

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-08-30**

**PANEL:** Mel Myers, Q.C., Chairperson  
Mr. Neil Cohen  
Mr. Neil Margolis

**APPEARANCES:** The Appellant, [text deleted], appeared on his own behalf and participated by teleconference; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

**HEARING DATE:** November 18, 2008

**ISSUE(S):** Whether the two-year determination was done correctly and in accordance with the Manitoba Public Insurance Corporation Act.

**RELEVANT SECTIONS:** Sections 106(1), 107 and 109 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 8, 1998 [the Appellant] was involved in a motor vehicle accident and sustained a fracture to his lumbar vertebrae and underwent several extensive back operations in January, 1999. [Appellant's orthopedic surgeon], who performed the surgery, noted that the initial radiologic investigations identified a co-existing condition of ankylosing spondylitis, which is an inflammatory condition of the spine which progresses over time and results in stiffness and loss of range of motion.

At the time of the accident the Appellant was [text deleted] years old and worked for [text deleted] for 20 years in various positions in sales and marketing and at the time of the motor vehicle accident was a technical manager. In the month of June, 1999 the Appellant attempted to return to work at [Text deleted] but after six weeks was unable to continue working due to his motor vehicle accident injuries.

In the month of June, 2000 [Text deleted] transferred the Appellant to a management position in [Text deleted], Ontario as there were no suitable positions to employ the Appellant in Manitoba. The Appellant's job duties were modified duties and a special work station was established to accommodate the Appellant. However, the Appellant found it difficult to work because of the constant pain to his back and neck and constant headaches. The Appellant's doctor advised him not to return to work in September of 2001 because of the ongoing complaints and since that time the Appellant has not returned to work at [Text deleted].

At the request of MPIC the Appellant was assessed on March 1, 2002 by [MPIC's rehab specialist], a physical medicine and rehabilitation specialist, who practiced in [Text deleted], Ontario. [MPIC's rehab specialist] was provided with the relevant medical reports by MPIC and personally examined the Appellant. [MPIC's rehab specialist] noted that the Appellant suffered from a pre-existing ankylosing spondylitis.

[MPIC's rehab specialist] provided a report to MPIC dated March 20, 2002 and stated:

**4. The extent to which the injuries render [the Appellant] incapable of resuming his employment.**

...The injuries that [the Appellant] suffered in the accident, his ankylosing spondylitis and his present condition limit the extent and vigorousness with which he can perform his employment. They limit the repetitive and heavy tasks, which he can perform, as well the prolonged duties such as sitting and driving. Obviously, based on the fact that he did

resume his employment and maintained this for some time, [the Appellant] is not incapable of working. However, his symptoms most definitely place him at a hugely competitive disadvantage in that he cannot work as quickly, with the same intensity nor symptom free, at present, as a result of this accident. For him to work now, I suspect that he will likely miss a number of days from work on a regular basis to try and recuperate from his days at work. In order for him to return, he would have to have an extremely understanding employer, work station and environment, and a supreme understanding of his own limitations so as not to push himself too hard to the point of pain escalation necessitating further time off work. As one can imagine, this is a difficult task to balance and orchestrate.

**5. If [the Appellant] is not totally incapacitated, what if any duties of his occupation can be performed.**

[The Appellant] is not totally incapacitated. As mentioned, he can perform occupational duties but would require restrictions on any repetitive or heavy lifting, repetitive bending, twisting stooping, prolonged sitting or standing, with the allowance to change position as needed. I suspect, based on this, the only jobs that he will truly be able to perform adequately and competitively would be at a part time level. He is obviously intelligent and his skills in management and roles of this sort may be very valuable to many employers. Furthermore, jobs that restrict prolonged sitting and driving will need to be pursued. In this technological society, jobs where he could work at home and communicate via the internet or telephone during some of the work week, may, in my opinion, have a higher success rate.

**6. What if any job site modifications could be implemented to assist [the Appellant] to return to work?**

I do not think that any specific job site modifications need to be implemented to assist [the Appellant's] return to work. I feel that the only way for him to return to work is with a very understanding employer who allows him to pace and structure his duties in such a way that will allow [the Appellant] optimal performance. This would likely be a schedule that was not fixed in time as [the Appellant] is likely to have certain days that he works longer and harder than other days, as a simple function of his pain fluctuations. The specifications commented on in #5 are appropriate for this question as well.

The Commission further notes that the Appellant's family doctor did not authorize any return to work and no vocational efforts were made by MPIC to have the Appellant return to work.

The Commission notes that an independent medical examination was conducted by [independent doctor], the medical director of [rehab assessment company #1] who are located in [text deleted],

Ontario in order to determine if there was any probability of the Appellant returning to some gainful employment.

On June 14, 2006 [rehab assessment company #1] issued a Transferable Skills Analysis Report which stated that the Appellant possessed the following transferable skills:

- analyzing data
- compiling data
- coordinating activities
- handling complaints
- monitoring the progress of people or processes
- planning
- record keeping
- selling
- supervising
- writing

The Transferable Skills Analysis identified a number of potential jobs within the NOC classification, such as:

- Communication Equipment Sales Representative
- Medical Instrument Sales Agent
- Technical Sales Advisor
- Technical Support Specialist
- Regional Sales Manager
- Marketing Manager
- Advertising Director
- Promotions Manager
- Web Internet Marketing/Manager
- Business Consultant
- Management Analyst
- Promotions Specialist
- Marketing Research/Consultant
- Production Clerk/Expediter
- Production Coordinator
- Purchasing Clerk
- Procurement Clerk

On June 15, 2006 [rehab assessment company #1] issued a Functional Abilities Evaluation and found that the Appellant demonstrated strength to perform medium to heavy level work. This report further stated:

Thus, when *comparing* [the Appellant's] *demonstrated abilities* to the *demands* of his *proposed job alternatives* (using the NOC/DOT Classifications), it is the conclusion of the assessors that from a *functional and physical standpoint*, [the Appellant] DOES NOT appear to be able to work as a *Communication Equipment Sales Representative; Medical Instruments Sales Agent; Technical Sales Supervisor; Technical Support Specialist; Regional Sales Manager; Marketing Manager; Advertising Director; Promotions Manager; Web/Internet Marketing Manager; Consultant, Business; Management Analyst; Promotion Specialist; Marketing Researcher/Consultant; Production Clerk/Expediter; Production Co-ordinator; Purchasing Clerk and Procurement Clerk*. Although the client demonstrated the functional strength and cardiovascular requirements to perform all the proposed job alternatives, [the Appellant] demonstrated a *reduced tolerance* for *sitting and neck flexion* specifically when performing desk work (i.e. Mathematical and Telephone Tasks) as well as *standing/stooping while reaching* (File and Sort Task). [the Appellant's] ability to work at a *competitive level consistently*, on a *day to day basis*, appears very unlikely at the present time. He *will likely experience difficulties with prolonged sitting, sustained neck flexion, prolonged weight bearing (i.e. standing/walking/stooping), and continuous upper extremity activity*. Therefore, respecting competitive employment standards which include getting to and from work daily, while at the same time meeting all employer requirements of productivity, efficiency and timeliness we feel [the Appellant] **WILL NOT** be successful based on our current findings.

It should be noted that the NOC/DOT Classifications for work were used as *guidelines only*. It is possible that these classifications may not accurately reflect the actual physical demands of the proposed job alternative(s). Thus, it is recommended that accurate and complete Job Site Analyses (JSA) be conducted to ensure that the NOC/DOT Classifications accurately address the physical demands of the client's proposed job alternative(s). If JSAs are conducted, the assessors would be able to review the documents and analyze whether [the Appellant] is demonstrating the physical abilities to perform these jobs. (underlining added)

On September 22, 2006 [rehab assessment company #1] was requested to provide a clarification of their report. [Independent doctor], who authored the Functional Activity Evaluation Assessment, stated that:

...the assessors feel that there are areas where he can fulfill certain elements of the proposed job alternatives, but not all elements (i.e. meets the strength and cardiovascular requirements but does not meet the sitting requirements). In practical terms, he is very

limited and it is difficult to speculate a total endurance/performance time. We would suggest that if a specific job is to be trialed, that he be “shadowed” (i.e. by an Occupational Therapist) to see what his performance would be like over several weeks. Overall, we feel he is at best limited to part-time work where frequent changes in position are afforded to him (as stated above, MAXIMUM sitting tolerance was 56 minutes). Work from a “home” office would be most ideal, if possible, to allow for pacing, rest breaks and minimize travel. (underlining added)

MPIC referred the Appellant’s medical file to [MPIC’s doctor], Medical Consultant of MPIC’s Health Care Services. In the report dated October 26, 2006 [MPIC’s doctor] felt the Appellant was capable of sedentary work with opportunity for position changes and pacing. [MPIC’s doctor] also felt that the Appellant could work 3-4 hours a day if he could work in a flexible job with the above-noted restrictions.

The Appellant resides within the [Text deleted], Ontario region. As a result MPIC requested the [rehab assessment company #2] to provide a labour market research report with respect to whether there were employment positions available for the Appellant within the National Occupational Classification codes 0611, 6221 and 1122 that exist within a 30 mile radius of [Text deleted]. The report researched job openings for three positions: Sales, Marketing and Advertising Manager, technical sales specialist, and Management Consultant. With respect to the technical sales specialist position, the [rehab assessment company #2] were able to locate one advertised position within a 30 mile radius of [Text deleted], which is close to where the Appellant lives. This job advertisement stated:

Technical Sales Specialists – Wholesale Trade, NOC 6221

- Customer Support Representative – Wholesale  
Part-time position leading to Full Time – [Text deleted], Ontario (underlining added)  
[text deleted]

An examination of the occupational classification 6221 in respect of technical sales specialist indicates the main characteristics for occupations in this area include the following aptitudes, interests and functions:

- general learning ability
- verbal ability
- numerical ability
- spatial and form perception
- clerical perception
- interest in troubleshooting technical problems
- social interest in promoting sales
- innovative interest in analyzing information

The NOC 2006 update in respect of these occupations indicates the following main duties:

- Promote sales to existing clients
- Identify and solicit potential clients
- Assess clients' needs and resources and recommend the appropriate goods or services
- Provide input into product design where goods or services must be tailored to suit clients' needs
- Develop reports and proposals as part of sales presentation to illustrate benefits from use of good or service
- Estimate costs of installing and maintaining equipment or service
- Prepare and administer sales contracts
- Consult with clients after sale to resolve problems and to provide ongoing support
- Troubleshoot technical problems related to equipment
- May train customers' staff in the operation and maintenance of equipment
- May conduct sales transactions through internet-based electronic commerce
- May supervise the activities of other technical sales specialists

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

On August 1, 2007 the case manager issued a two-year determination decision which determined that the Appellant could be employed as a technical sales specialist. As well, in respect of compensation, the case manager determined the Appellant had 10 or more years experience in this position and this resulted in a Level 3 experience rating for the Appellant. The gross yearly

employment income (GYEI) for a Level 3 technical sales specialist was \$85,223.00. However, the medical information on the file indicated that the Appellant could only work on a part-time basis 20 hours per week. The case manager determined that the GYEI was approximately half of the full-time gross yearly employment income in the amount of \$40,294.56. The case manager also advised the Appellant that the commencement of the two-year determination was effective August 2, 2007.

### **Application for Review**

The Appellant made an application for a review of the case manager's decision to an Internal Review Officer on September 26, 2007. In the application for review the Appellant stated:

The decision rendered indicates a job that my physical limitations after the accident would severely limit my ability to perform. In addition, the salary level chosen is not in keeping with the transferability of my skills post accident. Further, the job chosen is of a complex nature and cannot simply be halved. Further, your own experts have gone to great lengths to explain the level of competitiveness I would not be able to sustain – this has been ignored.

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

The Internal Review Officer issued a decision dated February 27, 2008 confirming the case manager's decision and rejecting the Appellant's application for a review.

The Internal Review Officer in arriving at his decision stated:

Section 109 of the Act requires that a case manager find an appropriate Two-Year Determination based on consideration of the education, training, work experience, and physical and intellectual abilities of the victim along with any knowledge or skill acquired by the victim in a rehabilitation program. Moreover, the employment determined must be normally available in the region in which the victim resides and is something that the victim is able to do at a minimum, on a part-time basis.

When I review the details of NOC 6221, it seems that you have the ability to do this type of work. It may be similar to what you did at [Text deleted], but it is not identical. There is nothing in NOC 6221 for example that says the job must be done via the use of a



vehicle. NOC 6221 is broad enough to encompass employment positions where you are working via telecommunication, whether it is at home or in an office, thereby allowing for whatever breaks or positional changes you require.

Indeed, we discussed this by telephone on February 22, 2008. You agreed that you could work at home, for about 3 hours per day doing something such as answering technical questions. I think that based on the Transferable Skills Analysis, however, you have far more abilities than just that, but even if that was your only skill, I think NOC 6221 covers that kind of ability.

I do not see any need to have the case manager revisit the determination process and find another position as I don't believe that there will be another position that matches and suits your abilities as much as the one that has already been determined.

Accordingly, there is no basis to suggest that the determined position was improper and accordingly, the case manager's decision of August 1, 2007 must be confirmed.

### **Notice of Appeal**

The Appellant filed a Notice of Appeal and provided a written submission in support of that appeal wherein he disputed the decision of MPIC's case manager. In this written submission the Appellant stated:

1. MPIC's case manager determined that the gross GYEI was for a Level 3 technical sales specialist occupation of \$85,223.00 would be reduced to \$40, 294.56 because he was only capable of maintaining employment on a part-time basis (20 hours/week).
2. MPIC's case manager ignored the data that he had provided to MPIC which indicated his experience in the determined field was shown to be 3-4 years and not 10 years as MPIC determined.
3. Although he was employed by [Text deleted] for over 20 years, only 3-4 years was spent as a sales representative and the balance of his time was spent in technical and other management areas.

4. Having regard to Schedule C of the Act, he should not have been determined to have a Level 3 (10 or more years experience) in the position, but should have been determined at a Level 2 experience in this position which carries an annual salary of \$20,328.72.
5. Based on a part-time employment of 20 hours the adjusted bi-weekly payments would amount to \$609.84 not \$1,210.89 as posed by MPIC.

In his Notice of Appeal submission the Appellant further asserted that:

1. MPIC erred in determining that he was capable of carrying out the duties and responsibilities in NOC 6221 technical sales specialist category.
2. Having regard to the duties and responsibilities set out in the technical sales specialist position determined by MPIC, MPIC failed to take into account his chronic back and neck pain as a result of the motor vehicle accident which is complicated by his ankylosing spondylitis.
3. He was not physically capable of carrying out the duties and responsibilities of NOC 6221 technical sales specialist.
4. MPIC ignored the neck and back pain as a result of the motor vehicle accident which was complicated by his ankylosing spondylitis.
5. This inflammatory disease caused pain on movement when he was sitting or standing.
6. MPIC ignored the expert independent medical evaluation which indicated that he would not be competitive in any of the determined occupations.
7. A paid sales representative must drive and visit customers to be highly successful and MPIC failed to consider that he would not be able to travel by car to a customer's location.
8. He would have difficulty with cognitive tasks due to pain but given enough time he could still work it out but deadlines would be a problem.

## **Appeal**

The relevant provisions of the MPIC Act in respect of this appeal are:

### **1. Factors for determining an employment**

[106\(1\)](#) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

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

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

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

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

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

#### **Type of employment**

[109\(2\)](#) An employment determined by the corporation must be

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

The appeal hearing took place on November 18, 2008. The Appellant participated in the appeal by teleconference. Legal counsel, Ms Danielle Robinson appeared on behalf of MPIC.

The Appellant testified by teleconference and reviewed his written submissions that he had provided to MPIC in support of his application for review of the case manager's decision and in support of his Notice of Appeal. He submitted that:

1. Having regard to his physical condition he was not capable of carrying out the duties and responsibility of the determined classification NOC 6221 technical sales specialist.
2. If the classification was appropriate then his level of experience as a sales representative was not 10 years but three or four years, and as a result the GYEI should have been reduced to a Level 2, not a Level 3 as set out in Schedule C of the Regulations.

MPIC's legal counsel reviewed the Internal Review Decision and asserted that:

1. MPIC had correctly determined in regard to the education, training, work experience and physical and intellectual abilities of the Appellant that he was capable of performing the position of a Technical Sales Representative.
2. This classification does not necessarily require the use of an automobile and encompasses employment positions where the Appellant would be able to carry on his work via telecommunications, whether at home or in an office, and allowances could be made for whatever breaks or physical changes the Appellant required.
3. The Appellant's appeal should be dismissed and the Internal Review Officer's decision be confirmed.

### **Discussion**

The Commission notes that [independent doctor], the Medical Director of [rehab assessment company #1], and [text deleted], Certified Kinesiologist, after completing the Functional Activity Evaluation, assessed that the Appellant was unable from a functional and physical standpoint to be able to do any of the positions set out in the Transferable Skills Analysis. The authors stated in their assessment that the Appellant would not from a functional and physical standpoint be able to do the work in the various classifications set out in the NOC/DOT Classifications. They further stated that the Appellant demonstrated a reduced tolerance for sitting and neck flexions,

specifically when performing desk work (i.e. mathematical and telephone tasks) as well as standing/stooping while reaching (file and sort task).

The authors further stated:

[the Appellant's] ability to work at a **competitive level consistently**, on a **day to day basis**, appears very unlikely at the present time. He **will likely experience difficulties with prolonged sitting, sustained neck flexion, prolonged weight bearing (i.e. standing/walking/stooping), and continuous upper extremity activity**. Therefore, respecting competitive employment standards which include getting to and from work daily, while at the same time meeting all employer requirements of productivity, efficiency and timeliness we feel [the Appellant] **WILL NOT** be successful based on our current findings.

In addition the authors stated that the NOC Classifications for work were guidelines only and may not necessarily reflect the actual physical demands of the proposed job. The authors therefore recommended that an accurate and complete Job Site Analysis be conducted to ensure that the NOC Classifications accurately addressed the physical demands of the Appellant's proposed job. If such a Job Site Analysis was conducted the assessors would be able to review the documents and analyze whether the Appellant was demonstrating the physical abilities to perform these jobs.

After reviewing this report MPIC requested more information with regard to “the amount of time the Appellant would be able to engage in work; either in terms of hours per day or percentage of a work day”. [Rehab assessment company #1] responded in a letter dated September 22, 2006:

Therefore, based on his performance during the 2-day FAE, the assessors feel that there are areas where he can fulfill certain elements of the proposed job alternatives, but not all elements (i.e. meets the strength and cardiovascular requirements but does not meet the sitting requirements). In practical terms, he is very limited and it is difficult to speculate a total endurance/performance time. We would suggest that if a specific job is to be trialled, that he be “shadowed” (i.e. by an Occupational Therapist) to see what his performance would be like over several weeks. Overall, we feel he is at best limited to part-time work where frequent changes in position are afforded to him (as stated above,

MAXIMUM sitting tolerance was 56 minutes). Work from a “home” office would be most ideal, if possible, to allow for pacing, rest breaks and minimize travel. (underlining added)

As a result of labour market research in the area where the Appellant resided, MPIC determined that the Appellant was capable of being employed in the following NOC 6221 position:

Technical Sales Specialists – Wholesale Trade, NOC 6221

- Customer Support Representative – Wholesale  
Part-time position leading to Full Time – [Text deleted], Ontario (underlining added)  
[text deleted]

The Internal Review Officer in his decision dated February 27, 2008 stated the only information that they had in respect of this job was the advertisement above. The Internal Review Officer further stated:

No further information on this job was obtained. (underlining added)

The Internal Review Officer in his decision indicated that having regard to the description of the job as set out in NOC 6221 technical sales specialist specification, that the Appellant was capable of performing this job.

The Commission notes that in making this decision MPIC ignored the independent assessment done by [independent doctor], the Medical Director of [rehab assessment company #1] and [text deleted], the Kinesiologist. Their report indicated that the classifications were guidelines only and may not necessarily reflect the actual physical demands of the job. They therefore recommended that MPIC conduct an accurate and complete Job Site Analysis in order to ensure that this classification actually addressed the physical demands of the Appellant. The

Commission finds that MPIC failed to conduct such a Job Site Analysis and was therefore unable to establish that the Appellant was physically capable of carrying out the duties of this job.

Section 109 of the Act requires MPIC to take into account the physical and intellectual abilities of the Appellant in determining the employment and whether the Appellant was capable of holding this job on a part-time basis. As a result MPIC was required to conduct an investigation to determine the physical demands of the advertised job they had found in [Text deleted], Ontario and they failed to do so. MPIC did not determine:

1. Whether or not the Appellant was required to load or unload products and carry them to customers' locations and whether he was physically capable of doing so.
2. Whether or not the job entailed travelling to other cities and if so, whether the Appellant was capable of so doing.
3. If he was required to travel to other cities, whether it was permissible for him to stay overnight in order to recuperate.

The Commission find that MPIC, instead of conducting a Job Site Analysis as recommended by [rehab assessment company #1] in their Functional Abilities Evaluation, ignored their advice and relied only on a NOC classification which the [rehab assessment company #1] indicated were only a guideline and did not in any way accurately reflect the actual duties of the job.

The Commission further notes that MPIC ignored the advice of [rehab assessment company #1]'s letter of September 22, 2006 wherein [independent doctor] indicated the Appellant was physically limited and it would be difficult to speculate his total endurance/performance time on a specific job. As a result [independent doctor] recommended that:

We would suggest that if a specific job is to be trialled, that he be “shadowed” (i.e. by an occupational therapist) to see what his performance would be like over several weeks.

The Commission notes that in determining that the Appellant was capable of carrying out the job duties as a technical sales specialist, failed to make the necessary arrangement for the Appellant to be “shadowed” by an occupational therapist for several weeks to see whether or not he could in fact perform this job.

The Commission concludes that MPIC, in determining the Appellant’s classification as a technical sales specialist, did not in accordance with Section 109 of the Act take into account the physical abilities of the Appellant to determine whether he was capable on a part-time basis of holding this job.

The Commission notes that [text deleted], on behalf of MPIC, wrote to [independent doctor] after reviewing the Functional Abilities Evaluation report and stated that it appears having regard to the functional limitations of the Appellant that he would only be able to work on a part-time rather than a full-time basis and requested [rehab assessment company #1] to advise the amount of time that the Appellant would be able to engage in work, either in terms of hours per day or percentage of a work day. In response [independent doctor] wrote to [text deleted] on September 22, 2006 and stated:

Overall, we feel he is at best limited to part-time work where frequent changes in position are afforded to him (as stated above, MAXIMUM sitting tolerance was 56 minutes). Work from a “home” office would be most ideal, if possible, to allow for pacing, rest breaks and minimize travel.

The Commission notes the advertisement for the job selected by MPIC “part-time position leading to full-time”. MPIC’s legal counsel was not able to confirm to the Commission that in



fact the job in question was a part-time position. The only information that MPIC had was the advertisement which stated “part-time position leading to full-time position”.

MPIC did not investigate whether the employer would accept the Appellant to work only on a part-time basis, and whether there was a requirement that if the Appellant satisfactorily performed the job duties on a part-time basis, would he then be required to continue to work only on a full-time basis. The Commission therefore finds that contrary to Section 109 of the Act, MPIC was not able to establish on a balance of probabilities that the Appellant was physically capable of performing the job in question or that the job was only a part-time job and not a full-time job.

In the alternative the Appellant further submitted that if the classification as a technical sales specialist was appropriate, his experience in the sales field with [Text deleted] was three or four years and not 10 years as determined by MPIC. As a result, the Appellant asserted that his gross yearly employment income (GYEI) was incorrectly determined at a Level 3 in the sales specialist occupation of \$85,223.00 rather than a Level 2 occupation which was 36 months or more but less than 120 months of experience. The Appellant therefore submitted that his GYEI should have been calculated on his experience based on a Level 2 rather than a Level 3. The Commission notes that MPIC legal counsel did not challenge the Appellant’s testimony. Although he worked for more than 20 years with [Text deleted], his sales experience was only three or four years. The Appellant testified in a very direct manner without equivocation and the Commission accepts this testimony that his sales experience working for [Text deleted] was only three or four years.

The Commission accepts the Appellant's submission that in respect of compensation the Appellant's GYEI should be determined on a Level 2 occupation and not a Level 3 occupation, and as a result the Appellant's GYEI should be reduced to \$20,328.72, working on a part-time basis 20 hours per week.

The Commission finds for the reasons set out herein that the Appellant has established on a balance of probabilities:

- a. That MPIC failed to properly determine, contrary to Section 109(1) of the MPIC Act, whether the Appellant had the physical abilities to carry out the duties of a technical sales specialist on a part-time basis.
- b. That MPIC failed to properly determine, contrary to Section 109(2), whether a part-time position as a technical sales specialist was an employment that would normally be available to the Appellant in the region where he resided.

For these reasons, the Commission allows the Appellant's Appeal and the decision of the Internal Review Officer bearing the date of February 27, 2008 is varied accordingly.

Dated at Winnipeg this 5<sup>th</sup> day of January 2009.

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**MEL MYERS, Q.C.**

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**NEIL COHEN**

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**NEIL MARGOLIS**