states:

> **Rule of liberal interpretation**
> s. 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.

The Commission finds that:

1. The Internal Review Officer in interpreting Section 81(1)(a) of the MPIC Act failed to consider the meaning of the phrase "unable to continue the full time employment" in light of the purpose of the Act as a whole and, as a result, erred in this respect.

2. When interpreting the Appellant's entitlement to benefits such as IRI, MPIC must determine the entitlement to benefits, having regard to Sections 150 and 138 of the MPIC Act, and any regulations which may limit the application of these provisions.

Section 81(1)(a)

The Internal Review Officer found that the Appellant was not entitled to IRI benefits for sporadic periods of time off work as there were no provisions in the Act that would support such benefits. We have noted above, the criticism by the Commission, particularly in [AC-95-03], of MPIC's pratice of denying benefits for absences of less than one day once a claimant has returned to work. The Commission finds that there is nothing in the Act to support this practice.

MPIC's legal counsel argued that the Appellant was not entitled to benefits under s. 81(1)(a) in that:

1. pursuant to Section 81(1)(a) of the Act the Appellant was not unable to continue her employment because of the motor vehicle accident; and,
2. upon her return to work after the motor vehicle accident, the Appellant was able to entirely or substantially perform the essential duties of her employment and, therefore, was not entitled to receive IRI pursuant to Section 81(1)(a) of the Act.

The Commission finds that MPIC's definition of the phrase "to continue the full-time employment" under Section 81(1)(a) of the Act, to mean the ability to entirely or

substantially perform the essential duties of the claimant's employment is not consistent with the purpose and intent of the Act as set out in *Menzies* (supra).

This Commission panel notes that the word "continue" in Section 81(1)(a) of the Act has been defined in the Oxford Dictionary, Tenth Edition as:

> **continue. . . 1** persist in an activity or process. remain in existence, operation, or a specified state. **2** carry on with. carry on traveling in the same direction. . . .

The definition of the word "continue" is found in Webster's New World College Dictionary, Fourth Edition as:

> **continue. . . 1** to remain in existence or effect; last; endure [the war *continued* for five years] **2** to go on in a specified course of action or condition; . . . **4** to remain in the same place or position; stay [to *continue* in office for another year] **5** to go on again after an interruption; resume . . .

The purpose of the Act is, as set out in *Menzies*, to provide immediate compensatory benefits based on real economic loss to those who suffer bodily injuries in motor vehicle in accidents. Section 81(1)(a) of the Act provides for IRI for a person who is unable to continue their full time employment as a result of a motor vehicle accident. MPIC has interpreted the phrase "unable to continue in the full-time employment" in Section 81(1)(a) of the Act to exclude from IRI benefits, claimants who are able to entirely or substantially perform the essential duties of the claimant's occupation. Pursuant to this interpretation of Section 81(1)(a) of the Act, MPIC submits that it is justified in refusing to consider the Appellant's request for IRI.

The Commission finds that MPIC's interpretation of Section 81(1)(a) of the Act is too narrow in that it does not provide for compensation for all claimants who are unable to continue their full-time employment as a result of a motor vehicle accident. The language of Section 81(1)(a) of the Act does not support MPIC's position that in order to be considered for IRI a claimant must be absent from work as a result of motor vehicle accident injuries for a full day and that a claimant would not be considered for IRI if the absence from work in respect of motor vehicle accident injuries is for less than one (1) full day. In the Commission's view the language of Section 81(1)(a) requires MPIC to consider eligibility for benefits where a claimant is absent from work in respect of motor vehicle accident injuries for less than one (1) full day.

This can be illustrated by the following example: The Commission notes that pursuant to MPIC's interpretation of Section 81(1)(a) of the Act a claimant who as a result of a motor vehicle accident is unable to continue their employment by being unable, entirely or substantially, to perform the essential duties of the occupation, is entitled to be considered for IRI. The Commission further notes that a claimant in these circumstances, as a result of the motor vehicle accident injuries, does not continue to enjoy, after the motor vehicle accident, the same terms and conditions of employment that the claimant had enjoyed prior to the motor vehicle accident.

As a result of the motor vehicle accident injuries the claimant's terms and conditions of employment were adversely affected. Prior to the motor vehicle accident the claimant worked a regular schedule of hours daily and weekly in their employment. After the

motor vehicle accident the claimant, due to the motor vehicle accident injuries, is unable to work any of the regularly scheduled hours daily and weekly. In these circumstances MPIC would correctly conclude that the claimant is unable to continue to perform their full time employment pursuant to Section 81(1)(a) of the Act and, as a result, the claimant would be entitled to be considered for IRI.

The Commission, however, notes that a claimant, in circumstances similar to the Appellant, may also suffer from having the terms and conditions of the claimant's employment adversely affected as a result of the motor vehicle accident. However, pursuant to MPIC's interpretation of Section 81(1)(a) of the Act such a claimant would be denied any consideration by MPIC from receiving IRI.

This can be illustrated by the following example: A claimant, in circumstances similar to the Appellant injured in a motor vehicle accident, who returns to work immediately after the accident without claiming IRI. This claimant, however, while able to work, at the same time must be absent from work from time to time in order to receive medically required treatments in respect of the motor vehicle accident injuries. Prior to the motor vehicle accident the claimant is employed in a job that required the claimant to work five (5) days each week, eight (8) hours each day, for a total of forty (40) hours per. Prior to the motor vehicle accident the claimant is not required to absent themself from work for any period of time and would work the regular hours of forty (40) hours per week, or eight (8) hours per day, without any modification of terms and conditions of employment.

As a result of the motor vehicle accident the claimant sustains injuries which require the claimant, for valid reasons, during the course of the work week or the work day, to absent themself from work, for a period of some hours short of a full day, in order to receive medical treatment in relation to these injuries. The employer permits the claimant to be absent from work without pay but the claimant does not receive any compensation from any employer benefit plan. As a result, the only compensation the claimant might receive in these circumstances would be IRI from MPIC.

When absent from work from time to time to receive prescribed treatments, the claimant would not be working a forty (40) hour week or a eight (8) hour day and, therefore, there is a modification of the terms and conditions of employment that the claimant had enjoyed prior to the motor vehicle accident. As a result of the motor vehicle accident injuries, in the Commission's view, the claimant is not continuing the full-time employment under Section 81(1)(a) of the Act because the claimant is unable to work the same forty (40) hours per week, or eight (8) hours per day that the claimant worked prior to the motor vehicle accident. Notwithstanding the modification of the claimant's terms and conditions of employment as a result of the motor vehicle accident, MPIC pursuant to its interpretation of Section 81(1)(a) of the Act would deny the claimant consideration for IRI.

The Commission notes that a claimant who is totally unable to continue the pre-accident employment, and a claimant in circumstances similar to the Appellant, who as a result of

motor vehicle accident injuries is partially unable to carry out the essential duties of the job, have the following similarities:

1. They have both suffered motor vehicle accident injuries.
2. As a result of these motor vehicle accident injuries, the terms and conditions of employment of both claimants have been adversely affected.

However, the Commission notes, they are treated differently:

1. In one case, the claimant whose terms and conditions of employment have been totally modified is entitled to be considered for IRI.
2. In the other case, the claimant, in circumstances similar to the Appellant, whose terms and conditions of employment have also been adversely modified by the motor vehicle accident injuries is not entitled to be considered for IRI.

The Commission notes that in respect of the two claimants in the above mentioned examples, their terms and conditions of employment were adversely affected by motor vehicle accident injuries but there has been a differential treatment by MPIC in respect of considering their claims for IRI.

For these reasons the Commission finds that MPIC's interpretation of Section 81(1)(a) of the Act is too narrow and is rejected by the Commission. The Commission finds that MPIC's interpretation of Section 81(1)(a) of the Act is not in harmony but in conflict with the purpose of the Act which is to *". . . provide immediate compensatory benefits to*

all Manitobans who suffer bodily injuries in accidents involving an automobile". (*Menzies* supra).

The Commission therefore determines that in order to satisfy the purpose of the Act, MPIC must take a fair, large and liberal approach pursuant to Section 6 of *The Interpretation Act* when interpreting Section 81(1)(a) of the Act. The Commission finds that in order to meet the purpose of the Act the phrase "unable to continue in the full-time employment" as used in Section 81(1)(a), this provision must be interpreted so as to provide that a claimant is entitled to consideration for benefits if, as a result of the motor vehicle accident, the terms and conditions of employment which the claimant enjoyed prior to the motor vehicle accident have been adversely affected by the motor vehicle accident injuries. The Commission finds that when in these circumstances there has been an adverse effect upon a claimant's existing terms and conditions of employment, the claimant, pursuant to Section 81(1)(a) of the Act, is unable to continue the full time employment and is entitled to be considered by MPIC to receive IRI. The Commission finds that such an interpretation of Section 81(1)(a) of the Act is in harmony with and not in conflict with the purpose of the Act.

The Commission finds, pursuant to this interpretation of Section 81(1)(a) of the Act, MPIC should not have refused to consider the Appellant's request for IRI. The Commission therefore determines that the Internal Review Officer, by misinterpreting Section 81(1)(a) of the MPIC Act:

1. failed to conduct an inquiry as to the merits of the Appellant's request for IRI;

2. erred in upholding the case manager's decision by stating *"The benefits you have requested simply do not exist."*

The Commission also determines that, prior to determining whether or not the Appellant was entitled to IRI, MPIC is required, under Section 150 of the Act to conduct an appropriate investigation to determine whether or not the Appellant was entitled to receive IRI pursuant to Section 81(1)(a) of the Act. Section 150 reads:

> **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, by misinterpreting Section 81(1)(a) of the MPIC Act, failed to conduct an appropriate investigation, pursuant to Section 150 of the Act, to determine whether or not the Appellant was entitled to receive IRI pursuant to Section 81(1)(a) of the Act.

The Commission therefore concludes that:

A. MPIC failed to determine whether:

1. The Appellant had a valid reason for being absent from work in order to receive physiotherapy treatments;
2. The Appellant would suffer a loss of wages by attending physiotherapy treatments during the course of a work day.

B. As a result of the failure of MPIC to consider the merits of the Appellant's claim for compensation, the Appellant was denied an opportunity of establishing that:

1. for valid reasons she could only receive medical treatments in respect of the motor vehicle accident injuries during her regular working hours;
2. she would suffer a loss of income if she was not provided with IRI by MPIC in respect of these absences from work.

For these reasons the Commission allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated October 6, 2004.

The Commission notes that if MPIC had conducted an appropriate investigation as set out in paragraph A above, and/or the claimant was unable to establish the matters as set out in paragraph B above, MPIC would be justified in not providing IRI to the claimant. Since each claim is fact driven, MPIC is required, on a case by case basis, to determine whether any particular claimant is eligible for IRI benefits and they failed, for the reasons set out herein, to make an appropriate determination in respect of the Appellant's claim for IRI.

Is the Appellant entitled to benefits pursuant to s. 138 of the Act?

In the alternative, in the case where MPIC conducted an appropriate investigation and determined that pursuant to Section 81(1)(a) of the Act that the Appellant was not entitled

to IRI compensation, the Commission finds that a remedy may be available to the Appellant pursuant to Sections 138 and 150 of the Act.

The Commission finds that MPIC failed to comply with Sections 150 and 138 of the Act. Section 150 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 Commission finds that Section 150 places on MPIC a duty to consider a victim's claim for entitlement to benefits, including the compensation for lost wages sought by this Appellant, having regard to the provisions of Section 138 and any regulations which may limit the application of Section 138.

In [AC-95-03], the Commission opined that the denial of benefits for partial day absences following a return to work was "wrong" in that it was contrary to the intent of s. 138 of the Act and thus implied that the benefits sought in that case, and in this, might properly be provided pursuant to s. 138:

> While that Section gives the Corporation a reasonable amount of discretion, it seems clear to this Commission that part of the healing or rehabilitation process will frequently consist of a gradual return to work, initially on a part-time basis. The policy directive cited above seems to negate the basic intent of Section 138 and, if only for that reason, to be wrong. (emphasis and underlining added)

In *Menzies* the Manitoba Court of Appeal gave this interpretation of the intent of Section 138:

> Section 138 is intended to require MPIC, subject to the regulations under the Act, to take any measure which, in its discretion, it considers necessary or advisable ...:
> (i) to contribute to the rehabilitation of a victim,
> (ii) to lessen a disability resulting from bodily injury,
> (iii)to facilitate the victim's return to a normal life
> (iv)(to facilitate the victim's) reintegration into society
> (v) (to facilitate the victim's reintegration into) the labour market.

The Court continued:

> [I]t is clear that s. 138 is (but "[s]ubject to the regulations") intended to vest MPIC with a considerable discretion, not only in respect of matters that will contribute to rehabilitation, as set out in the objective ... identified as (i) ... above, but considerably beyond. The other objectives of s. 138 (ii through v) describe additional circumstances which may prompt action from MPIC. These further objectives are, of course, encompassed within the concept of "rehabilitation" in a broad sense. ... *[Section 138 vests] MPIC with power, but exercisable only if MPIC considers it necessary or advisable to exercise that power, to do whatever would advance the objectives in the section in any particular case.* (emphasis added)

The Commission rejects MPIC's counsel's submission that Section 138 "has no application in relation to the issue under appeal". The discretionary power described by the Court of Appeal, in *Menzies (*supra), allows MPIC, pursuant to Section 138 of the Act to offer to such victims, the compensation which will, in the circumstances in which they find themselves, best help them rebuild their lives. "[T]he section is framed, the Court stated, in terms of individual victims, not victims as a class."

The Commission was not made aware of any regulations which might limit the exercise of the discretionary powers contained in s. 138 in relation to providing benefits for the purpose of contributing to the rehabilitation of the Appellant or to lessen the Appellant's

disability resulting from bodily injury. In the Commission's view, pursuant to Section 138, MPIC in the exercise of its discretionary powers, can consider providing to a victim wages lost due to partial days absent from work, during working hours, in order to attend for medically prescribed treatment and\or medical appointments.

An examination of the decisions of the case manager and the Internal Review Officer makes it clear that neither considered exercising any discretion pursuant to Section 138 of the Act in relation to the Appellant's claim for benefits for the purpose of contributing to the rehabilitation of the Appellant or to lessen the Appellant's disability resulting from bodily injury. The case manager erred in failing to consider Section 138 of the Act when she informed the Appellant "there are no provisions under the Act to allow for such compensation." The Internal Review Officer also failed to exercise her discretion, pursuant to Section 138 of the Act, when she upheld the case manager's decision and stated, "Unfortunately, the benefits you have requested simply do not exist."

The Commission therefore concludes that MPIC failed to exercise the discretionary power granted to it pursuant to s. 138 of the Act and, as a result, failed to consider the request of the Appellant for benefits to compensate her for any wages loss she may experience as a result of taking partial days off for prescribed treatment arising out of the accident.

The Commission notes that under Section 138 of the Act, MPIC is not automatically required to grant benefits to the Appellant. MPIC is required to conduct an appropriate investigation to determine if it should take any measure it considers necessary or

advisable for the purpose of contributing to the rehabilitation of the Appellant or to lessen the Appellant's disability resulting from bodily injury.

The Commission concludes for these reasons that MPIC erred in failing to consider the provisions of Sections 138 and 150 of the Act. As a result the Commission therefore allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated October 6, 2004.

Loss of Income

The Commission notes the second reason MPIC refused to provide IRI to the Appellant was that the Appellant had not established that she had suffered any loss of income as a result of receiving medical treatments in respect of the motor vehicle accident injuries.

The Commission further notes that the primary reason why the Appellants in the five (5) decisions by the Commission referred to earlier, did not suffer a loss of income was because they were generally able to absent themselves from work and yet receive payment for their loss of wages from their employer or from some employer benefit plan. However, in this appeal, the Appellant was unable to demonstrate a loss of income since she was unable to absent herself from work because, she asserts, she could not afford the loss of income as a result of being denied IRI by MPIC. The Appellant submitted that she did not voluntarily refuse to absent herself from work, but was being forced by MPIC to continue to work and, as a result, she argued she was unable to receive physiotherapy

treatments because of MPIC's refusal to compensate her for any sporadic absences from work.

The Commission finds that MPIC, by failing to conduct an appropriate investigation pursuant to Section 150, and by failing to consider the provisions of Section 138 placed the Appellant in a catch-22 situation. The Appellant claims she needed medical treatment but without compensation she could not afford to be absent from work.

MPIC stated they would not provide compensation to the Appellant because she had not demonstrated a loss of pay as a result of an absence from work. The Commission rejects MPIC's position in respect of this issue. The Commission finds that MPIC, by failing to carry out its duties pursuant to Sections 81(1)(a) of the Act in respect of the claimant's request for reimbursement of wages lost, and/or in respect of Sections 150 and 138 of the Act for the Appellant's request for benefits under the Act, prejudiced the Appellant's claim to be considered for these benefits under the Act. In the circumstances, MPIC cannot conclude, without having conducted the appropriate investigation, that the Appellant was not entitled to be considered for benefits because she could not demonstrate a loss of income as a result of receiving medical treatments in respect of the motor vehicle accident injuries during her regular working hours. For these reasons the Commission therefore allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated October 6, 2004.

Decision

The Commission notes the decision of the Internal Review Officer in rejecting the Appellant's Application for Review and confirming the case manager's decision was made prior to the decision of the Manitoba Court of Appeal in *Menzies*. As a result, MPIC has not had the opportunity of considering the Appellant's claim for benefits having regard to this decision. However, the Commission does find that the Internal Review Officer, for the reasons set out in this decision, did err in:

1. failing to properly consider the Appellant's claim for compensation under Section 81(1)(a) of the Act;
2. failing to properly consider the Appellant's claim for benefits under Sections 138 and 150 of the Act.
3. failing to carry out its responsibilities as set out in paragraphs 1 and 2 herein and, as a result thereof, prejudiced the Appellant's claim for compensation and/or benefits.

For these reasons the Commission therefore allows the Appellant's appeal and rescinds the decision of the Internal Review officer dated October 6, 2004.

Dated at Winnipeg this 19th day of January, 2006.

MEL MYERS, Q.C.

DEBORAH STEWART

MR. PAUL JOHNSTON