

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-05-208**

**PANEL:** Mr. Mel Myers, Q.C., Chairperson  
Dr. Patrick Doyle  
Mr. Paul Johnston

**APPEARANCES:** The Appellant, [text deleted], was represented by [text deleted];  
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

**HEARING DATE:** August 23, 2007

**ISSUE(S):** Whether the Appellant is capable of carrying out the duties of the determined employment as a Service Station Attendant

**RELEVANT SECTIONS:** Sections 107 and 109(1)&(2) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act')

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

**Reasons For Decision**

[The Appellant] was struck by an automobile at the corner of [text deleted] and [text deleted] on April 17, 1999 and sustained serious injuries and was sent by ambulance to the [Hospital]. The [Hospital] Case Summary Report, dated June 1, 1999 and revised on July 13, 1999 indicated that the Appellant suffered from a fractured right clavicle, fractured right ileum, right frontal lobe contusion, right epidural hematoma, and a right zygomatic arch fracture which required plastic surgery. The report further stated that a CT scan indicated that the Appellant's right orbit showed a fracture through the right optic nerve foramen.

The Appellant was seen by [Appellant's Neuropsychologist #1], who referred the Appellant to [Appellant's Neuropsychologist #2], for assessment. [Appellant's Neuropsychologist #2] indicated that he saw the Appellant on May 12, 17 and 21, 1999 and reported that the Appellant advised him that there was a loss of vision to his right eye and blurring in his left eye, pain in his right shoulder and hip, occasional problems maintaining balance and ambulating. In respect of the Appellant's memory, [Appellant's Neuropsychologist #2] stated that, as a result of the neuropsychological evaluation, the Appellant demonstrated some difficulty on measures of drawing construction (i.e., measures with combined perceptual, spatial, and motor requirements). He also exhibited difficulty on tasks of verbal and visual memory (recall and recognition), flexibility of thought, and conceptual thinking and reasoning.

In a report dated July 14, 1999 [Appellant's Neuropsychologist #1] indicated that the Appellant's memory was improving and that the Appellant was completely blind in his right eye.

[Appellant's Physiotherapist], who treated the Appellant, in a report dated July 27, 1999 indicated that the Appellant demonstrated a flat affect and an inability to close his left eye.

The Appellant was referred by the Rehabilitation Consultant, [text deleted], to [Appellant's Neuropsychologist #3], a clinical psychologist and neuropsychologist, for assessment. In an undated report in respect of the Appellant, [Appellant's Neuropsychologist #3] stated that with respect to the Appellant's memory there was a need for slight supervision of the Appellant. [Appellant's Neuropsychologist #3] also provided a report to [Appellant's Rehabilitation (Rehab) Consultant] dated October 11, 1999 and stated:

Page 3 – performed poorly on the primary validity test and was below a level typically found in organically injured individuals

Page 4 – significantly slow in measures of his concentration

Page 4 – memory was variable from an average to severely impaired level

Page 5 – immediate recall was in a “low average” range

Low average to mildly below average respecting memory

Page 5 – psychomotor skills were mildly below average

Page 6 – decreased strength and speed

Page 6 Cognitively, [the Appellant] acknowledged occasional difficulties in concentrating

### **One Hundred and Eighty (180) Day Determination**

The Senior Case Manager wrote to the Appellant’s solicitor on March 27, 2000 and advised that the Appellant was classified as a non-earner at the time of the accident and therefore was entitled to a 180-day determination in accordance with Section 86(1) of the MPIC Act. Pursuant to this provision the Appellant was provided with an Income Replacement Indemnity (‘IRI’) benefit effective October 15, 1999.

### **[Appellant’s Neuropsychologist #3’s] Report**

On May 9, 2001 [Appellant’s Neuropsychologist #3] wrote to MPIC’s Senior Case Manager and summarized the results of his neuropsychological follow-up of the Appellant on February 20, 2001 as follows:

In respect of the Appellant’s anterograde memory [Appellant’s Neuropsychologist #3] stated:

#### **Anterograde Memory**

With visual or nonverbal information, we find the following:

a) The primary difficulty for [the Appellant] is where he is not cued or forewarned in advance to study the material. (We term this “incidental” memory). Thus in a situation where [the Appellant] was copying a complex figure, and later asked to recall the information, we find his immediate recall as well as his ability to retain the information after half an hour, to both be severely impaired. This is similar to his performance in 1999. Indeed, his ability to benefit from a recognition aide is actually worse now, compared to what it was in 1999 (where he was only mildly below average).

b) [The Appellant] continues to be approximately mildly below average in his ability to recognize individual words.

c) When we then add a third type of visual memory, for simulated social scenes (e.g. meals, shopping, etc), we find [the Appellant] to be mildly below average in his immediate recall. However, there is no substantial loss of information thereafter (e.g. his percentage of information retained is above the “high average” level).

In respect of intentional non-verbal memory [Appellant’s Neuropsychologist #3] found the Appellant to be above average in his immediate recall, below average range after a one-half (1/2) hour delay, and this represented an improvement from his previous testing. [Appellant’s Neuropsychologist #3] also indicated that the Appellant had improved in his verbal contextual memory (e.g. a paragraph), but in respect of his verbal non-contextual information (e.g. lists), the Appellant’s overall retention of several presentations was in the low average range. [Appellant’s Neuropsychologist #3] further stated:

. . . However, after only a few minutes delay, [the Appellant] dropped into a significantly below average level.

[Appellant’s Neuropsychologist #3] also stated that when the Appellant was assessed in respect of his retention after a one-half (1/2) hour delay, [Appellant’s Neuropsychologist #3] found this again to be significantly below average. With respect to verbal information, [Appellant’s Neuropsychologist #3] stated:

d) With verbal information that is somewhat (sic) abstract in nature, his immediate recall was within the average range, while his speed of learning was in a “low average” range and his retention after several repetitions was mildly below average (5<sup>th</sup> percentile). When we assessed his retention after half an hour, we find this significantly below average. . .

In respect of problem solving, [Appellant’s Neuropsychologist #3] stated:

### **Problem Solving**

In his 1999 testing, we had manually administered a visually oriented test for problem

solving. Currently, we supplemented this with computer-assisted testing. This revealed [the Appellant] to be in the “low average” or functional range in the number of solutions he was able to generate, and his ability to learn the abstract principles. However, he was at least mildly below average in the number of attempts required to arrive at the first correct solution, and in his ability to continue with a correct solution.

[Appellant’s Neuropsychologist #3] further reported that:

1. In respect of the Appellant’s physical status the Appellant had complained about hearing difficulties, occasional back pain, and pain associated with the clavicle fracture when he attempts to do any heavy lifting.
2. In respect of his emotional status *[the Appellant’s] current mood was more upbeat than in our previous assessment.*”
3. In respect of cognitive issues the Appellant felt that his memory was not as strong as it had been prior to his accident.
4. The Appellant stated that he required a longer time to remember other individual’s faces.
5. The Appellant had shown improvement in a number of areas including concentration, motivation, word finding, one type of non-verbal memory, visual/spatial judgment and a degree of impairment in his psychomotor skills.
6. The Appellant continued to have impairments in the following areas:
  - a) most types of nonverbal or visual memory. This includes mild impairments in his memory for simulated social scenes; mild impairments in recognizing individual words; and more significant impairments in his non-verbal “incidental” memory (for situations when he is unaware that he would need to retain information). Not all types of nonverbal memory are affected, since his retention of drawings is above average for his immediate recall, and in a “low average” range for his delayed recall.
  - b) very specific types of attention. He is mildly slow (but accurate), in briefly sustaining his attention on rote tasks. This has improved from a previously significant degree of impairment.
  - c) problem-solving. With the addition of a new computer-assisted format in

testing, we have found him to have at least mild difficulties in two of the four variables, including slowness to develop the first correct solution (although he functional in coming with solutions hereafter), as well as occasionally becoming “off track” even when he is utilizing a correct solution.

d) a very specific tactile perceptual difficulty (in graphesthesia).

7. Emotionally the Appellant appears to be slightly more optimistic and further stated:

5. At this point in time, I would regard [the Appellant’s] cognitive changes as permanent, since we are approaching the two year mark post-injury, when recovery tends to plateau. (underlining added)

[Appellant’s Neuropsychologist #3] further reported:

1. Under the heading **Recommendations**, that he would not recommend that the Appellant return to his previous occupation [text deleted], having regard to his visual loss.
2. In respect of impairment ratings:
  - a) Under the “Organic Brain Syndromes” schedule (Subdivision 1, Division 9), I would suggest that [the Appellant] receive the maximum rating under Subcategory 4. This carries with it an impairment rating of 7%-15%. Thus I would suggest the 15% impairment rating. . .
  - b) Under the “Skull, Brain and Carotids” section of the Impairment Schedule (Subdivision 1, Division 2), [the Appellant’s] medical records would indicate that his head injury falls under Subcategory 5, referring to an intracerebral haematoma. There are two categories for this, including minor or severe. Since he was unconscious upon admission, and required an intracranial pressure monitor, I would suggest that we use the severe category that ranges from 3%-5%. I would suggest utilizing the intermediate value of 4%, which recognizes there were specific types of trauma to the brain, but this did not require a craniotomy to evacuate the hemorrhage.

In a note to file dated October 25, 2001 the case manager reports that he was informed by the Appellant that he has discomfort in his clavicle when he tries heavy lifting; his eyesight has not changed and he remains blind in his right eye; his memory isn’t as strong as prior to the motor vehicle accident and he is precluded from doing very fast hand movement occupations, as well as

any occupations which would require frequent memorizing or troubleshooting.

In a memorandum to his supervisor dated December 2, 2002, the Senior Case Manager stated:

[The Appellant] has a moderately severe head injury as a result of being hit by a car. He is blind in his right eye and is complaining of pain in his clavicle area as well as his lower back. He has also been involved with the [text deleted] program at the [text deleted].

[Appellant's Neuropsychologist #3] feels that he may be employable in lower level occupations which would take into account his deficits (below average hand speed, reduced memory capacity, reduced problem solving, right side blindness, ongoing pain complaints of his back and clavicle area). [Appellant's Rehab Consultant] reviewed the report and feels that possibly something along the lines of a janitor might be as (sic) possibility. However she does concede with his past history and transferable skills, it would be difficult. (underlining added)

...

In light of this situation, can I go ahead with a two year determination? I am doubtful it would be supported in light of the lack of medical information and I am also concerned that [Appellant's Neuropsychologist #3's] opinion on his employability may be optimistic. I am not sure if I will be able to support proceeding with the determination or whether I should just view this as a file without rehab potential and proceed on the basis that he will be on IRI for life. (underlining added)

On March 4, 2003 [text deleted], the rehabilitation consultant, provided a series of job descriptions to the Senior Case Manager, including the job description for a service station attendant and states:

. . . Again, physical issues may interfere with [the Appellant's] ability to do a job in this category, depending on the particular employer's needs. Let me know if there is anything else you need. (underlining added)

In a note to file dated April 15, 2003 the Senior Case Manager reported that in a meeting with the Appellant and his lawyer in respect of the Appellant's rehabilitation process:

[The Appellant] presents with a very flat affect and it is obvious that he is blind in the right eye. . . . He has not bothered to attend to the doctors for any follow up and assumes that the way he is, is the way he will be for the future. (underlining added)

In this note the Senior Case Manager describes the Appellant's physical complaints as reported to him by the Appellant's solicitor as follows:

- The right shoulder is giving him a lot of problems and he is unable to lift or use it for any length of time.
- His right hip also bothers him, this is something new that we're not aware of, and if he has to stand or walk for any length of time it starts to get worse. It starts out as a sharp pain and appears to be primarily in the joint area.
- He has headaches which come on, on a regular basis in the right temporal area and there are periods of time where he just blanks out or zones out for a short period of time. Obviously the memory problems are listed by [Appellant's Neuropsychologist #3] and appear to be accurate.

### **Functional Capacity Evaluation Report**

On October 2, 2003 [Rehabilitation (Rehab) Clinic] wrote to MPIC's Senior Case Manager and provided him with a Functional Capacity Evaluation Report of the Appellant wherein he stated:

1. The major barrier that the Appellant had in respect of returning to work is his limited standing and walking tolerance due to increased right hip pain.
2. The Appellant would be more successful if he alternated between sitting and standing, not lifting above forty-five (45) pounds, and limit his walking.
3. The Appellant was able to carry out the position of a service station attendant and cashier given that he had the opportunity for brief periods of sitting as his standing tolerance is forty-five (45) minutes. This could be accomplished by supplying a stool at the cash desk.
4. Recommended that a gradual return to work for two (2) weeks be implemented to help the transition back into the work place.
5. **Beck Depression Inventory:** This questionnaire is used to screen for depression. It consists of 21 items with a cumulative scoring system focusing on various aspects of depression such as sleep disturbance, sexual functioning and appetite change. [The Appellant's] score indicates that he is experiencing psychological and physiological changes consistent with severe depression.



(underlining added)

### **Two (2) Year Determination Decision**

On April 6, 2004 the Senior Case Manager wrote to the Appellant advising him that a two (2) year determination had been made and that the Functional Capacity Evaluation (FCE) determined that he retained the physical abilities to do work in a sedentary to light work occupation.

Taking into account your work experiences and education, the FCE looked at your abilities to work as a service station attendant. A service station attendant is classified as a sedentary to light duty occupation. As outlined in the report you meet the necessary requirements to be employed a s (sic) a service station attendant.

The potential annual income of this position on a full-time basis is \$12,398.00. To establish a salary for an entry level position, we rely upon the National Occupational Classification, NOC code no. 6621 which is then matched with our Schedule C, Level 1.

The Senior Case Manager further stated the Appellant's IRI benefits would cease on April 15, 2005.

The Commission was provided with a copy of the National Occupational Classification ('NOC') code no. 6621, produced by the Federal Government, which describes the main duties of a service station attendant as performing the duties of refueling vehicles, performing other service and maintenance on vehicles, performing minor property maintenance duties and picking up and delivering customer cars for automotive repair work.

### **Application for Review**

On June 21, 2005 the Appellant made application for a review of the case manager's decision terminating the IRI benefits effective April 15, 2005.

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

On September 1, 2005 the Internal Review Officer wrote to the Appellant's solicitor confirming the case manager's decision and rejecting the Appellant's Application for Review.

In arriving at his decision the Internal Review Officer adopted the report of the occupational therapist and stated that the Appellant was able to carry out the position of a service station attendant and cashier given that he has an opportunity for brief periods of sitting as his standing tolerance is forty-five (45) minutes, which could be accomplished by supplying a stool at the cash desk.

### **Notice of Appeal**

On November 29, 2005 the Appellant filed a Notice of Appeal with the Commission in respect of the decision of the Internal Review Officer.

### **[Appellant's Neurologist's] Report**

On May 23, 2006 the solicitor for the Appellant provided the Commission with a copy of a report from [Appellant's Neurologist], on behalf of the Appellant. In this report [Appellant's Neurologist] indicates that he examined the Appellant on February 24, 2006 and that the Appellant was seen briefly on three (3) further occasions on March 21, April 2 and 4, 2006. [Appellant's Neurologist] further indicated that he was provided with a number of medical reports for his review and was specifically asked to comment on the Appellant's ability to hold a position as a service station attendant and whether the Appellant was entitled to permanent impairment benefits with respect to his injuries.

[Appellant's Neurologist] further stated:

The chief complaints that [the Appellant] voiced at this time are residual problems with his memory and concentration. He indicated to me that he would forget in mid-sentence what he is talking about. He was concerned about the fact that he had forgotten what he learned as a [text deleted] prior to his head injury. He also indicated that he has difficulty with speech in that he tends to stutter and cannot speak fluently.

He expressed concern about the fact that “people say I am different” and this examiner thought that he was referring to changes in his personality. He indicated to me that he had complete blindness in the right eye, which dates back to his accident. He was asked about other symptoms and specifically questions about his reasons for not being able to go back to work. He indicated to me that his back was sore all the time and that his spine had a curve in it. He indicated that he did not feel that he could work as a gas station attendant, as his back is sore and it would be aggravated by any type of work which involves standing, walking, lifting and bending. He did indicate that prior to the accident he worked as a [text deleted].

[Appellant’s Neurologist] also indicated in this report that he conducted a neurological examination, reviewed a number of medical reports relating to the Appellant’s motor vehicle accident injuries and referred to [Appellant’s Neuropsychologist #2’s] medical report as follows:

In reference #1 [Appellant’s Neuropsychologist #2] indicates in his neuropsychological consultation that [the Appellant] demonstrated decreased attention span, some degree of constructional apraxia, poor verbal and visual memory and lack of awareness or insight into the fact that he was having these problems.

*With regards to my assessment at this stage, I would comment that the attention span is still decreased, even though this is now almost seven years post-injury. One cannot make any definitive statements without knowing what his pre-injury status was. It is of interest that [Appellant’s Neuropsychologist #2] quotes [the Appellant’s] mother as being concerned that he would be a victim of violence. As it turns out, he did get assaulted in February of this year, which has been commented on above.*

[Appellant’s Neurologist] also commented on the reports of [Appellant’s Neuropsychologist #3], dated October 11, 1999 and March 9, 2001, as follows:

- (a) In reference #4 and #5 (October 11, 1999 and March 9, 2001 reports) [Appellant’s Neuropsychologist #3] documents several neuropsychologic deficits and it is also documented that there was considerable improvement in the 17 month interval between the two examinations. He did, however, mention that there were residual deficits and he felt that [the Appellant] has reached maximum medical recovery by that time. Specific improvements included attention, motivation, word finding, non-verbal memory, visual spatial judgment and some psychomotor skills.

He indicated that there were residual impairments in non-verbal or visual memory, certain types of attention, some problem solving issues and tactile perceptual difficulty. He felt that the cognitive changes would be permanent. [Appellant's Neuropsychologist #3] indicated that [the Appellant] should not return to a job as a [text deleted] but thought that he would be capable to do some designs, artwork and other tasks. He also indicated that [the Appellant] was having problems with hearing.

My comment with regards to [Appellant's Neuropsychologist #3's] findings are that he does indeed appear to have residual neuropsychologic changes, even though his Mini Mental Status testing was in the normal range. I thought that his attention span was down and his communication skills were also impaired. (underlining added)

- (b) [Appellant's Neuropsychologist #3] in his report of March 9, 2001 indicated that there were no organic signs such as emotional lability, nor evidence of depressive ideation, phobias or other post injuries sequelae.

I would differ with this statement in the sense that I do believe that this patient has a post concussion syndrome with some depressive features and although this examiner does not know the pre-injury psychologic status, it is my opinion that he is slow in his responses and has difficulty in performing multiple tasks and issues that would require problem solving. . . (underlining added)

- (c) In reference #9 [Appellant's Eye Doctor] comments on the visual loss in the right eye. He indicated that papillary response was very sluggish.

*On my examination [the Appellant] was completely blind in the right eye with no light perception. The right disc was pale and according to my assessment, the complete loss of vision in the right eye is due to the fracture of the orbital wall, which is a result of the injury suffered in the car/pedestrian accident.*

- (d) In reference to #12 [Appellant's Occupational Therapist] did a Functional Capacity Evaluation Report.

*[Appellant's Occupational Therapist] indicated that [the Appellant] would have difficulty doing a job where he has to stand or climb for a prolonged period.*

*In my assessment, [the Appellant] indicated that he has back pain and pain in his hip after standing for prolonged periods of time. [The Appellant] indicated to me that any period of standing or even sitting for over twenty or thirty minutes would result in pain. For these reasons, I would consider [the Appellant] to be disabled from working as a gas station attendant or for that matter a stocking clerk, or doing any type of physical activity where he would have to be on his feet for extended periods of time. As far as the gas station attendant job is concerned, he would not be able to do that even on an intellectual basis as his cognitive problems, such as calculation and handling numbers, would interfere with his ability to deal with money.* (underlining added)

*I also felt that there was an element of depression in [the Appellant], which would also interfere with holding down a job.*

### **[MPIC's Doctor's] Report**

The Internal Review Officer requested [MPIC's Doctor], Director of Medical Education for MPIC, to comment on [Appellant's Neurologist's] report. [MPIC's Doctor], in an Inter-departmental Memorandum dated June 29, 2006 under the heading **Work Capacity** stated:

[Appellant's Neurologist] has opined that he does not feel the claimant is capable of working as a gas station attendant (his determined occupation). He appears to base his conclusion of the claimant's difficulty standing (citing same from the FCE report of October 2, 2003) his limited intellectual capacity and his depression.

In this regard it is noted that the FCE report cited notes that the claimant demonstrated the physical capacity to meet the physical demands of a medium level occupation. In addition, he was able to perform various simulated occupations including cashier, stocking shelves and sweeping.

Accordingly, there is some evidence that the claimant has both the physical and intellectual capacity to perform the essential tasks of a gas station attendant. This occupation could also allow for the accommodations proposed in the FCE report to:

- ◆ Alternate between sitting and standing
- ◆ Limit lifting to <45 lbs
- ◆ Limit walking

It should also be noted that in the course of the FCE, a Beck Depression Inventory was performed, with the claimant scoring in the severely depressed range. Nevertheless, he was able to perform the essential tasks of the simulated occupations and meet the physical demands of medium level work while apparently suffering from depression.

Therefore, it does not appear that depression is a factor that impairs the claimant's work capacity sufficiently to render him incapable of performing the essential tasks of a gas attendant.

### **Appeal Hearing**

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

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

**107** From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable

because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

**Considerations under section 107 or 108**

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

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

**Type of employment**

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

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

[Appellant's Neurologist] testified at the hearing. The Appellant's counsel filed [Appellant's Neurologist's] Curriculum Vitae as an Exhibit in the proceedings. An examination of this document indicates that [Appellant's Neurologist] is a graduate of the University of [text deleted] Faculty of Medicine. [Text deleted]. [Appellant's Neurologist] has also testified on a number of occasions in the Courts of Manitoba.

[Appellant's Neurologist], in his testimony, confirmed the opinions that he expressed in his report dated May 23, 2006 and further testified that:

1. after examining the relevant medical reports that were provided to him, and after interviewing and examining the Appellant on four (4) occasions, he concluded that the Appellant was disabled from working as a gas station attendant.
2. he reviewed [Appellant's Neuropsychologist #3's] report and stated that [Appellant's Neuropsychologist #3] confirmed his own opinion as to the cognitive deficits the Appellant suffered.

3. as a result of these deficits the Appellant could not intellectually perform the duties of a gas station attendant.

[Appellant's Neurologist] also testified that:

1. as a result of the motor vehicle accident the Appellant suffered from a post-concussion syndrome.
2. the Appellant had difficulty in concentrating, processing information, calculating numbers, had difficulty with his memory and was unable to multitask.
3. the job of a gas station attendant was not simply to pump gas but that this job required the gas station attendant to perform a number of physical and intellectual activities, which the Appellant was unable to do.

During the course of his testimony [Appellant's Neurologist] provided an example of the duties of a gas station attendant at a [text deleted] in [text deleted], who would be required, on a regular basis:

1. to serve a number of customers simultaneously and to carry out such activities both accurately and efficiently.
2. to be able to effectively communicate with customers.
3. when carrying out these activities, to accurately obtain instructions from a customer as to the amount of gasoline the customer desired
4. to fill the tank quickly and accurately.
5. to calculate accurately the amount of money owing by the customer.
6. to accurately, after receiving the customer's money, be able to remember to provide the customer with the correct change, if required.
7. to be able to accurately process the customer's credit card.

[Appellant's Neurologist] further testified that the Appellant would be required, during busy times, to simultaneously carry out the above mentioned activities in order to serve three (3) or four (4) customers who required gas or window washer fluid. [Appellant's Neurologist] also stated that at the same time there could be several additional customers who attended at the gas station for the sole purpose of purchasing cigarettes, candy, newspapers, etcetera.

[Appellant's Neurologist] further testified that:

1. a gas station attendant, during busy periods, could be working under a great deal of pressure, in a stressful environment, and that in his view the Appellant did not have the ability to multitask in this fashion in order to properly provide these services to customers.
2. he disagreed with [Appellant's Neuropsychologist #3's] opinion as to the employability of the Appellant.
3. the primary basis for the Appellant's inability to work as a service station attendant was due to his cognitive deficits.

[Appellant's Neurologist] further testified that a secondary reason for the Appellant's inability to be employed as a service station attendant was due to the physical capacity of the Appellant. In this respect he testified that:

1. the Appellant was blind in his right eye.
2. the Appellant had difficulty seeing out of his left eye.
3. due to the Appellant's complaint of constant pain to his back and right hip, the Appellant was prevented from standing, walking or sitting for an extended period of time.



The Commission notes that the case manager, in the two (2) year determination decision, dated April 6, 2004, referred to the NOC code 6621 in arriving at his decision. An examination of the job description set out in this document indicates that the main duties of a service station attendant include not only refueling vehicles and providing cash to customers, but also included:

- a) a number of minor repairs to vehicles such as washing windshields, checking fluid levels and air pressure, replacing parts such as tires, light bulbs and windshield wiper blades.
- b) performing minor property maintenance duties such as sweeping service station lots, trimming shrubs, scrubbing service bays and painting curbs.
- c) picking up and delivering customer cars to the service station.

[Appellant's Neurologist], in his testimony:

1. referred to this job description in NOC code 6621 and indicated that a service station attendant, during busy periods, was required to carry out a number of physical activities which would require the Appellant to be on his feet for extended periods of time without the opportunity of sitting down and resting from time to time as suggested by the occupational therapist.
2. disagreed with the opinion of the occupational therapist who was of the view that the Appellant could easily carry out the duties of a service station attendant if he had the opportunity to rest.
3. asserted that the Appellant would not be capable of physically carrying out the duties of a service station attendant.

[Appellant's Neurologist] also differed from [Appellant's Neuropsychologist #3] in respect of the Appellant's depression. [Appellant's Neuropsychologist #3], in his report dated March 9,

2001, found no evidence of depressive ideation. However, [Appellant's Neurologist] did find that the Appellant suffered from post-concussion syndrome which had some depressive features.

[Appellant's Neurologist] testified that:

1. the Appellant's depression could affect his motivation to attend work regularly and, as a result, this also placed a challenge in the Appellant's ability to carry out his duties as a service station attendant.
2. his opinion as to the Appellant's depression was supported by the occupational therapist who, in his report dated October 2, 2003, had noted that the Appellant's score in the Beck Depression Inventory Questionnaire indicated that the Appellant was experiencing psychological and physiological changes consistent with severe depression.

The Appellant also testified that he had suffered serious injuries as a result of the accident which he enumerated as follow:

1. He had been blinded in his right eye.
2. He suffered from palsy in his left eye which did not permit him to close that eye and that he slept with the eye partially open.
3. He was right handed and the motor vehicle accident injury to his right shoulder caused him to be in constant pain in this area. As a result, he was unable to use his right hand and used his left hand instead.
4. Due to his eyesight difficulties this resulted in his unintentionally bumping into people which he found to be extremely embarrassing.
5. Severe problems with respect to his memory and concentration
6. Constant pain to his hip and back and, as a result, he had trouble standing, walking, bending, sitting and lifting.

The Appellant testified that prior to the motor vehicle accident he was physically fit and able to work as a [text deleted] and [text deleted] but, as a result of the motor vehicle accident injuries, he was unable to return to these occupations. He further testified that as a result of his physical and mental problems he was unable to carry out the job of a service station attendant.

[Text deleted], the Appellant's cousin, also testified at the hearing. She stated that:

1. as a result of the motor vehicle accident the Appellant was in a coma for two (2) weeks and that there was a very significant change in the Appellant's behaviour after the motor vehicle accident.
2. prior to the motor vehicle accident he was very energetic, outgoing, and had a great sense of humour.
3. after the motor vehicle accident she saw him frequently and noted a number of significant changes to his personality as follows:
  - (a) memory and concentration problems
  - (b) walked very slowly with difficulty
  - (c) unsure of himself
  - (d) depressed
  - (e) self-absorbed
  - (f) extremely quiet
  - (g) no longer outgoing or energetic
4. after the motor vehicle accident she saw the Appellant every few days and in her view these changes to the Appellant were due to the motor vehicle accident injuries he sustained.

She further testified that:

1. she presently was a caretaker of an apartment block on [text deleted] and for the last three (3) months the Appellant has been living in one of the suites in this apartment block.
2. having regard to his physical and mental condition, she now takes care of him by doing his cooking and his laundry.
3. in respect of his memory problems, she ensures that he attends doctor appointments.
4. from time to time she has sent the Appellant to the grocery store to pick-up groceries but he was forgetful and he couldn't remember what he was required to purchase.

She further testified that there was no improvement in his physical or mental condition from the time of the motor vehicle accident to the present day.

### **Submissions**

The Appellant's legal counsel submitted that, having regard to the significant injuries that the Appellant suffered as a result of the motor vehicle accident, he was unable to carry out the duties of a service station attendant. The Appellant's legal counsel reviewed the injuries he sustained in the motor vehicle accident which prevented him from being employed as a service station attendant. The Appellant's legal counsel referred at some length to the testimony and report of [Appellant's Neurologist] and urged the Commission to accept [Appellant's Neurologist's] opinion that the Appellant was incapable of carrying the duties of a service station attendant and reject the medical reports of [Appellant's Neuropsychologist #3], [MPIC's Doctor] and the report of the occupational therapist. The Appellant's legal counsel therefore submitted that the Appellant has established, on a balance of probabilities, that he was incapable of performing the services of a service station attendant.

In reply, MPIC's legal counsel submitted that the Commission should reject the report of [Appellant's Neurologist] and accept the report of [Appellant's Neuropsychologist #3] as to the employability of the Appellant. MPIC's legal counsel stressed that the Functional Capacity Assessment demonstrated that the Appellant had the capacity to carry on the duties of a service station attendant.

MPIC's legal counsel further submitted that:

1. the Functional Capacity Assessment corroborated [Appellant's Neuropsychologist #3's] opinion as to the Appellant's employability as a service station attendant.
2. [Appellant's Neuropsychologist #3's] report, which was obtained shortly after the motor vehicle accident, was supported by the medical report of [MPIC's Doctor].
3. [Appellant's Neurologist's] report was obtained approximately seven (7) years after the motor vehicle accident and, as a result, greater weight should, therefore, be given to the report of [Appellant's Neuropsychologist #3] than to the report of [Appellant's Neurologist].

In conclusion, MPIC's legal counsel submitted that the Appellant has failed to establish, on the balance of probabilities, that he was not capable of carrying out the duties of the determined employment as a service station attendant and that the Appellant's appeal should be dismissed.

### **Discussion**

The Appellant has appealed the decision of the Internal Review Officer who confirmed the case manager's two (2) year determination pursuant to Section 107 of the MPIC Act that the Appellant was capable of carrying out the work of a service station attendant as of April 6, 2004.

As a result, the Internal Review Officer concluded that the case manager was correct in informing the Appellant that his IRI benefits would cease on April 15, 2005. In arriving at his decision, the Internal Review Officer adopted the case manager's decision in which he stated:

Based upon my review of the file it would appear that the Case Manager's two year determination was based largely in part upon the functional capacity evaluation, the final assessment report of [Appellant's Neuropsychologist #3] and the input from [Appellant's Rehab Consultant]. Notwithstanding the serious nature of [the Appellant's] injuries, the evidence establishes, on the balance of probabilities, that [the Appellant] had the ability of carrying out the employment duties of a service station attendant. Accordingly I am upholding the two year determination decision of April 6, 2004 and dismissing his Application for Review.

The Commission finds that the Internal Review Officer erred in accepting the case manager's reasons for the Appellant's two (2) year determination and rejects the Internal Review Officer's decision that the evidence established, on a balance of probabilities, that the Appellant had the ability of carrying out the employment duties of a service station attendant as of April 6, 2004.

The Commission, in arriving at its decision, reviewed the three (3) reasons cited by the Internal Review Officer in coming to his decision to reject the Appellant's Application for Review.

**Final Assessment Report of [Appellant's Neuropsychologist #3]**

[Appellant's Neuropsychologist #3] provided two (2) reports to MPIC, the first dated April 19, 2000 and the final assessment report dated March 9, 2001, which is referred to by the Internal Review Officer in his decision. [Appellant's Neuropsychologist #3], in his final assessment, indicated that although the Appellant had improved in respect of certain cognitive functions he continued to have the following impairments:

- a) most types of non-verbal or visual memory
- b) very specific types of attention

- c) problem solving
- d) very specific tactile perceptual difficulties (graphesthesia)

[Appellant's Neuropsychologist #3] further stated:

5. At this point in time, I would regard [the Appellant's] cognitive changes as permanent, since we are approaching the two year mark post-injury, when recovery tends to plateau. (underlining added)

In respect of the Appellant's employability, [Appellant's Neuropsychologist #3] indicated that the Appellant could not return to his previous occupation as a [text deleted] secondary to his visual loss but did recommend that the Appellant could perform certain job functions including doing assembly work. It should be noted that the occupational therapist, in his Functional Capacity Evaluation Report, disagreed with [Appellant's Neuropsychologist #3] that the Appellant was employable as an assembly worker.

[Appellant's Neuropsychologist #3] was not given an opportunity to examine the occupational therapist's report nor the job description of a service station attendant (NOC code 6621), nor was he given an opportunity of commenting on [Appellant's Neurologist's] report. It should further be noted that [Appellant's Neuropsychologist #3] was not requested by MPIC to provide his opinion as to whether or not the Appellant could be employed as a service station attendant pursuant to NOC code 6621. [Appellant's Neuropsychologist #3] did not testify at the hearing and was not subject to cross-examination.

On the other hand, [Appellant's Neurologist] was given the opportunity of examining this job classification, as well as the occupational therapist's report and [Appellant's Neuropsychologist #3's] report, and provided a medical report specifically addressing the issue as to whether or not

the Appellant had the capacity to work as a service station attendant pursuant to this job classification.

[Appellant's Neurologist], after interviewing the Appellant, and reviewing [Appellant's Neuropsychologist #3's] report, testified that he agreed with [Appellant's Neuropsychologist #3's] assessment of the Appellant's cognitive deficits which were of a permanent nature. He further testified that, after examining the Appellant and reviewing the reports of [Appellant's Neuropsychologist #3] and the occupational therapist, as well as the NOC code 6621 job classification for a service station attendant, he concluded that the Appellant's cognitive deficits prevented him from carrying out the duties of a service station attendant as of April 6, 2004. (The date of April 6, 2004 is the date when the case manager advised the Appellant that his IRI benefits would be terminated one (1) year from that date because the Appellant was capable of returning to work as a service station attendant)

In response to questions from the Appellant's counsel, [Appellant's Neurologist] testified that, as of April 6, 2004, the Appellant was not capable of performing the duties of a service station attendant due to the cognitive deficits he suffered as a result of the motor vehicle accident.

[Appellant's Neurologist], in his report stated:

. . . it is my opinion that he (the Appellant) is slow in his responses and has difficulty performing multiple tasks and issues that require problem solving.

[Appellant's Neurologist] also stated in his report:

. . . As far as the gas station attendant job is concerned, he would not be able to do that even on an intellectual basis as his cognitive problems, such as calculation and handling numbers, would interfere with his ability to deal with money.



[Appellant's Neurologist] testified that working as a service station attendant, the Appellant would be unable to simultaneously service a number of customers, accurately taking instructions from a number of customers to fuel their gasoline tanks, to correctly calculate the amount owing, to correctly handle cash and credit cards, while simultaneously dealing with customers who wish to buy a variety of items such as newspapers, cigarettes, candy, etc.

The Appellant testified as to the severe problems he had with respect to his memory and concentration. The Appellant's cousin testified that she was in regular contact with the Appellant after the motor vehicle accident and indicated that the Appellant was incapable of looking after himself and, as a result, she was taking care of him by doing his cooking and laundry. She further testified that in respect of his memory problems she was required to ensure that he attended his doctor appointments and that he was often forgetful when making purchases when attending a grocery store on her behalf.

The Commission finds that both the Appellant and [Appellant's Cousin] testified in a direct fashion, without equivocation, and the Commission finds them to be credible witnesses. The Commission further finds that the medical report of [Appellant's Neurologist], and his testimony, corroborate the testimony of the Appellant and [Appellant's Cousin] as to the Appellant's cognitive problems.

The Commission notes that both the rehabilitation officer and the senior case manager in the month of December 2002, which is approximately forty-four (44) months after the motor vehicle accident, raised some concerns about the employability of the Appellant. The case manager, in a memorandum dated December 2, 2002, reports that the rehabilitation officer suggested that the Appellant might be employable as a janitor but conceded that, having regard to the Appellant's

past history and transferable skills, it would be difficult. The case manager expressed his concerns as follows:

In light of this situation, can I go ahead with a two year determination? I am doubtful it would be supported in light of the lack of medical information and I am also concerned that [Appellant's Neuropsychologist #3's] opinion on his employability may be optimistic. I am not sure if I will be able to support proceeding with the determination or whether I should just view this as a file without rehab potential and proceed on the basis that he will be on IRI for life. (underlining added)

Notwithstanding these concerns, the case manager did eventually proceed with a two (2) year determination and found that the Appellant was capable of working as a service station attendant.

Approximately four (4) months later, in a memo to file, the case manager reports of a meeting with the Appellant's solicitor and the Appellant and states that:

Any of his contributions to the conversations were very slow in coming out and it is obvious that he is suffering from cognitive deficits. . . (underlining added)

And further states in this report:

- He has headaches which come on, on a regular basis in the right temporal area and there are periods of time where he just blanks out or zones out for a short period of time. Obviously the memory problems are listed by [Appellant's Neuropsychologist #3] and appear to be accurate. (underlining added)

The Commission notes that both the rehabilitation officer and the case manager had a great deal of personal contact with the Appellant and their comments in regard to the Appellant's cognitive deficits in respect to the Appellant's employability are consistent with [Appellant's Neurologist's] medical opinion that the Appellant was incapable of performing the duties of a service station attendant due to these deficits.

MPIC's legal counsel indicated that [Appellant's Neuropsychologist #3's] assessment in respect

of the Appellant's employability should be preferred to that of [the Appellant's Neurologist] since [Appellant's Neuropsychologist #3] initially assessed the Appellant approximately five (5) months after the motor vehicle accident in September 1999 and, finally, in the month of February 2001, a period of twenty-two (22) months after the motor vehicle accident of April 17, 1999.

MPIC's legal counsel further submitted that [Appellant's Neurologist] did not see the Appellant until the month of February 2006 and conducted four (4) interviews between the month of February and the month of April 2006, which is a period of approximately seven (7) years after the motor vehicle accident.

The Commission, however, notes that the critical date in respect of this appeal is not the date of the motor vehicle accident (April 17, 1999) but April 6, 2004 when the case manager advised the Appellant that his IRI benefits would terminate one (1) year from that date because the Appellant was capable of returning to work as a service station attendant. The issue for determination by the Commission is whether or not the Appellant demonstrated, on a balance of probabilities, that he was incapable of being employed as a service station attendant as of that date.

[Appellant's Neuropsychologist #3], in his final report in March of 2001, indicated that the Appellant's cognitive deficits had plateaued and therefore would be of a permanent nature. It should be noted that [Appellant's Neuropsychologist #3's] report was prepared thirty-eight (38) months prior to the case manager's decision on April 6, 2004, while [Appellant's Neurologist's] report, in April of 2006, was prepared twenty-four (24) months after the case manager's decision.

It should further be noted that [Appellant's Neurologist] testified that he accepted [Appellant's

Neuropsychologist #3's] assessment regarding the cognitive deficits that [Appellant's Neuropsychologist #3] noted in his final report of March 2001, and [Appellant's Neuropsychologist #3's] opinion that these deficits were of a permanent nature. [Appellant's Neurologist] therefore had considered the same cognitive deficits when he arrived at his opinion as did [Appellant's Neuropsychologist #3] when he arrived at his opinion. The Commission finds that the passage of time neither diminishes the value of either [Appellant's Neuropsychologist #3's] report or [Appellant's Neurologist's] report.

It is for these reasons that the Commission gives greater weight to the opinion of [Appellant's Neurologist] than it does to the opinion of [Appellant's Neuropsychologist #3] in respect of the Appellant's cognitive capacity to carry out the duties of a service station attendant. The Commission finds that, having regard to the medical report and testimony of [Appellant's Neurologist], and to the testimony of the Appellant and [Appellant's Cousin], that the Appellant has established, on a balance of probabilities, that due to his cognitive deficits he was not capable of returning to work as a service station attendant as of April 6, 2004. As a result, the Commission finds that the Internal Review Officer erred in concluding that the Appellant was capable of working as a service station attendant on that date.

### **Functional Capacity Evaluation Report**

The occupational therapist in his report, after examining the functional capacity of the Appellant, required the Appellant to participate in a series of activities in order to simulate the Appellant's level of performance doing specific work tasks. These activities included West Bus Bench Disassembly/Assembly, Cashier and Stocking Shelves. In respect of work tolerance, the occupational therapist indicated:

[The Appellant] demonstrated good workplace tolerance. He remained at [Rehab Clinic]

for 5.5 hours on the initial evaluation day, and for 3.5 hours on the second evaluation day. A one-hour lunch break was provided each day.

The occupational therapist concluded that the Appellant met the criteria in respect of sedentary and light levels of work. Subject to certain restrictions in terms of sitting, standing, lifting and walking, the occupational therapist determined that the Appellant could carry out the position of a service station attendant and cashier assuming that he had the opportunity for brief periods of sitting after the standing tolerance of forty-five (45) minutes, which could be accomplished by supplying a stool at a cash desk.

The Commission notes that the occupational therapist's report is limited to examining the physical capacity of the Appellant to perform the duties of a service station attendant, and the occupational therapist did not express any opinion as to the cognitive capacity of the Appellant to do this job.

As well, the occupational therapist's opinion as to the Appellant's employability was based on a work simulation of various activities over a period of five (5) hours on one day and three point five (3.5) hours on the second day. However, the Commission noted that the Appellant was not subjected to an assessment at a workplace where the Appellant could participate in the actual activities of a service station attendant and cashier during the course of an eight (8) hour day, over a period of several weeks. In the Commission's view such a workplace assessment, in combination with the occupational therapist's report, would have provided MPIC with a more accurate assessment as to whether or not the Appellant was capable of working as a service station attendant and cashier as defined in NOC code 6621.

The Appellant testified that before the motor vehicle accident he was able to work as a [text deleted] and do all of the physical activities that these jobs required. He further testified that because of the motor vehicle accident injuries he was physically unable to return to these occupations.

The Appellant testified as to the following physical problems he had as a result of the motor vehicle accident injuries:

1. He was blinded in his right eye;
2. He was right handed but because of the constant pain to his right shoulder he could not use his right hand and had to use his left hand;
3. Due to the constant pain to his right hip and back he was unable to walk, stand or sit for long periods of time or do any lifting.

The Appellant's cousin testified at the hearing and stated that there was a significant change in the Appellant's behaviour after the motor vehicle accident. She indicated that prior to the motor vehicle accident the Appellant was very energetic and physically active. After the motor vehicle accident she testified as to the Appellant's constant complaints about his back and hip pain, his difficulty in walking, sitting or standing, and his inability to lift heavy objects.

The Commission finds that both the Appellant and his cousin were credible witnesses and that they both testified in a direct manner, without equivocation, and both were not contradicted in cross-examination.

[Appellant's Neurologist] had the opportunity of examining [Appellant's Neuropsychologist #3's] report, the occupational therapist's report, the service station attendant/cashier job

description as set out in NOC code 6621, and, as a result, he disagreed with the occupational therapist's opinion that the Appellant had the physical capacity to work as a service station attendant. [Appellant's Neurologist] testified that the Appellant had advised him that he had back and hip pain after standing for prolonged periods of time and that any period of standing or sitting over twenty (20) or thirty (30) minutes would result in such pain. [Appellant's Neurologist] further testified that, having regard to the Appellant's physical problems and the job duties as set out in the service station attendant's job description, NOC code 6621, the Appellant was physically incapable of performing these duties as of April 6, 2004.

In his report, [Appellant's Neurologist] stated that:

. . . For these reasons, I would consider [the Appellant] to be disabled from working as a gas station attendant or for that matter a stocking clerk, or doing any type of physical activity where he would have to be on his feet for extended periods of time.

The Commission notes that both the rehabilitation officer and the senior case manager also expressed concern about the physical capacity of the Appellant to do the job of a service station attendant as set out in an NOC code 6621.

The rehabilitation consultant, in her report dated March 2, 2004 made reference to the job description of a service station attendant as set out in NOC code 6621, and stated:

. . . Again, physical issues may interfere with [the Appellant's] ability to do a job in this category, depending on the particular employer's needs. Let me know if there is anything else you need. (underlining added)

On April 14, 2003 the senior case manager reports of a meeting with the Appellant and his lawyer and states:

- The right shoulder is giving him a lot of problems and he is unable to lift or use it for any length of time.
- His right hip also bothers him, this is something new that we're not aware of, and if he has to stand or walk for any length of time it starts to get worse. It starts out as a sharp pain and appears to be primarily in the joint area.

[Appellant's Doctor], on May 20, 2005, wrote that the Appellant was unemployable due to the fact that he was unable to do any bending, twisting or lifting in respect of his lower back.

The Commission finds that the comments of the rehabilitation officer and the senior case manager, and the medical opinion of [Appellant's Doctor], are consistent with the opinion of [Appellant's Neurologist] as to the Appellant's physical incapacity to perform the duties of a service station attendant.

The occupational therapist, in his Functional Capacity Evaluation Report, concluded that the Appellant could perform the duties of a service station attendant if he was prohibited from lifting beyond forty-five (45) pounds, given the opportunity of brief periods of sitting and this could be accomplished by supplying a stool to the Appellant. However, [Appellant's Neurologist] in his testimony described the duties that a service station attendant would be required to do, and found that the Appellant would be required, for long periods of time, and/or during a busy period, to do a great deal of walking and standing without much of an opportunity for brief periods of sitting.

The Commission, having regard to the testimony of the Appellant in respect of his physical problems, which were corroborated by the testimony of his cousin, the nature of the job duties of a service station attendant as set out in NOC code 6621, the lack of a workplace assessment, and



the testimony and medical report of [Appellant's Neurologist], gives greater weight to [Appellant's Neurologist's] medical opinion as to the Appellant's physical incapacity to perform the duties of a service station attendant than it does to the opinion of the occupational therapist as to the Appellant's employability as set out in the Functional Capacity Evaluation Report.

For these reasons the Appellant has established, on a balance of probabilities, that his physical problems were a significant factor in preventing the Appellant from carrying out the duties of a service station attendant as of April 6, 2004. The Commission further finds that, having regard to both the cognitive deficits of the Appellant and his physical problems as of April 6, 2004, the Appellant was incapable of performing the duties of a service station attendant. As a result, the Commission finds that the Internal Review Officer erred in concluding that the Appellant was capable of returning to work as a service station attendant on that date.

### **Appellant's Depression**

[Appellant's Neurologist] also noted that the Appellant suffered from depression which, in his view, affected his ability to perform the duties of a service station attendant. The Commission notes that [Appellant's Neuropsychologist #3] did not come to the same conclusion in his assessment.

However, the Commission notes that several persons who had contact with the Appellant after the motor vehicle accident disagreed with [Appellant's Neuropsychologist #3's] assessment. [Appellant's Physiotherapist], the physiotherapist who treated the Appellant, in a report dated July 27, 1999, indicated that the Appellant demonstrated a flat affect.

On April 15, 2003 the case manager, in a note to file, reported meeting with the Appellant at his

lawyer's office on April 14, 2003 and stated that the Appellant presents with a very flat affect. He further reported that the Appellant informed him that in his day to day activities the Appellant does nothing but stay with either his mother in [text deleted], or his sister's place on [text deleted], and all he does is watch television or listen to music. He further reported that the Appellant has not bothered to attend at doctors for any follow up and assumes that the way he is, is the way he will be for the future.

The Commission further notes that the occupational therapist, in his report dated October 2, 2003, stated:

**Beck Depression Inventory:** This questionnaire is used to screen for depression. It consists of 21 items with a cumulative scoring system focusing on various aspects of depression such as sleep disturbance, sexual functioning and appetite change. [The Appellant's] score indicates that he is experiencing psychological changes consistent with severe depression. (underlining added)

The Appellant testified before the Commission and demonstrated a flat affect in both his testimony-in-chief and in cross-examination.

The Commission notes that the Appellant's cousin testified that the Appellant, prior to the motor vehicle accident, was a very energetic, outgoing person, but, as a result of the motor vehicle accident, the Appellant became very quiet, withdrawn, self-absorbed, confused and depressed.

The Commission finds that the testimony of the Appellant's cousin, the comments of the physiotherapist, the case manager and the occupational therapist in respect to the Appellant's depression following the motor vehicle accident, are consistent with [Appellant's Neurologist's] opinion, and are inconsistent with [Appellant's Neuropsychologist #3's] opinion in respect of the Appellant's depression.

For these reasons the Commission gives greater weight to the opinion of [Appellant's Neurologist] as to the Appellant's depression than it does to [Appellant's Neuropsychologist #3's] opinion in this respect. The Commission therefore finds that the Appellant has established, on a balance of probabilities, that his depression would have been a factor in preventing the Appellant from carrying out the duties as a service station attendant as of April 6, 2004.

### **Decision**

The Commission finds, therefore, that the Appellant has established, on a balance of probabilities, that the motor vehicle accident injuries caused the Appellant's cognitive deficits and rendered the Appellant incapable of performing the duties of a service station attendant on and after April 6, 2004. The Commission further finds that the Appellant has established, on a balance of probabilities, that as a result of the motor vehicle accident the Appellant suffered significant physical injuries of a permanent nature and depression which were factors in preventing the Appellant from working as a service station attendant on or after April 6, 2004.

The Commission therefore concludes that the Internal Review Officer, in his decision dated September 1, 2005, erred in determining that the Appellant was capable of working as a service station attendant on April 6, 2004, pursuant to Sections 107 and 109 of the MPIC Act. As a result, the Commission finds that in determining the Appellant's employment, the Internal Review Officer erred in assessing the Appellant's physical and intellectual abilities as of April 6, 2004 pursuant to Section 109(1)(a) of the MPIC Act. As a result, the Commission allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated September 1, 2005. The Commission directs that MPIC reinstate the Appellant's IRI effective April 15, 2005, together with interest thereon.

Dated at Winnipeg this 29<sup>th</sup> day of October, 2007.

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**MEL MYERS**

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**DR. PATRICK DOYLE**

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**PAUL JOHNSTON**