



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-171

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms Wendy Sol
Mr. Neil Cohen

APPEARANCES: The Appellant, [text deleted], was represented by Ms Liisa Cheshire of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATE: June 24, 2005

ISSUE(S): 1. Was the decision to end Income Replacement Indemnity Benefits supported by the evidence?
2. Was the Appellant entitled to reimbursement for personal care assistance funding following the accident?

RELEVANT SECTIONS: Sections 110(1)(a) and 131 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 October 24, 2001 [the Appellant] was injured in a motor vehicle accident in which the vehicle he was driving left the road and slid into a ditch. Damage to the vehicle was minor but the Appellant suffered a number of injuries including a concussion, as well as bruising to the left leg and arm. The Appellant was taken first to the [text deleted] and then to the [hospital] in [text deleted]. He was discharged the day following his accident with a diagnosis of a minor head

injury. As a result of the injuries, the Appellant became entitled to Income Replacement Indemnity ('IRI') benefits.

At the time of the motor vehicle accident the Appellant was a probationary employee with [text deleted] (hereinafter referred to as '[text deleted]'), employed as a scale technician. The Appellant's job description stated:

Duties:

Install, troubleshoot, repair, calibrate various electromechanical and electronic "Legal for Trade" heavy industrial weighing devices which incorporate a wide range of digital readouts, printers and related equipment at customer's sites located mostly in Manitoba, Saskatchewan and Alberta.

Essential Requirements

Education:

Senior matriculation with science background (i.e. physics and/or math).
Post secondary education in electronic technical courses.

Abilities:

Mechanical and electrical aptitude

The Appellant had worked with [text deleted] from March 1997 through April 2000 when he left to pursue similar employment with another employer but subsequently returned to [text deleted] in August 2001, shortly before the motor vehicle accident.

The Appellant attended the [hospital] on November 15, 2001 and was described as feeling "a little out of sorts" with "occasional floaters in his vision". On November 28 and 30, 2001 he attempted a return to work but left each day after a short time complaining of difficulty with memory, headaches and an increased sensitivity to stress. On December 6, 2001 the Appellant again attended at the [hospital] and [Appellant's doctor] diagnosed "post-traumatic concussive

disorder” and referred him for neuropsychological testing. [Appellant’s doctor] felt that the Appellant was unable to work at that time.

In the month of January 2002 the Appellant wished to return to light duties with his employer. With the support of MPIC and his employer, the Appellant began to attend the workplace in a supernumerary capacity, working at light tasks at which he felt he could succeed. The nature of the Appellant’s activities were described by the case manager as an “informal return to work” while still receiving his full IRI. The Appellant, [text deleted] and MPIC agreed that the light duties assigned would consist of desk work, telephone solicitation, customer solicitation, and paperwork. Customer solicitation, it was noted, included a requirement to travel.

The Appellant was seen by [text deleted], a neuropsychologist, in April 2002. [Appellant’s neuropsychologist] confirmed “residual cognitive impairments” including impairments in visual spatial skills which, he commented, “unfortunately will impact on his vocation in his technical field”. [Appellant’s neuropsychologist] noted that the Appellant was “not able to resume full duties with his company” and advised referring the Appellant to an otolaryngologist for treatment of his ongoing vertigo, and to [Appellant’s headache specialist], an internist with a special interest in post-concussive headaches. (underlining added)

Throughout this time, the Appellant continued to work in a supernumerary capacity and, although not attending work on a full-time basis, he was being given increasing responsibilities including attending service calls in a support role with another scale technician. During this time the Appellant had also separated from his spouse and was experiencing stress resulting from a struggle over custody and access to his daughter.

In a report dated June 21, 2002, the Appellant was re-assessed by [Appellant's neuropsychologist] on June 13, 2002 who reported specific impairments especially in visual and non-verbal memory and visual attention. [Appellant's neuropsychologist] stated:

The employment implications of these results would be to prevent [the Appellant] from completing his full or regular duties. He will need more time in recalling information; will be vulnerable to occasional attentional errors; and would be more vulnerable to fatigue after regular work hours. Unfortunately in [the Appellant's] case, the nature of his position often calls for overtime hours, which I would avoid where possible. (This is likely not always possible however since he cannot estimate the amount of time required for rural calls). He is now accommodated in a different position at work ... that avoids my concerns over heights and unpredictable work hours. (underlining added)

[Appellant's neuropsychologist] also noted in this report "additional stressors" resulting from the Appellant's separation from his family.

In August, [text deleted], an otolaryngologist, diagnosed the Appellant with post-head injury cochlear and vestibular trauma. [Appellant's otolaryngologist #1] felt that, at that time, the Appellant would be limited in carrying out the full duties of his employment. [Appellant's headache specialist], who had begun his treatment, also felt that the Appellant was, at the time, unable to return to work.

In June, the Appellant ceased making service calls for [text deleted] and in October was advised to cease driving a motor vehicle for work due to problems with his eyesight. As a result, the Appellant reduced his hours of work and by September ceased working at [text deleted] for a time.

A report dated June 14, 2003 notes that the Appellant was seen again by [Appellant's neuropsychologist] for follow-up visits on December 12 and 17, 2002. [Appellant's neuropsychologist] in this report notes continued gradual cognitive recovery, but also

commented the Appellant appeared “more depressed”, possibly as a result of the ongoing health and family issues. He added that he felt it important to monitor the Appellant’s mood in case it might in the future be useful to consider other options such as psychotherapy or psychiatric consultation. [Appellant’s neuropsychologist] recommended that if there are complications in the Appellant’s return to work, the case manager consider engaging “an occupational therapist to liaison between the Appellant and the company to help identify work solutions that might be appropriate”.

The Appellant was referred to [Appellant’s otolaryngologist #2], [text deleted], by [Appellant’s otolaryngologist #1], to assess the Appellant’s dizziness. [Appellant’s otolaryngologist #2], in his report dated May 14, 2003, states that he saw the Appellant on April 9, 2003. In his report [Appellant’s otolaryngologist #2] could find no objective physical findings to support the Appellant’s claim of dizziness and noted a “fair bit of psychogenic overlay which may have been caused by his concussion”. [Appellant’s otolaryngologist #2] suspected that the Appellant’s “subjective complaints can be related to the MVA” and recommended he be treated by a “neuropsychologist who specializes in head injuries and psychological changes that can occur post-head injury”. (underlining added)

The case manager arranged for a Rehabilitation Consultant who developed a Gradual Return to Work Plan, which the Appellant began in June 2003. The Plan built on the tasks he had been doing “so as not to tax him with new learning” and focused on providing “structured singular tasks” with multi-task items being minimized. High level and balance work tasks, such as those which require the use of a ladder and driving company vehicles, were to be strictly avoided.

On October 29, 2003 [Appellant's neuropsychologist] provided a report which indicated that he saw the Appellant on October 23, 2003. In this report [Appellant's neuropsychologist] noted that there was improvement to the Appellant's cognitive functions to some extent. However, he also stated:

. . . In contrast, he continued with approximately a moderate slowness in one form of concentration (where he needs to focus on two factors simultaneously); and computerized testing of his visual attention/vigilance indicates slowness, variability, limited flexibility to change, and general inattentiveness.

[Appellant's neuropsychologist] further stated in this report:

[The Appellant] has returned to his duties as a scale technician on a full-time basis. However I understand both from [the Appellant] and [Appellant's rehabilitation consultant] that he is not fulfilling all of his duties and is engaged in more of the routine aspects. I understand that his employer is not fully confident in [the Appellant] making "calls" with the company vehicle alone. [The Appellant] continues to have low confidence in his ultimate success.

In a report dated November 24, 2003, [text deleted], a psychiatrist, diagnosed the Appellant as suffering from a Somatoform Disorder – NOS, which he described as a condition in which there are physical symptoms suggestive of a medical condition where the symptoms are not fully explained by any medical condition which is present. Noting that there are no specific treatments for such conditions, he recommended medication and a referral for cognitive behavioural psychotherapy.

In December 2003, the Appellant attended [text deleted], a registered psychologist, for treatment of the Somatoform Disorder. The Appellant commenced treatment in January 2004 and continued until April when he requested, and was given, a break because he found himself becoming increasingly stressed by the demands on him at that time. [Appellant's psychologist] asked that the Appellant return one month after the break began for a follow-up meeting but this meeting did not occur and she did not see him again. In a report dated August 9, 2004,

[Appellant's psychologist] reported to the case manager that she had discharged the Appellant from her care and commented that she felt that the psychotherapy had been of some benefit to the Appellant and noted that underlying issues persist such that he might benefit from further treatment at some point in the future. She did not feel that the underlying issues were related to the motor vehicle accident.

In February 2004, a Rehabilitation Plan was developed for the Appellant. The Rehabilitation Consultant developed a six (6) week Gradual Return to Work Plan to commence on February 23, which would see the Appellant returned to his employer's payroll upon completion. In March, the Plan was extended by two (2) weeks due to difficulties being experienced at the end of week four (4) by the Appellant. The Plan was extended further when the Appellant broke out in "hives" and missed a number of days. On April 28, 2004, the Rehabilitation Consultant reported that the Appellant would have, by April 30, completed several weeks of full time work and successfully completed the return to work program.

In a memo to file dated May 3, 2004 the case manager indicates that he called the Appellant on April 30, 2004 and advised him that he was returning to full duties with [text deleted] and was going on the payroll as of May 3, 2004. The case manager confirmed to the Appellant that [text deleted] felt that the Appellant was doing well at work and that he had been able to complete all of his duties as a scale technician. The case manager further advised the Appellant that IRI would be paid to May 2, 2004 and thereafter would end since the Appellant was returning to his full duties with [text deleted].

Case Manager's Decision - IRI

On May 3, 2004 the case manager wrote to the Appellant confirming that the Appellant had completed his supernumerary Graduated Return to Work Program and was capable of returning to his employment as a scale technician. The case manager noted that as of April 30, 2004 the Appellant had completed several weeks of full-time work and that he was returning at full duties on [text deleted] payroll as of May 3, 2004.

On June 24, 2004 [Appellant's neuropsychologist] provided a medical report to the case manager wherein he stated that he had seen the Appellant earlier in the month of June for a neuropsychological follow-up. The purpose of the follow-up was to review the Appellant's cognitive status following completion of all treatment modalities. [Appellant's neuropsychologist] informed the case manager that he had been monitoring the Appellant's cognitive recovery intermittently from the concussion he had sustained on October 24, 2001, the date of the motor vehicle accident. In this report [Appellant's neuropsychologist] stated:

Verbal Memory

[The Appellant] has had persistent limitations with one type of verbal memory, in remembering information in list form. We have attempted to utilize different versions, alternate formats, and/or earlier versions when we see him to minimize practice effects. On the current testing [the Appellant] had slight difficulties in recalling information in his immediate recall, and was mildly below average in his speed of verbal learning. His ability to recall information after a few minutes delay was slightly below average, and he continued to be slightly below average in recalling information after a half-hour delay as well. . . .

...

Attention/Concentration

[The Appellant] continues to be slow in one type of concentration, where we are potentially seeing vulnerability to distraction. In this type of task, he needs to focus on two factors simultaneously, which appears to slow him substantially, compared to a test where he is only focussing (sic) on one factor. His level of difficulty here is at least moderate.

...

Conclusions and Recommendations

- 1) [The Appellant] has improved in one type of attention/concentration, but does continue to be vulnerable to distraction with a second type of concentration.(sic)
 - 2) He also continues to have some mild variability in limitations in one type of verbal memory, with information in list form.
 - 3) Since we are more than two years post-injury, I would not anticipate either improvement or regression at this point in time. (underlining added)
- ...

Application for Review - IRI

On August 16, 2004 the Appellant made an Application for Review claiming that the return to work program was not timed right in that he was still experiencing problems and losing time at work, for which there was no compensation. The Appellant also sought compensation for his sister and his mother in respect of their taking care of him following the motor vehicle accident.

On August 20, 2004, the Appellant was laid off from his employment due to lack of work in the service department.

Internal Review Officer's Decision – IRI

The Internal Review hearing occurred on September 14, 2004 and the Internal Review Officer issued his decision on September 21, 2004 confirming the case manager's decision to terminate IRI.

In upholding the case manager's decision in respect of terminating the Appellant's IRI, the Internal Review Officer stated:

15. Although the return to work program ended up taking 10 weeks, by final report dated April 28, 2004, [Appellant's rehabilitation consultant] reported that you

successfully completed the return to work program in a full time capacity. You went on the payroll of [text deleted] as of the end of April 2004.

16. Accordingly, by decision letter dated May 3, 2004, the case manager terminated your IRI benefits on the basis that you had gone back to regular full time work.
17. On August 16, 2004, you filed an Application for Review. On August 20, 2004, you were laid off from your job at [text deleted] due to a shortage of work. The file indicates that you were advised that due to a downturn in the farming industry, there was a lack of work. Your supervisor indicated you were doing your job and performing all the duties required of a scale technician.
18. At the hearing, you and your sister, [text deleted], contended you did not receive feedback on how you were doing at [text deleted], and that you were not doing the same things that you had been doing prior to the motor vehicle accident. For example, you claimed that you only climbed a ladder and worked on a grain elevator once instead of everyday like you did before. You also suggested that IRI benefits should not have ended as you now have no job and little chance of finding a new one. You suggested I speak to [text deleted].
19. Immediately following the hearing, I spoke to [text deleted] by telephone. She works in the Accounts Payable and Human Resources Department at [text deleted], and said she was familiar with your situation. She said that when you began the gradual return to work program in February 2004, that is the slow time of year. Contrary to your evidence, however, she said that you went on site many times and did not just work "in-house" on projects in the office. She gave the following dates that you were off-site working at various customers' locations: March 3, 9, April 5, 27, 29, May 7, 19, 27, 31, June 1, 8, 22, 23, 24, July 8, 14, 15, 17, 20, 27, 28, 29, 30, August 3, 4, and 5. She also advised that between February 2 and May 20, you were off work about 44 days for personal reasons, such as court dates relating to the custody matter of your child, doctor's appointments, and most importantly, your house burnt down on May 7.

The Internal Review Officer stated that the issue for his determination was whether the decision to end IRI benefits was supported by the evidence, and he concluded that there was sufficient evidence for the following reasons:

DISCUSSION & RATIONALE FOR DECISION

Section 110(1)(a) of the *Act* states that IRI ceases when a person is able to hold the employment that they held at the time of the motor vehicle accident.

In May 2004 when you went back on [text deleted] payroll, you were doing the tasks that you had done prior to the motor vehicle accident. The reports of [Appellant's rehabilitation consultant] reflect that he was in communication with your supervisor all along, monitoring your progress. It is evident as well from speaking with [text deleted]

that you were sent to job sites many more times than you recall. Your supervisor also indicated that you were doing all the job duties as a scale technician.

In sum, it appears to me that your recollection of what you did is not accurate.

The case manager thus had no choice but to end IRI benefits in May 2004 since you were back to your regular job duties. (underlining added)

The fact that several months later you were laid off due to a lack of work is unfortunate. It is understandable, given your medical condition, why you believe the layoff relates to the accident somehow. The evidence, however, suggests that the layoff had nothing to do with your ability to do your job and the fact that it had occurred a few months after you returned to your regular duties, seems more of a coincidence than anything else.

The decision to terminate your IRI benefits must be confirmed.

In respect of the Appellant's request for compensation for his sister and mother, in respect of their taking care of him following the motor vehicle accident, the Internal Review Officer referred this request back to the case manager for the case manager's assessment.

The Appellant then submitted a formal request for payment of \$5,950.00 along with a signed receipt from his mother for "homecare, housekeeping, meal preparation, driving to and from Dr. appointments, and child care ... for the period Nov. 1/02 – March 30/04".

On October 5, 2004, the Appellant filed a Notice of Appeal with the Commission stating that he had been left with no income and was unable to support himself.

Case Manager's Decision – Personal Care Assistance

On October 15, 2004 the case manager rejected the claim for compensation for personal care on the basis that such a claim is based on a percentage set out in the legislation governing MPIC and determined by a Personal Assistance Expenses Worksheet score which assesses need in relation to: Personal Care Assistance, Home Assistance Requirements, Neurological or Psychological

Factors Necessitating Supervision, and Need for Particular or Special Supervision. This Worksheet was not completed as the claim was not made until September 20, 2004. The case manager stated that a review of the Appellant's medical information as of October 5, 2004 showed no medical evidence to indicate the existence of psychological, psychiatric, or neuropsychological conditions which can be attributed to the motor vehicle accident and which would necessitate the need for personal care.

On October 15, 2004, the Appellant was granted Permanent Impairment Benefits of \$10,933.08 for the concussion and cognitive impairment resulting from the motor vehicle accident.

Internal Review Officer's Decision – Personal Care

The Appellant made Application for Review of the case manager's decision dated October 22, 2004. On October 22, 2004, the Internal Review Officer upheld the decision of the case manager to reject the claim for repayment of the monies claimed for personal care on the basis that there was no medical evidence to support the claim of the Appellant of a need for personal care assistance.

On November 2, 2004, the Appellant filed a Notice of Appeal with the Commission stating that the case manager had erred in his decision and that his condition was such that he did in fact require supervision and help.

Appeal

The relevant provisions of the MPIC Act relating to this appeal are Sections 110(1)(a) and 131, which state:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;

Reimbursement of personal assistance expenses

131 Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than \$3,000. per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

The Appellant testified that prior to the motor vehicle accident he worked as an electronics technician and technologist with [text deleted] and carried out all of the duties as set out in the job description, which included installing, troubleshooting, repairing and calibrating various electromechanical and electronic “Legal for Trade” heavy industrial devices which incorporate a wide range of digital readouts, printers and related equipment at customer’s sites. [Appellant’s rehabilitation consultant], [text deleted], in his Initial Assessment of the Appellant dated April 21, 2003, describes the Appellant’s occupation as follows:

. . . This occupation involved operating and establishing process control parameters, programming computers, calibration of industrial scales throughout rural Manitoba. [The Appellant] has been involved in hydro projects, cement plants, airports, grain elevators, steel manufacturing and fertilizer/feed businesses.

Essentially, his occupation required him to install, calibrate, set up, maintain, or repair scale and related technological instruments in industrial environments. In addition, he was required to complete service contracts with these customers and as a result, would travel on a regular basis. He reports that for a period of time he worked at [text deleted] and traveled for 260 nights per year.

In his testimony the Appellant said that:

1. his primary job was to attend at a customer’s site and conduct a troubleshooting investigation to determine the problem with the weighing devices, and then to proceed to remedy the problem;

2. the work of identifying the problem was complex, involved a series of multi-tasks and analysis, assessment, and reliance on past experience in determining the nature of the problem;
3. after identifying the problem, the next step was to decide on the most effective method to resolve the problem and then to proceed with the necessary work to accomplish this objective.

The Appellant further testified that:

1. prior to the motor vehicle accident he was able to carry out his duties quickly and efficiently without error and this permitted his employer to charge the customer for all of the hours the Appellant worked.
2. as a result thereof, there was sufficient chargeable hours which permitted the employer to cover the Appellant's salary and expenses and, as well, to provide for the employer's profit.
3. he was recognized by [text deleted] as being a valuable employee and was always sent out to carry out the core activities of the scale technician's job, which were trouble shooting assignments at the customer's site.

The Appellant further testified that after the motor vehicle accident:

1. he was unable to quickly and efficiently carry out the troubleshooting aspects of his job in a manner satisfactory to [text deleted];
2. while he was performing these trouble shooting duties he was having memory problems, as well as problems in carrying out a variety of tasks simultaneously, which prevented him from speedily and satisfactorily carrying out the trouble shooting functions.

3. he had a problem with vertigo which prevented him from climbing ladders to carry out his trouble shooting activities at customer's sites.
4. in attempting to perform the trouble shooting activities he was committing errors which required [text deleted] to send out another scale technician to rectify these errors.
5. due to these difficulties [text deleted] was unable to charge their customers for all of the hours they had expended in respect of the trouble shooting activities performed by him and, as a result, [text deleted] was unable to recover his salary and expenses and obtain a profit.
6. [text deleted] had lost confidence in his ability to trouble shoot and, as a result, restricted his activities to performing the duties of a janitor and warehouseman at [text deleted] premises and acting as an assistant to a scale technician at the customer's sites.

The Appellant also testified that after the motor vehicle accident:

1. as a result of these work problems he never returned to carried out the essential duties as a scale technician.
2. he spent a large portion of his work day at [text deleted] premises doing warehouse and caretaker duties only.
3. when he attended at customer's premises he did so in the capacity of an assistant to the scale technician performing routine duties as a scale technician's helper.
4. due to these difficulties, he was unable to successfully carry out his troubleshooting activities at a pace which would permit his employer to charge a customer for all the hours the Appellant had expended on the repair work;

5. as a result, his employer was not able to recover the Appellant's salary and expenses and make a profit.

The Appellant in his testimony:

1. was critical of the role played by [Appellant's rehabilitation consultant] who, he alleged, superficially monitored his work progress.
2. acknowledged that [Appellant's rehabilitation consultant] did speak to him from time to time but that [Appellant's rehabilitation consultant] never attended at the work sites to determine whether or not the Appellant in fact was performing the duties of a scale technician.
3. asserted that all that [Appellant's rehabilitation consultant] did in monitoring his work was to communicate with both himself and the employer's supervisor as to his work activity.
4. asserted that [Appellant's rehabilitation consultant] was in error when he informed MPIC in April of 2004 that the Appellant had successfully completed a return to work program in a full-time capacity.
5. asserted that the case manager erred when he terminated his IRI benefits on the basis that he had gone back to his regular full time work at [text deleted].
6. strongly disagreed with the decision of the Internal Review Officer who found that in May 2004, when the Appellant went back on [text deleted] payroll, that he was doing the work of a scale technician which he had done prior to the motor vehicle accident.

The Appellant further testified that:

1. after he returned to [text deleted] payroll in the month of May 2004, until he was laid off at the end of August 2004, he continued to perform the same kind of duties he

performed prior to the termination of his IRI benefits and that at no time did he ever return to performing the essential duties he performed as a scale technician prior to the motor vehicle accident.

2. in his view [text deleted] laid him off from his employment not because there was a lack of work, but because of the cognitive impairment injuries he sustained in the motor vehicle accident.
3. subsequent to his lay off he attempted to start his own business as a scale technician and was largely unsuccessful in obtaining any significant business in this respect.

Submission

The Appellant's Claimant Adviser, in her submission, reviewed the Appellant's testimony and referred as well to the medical evidence in support of the Appellant's position and stated:

1. [Appellant's neuropsychologist], [text deleted], who had seen the Appellant in the month of April, 2002, confirmed "residual cognitive impairments which will impact on the Appellant's vocation in his technical field", and stated that in his view the Appellant was not able to resume full duties with the company.
2. [Appellant's neuropsychologist], in a report in the month of June 2002, indicated he had reassessed the Appellant and had found specific impairments especially visual and non-verbal memory and visual attention. In his view the employment implications of these results would be to prevent the Appellant from completing his regular and full-time duties.
3. [Appellant's otolaryngologist #2], [text deleted], who examined the Appellant in respect of his complaints relating to dizziness, stated that he had noted a fair bit of psychogenic overlay which may have been caused by the Appellant's concussion.

4. [Appellant's psychiatrist], [text deleted], diagnosed that the Appellant was suffering from a Somatoform Disorder – NOS.
5. the reports of [Appellant's rehabilitation consultant] were flawed and were primarily relied upon by the Internal Review Officer in confirming the case manager's decision to terminate the Appellant's IRI.

The Claimant Adviser therefore submitted that the Commission should rescind the Internal Review Officer's decision to terminate the Appellant's IRI benefits and to reinstate these benefits.

MPIC's legal counsel submitted that:

1. the Appellant had failed to establish, on a balance of probabilities, that he was unable to hold full-time employment as a scale technician at the time of the motor vehicle accident when MPIC terminated his IRI benefits in May of 2004.
2. the evidence clearly established that not only was the Appellant capable of carrying out all of the duties as a scale technician, and in fact he had performed all of these duties from the date of the termination of his IRI benefits until he was laid off at the end of August 2004.
3. the evidence established that the layoff by the Appellant's employer had nothing to do with the Appellant's motor vehicle accident injuries and that in fact the Appellant had continued to work for several months after termination of his IRI benefits and was only laid off from his employment due to a lack of work.
4. the reports of [Appellant's rehabilitation consultant], [text deleted] who had monitored the Appellant's return to work on behalf of MPIC, and the reports of the

Appellant's supervisor, both indicated that the Appellant was performing all of the duties required of a scale technician.

5. the Internal Review Officer reported that he had spoken to an officer of the Appellant's employer who informed him that the Appellant not only had worked "in-house" on projects in the office, but also worked on site at various customer locations during the months of March, April, May, June, July and August of 2004.

MPIC's legal counsel therefore submitted that the Internal Review Officer was correct in concluding that since the Appellant had returned to his regular job duties he was no longer entitled to IRI benefits under Section 110(1)(a) of the MPIC Act and that the appeal should be dismissed.

Discussion

The Commission finds that the issue for determination in respect of the termination of IRI benefits must be decided on the basis as to whether or not the Appellant has established, on the balance of probabilities, that he was incapable of returning to his pre-employment status as a scale technician when his IRI benefits were terminated by MPIC on May 3, 2004. The Commission also finds that the issue as to whether the Appellant was or was not bona fide laid off due to lack of work, or because of motor vehicle accident injuries at the end of August 2004, is not an issue for determination by the Commission at this time.

The Internal Review Officer, in his decision dated September 21, 2004, confirming the case manager's decision to terminate IRI benefits, states:

ISSUE

Was the decision to end IRI benefits supported by the evidence?

DISCUSSION & RATIONALE FOR DECISION

Section 110(1)(a) of the *Act* states that IRI ceases when a person is able to hold the employment that they held at the time of the motor vehicle accident.

In May 2004 when you went back on [text deleted] payroll, you were doing the tasks that you had done prior to the motor vehicle accident. The reports of [Appellant's rehabilitation consultant] reflect that he was in communication with your supervisor all along, monitoring your progress. It is evident as well from speaking with [text deleted] that you were sent to job sites many more times than you recall. Your supervisor also indicated that you were doing all the job duties as a scale technician.

The Commission, after reviewing all of the documentary evidence filed at the hearing, and considering the testimony of the Appellant and the submissions of both parties, has concluded the Internal Review Officer erred in determining the Appellant was carrying out the work of a scale technician when he went back on [text deleted] payroll in May 2004.

In arriving at his decision the Internal Review Officer:

1. relied on the incomplete and faulty investigation of [Appellant's rehabilitation consultant] as to the ability of the Appellant to return to full-time employment as a scale technician;
2. relied on the decision of the case manager who:
 - a. failed to give any weight to the medical reports of [Appellant's neuropsychologist] as to the Appellant's fitness to return to work as a scale technician;
 - b. failed to obtain an updated medical report from [Appellant's neuropsychologist] as to the Appellant's fitness to return to work.
3. relied on the ambiguous reports of [text deleted] in respect of the Appellant's activities at the customer's worksites; and

4. uncritically accepted the report of the Appellant's supervisor as to the Appellant's fitness to carry out the essential duties of a scale technician.

Investigation of [Appellant's rehabilitation consultant] and the Case Manager

The Commission finds that the initial reports of [Appellant's rehabilitation consultant] and the case manager do not support the Internal Review Officer's decision that at the time that the Appellant went back on [text deleted] payroll in May 2004 he was performing all of the essential duties of a scale technician.

The Appellant, due to his motor vehicle accident injuries, had difficulties in returning to work as a scale technician. The Appellant had attempted to return to work on November 28 and 30, 2001 but left each day after a short time complaining of difficulty with memory, headaches and an increased sensitivity to stress.

Due to the difficulty the Appellant was having in returning to his employment, MPIC retained [Appellant's rehabilitation consultant], [text deleted], to arrange and monitor the Appellant's return to work. [Appellant's rehabilitation consultant], in his reports to MPIC, consistently noted the difficulties the Appellant had upon his return to work at [text deleted]. [Appellant's rehabilitation consultant] provided an Initial Report to MPIC dated October 31, 2003 wherein he states:

Physical Limitations/Complaints

[The Appellant] reports ongoing feelings of frustration and cognitive difficulties in performing his work. [Appellant's neuropsychologist] has recently forwarded a report outlining [the Appellant's] complaints. In relation to work, [the Appellant] continues to experience concentration and attention errors in the tasks. It has been identified by [the Appellant] and the employer that when problem solving errors on the scales he has to start at the beginning of the process if interrupted prior to completing the work.

[The Appellant] expresses and displays a level of frustration. He states it is related to not being able to complete tasks as he did before the MVA (accuracy and speed).

The employer has identified this issue as well and may be negatively affecting [the Appellant's] relationship with his co-workers.

...

[Appellant's rehabilitation consultant] further stated:

[The Appellant] was to perform occupational tasks with which he was familiar. He was and continues to be restricted in working alone on service calls. This restriction is related to the employers concern regarding safety and accuracy of the work.

[The Appellant] was scheduled to complete the return to work program as of September 15th, 2003, pending [Appellant's neuropsychologist's] assessment. [Appellant's neuropsychologist] advised that [the Appellant] continued to have concentration and attention difficulties. The employer confirmed that [the Appellant] was making errors in his work and that he was taking additional time to complete tasks. The [text deleted] of [text deleted] expressed concern regarding [the Appellant's] ability to work to the pre-MVA level. She stated that they would require that [the Appellant] be more productive and accurate in the work than he has demonstrated since over the past few months.

.....

As of October 31st, [the Appellant] continues to work 8 hours per day. His manager reports continued errors on the job and have not, (nor feel it is safe to do so) had [the Appellant] do service calls independently. Independent service calls is a core essential task of his work. (underlining added)

On January 26, 2004 [Appellant's rehabilitation consultant] wrote to the case manager and reported that he had contacted the employer who informed him that the Appellant:

... continues to make mistakes in his work, where other employees have had to return to the job site to correct the errors. The employer remarked that there are increasing tensions between the employees and [the Appellant], due to [the Appellant's] moods and work errors. (underlining added)

The Commission also notes that the case manager produced a memo to file in respect of a meeting of February 3, 2004 with the Appellant. In this discussion the Appellant outlined the difficulties he was having upon his return to work and the case manager stated:

I advised that he needs to go back to work. I asked how he was doing and he advised that

he is still having some dizziness and cognitive memory problems. He advised that when he is in a hallway he feels like the hallway tilts to one side when he is walking. He also stated one of the problems about returning to work would be that he had to drive the big truck with the boom to lift the weights onto the scales. He advised that he has enough trouble driving his own car and does not feel that he can drive that big truck with the way he feels. He is still having problems with trouble shooting in scale repair and organizing the daily routine of going to work and life's daily activities. He confirmed that he was not talking to people at work and was keeping to himself. I asked if he was trying to climb any stairs our (sic) anything to see if the dizziness had improved and he confirmed that he had cleaned the snow off of the roof of the trailer that he lives at.

I asked about what he was doing at work and he indicated that all he was doing was sweeping up when he left just before Christmas. He advised that he just wanted someone to tell him what to do and he wanted to be done and the doctors to say that he was better so he could carry on with his life. (underlining added)

The reports of both [Appellant's rehabilitation consultant] and the case manager clearly indicate the Appellant was not performing the essential duties of a scale technician, ie. trouble shooting, and that when the Appellant left his job at Christmas he was only performing caretaking duties at the employer's premises.

In a further report to file dated February 4, 2004 the case manager reports a discussion he had with the Appellant:

He spoke to his boss at [text deleted] and he told them that he wants to come back on a full time basis. [text deleted] has asked that they meet with [Appellant's rehabilitation consultant] and him so they can get this into place. [The Appellant] is indicating that [text deleted] does not want him back unless he can do the job. [The Appellant] indicated that he has to do the job. (underlining added)

The Commission had an opportunity of hearing the testimony of the Appellant and observing him during the course of his testimony. The Appellant had suffered significant injuries as a result of the motor vehicle accident which adversely affected his ability to return to his employment as a scale technician. It was clear to the Commission that the Appellant was having difficulties in performing the work of a scale technician up to the standard expected by his employer and as a result his employer had limited the Appellant's duties to that of a

caretaker/warehouseman and an assistant to a scale technician at the customer worksites.

The Appellant testified that when the employer limited his work to caretaking, warehousing and acting as an assistant to a scale technician, this caused him a great deal of frustration, anxiety and insecurity in respect of his employment. As a result, although the Appellant was unhappy with the limitations imposed upon him in respect of his work activities, he was prepared to do any work offered by the employer in order to keep his job.

In the above mentioned memorandum dated February 4, 2004 the case manager documents the employer's position that the employer would only accept the Appellant back on their payroll if the Appellant was able to do all the essential duties of scale technician. Although the Appellant knew he was having enormous difficulties doing the complex duties of a scale technician, he accepted the employer's terms and conditions of employment when he returned to work on the employer's payroll in order to protect his employment.

In November 2003 [Appellant's psychiatrist], [text deleted], diagnosed the Appellant as suffering from a Somatoform Disorder. In December 2003 the Appellant attended upon [Appellant's psychologist], [text deleted], for treatment of the Somatoform Disorder. The Appellant commenced treatment in January 2004 and discontinued the treatment in the month of April 2004.

In a memorandum to file dated February 9, 2004 the case manager reported that [Appellant's psychologist] had confirmed that the Appellant could return to work but it should be done on a graduated basis and further stated in this memorandum:

TREATMENT PLAN: ... [Appellant's psychologist] indicates that there is nothing physically preventing the return to full time duties as a scale technician. ...

The Commission finds that the Appellant's physical capacity to perform the duties of a scale technician was not in issue in this appeal. The Commission further finds that [Appellant's psychologist's] diagnosis was irrelevant as to the fitness of the Appellant to return to his full-time duties as a scale technician as a result of the motor vehicle accident. The Appellant suffered from cognitive impairments diagnosed by [Appellant's neuropsychologist], and vertigo with psychogenic overlay as diagnosed by [Appellant's otolaryngologist #2]. Neither of these diagnoses were physical in nature and therefore [Appellant's psychologist] comments have no relevance as to the fitness of the Appellant to return to work as a result of the motor vehicle accident.

The Commission notes that notwithstanding the consistent negative reports of [Appellant's rehabilitation consultant], the case manager and the Appellant's employer in respect of the Appellant's difficulties in working as a scale technician, and notwithstanding the medical reports of [Appellant's neuropsychologist] and [Appellant's otolaryngologist #2] outlining the Appellant's medical difficulties, the case manager in relying on [Appellant's psychologist] irrelevant medical opinion entered into an agreement with both the Appellant and the employer relating to a rehabilitation plan providing for the Appellant's return to work at [text deleted]. This rehabilitation plan provided a six (6) week gradual return to work plan commencing February 23, 2004 which would see the Appellant's return to his employer's payroll upon completion.

Unfortunately, approximately two (2) weeks after the Appellant returned to work on the

rehabilitation plan, he continued to have difficulties with performing the work. In a memorandum to file dated March 10, 2004 the case manager reported a telephone discussion with the Appellant wherein he advised his case manager that he was having a difficult time at work and that things were not getting better. He further advised the case manager that he had been off work for sometime, that the transition would be difficult and he had to put his best effort in at doing this job.

In a further memorandum to file dated March 18, 2004 the case manager reported that he contacted the Appellant's immediate supervisor at [text deleted] who informed the case manager that the Appellant was doing well at work and HE WAS DOING WHAT HAD BEEN ASSIGNED TO HIM. The supervisor further indicated the Appellant had been on time, had shown up for work and was doing his duties but the supervisor was hesitant to send the Appellant on the road at that time. The case manager in this report did not specify the specific duties that the Appellant was performing. However, the Appellant testified that he worked only as a caretaker/warehouseman, and as an assistant to a scale technician at the customers' sites during this period of time and was not assigned the duties of a scale technician. The Commission finds that the employer's report to the case manager, as set out in this memorandum, corroborates the Appellant's testimony that he was not performing the work of a scale technician during the return to work program.

[Appellant's rehabilitation consultant] in his final report to MPIC dated April 28, 2004 confirms that the Appellant had returned to work in a full-time capacity and had successfully completed the return to work program which commenced on February 23, 2004. However, the Commission finds that [Appellant's rehabilitation consultant's] report of April 28, 2004 contradicts his earlier reports dated October 31, 2003 and January 26, 2004 that the Appellant successfully completed a

return to work program. The Commission finds that [Appellant's rehabilitation consultant] does not explain on what basis he determined that initially the Appellant was incapable of working as a scale technician and that subsequently the Appellant was capable of carrying out these duties. As a result, in view of [Appellant's rehabilitation consultant's] contradictory reports, the Commission cannot give any weight to his final report of April 28, 2004.

The Commission notes that the Appellant in his testimony was highly critical of the manner in which [Appellant's rehabilitation consultant] carried out his monitoring duties. The Appellant testified that [Appellant's rehabilitation consultant] obtained his information as to his progress primarily from the Appellant's supervisor and only occasionally spoke to the Appellant briefly about his work activities. The Appellant further testified that [Appellant's rehabilitation consultant] never observed him either working at the company's premises or at the customers' sites and therefore asserted that [Appellant's rehabilitation consultant] was not in a position to conclude that he had returned to work in a full-time capacity and had successfully completed his return to work program. The Commission further notes that MPIC did not call [Appellant's rehabilitation consultant] to rebut the testimony of the Appellant in this respect.

The Commission finds that [Appellant's rehabilitation consultant] did not obtain any information as to the work activities of the Appellant from sources independent of the Appellant's supervisor. The Appellant testified that when he attended customers' sites he did so in the capacity as an assistant to a scale technician carrying out routine activities as instructed by the scale technician. The Commission notes that MPIC did not produce any evidence to establish that [Appellant's rehabilitation consultant] ever obtained any information from any of the Appellant's co-workers as to the Appellant's work activities. The Commission further notes that MPIC did not call any witnesses from the employer to contradict the testimony of the Appellant in this respect. The

Commission is not convinced that [Appellant's rehabilitation consultant's] April 28th report is an accurate assessment for the Appellant's work activities. The Commission therefore finds the Appellant's testimony in respect of his work activities prior to May 3, 2004 at the employer's premises and at the customers' sites stands unchallenged and this testimony is accepted by the Commission.

The Commission therefore determines that [Appellant's rehabilitation consultant], in carrying out his monitoring duties, did not conduct a thorough investigation to determine whether or not the Appellant had successfully completed the return to work program and was able to perform all of the duties of a scale technician. Unfortunately the Internal Review Officer in arriving at his decision to terminate the Appellant's IRI relied on [Appellant's rehabilitation consultant's] flawed final report dated April 28, 2004.

In a memorandum to file dated June 8, 2004 (approximately six (6) weeks after the Appellant went back on [text deleted] payroll) the case manager reported a telephone discussion he had with the Appellant and stated that:

1. the Appellant informed him that the employer had placed him on probation and he wished to appeal MPIC's decision to return to work since he was not on full duties;
2. he advised the Appellant that since he had completed his return to work program it was now between the Appellant and his employer, and that there was no medical information which prevented him from returning to his full duties.

The Commission finds in respect of the purported lack of medical evidence that if the case manager:

1. had not relied on the irrelevant medical opinion of [Appellant's psychologist] in respect of the Appellant's physical abilities;
2. had considered the existing medical reports of [Appellant's neuropsychologist] prior to terminating the Appellant's IRI;
3. had obtained updated reports from [Appellant's neuropsychologist] as to the fitness of the Appellant's ability to work as a scale technician;

the case manager might have concluded that there was ample medical information which would have prevented the Appellant from returning to his full duties.

The Commission finds that the case manager erred in failing to obtain the appropriate medical information to determine the fitness of the Appellant to carry out the essential duties of a scale technician. The Commission also finds that the Internal Review Officer unfortunately adopted the findings of the case manager in this respect and in error concluded that the case manager had no choice but to end the IRI benefits in May 2004 on the basis the Appellant had returned to his regular job duties.

The Commission finds that:

1. prior to the motor vehicle accident the Appellant was considered as an extremely valuable employee by [text deleted];
2. the difficulties the Appellant had in attempting to perform the duties of a scale technician prior to the end of April 2004 continued after the Appellant returned to [text deleted] payroll;
3. the Appellant's desire to appeal MPIC's decision on the grounds that as of May 3, 2004 he was not performing the full duties of a scale technician confirms the Appellant's testimony in that respect.

The Commission therefore finds that:

1. [Appellant's rehabilitation consultant] did not conduct a thorough investigation into the Appellant's work activities at [text deleted] and that his final report to the case manager dated April 28, 2004 indicating that the Appellant has successfully completed the return to work program in a full-time capacity was flawed;
2. the case manager erred in accepting the final report of [Appellant's rehabilitation consultant] as to the Appellant's fitness to work as a scale technician and the irrelevant medical opinion of [Appellant's psychologist] in respect of the Appellant's physical capacity to carry out the activities of a scale technician and, as a result, erred in determining that the Appellant was capable of returning to work as a scale technician on or about May 3, 2004;
3. the Internal Review Officer, when accepting the flawed investigation of [Appellant's rehabilitation consultant] and the case manager's decision that the Appellant was capable of working as a scale technician on May 3, 2004, erred in rejecting the Appellant's Application for Review and confirmed the case manager's decision dated May 3, 2004.

Medical Evidence

The case manager in arriving at his decision to terminate the Appellant's IRI, erred in failing to give any weight to the existing medical reports of [Appellant's neuropsychologist] to outline the significant medical difficulties the Appellant suffered from as a result of the motor vehicle accident. The Commission further finds that having regard to the negative reports of [Appellant's rehabilitation consultant] and the employer, and the medical reports of [Appellant's

neuropsychologist], the case manager should have requested [Appellant's neuropsychologist] to provide an updated assessment of the Appellant's ability to return to work as a scale technician prior to terminating the Appellant's IRI. Instead, the case manager relied on the irrelevant medical opinion of [Appellant's psychologist] in determining the Appellant's fitness to return to work as a scale technician.

On December 6, 2001 the Appellant attended again at the [hospital] when [Appellant's doctor] diagnosed a "post-traumatic concussive disorder" and referred him for neuropsychological testing. [Appellant's doctor] felt that the Appellant at that time was unable to work.

The Appellant was seen by [Appellant's neuropsychologist], [text deleted], in April 2002 and [Appellant's neuropsychologist] confirmed "residual cognitive impairments" including impairments in visual spatial skills which he commented "unfortunately will impact on his vocation in his technical field". [Appellant's neuropsychologist] noted at that time the Appellant was not able to resume his full duties with the company and the Appellant was referred by [Appellant's neuropsychologist] to an otolaryngologist for treatment of his ongoing vertigo and to [Appellant's headache specialist] in respect of his post-concussive headaches.

In June of 2002 the Appellant was reassessed by [Appellant's neuropsychologist] who found specific impairments especially in visual and non-verbal memory and visual attention which would prevent the Appellant from completing his full or regular duties. [Appellant's neuropsychologist] stated in his report:

. . . He will need more time in recalling information; will be vulnerable to occasional attentional errors; and would be more vulnerable to fatigue after regular work hours. . . . He is now accommodated in a different position at work. . . . (underlining added)

In the month of June 2002 the Appellant ceased making service calls and in October 2002 he was advised to cease driving a motor vehicle for work due to problems with his eyesight. As a result the Appellant reduced his hours of work and by September 2002 ceased working at [text deleted] for a time.

On October 29, 2003 [Appellant's neuropsychologist] wrote to the case manager at MPIC and indicated that he had seen the Appellant on October 23rd and noted that the Appellant had sustained a concussion two (2) years prior to this visit. [Appellant's neuropsychologist] further stated that recent test results indicated the Appellant continued with approximately "...a moderate slowness in one form of concentration (where he needs to focus on two factors simultaneously); and computerized testing of his visual attention/vigilance indicates slowness, variability, limited flexibility to change, and general inattentiveness."

[Appellant's neuropsychologist] further stated that:

[The Appellant] has returned to his duties as a Scale technician on a full time basis. However I understand both from [the Appellant] and [Appellant's rehabilitation consultant] that he is not fulfilling all of the duties and is engaged in more of the routine aspects. I understand that his employer is not fully confident in [the Appellant] making "calls" with the company vehicle alone. (underlining added)

The Commission therefore notes that both [Appellant's neuropsychologist] and the employer felt that it was not advisable or safe for the Appellant to resume a full range of duties as a scale technician in the month of October 2003, a period of two (2) years after the motor vehicle accident.

On November 24, 2003 [Appellant's psychiatrist], [text deleted] reported to the case manager that he was requested by [Appellant's neuropsychologist] to reassess the Appellant and his

diagnosis was that the Appellant was suffering from a Somatoform Disorder - NOS. [Appellant's psychiatrist] described this disorder as a condition in which there were physical symptoms suggestive of a medical condition where the symptoms are not fully explained by any medical condition which is present.

The Commission notes that [Appellant's neuropsychologist] examined the Appellant on June 3, 2004, approximately one (1) month after MPIC determined the Appellant had the capacity to return to work. [Appellant's neuropsychologist], in his report to MPIC dated June 24, 2004, reports no change in the cognitive deficits of the Appellant from his earlier diagnosis and further states "since we are more than two years post injury, I would not anticipate either improvement or regression at this point in time." [Appellant's neuropsychologist], in this report, determined that the Appellant had plateaued in respect of his cognitive impairments, his memory problems and problems with concentration in the ability to multi-task and that these cognitive impairments were of a permanent nature.

The Commission concludes that [Appellant's neuropsychologist], who had assessed the Appellant initially in the month of June 2002, and subsequently on two occasions in December 2002, as well as in the month of October 2003 and June 2004, was in the best position to determine whether or not the Appellant was fit to return to work as a scale technician in the month of April 2004. Unfortunately, the case manager, prior to terminating the Appellant's IRI at the beginning of May 2004, failed to request an updated medical assessment from [Appellant's neuropsychologist] as to the Appellant's fitness to return to work as a scale technician. As a result, the case manager did not have available to him the information contained in [Appellant's neuropsychologist's] medical report dated June 24, 2004 when he made his decision to terminate the Appellant's IRI.

Unlike the case manager, the Internal Review Officer did have the opportunity of considering [Appellant's neuropsychologist's] medical report dated June 24, 2004 prior to confirming the case manager's decision dismissing the Appellant's Application for Review. Unfortunately, the Internal Review Officer, in making his decision:

1. failed to consider and give any weight to the existing medical reports of [Appellant's neuropsychologist] as to the Appellant's fitness to work as a scale technician;
2. having regard to [Appellant's neuropsychologist's] medical report of June 24, 2004 failed to specifically request an updated medical assessment from [Appellant's neuropsychologist] as to the Appellant's fitness to return to work as a scale technician.

The Commission finds that:

1. the Appellant testified in a straightforward manner, without equivocation and his testimony was consistent throughout both his examination-in-chief and cross-examination.
2. the Appellant's testimony was also consistent with the initial assessments of the case manager, [Appellant's rehabilitation consultant] and his employer as to his difficulties in performing the essential duties of a scale technician.
3. the Appellant's testimony in respect of his inability to perform the essential functions of a scale technician to a standard acceptable to his employer was corroborated by the medical reports of [Appellant's neuropsychologist].
4. the Appellant to be a credible person and accepts his testimony on all issues in dispute between himself and MPIC.

The Report of [text deleted]

The Internal Review Officer conducted a hearing on September 14, 2004 and both the Appellant and his sister, [text deleted], made submissions to the Internal Review Officer in respect of the Appellant's work activities at [text deleted]. The Internal Review Officer noted that the Appellant had suggested that he speak to [text deleted], who was employed by [text deleted] in the Accounts Payable and Human Resources Department. The Internal Review Officer, following the hearing, spoke to [text deleted] by telephone and subsequently reported the substance of their telephone conversation in paragraph 19 of the Internal Review decision dated September 21, 2004.

An examination of paragraph 19 of this decision indicates that [text deleted] did not specify the nature of the Appellant's work when he was working off-site at various customer locations. [text deleted] information did not indicate to the Internal Review Officer whether the Appellant was carrying out the duties of a scale technician or acting as an assistant to a scale technician when he was employed off-site. As a result, the information the Internal Review Officer received from [text deleted] does not contradict the Appellant's testimony that he worked off-site as an assistant only to a scale technician and not as a scale technician. The Commission therefore finds that the Internal Review Officer erred in terminating the Appellant's IRI when he relied upon [text deleted] report to support his conclusion that the Appellant was capable of returning to his pre-employment status as of May 3, 2004.

Statement from Appellant's Supervisor

The Internal Review Officer, in determining that the Appellant was able to return to his pre-employment status as of May 3, 2004, relied in part on a statement from the Appellant's

supervisor that the Appellant was doing all of the jobs of a scale technician. The Commission finds that this statement by the Appellant's supervisor is totally inconsistent with the progress reports from [Appellant's rehabilitation consultant], the case manager and the reports of the Appellant that prior to May 3, 2004 the Appellant was unable to carry out the essential duties of a scale technician.

The supervisor's statement was also inconsistent with the Appellant's discussion with the case manager approximately five (5) weeks after the Appellant was placed on [text deleted] payroll. In a note to file dated June 8, 2004 the case manager reported that the Appellant advised him that he wished to appeal MPIC's decision to return to work since he was not performing the full duties of a scale technician. The Commission finds that the complaints of the Appellant as to the scope of his duties on or before May 3, 2004 is totally consistent with the initial reports of [Appellant's rehabilitation consultant], the case manager and the Appellant's employer that the Appellant was not performing the essential duties of a scale technician, prior to May 3, 2004.

The Commission notes that the Appellant testified at the hearing and was cross-examined, and challenged his employer's statements that he was performing the work of a scale technician on May 3, 2004 when he was placed back on the employer's payroll, and his IRI was terminated. The Commission further notes that MPIC did not call the Appellant's supervisor or any of the other employees at [text deleted] in order to contradict the Appellant's testimony in respect of the scope of his work activities. In these circumstances the Commission gives greater weight to the Appellant's testimony in respect of this issue than it does to the statement of the Appellant's supervisor.

The Commission further finds that having regard to the previous medical reports of [Appellant's

neuropsychologist], and the consistent history that the Appellant was not performing the work of a scale technician on or before May 3, 2004, the Internal Review Officer should have given very little weight to the report of the case manager that he had been advised by the employer's supervisor that the Appellant was working well and doing all of the duties of a scale technician when he rejected the Appellant's Application for Review.

Decision

The Commission therefore determines that the Internal Review Officer, in confirming the case manager's decision and rejecting the Appellant's Application for Review, erred:

1. by relying on the incomplete and faulty investigation of [Appellant's rehabilitation consultant] and the case manager as to the fitness of the Appellant to return to work as a scale technician.
2. by failing to consider medical reports of [Appellant's neuropsychologist] in respect of the Appellant's cognitive impairments and the relationship of these impairments as to the Appellant's fitness to return to work as a scale technician;
3. by failing to obtain an updated medical report from [Appellant's neuropsychologist] as to the Appellant's fitness to return to work as a scale technician;
4. by relying on the report of [text deleted] in respect of the Appellant's work activities at the customers' worksites;
5. by accepting the report of the Appellant's supervisor as to the scope of the Appellant's work activities at the time the Appellant was placed on [text deleted] payroll.

The Commission finds that:

1. the Appellant was a credible person whose testimony is corroborated by the initial reports of [Appellant's rehabilitation consultant], the case manager, the Appellant's employer and the medical reports of [Appellant's neuropsychologist];
2. in all issues in dispute between MPIC and the Appellant in respect of the Appellant's ability to return to work as a scale technician, the Commission prefers the testimony of the Appellant;
3. the Appellant has established, on the balance of probabilities, that on May 3, 2004 the motor vehicle accident injuries he sustained rendered him unable to hold the employment as a scale technician pursuant to Section 110(1)(a) of the Act.

For these reason the Commission therefore allows the Appellant's appeal in respect of MPIC's termination of IRI and therefore rescinds the Internal Review Officer's decision dated September 21, 2004 in this respect.

Employer's Reports

Subsequent to the Internal Review decision dated September 21, 2004, the Appellant obtained a series of the employer's incident reports in respect to the Appellant which had been filed with the Human Rights Commission and which were entered into evidence in these proceedings without objection by MPIC's legal counsel. The Commission notes that the Internal Review Officer did not have knowledge of these reports when he issued his decision dated September 21, 2004 confirming the case manager's decision and dismissing the Appellant's Application for Review. However, these incident reports in substance corroborate the Appellant's testimony that he was unable to meet the employer's expectations in performing the duties of a scale technician in a productive and satisfactory fashion on May 3, 2004.

The Commission notes that the employer's incident report dated July 19, 2004 states in part:

Executive Team has already been discussing future of [the Appellant] to remain with [text deleted]. [The Appellant's] chargeable time is not covering his pay due to lack of service work. July 30/04 – (underlining added)

Attached to a document headed Management Review Committee (MRC) Minutes of a July 30, 2004 meeting is a further document which reviews the Appellant's hours at work and his absence from work between May 3, 2004 and August 5, 2004:

[The Appellant] was employed from May 3, 2004 – September 3, 2004. During this time, [text deleted] was struggling financially. The service department was not doing well enough to meet our Gross Profit Margin. [The Appellant] was not providing enough chargeable hours to cover his salary and expenses. . . . (underlining added)

These reports are inconsistent with the letter from [text deleted], Service Manager, to MPIC, dated September 1, 2004, wherein [text deleted] stated: “[the Appellant] had returned to work in May of 2004 as a full time scale technician . . .”

The information provided to the Internal Review Officer by [text deleted], set out in paragraph 19 of the Internal Review Officer's decision dated September 21, 2004, must be now read in light of the employer's internal documents. The Internal Review Officer, of course, did not have access to these internal documents when he issued his decision. However, these internal documents do corroborate the Appellant's testimony that he was not performing the duties of a scale technician on May 3, 2004 and thereafter.

These internal documents filed in the appeal proceedings also included a schedule setting out the employer's records in respect of the Appellant's hours of work between May 3, 2004 and August

5, 2004. This schedule demonstrates that the majority of the duties that the Appellant performed during this period of time was work performed at the employer's premises and not at customers' sites and corroborate his testimony that he did not work as a scale technician subsequent to the termination of his IRI benefits. (Attached to this decision and marked as Schedule A is a true copy of this schedule.)

The Commission further notes that MPIC did not call a representative of the employer to rebut any of the statements obtained in the incident reports and Schedule A the Commission has referred to in this decision.

Entitlement to reimbursement for Personal Care Assistance funding following the accident

The Commission has reviewed all of the documentation provided by the parties in respect of this issue and considered the evidence of the Appellant, his sister and his mother. The Commission recognizes that subsequent to the motor vehicle accident the Appellant had a difficult time in coping with his attempt to return to work and the Commission has indicated that the injuries the Appellant sustained in the motor vehicle accident seriously affected his ability to return to work as a scale technician.

The Commission finds, however, that after examining the medical reports of [text deleted], psychological consultant to MPIC's Health Care Services Team, and the reports of [Appellant's psychiatrist], [text deleted], and [Appellant's psychologist], [text deleted], the Appellant has failed to establish, for the reasons set out in the Internal Review Officer's decision dated October 22, 2004, (a true copy of which is attached hereto and intended to form part of this decision and is marked as Schedule B) that the Appellant suffered from a psychological, or psychiatric or neuropsychological condition which could be attributed to the motor vehicle accident in question

and which would necessitate any personal care assistance or supervision pursuant to Section 131 of the MPIC Act.

For these reasons the Commission confirms the decision of the Internal Review Officer dated October 22, 2004 in respect of the rejection of any entitlement by the Appellant to reimbursement for personal care assistant funding and dismisses the Appellant's appeal in this respect.

Dated at Winnipeg this 19th day of September, 2005.

MEL MYERS, Q.C.

WENDY SOL

NEIL COHEN