Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-82

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms Diane Beresford** **Ms Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.**
HEARING DATES:	**May 19, 2010, July 15 and 16, 2010**
ISSUE(S):	**1. Entitlement to Income Replacement Indemnity Benefits** **2. Entitlement to further Personal Care Assistance Benefits**
RELEVANT SECTIONS:	**Section 110(1)(c) 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 involved in a motor vehicle accident on October 26, 2006 and suffered the following injuries:

1. Fracture of the mid humeral shaft – surgically repaired.
2. Comminuted fracture involving the supracondylar and infercondylar distal humerus – surgically repaired.
3. Undisplaced transverse fracture of the proximal fibula.

The Appellant was treated by his personal physician, [Appellant's Doctor #1], who referred him to [Appellant's Psychologist] who diagnosed the Appellant with post traumatic stress disorder.

The Appellant commenced physiotherapy at the end of December 2006 at [Rehab Facility #1]. An Initial Physiotherapy Report was received by MPIC from [Appellant's Physiotherapist #1] dated December 27, 2006. That report confirmed that the Appellant was experiencing decreased range of motion of the left shoulder and elbow and decreased strength of his left shoulder, elbow and hand.

[Appellant's Doctor #1] provided a Health Care Provider Progress Report to MPIC dated January 20, 2007. In this report [Appellant's Doctor #1] noted that the Appellant was complaining of anxiety, panic attacks, nightmares and left elbow pain with movement.

[Appellant's Psychologist] provided a report to MPIC dated January 18, 2007. He stated in part:

> "In accord, sessions have now decreased to a bi-weekly basis. He remains highly motivated to return to the workplace and is impatient regarding his speed of his physical recovery. He also remains concerned regarding the maximum degree of potential recovery. The high risk nature of his work, however, precludes premature engagement. It is estimated the client will require approximately 20 sessions to achieve successful conclusion which includes a return to his workplace." (underlining added)

On February 27, 2007, MPIC referred the Appellant to [Independent Therapist] of [text deleted] to conduct a Physical Demands Analysis. In its letter to [Independent Therapist], MPIC indicated that they wished to assess the Appellant's claim for IRI and required additional information.

On March 5, 2007 [Independent Therapist] provided a report to the case manager in which he stated:

1. Having regard to the Appellant's employment as a security officer that the exertion level was "Limited – Light, the individual is not required to work with any significant loads in the completion of the essential work duties"
2. "The individual is responsible for patrolling the [text deleted] residential complex and parking garage during the night. This involves a walking patrol of the outdoor parking and parking garage as well as patrolling throughout the building on a regular basis. Foot patrols outside last for approximately 45 of every 60 minutes and are the primary duty of the work. Security guards are required to patrol the designated areas and report any unusual personnel or findings identified during their patrol. Security guards are not required to restrain unauthorized personnel or potential criminals in the completion of their patrol duties. Each Security Guard works alone and has a radio/cell phone to contact a mobile supervisor or dispatch in the case of an emergency. If an incident is identified during a patrol the individual is required to initiate the appropriate emergency response (i.e. contact police or fire, etc.)."
3. He spoke to and received information from [Appellant's employer's representative] of [text deleted] with respect to the demands of the Appellant's position.

The Appellant was referred to the [Rehab Facility #2] for a Multi Disciplinary Assessment. In their report dated March 20, 2007, [Rehab Facility #2] stated that the Physical Demands Analysis report prepared by [Independent Therapist] was reviewed with the Appellant and he had "acknowledged that the report is a good description of the demands of his position as a Security Guard".

Case Manager Decision:

The case manager sent a letter to the Appellant on July 5, 2007 and indicated that [Rehab Facility #2's] Reconditioning Program Discharge Report dated May 22, 2007 outlined the results achieved during the Appellant's six week rehabilitation program which ended on May 18, 2007. The case manager stated that:

1. This report indicated that the Appellant was fit for an immediate return to his pre-injury employment.
2. The discharge report clearly outlined the Appellant's physical status and return to work capabilities relative to the physical demands of his pre-injury employment as a security guard.
3. The Appellant had been terminated from his employment as a security guard and therefore there was no job for him to return to.
4. The Appellant's entitlement to IRI would end on July 22, 2007 in accordance with Section 110(c) of the MPIC Act.

On July 12, 2007 the Appellant applied for a review of the case manager's decision dated July 5, 2007.

Internal Review Officer's Decision:

On October 30, 2007, the Internal Review Officer issued a decision confirming the case manager's decision and dismissed the Appellant's Application for Review. In his decision the Internal Review Officer reviewed the Physical Demands Analysis conducted by [Independent Therapist], the medical reports of [Appellant's Orthopedic Surgeon], [Appellant's Doctor #1], [Rehab Facility #2's Doctor], [the Appellant's Psychologist] and [MPIC's Psychologist].

The Internal Review Officer reviewed [Rehab Facility #2's Doctor's] work hardening discharge report dated May 22, 2007, wherein [Rehab Facility #2's Doctor] stated:

> "[The Appellant] demonstrated the ability to work at the Light level. He demonstrated the ability to walk, reach with weight on the left and handle bilaterally on a frequent level. He demonstrated the ability to reach with weight on the right at a constant level. He demonstrated the ability to reach overhead bilaterally on an occasional level.

> According to the PDA, [the Appellant] is not required to work with any significant loads during his work duties. The strength requirements of his job have been reported to be Light. [The Appellant] is required to foot patrol for the majority of his work. He is required to report unusual individuals. He is not required to restrain unauthorized individuals or potential criminals but instead initiate the appropriate emergency response."

[Rehab Facility #2's Doctor] concluded that the team recommendations portion of the report indicated that although the Appellant continued to report pain and showed self-limiting behaviour, he was capable of performing "greater than the job requirements".

The Internal Review Officer also noted a report to file dated June 5, 2007 by the case manager who spoke to [Appellant's Psychologist]. [Appellant's Psychologist] advised that he had reviewed the [Rehab Facility #2] report and he was of the view that he did not think the Appellant was ready to go back to work because he was angry and he did not understand what was happening to him. The case manager further stated that [Appellant's Psychologist] indicated that from a psychological standpoint the Appellant was not capable of returning to his pre-accident employment on a full-time basis because:

> "This client requires a clear description of his resultant physical status, future options with respect to career supports, a graduated re-entry, psychological support to secure management and prevention of regression. Client's earlier history of PTSD and difficult early history [text deleted] are identified as complicating variables."

The Internal Review Officer also referred to a report form (sic) [Appellant's Psychologist] dated July 3, 2007 as follows:

> "<u>Although PTSD is in remission the client is now emotionally fragile, with ongoing risk of a depressive episode; anger and resentment associated with his identified losses; and avoidance and protection regarding the use of his injured limb.</u>" (underlining added)

The Internal Review Officer also noted that the case manager had made arrangements for the file

to be reviewed by [MPIC's Psychologist]. In his report, [MPIC's Psychologist] noted that since the Appellant's PTSD symptoms were in remission, he concluded there was no psychological impediment or barrier for the Appellant to return to his determined employment as a security officer if such a position were available for him. [MPIC's Psychologist] also noted that [Appellant's Psychologist] had indicated the Appellant was prepared to return to his job although the Appellant had some anxiety about it, which [MPIC's Psychologist] assumed would be addressed during the Appellant's therapy.

The Internal Review Officer also referred to a report from [MPIC's Doctor], [text deleted], who reviewed the Appellant's file and stated that the Appellant did not have a physical impairment that would prevent him from returning to his employment.

The Internal Review Officer found that his review of the medical evidence supported the case manager's finding that the Appellant had the ability to return to the essential duties of his determined employment as a security officer. As a result, the Internal Review Officer dismissed the Appellant's Application for Review and upheld the case manager's decision of July 5, 2007 based on the medical opinions provided by [Rehab Facility #2's Doctor], [MPIC's Psychologist] and [MPIC's Doctor].

The Appellant filed a Notice of Appeal on November 15, 2007.

Prior to the Appellant's appeal hearing, the Commission received two further interdepartmental memorandums from [MPIC's Doctor] as follows:

1. On June 22, 2009 [MPIC's Doctor] provided an interdepartmental memorandum to the case manager in respect of whether the Appellant was entitled to permanent impairment benefits.

[MPIC's Doctor] stated:

> "Information obtained from the file indicates [the Appellant] fractured the left humerus as a result of the incident in question. It is noted that the fracture required open reduction and internal fixation and a course of physiotherapy following the surgical procedure. It is noted that [the Appellant] underwent numerous assessments and received multiple forms of treatment in order to address the medical conditions arising from the incident in question, in particular that relating to the left humerus.
>
> In the documents obtained from [Rehab Facility #2], it is documented that [the Appellant's] examination identified limitation of left shoulder and elbow range of motion. The information obtained from [Appellant's Orthopedic Surgeon] indicates the same (i.e. limitation of shoulder and elbow range of motion).
>
> The information obtained from [Appellant's Doctor #1] indicates that as of January 7, 2008, [the Appellant's] examination identified limitation of left shoulder and elbow range of motion.
>
> Information obtained from [Appellant's Doctor #2] indicates [the Appellant's] left shoulder symptomatology was not secondary to an entrapment neuropathy or cervical radiculopathy.
>
> In [Appellant's Physiotherapist #2's] May 16, 2009 report, it is noted that [the Appellant's] permanent impairment assessment identified a limitation of shoulder and elbow range of motion…"

[MPIC's Doctor] further stated:

> "Based on the documentation provided by [Appellant's Physiotherapist #2], [the Appellant's] active range of motion in his left shoulder and elbow were as follows:
>
> - Left shoulder flexion and extension – total range of motion equals 100°;
> - Left shoulder abduction/adduction – total range of motion equals 70°;
> - Left shoulder internal and external rotation – total range of motion equals 70°;
> - Left elbow flexion/extension – total range of motion equals 70°;
> - Left forearm pronation/supination 0 total range of motion equals 110°.
>
> **COMMENTS**
> Based on the severity of [the Appellant's] left arm injury and the surgical procedure he underwent, it is not unreasonable to assume that he might develop some degree of impairment in joint mobility in the elbow more so than the shoulder. It is not common for individuals to develop a significant loss in shoulder range of motion following this type of injury. <u>Based on information obtained from [the Appellant's Physiotherapist #2] indicating that [the Appellant] was only able to flex his shoulder to 85° and abduct to 70°, it appears that [the Appellant] has developed a significant limitation of active shoulder range of motion in the absence of an underlying structural abnormality that might account for the marked limitation of movement.</u>" (underlining added)

2. [MPIC's Doctor] provided a further interdepartmental memorandum dated March 29, 2010 to the Internal Review Officer. In this report [MPIC's Doctor] noted that the case manager had reassessed the Appellant on December 23, 2009 and had compared that examination with his report in respect of the Appellant on July 2, 2009 and there did not appear to be any significant change except for a small reduction in the shoulder internal and external rotation. [MPIC's Doctor] concluded that based on previous reviews of the Appellant's file it was determined that he had improved from a functional standpoint to the extent he was capable of performing work as a security guard, even in the presence of a limited left shoulder and elbow range of motion.

Appeal:

The relevant provisions in this appeal are as follows:

Section 110(1)(c) of the MPIC Act states:

> **Events that end entitlement to I.R.I.**
>
> 110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (c) the victim is able to hold an employment determined for the victim under section 106;

Appeal Hearing:

The Appellant testified that:

1. Prior to the motor vehicle accident he had been working for [text deleted] in a residential apartment complex on [text deleted] two days a week from 12 to 16 hours per day.
2. He had also been working at the [text deleted] office at [text deleted] two days a week with 12 hour shifts.
3. He indicated he was laid off from this job some time prior to the motor vehicle accident.
4. [Appellant's Orthopedic Surgeon] operated on the Appellant in respect of his injuries and

several metal plates and a number of screws had been affixed to his humerus.

5. As a result of the injuries he sustained in the motor vehicle accident he was unable to raise his left arm above his shoulder and does not have total strength in that shoulder.
6. When he walks for a period of 30 minutes or more his left arm begins to ache.
7. At the apartment complex where he was employed he was unable to remove the canvass cover of the pool which required him to use both hands to control the deck to roll the canvass off and subsequently put it back on.
8. There was a heavy cover for the hot tub which required the use of both hands to remove it from the hot tub and he was physically unable to do so.
9. At the apartment complex he was required to climb very narrow stairs to check the mechanical room and in order to do so he would have to grasp both the steel rails to climb these stairs and was not physically capable of using his left arm for that purpose.
10. He would be unable to continue employment at [text deleted] because the job as a security officer was inherently risky and at any time he could be confronted by someone and he would be unable to defend himself.

The Appellant further testified that:

1. There was a nightclub next door to the apartment complex and often in the evenings people who were intoxicated after leaving the nightclub, would climb the apartment wall for the purpose of cutting across the apartment complex property.
2. In these circumstances he had to watch very carefully so that none of these people came into contact with the automobiles parked on the property. When he confronted them, they left the property.
3. In doing this activity he exposed himself to being physically confronted by intoxicated persons.

4. If he was so confronted he would not be able to defend himself.

He further testified that while on night duty at the [text deleted] Office building he heard noises on the second floor and when he attended on that floor he noted three computers were sitting on a desk beside an open window. However there were no persons in that room and he believed as a result of the noise he made in entering the room the persons left the premises. He further testified that if he had confronted the thieves, he would not have been physically able to defend himself if he had been attacked.

In cross-examination Ms Pemkowski referred to [Independent Therapist's] reports which indicated that the Appellant was reported to have indicated that his job description was accurate. In reply the Appellant:

1. Denied this suggestion and said that the job description was not accurate.
2. Stated that [Independent Therapist] had never discussed the job description with him but accepted the opinion of the employer in respect of the job description.

[Appellant's brother] testified that:

1. Prior to the motor vehicle accident the Appellant was self-sufficient and could carry out his daily household duties without any help.
2. Prior to the motor vehicle accident the Appellant was very calm, but became very agitated and depressed after the motor vehicle accident.
3. After the motor vehicle accident, the Appellant was unable to do the essential household duties such as washing himself, cleaning the apartment, cooking for himself or shopping.
4. As a result, he attended at his brother's apartment and did all the cleaning, washing, cooking and shopping for him.

5. The Appellant complained of pain to his left arm and had trouble sleeping.

The next witness to testify on behalf of the Appellant was [Appellant's brother's friend], who had known the Appellant since 2007. He testified that:

1. He is a friend of the Appellant's brother and that prior to the motor vehicle accident he would see the Appellant from time to time.
2. After the accident he attended the Appellant's apartment and swept the floor and helped him shop.
3. When the Appellant's brother was out of town for one month or six weeks he went over to do all the essential tasks on behalf of the Appellant.

[MPIC's Doctor], [text deleted] testified that although the Appellant was suffering from some chronic pain and had some limitations with his left arm, he was physically capable of carrying out the duties of a security officer employed by [text deleted].

[MPIC's Doctor] referred to [Independent Therapist's] Physical Demands Analysis Report in respect of the Appellant's employment as a security guard and stated:

1. Security guards were not required to restrain unauthorized personnel or potential criminals in the completion of their patrol duties.
2. The job summary provided that each security officer works alone, has a radio/cell phone to contact the mobile supervisor or dispatch in the case of an emergency. If an incident was identified during the patrol, a security officer was required to initiate the appropriate emergency response by contacting the police, fire department or a supervisor.
3. The report of [Independent Therapist] indicated that the exertion level required for the specific position of a security officer was light and that the individual was not required to

work with any significant loads in the completion of the essential duties.

[MPIC's Doctor] also referred to [Rehab Facility #2's Doctor's] Modified Work Hardening Discharge report.

[MPIC's Doctor's] testimony confirmed his written reports where he concluded that the medical evidence established the Appellant's ability to carry out the essential duties of his determined employment as a security officer.

The Commission asked [MPIC's Doctor], having regard to the limited motion of his left arm and shoulder, whether the Appellant could defend himself if confronted by one or more persons while he was on duty. [MPIC's Doctor] responded that in these circumstances the job duties required that the Appellant not get involved in any confrontation and to remove himself from the situation and report the matter to a supervisor or to the police. The Commission asked [MPIC's Doctor] if the Appellant was unable to remove himself from the situation but was being attacked by one or more persons whether he would be capable of defending himself. [MPIC's Doctor] responded that it was unlikely that this would occur since the Appellants' duties were in locations where it was not expected that he would be faced with such circumstances.

The Commission informed [MPIC's Doctor] that the apartment complex, where the Appellant had been employed as a security officer, was situated beside a nightclub and that in the late evening intoxicated persons would climb over the fence and would approach automobiles parked at the complex. [MPIC's Doctor] was further informed that the Appellant testified that he would advise these people to leave the premises. The Commission asked [MPIC's Doctor] whether or not the Appellant would be able to defend himself should intoxicated persons confront him in

these circumstances. [MPIC's Doctor] responded that it was possible, not probable, that this could occur.

The Commission also referred [MPIC's Doctor] to the Appellant's testimony that while he was employed at the [text deleted], during the night shift he had heard noises on the second floor of the building and when he attended noted that there was an open window with a number of computers next to it. The Appellant had further testified that he believed that because he had made some noise when coming into the room, one or more thieves had escaped through the open window.

The Commission asked [MPIC's Doctor] whether, in these circumstances, if the Appellant was confronted by persons attempting to remove stolen goods from these premises, would he be able to defend himself physically. Again [MPIC's Doctor] indicated that likely this would not occur, however, he did acknowledge that if the Appellant was confronted in the manner described by the Commission that he would not be able to defend himself. [MPIC's Doctor] again reiterated that it was possible, not probable, and therefore unlikely.

[MPIC's Doctor] was of the view that the risk to the security officer was highly unlikely and should not present a problem for the Appellant to be employed in that capacity. [MPIC's Doctor] demonstrated to the Commission the limited movement that the Appellant had to his shoulder and elbow. He testified that the Appellant could not in a quick motion thrust his left arm back and forth, a motion necessary to ward off an attack or to land a blow on an assailant. He did acknowledge that there were higher degrees of risk involved with a police officer, a firefighter or a correctional officer, but would not acknowledge that a security officer could be involved in a confrontation, only that it might be possible but not probable.

[MPIC's Psychologist] testified that:

1. He had been a correctional officer before becoming a psychologist and therefore has knowledge of the degree of risk involved in that employment, which he indicates was a high risk.
2. The occupation of a security officer is of a lower risk, but risky nevertheless.
3. A security officer who worked at a residential apartment block near a bar could be in contact with people who are intoxicated and this could create a risk of confrontation for the security officer.
4. As well, if a security officer attended the scene where there was evidence of a break-in (i.e. the [text deleted] office) this could result in physical confrontation which would require a security officer to defend himself.
5. In these circumstances, anybody who is physically incapable of defending himself should not be working as a security officer.
6. It was not rational for the Appellant, with his physical limitations, to accept employment as a security officer, having regard to the risky nature of that employment.

[Appellant's branch manager] testified that she was a branch manager of [text deleted] and testified that:

1. The duties of the security officer would not include physical contact with any person or using any force and that the security officers are trained to avoid such confrontation.
2. Having regard to the nature of the Appellant's duties it would be unlikely that he would be physically confronted while carrying out these duties.
3. If there were any potential problems in this respect it was the Appellant's duty to report the matter to the supervisor and discuss with him an attempt to eliminate the problem.

[Appellant's branch manager] during the course of her testimony also produced the [text deleted] Security Officer's Handbook, a document which was not part of the indexed material provided to the parties prior to the appeal hearing.

This handbook contained the following comments:

> "**The Role of a Security Practitioner**
>
> Your role as a Security Practitioner is to detect, deter and report possible threats to clients' property, while performing the duties outlined in the written Post Orders.
>
> **Detect** means to actively observe. You can detect possible threats to clients' property by remaining alert while on post and constantly observing for what is usual and unusual.
>
> **Use of Force**
>
> If you are personally threatened, avoid physical contact situations and the use of force. [text deleted]' procedures on the use of force state the following:
>
> - ❑ When faced with a clear and immediate threat of bodily harm, always try first to retreat with any other people present to a secure position.
> - ❑ Use force only when necessary to protect yourself and others from a clear and immediate threat of bodily harm.
> - ❑ Use only the degree of force necessary to repel an attack or the threat of an attack.
> - ❑ Never use force to protect property.
> - ❑ Call the police for assistance and follow directions in the Post Orders.
> - ❑ Call the client contact and your Supervisor.
> - ❑ Record all incidents in the Log Book and then complete a Security Incident Report." (underlining added)

In response to questions from the Commission, [Appellant's branch manager] testified that:

1. The security officers were instructed not to get involved physically with anybody and to report the matter immediately to their supervisor.
2. However, the duties of a security officer at [text deleted] did contain a degree of risk.

The Commission requested that [Appellant's branch manger] comment on the contents in the

handbook under the heading “Use of Force” which stated that force would be used “only when necessary to protect yourself and others from a clear and immediate threat of bodily harm”. In response, [Appellant’s branch manger] stated that:

1. This provision recognized that there could be occasions where a security officer would be required to use force in order to defend himself or others.
2. Having regard to the Appellant’s injury in these circumstances the Appellant would not be able to defend himself.
3. If a person was not physically capable of defending himself as a security officer then he should not be employed in that capacity.

Submissions:

The Appellant, in his submission, reiterated his testimony that:

1. He was not physically capable of carrying out any heavy duty tasks such as lifting covers of swimming pools or climbing up very narrow stairways.
2. He was physically unable to walk great distances and when he did his left arm began to ache in carrying out his duties as a security officer.
3. Having regard to the motor vehicle accident injuries he sustained to his left arm and shoulder and the chronic pain he felt in his left arm, he was not physically capable to defend himself if physically confronted by someone.
4. As a result of the potential risk he refused to return to work as a security officer at [text deleted].

For these reasons the Appellant requested that the Internal Review Officer’s Decision dated October 30, 2007 be rescinded and the appeal be allowed.

MPIC's legal counsel reviewed the reports of [Rehab Facility #2's Doctor], [MPIC's Psychologist] and [MPIC's Doctor] and the report of [Independent Therapist] and concluded that the Appellant was physically capable of carrying out the duties of a security officer notwithstanding that he suffered from chronic pain to the left arm and elbow. MPIC's legal counsel submitted that the Appellant had failed to establish on a balance of probabilities that he was incapable of returning to work as a security officer at [text deleted]. MPIC's legal counsel stated that the chronic pain the Appellant suffered did not prevent him from carrying out these duties.

For these reasons MPIC's legal counsel submitted that the Appellant's appeal be dismissed and the decision of the Internal Review Officer dated October 30, 2007 be confirmed.

Decision:

The Commission, however, finds that the Internal Review Officer erred in concluding, based on [Independent Therapist's] Physical Demand Analysis ("PDA"), that the Appellant was not "required to restrain unauthorized individuals or potential criminals but instead initiate the appropriate emergency response" as part of his job duties.

In defining the job duties of the Appellant the Commission notes that in [Independent Therapist's] PDA, he relied on information received from [Appellant's employer's representative] of [text deleted] in concluding:

> "Security guards are not required to restrain unauthorized personnel or potential criminals in the completion of their patrol duties. Each Security Guard works alone and has a radio/cell phone to contact a mobile supervisor or dispatch in the case of an emergency. If an incident is identified during the patrol the individual is required to initiate the appropriate emergency response (i.e. contact police or fire, etc.)."

The Commission further notes that [Rehab Clinic's] Multi Disciplinary Assessment Report of March 20, 2007 stated that the Appellant had reviewed [Independent Therapist's] PDA and acknowledged that the report contained a good description of the demands of his position as a security officer.

The Commission finds however that the Appellant consistently advised his case manager that having regard to the injuries he sustained to his left shoulder and arm, he would not be able to defend himself if he was confronted when carrying out his duties. In his testimony the Appellant confirmed this position to the Commission.

The Appellant's position in this respect was also confirmed by his communications with [Appellant's Psychologist]. In [Appellant's Psychologist's] report to MPIC dated January 18, 2007, [Appellant's Psychologist] stated in respect of the Appellant that "the high risk nature of his work, however, precludes premature engagement". As well, in [Appellant's Psychologist's] report to MPIC dated July 3, 2007, he stated:

> "Although PTSD is in remission the client is now emotionally fragile, with ongoing risk of a depressive episode; anger and resentment associated with his identified losses; and avoidance and protection regarding the use of his injured limb." (underlining added)

The Commission notes that the Appellant's comments to his case manager in respect of the risky nature of his occupation and [Appellant's Psychologist's] reports to MPIC in this respect occurred prior to the Internal Review Officer's decision dated October 30, 2007. The Commission therefore concludes that in issuing the decision of October 30, 2007 the Internal Review Officer was aware of the Appellant's position regarding the inherent risk of his work as a security officer.

It is the Commission's view that having regard to the conflicting information in respect of the nature of the Appellant's job demands as provided by the Appellant and by [Independent Therapist], MPIC should have conducted an investigation to determine whether or not there was any risk to the Appellant in carrying out his duties as a security officer.

The Commission further notes that in arriving at its decision to terminate the Appellant's IRI, MPIC relied solely on the report of [Independent Therapist] who had interviewed the employer's representative, [text deleted], but had not interviewed either the Appellant nor any of the other security officers that worked for [text deleted]. Such an investigation may have discovered that there was no written job description in respect of a security officer's duties at [text deleted], but that there was a Personal Security Handbook which clearly stated that there was an inherent risk in carrying out the duties of a security officer. This handbook provided that

1. If a security officer was personally threatened the security officer was to "avoid physical contact situations and the use of force".
2. When faced with a clear and immediate threat of bodily harm the security guard should retreat to a secure position.
3. Use force only when necessary to protect yourself and others from a clear and immediate threat of bodily harm.
4. Use only the degree of force necessary to repel an attack or the threat of an attack.

The Commission finds that MPIC disregarded the concerns of both the Appellant and [Appellant's Psychologist] in respect of determining whether or not there was any risk to the Appellant in carrying out his duties as a security officer. The Commission further finds that had a proper investigation been conducted, the Internal Review Officer and [MPIC's Doctor] would have learned of the content of the [text deleted] handbook in respect of "the use of force" prior to

determining whether or not there was any risk to the Appellant in carrying out his duties as a security officer. Armed with this information the Internal Review Officer and [MPIC's Doctor] would have concluded that the Appellant's job posed a significant risk to him and as a result he was justified in refusing to return to the determined employment as a security officer pursuant to Section 110(1)(c) of the MPIC Act.

The Commission further finds that if MPIC had interviewed [Appellant's branch manager], the branch manager at [text deleted], prior to the decision of the Internal Review Officer she would have acknowledged to them (as she did in her testimony) that the provisions in the handbook recognized that there could be occasions where a security officer would be required to use force in order to defend himself. As well [Appellant's branch manager] would have acknowledged to MPIC, as she did in her testimony, that having regard to the Appellant's injury that he would not be able to defend himself if physically confronted while carrying out his duties as a security officer.

The Commission notes that the Appellant testified under oath in respect of his duties as a security officer and was subject to examination and cross-examination. Neither [Independent Therapist] nor [Appellant's employer's representative] were called as witnesses to contradict the Appellant's testimony. As well [Appellant's branch manager], in her testimony, corroborated the Appellant's testimony that there could be occasions where a security officer would be required to use force in order to defend himself. In these circumstances the Commission gives greater weight to the testimony of the Appellant in respect to the job demands of a security officer than it does to [Independent Therapist's] PDA report which was relied upon by the Internal Review Officer in terminating the Appellant's IRI.

[MPIC's Psychologist] was called by MPIC to testify as to the impact of the Appellant's chronic pain in carrying out his duties as a security officer. In response to the Commission's questions, [MPIC's Psychologist] corroborated the Appellant's testimony that there was an inherent risk of physical confrontation when carrying out the duties of a security officer. In his testimony, [MPIC's Psychologist] stated:

1. He had been a correctional officer before becoming a psychologist and therefore has knowledge of the degree of risk involved in that employment, which he indicates was a high risk.
2. The occupation of a security officer was of a lower risk, but risky nevertheless.
3. A security officer who worked at a residential apartment block near a bar could be in contact with people who are intoxicated and this could create a risk of confrontation for the security officer who may have been required to defend himself.
4. As well, when a security officer attended the building site where there was evidence of a break-in (i.e. the [text deleted] Office) and came into contact with the persons who had broken into the premises, a physical confrontation could have occurred which would have resulted in the security officer being required to defend himself.
5. In these circumstances, anybody who is physically incapable of defending himself should not be working as a security officer.

The Appellant testified that having regard to the limitations of his left shoulder and arm he would be unable to defend himself if physically confronted while carrying out his duties as a security officer. MPIC did not dispute that the Appellant had a significant limitation to his left shoulder and arm. After reviewing all of the relevant medical reports relating to the Appellant MPIC's Medical Consultant, [MPIC's Doctor], stated in his June 22, 2009 report to MPIC:

"Based on information obtained from [Appellant's Physiotherapist #2] indicating that

> [the Appellant] was only able to flex his shoulder to 85° and abduct to 70°, it appears that [the Appellant] has developed a significant limitation of active shoulder range of motion in the absence of an underlying structural abnormality that might account for the marked limitation of movement." (underlining added)

The Commission further finds that the Appellant's testimony was corroborated by the reports of [Appellant's Psychologist], the testimony of [MPIC's Psychologist] and [Appellant's branch manager] that the risk involved in the Appellant's work as a security officer could require him to defend himself when confronted by other persons. The Commission finds that the Appellant did testify in a direct and unequivocal fashion and accepts his testimony in all issues under dispute between himself and MPIC.

The Commission therefore finds that:

1. The work of a security officer at [text deleted] was inherently risky.
2. The Appellant's motor vehicle accident injuries resulted in a significant limitation of his left shoulder and arm and chronic pain to his arm.
3. As a result he was not physically capable of defending himself from any clear and immediate threat of bodily harm when carrying out his duties as a security officer.

For these reasons the Commission therefore finds that the Appellant has established on a balance of probabilities that MPIC erred in concluding, pursuant to Section 110(1)(c) of the MPIC Act, that MPIC was entitled to terminate the IRI benefits to the Appellant on the grounds that he was able to hold his determined employment as a security officer. The Commission allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated October 30, 2007 in respect of his IRI benefits.

Personal Care Assistance:

On January 22, 2007, MPIC's case manager wrote to the Appellant advising him that an assessment had been conducted to determine his entitlement to Personal Care Assistance Benefits ("PCA") relating to the injuries he sustained in the motor vehicle accident. An assessment was completed by [Appellant's PCA Assessor] on January 16, 2007 and he indicated that the Appellant required assistance with the following activities:

- Meal Preparation: Dinner
- Light Housekeeping
- Heavy Housekeeping
- Community Outings

The case manager stated that these requirements gave the Appellant a score of 11.0 which equals a monthly maximum entitlement of $475.00.

On March 13, 2007, the case manager wrote to the Appellant advising him that a new assessment was completed by [Appellant's PCA Assessor] on February 28, 2007. The case manager informed the Appellant that in order to qualify for entitlement to PCA expenses a minimum score of "9" is required. The case manager informed the Appellant that his assessment score was 5.0 resulting in no entitlement to PCA beyond February 28, 2007.

An examination of the assessment indicated that the Appellant scored 2 in respect of light housekeeping and 3 in respect of laundry for a total of 5. According to this assessment, the Appellant no longer required assistance in respect of meal preparation – dinner, heavy housecleaning, or community outings.

On March 15, 2007, the Appellant filed an Application for Review. In this Application for Review the Appellant stated:

> "The assessment was very poor, unfair, unacceptable and extremely suspicious. For the following points
> - the period of the assessment was very short
> - the therapist does not have any tool that helps taking the right decision. Just asking questions
> - I remind him to have a look at the last assessment did by [Appellant's Physiotherapist #1] (Therapist at [Rehab Facility #1]) on Feb/27/07. Just one day before his assessment.
> - I am still attending physiotherapy ([Rehab Facility #1]) 2 days a week, experiencing weakness and pain in my L-hand

Internal Review Officer's Decision:

On May 16, 2007 the Internal Review Officer issued a decision confirming the case manager's decision in respect of the Appellant's entitlement to PCA and rejected the Appellant's Application for Review.

The Internal Review Officer noted that [Appellant's PCA Assessor] of [text deleted] had conducted an assessment on February 28, 2007 and the Appellant scored 5 on this assessment and stated:

> "You pointed out in the hearing that you require assistance with some tasks in the home, those being mainly heavy housework, some meal preparation and some assistance with shopping. Those are the same areas which [Appellant's PCA Assessor] identified on the Assessment Tool and you were awarded scores for some of those needs. The end result remains that you scored a five in total on that Assessment Tool and the legislation requires a minimum score of nine before any entitlement to PCA arises.
>
> While MPI does not dispute the fact that you do require assistance with some of the above noted tasks, the legislation precludes entitlement to benefits in this regard where you do not reach a minimum score of nine.
>
> Based on all of the above, I am dismissing your Application for Review of PCA and confirming the Case Manager's decision."

The Appellant filed a Notice of Appeal on July 20, 2007 and stated:

> "I am still unable to wash, clean myself properly, still using bath chair, unable to clean kitchen, bathroom, cooking, etc.
>
> The decision based on poor assessment, the therapist who did it, doesn't have any tool that helps taking right decision, just asking questions."

The Appellant testified at the appeal hearing that he had difficulties personally washing himself, he was unable to clean his kitchen and bathroom, nor was he able to properly cook meals for himself. He testified that he required the assistance of his brother to carry out these activities on his behalf and to shop for groceries for him. He further testified that when his brother was away his brother's friend assisted in respect of these activities.

The Appellant's brother and his friend both testified and corroborated the complaints of the Appellant.

Discussion:

The Commission finds that MPIC erred in terminating the personal care assistance it had been providing to the Appellant as a result of the motor vehicle accident.

The Commission notes there is conflicting evidence between [PCA Assessor's] second assessment and the testimony of the Appellant and his two witnesses in respect of the Appellant's ability to cook his dinner meal, personally care for himself, do heavy housecleaning or carry out community outings such as shopping for groceries and other personal needs.

The Commission notes that in the Appellant's Application for Review of the Internal Review Officer's Decision, he complained about the manner in which [Appellant's PCA Assessor] had carried out the second assessment on February 28, 2007 which resulted in a termination of the

Appellant's personal care assistance. In this application the Appellant stated that the period of the assessment was very short and that [Appellant's PCA Assessor] had not conducted any tests to determine the capacity of the Appellant to prepare meals, do housekeeping or community outings, but merely asked the Appellant some questions. The Appellant reiterated this complaint in his Notice of Appeal.

The Commission notes that the period of time from the first assessment of January 16, 2007 where the Appellant had scored 11.0 and was entitled to personal care assistance and the second assessment on February 28, 2007 where he scored 5.0 which resulted in no entitlement to PCA was a period of six weeks. MPIC could not explain to the Commission how the significant motor vehicle accident injuries suffered by the Appellant, which resulted in a permanent impairment to his left shoulder and arm, could within a period of six weeks result in a dramatic reduction in his personal assistance score from 11.0 to 5.0.

In his testimony, the Appellant challenged the assessment made by [Appellant's PCA Assessor] that he was able to cook his dinner meal, do his heavy housecleaning, properly care for himself or do his shopping. The Appellant's testimony was corroborated by [Appellant's brother] and [Appellant's brother's friend].

MPIC did not call [Appellant's PCA Assessor] to testify:

1. As to the means by which he determined a reduction in the personal assistance score of the Appellant from 11.0 to 5.0.
2. To rebut the testimony of the Appellant, and his two witnesses, [Appellant's brother] and [Appellant's brother's friend] as to the Appellant's inability to cook dinner, conduct the housecleaning or carry out community outings.

As a result, the Commission finds that MPIC produced no evidence before the Commission to challenge the testimony of the Appellant, [Appellant's brother] and [Appellant's brother's friend] as to the nature of the second assessment provided by [Appellant's PCA Assessor] or whether or not the Appellant required assistance in respect of meal preparation – dinner, heavy housecleaning or community outings.

The Commission therefore concludes that MPIC did not produce any satisfactory evidence to demonstrate the manner in which [Appellant's PCA Assessor] determined the reduction in the score from 11.0 to 5.0 in a period of six weeks having regard to the Appellant's significant injuries.

MPIC did not dispute the significant injuries the Appellant sustained in the motor vehicle accident which resulted in a permanent impairment to the Appellant's shoulder and arm. On June 22, 2009, in describing the Appellant's motor vehicle accident injuries, [MPIC's Doctor], MPIC's medical consultant, stated:

> "Based on the documentation provided by [Appellant's Physiotherapist #2], [the Appellant's] active range of motion in his left shoulder and elbow were as follows:
>
> - Left shoulder flexion and extension – total range of motion equals 100°;
> - Left shoulder abduction/adduction – total range of motion equals 70°;
> - Left shoulder internal and external rotation – total range of motion equals 70°;
> - Left elbow flexion/extension – total range of motion equals 70°;
> - Left forearm pronation/supination 0 total range of motion equals 110°…
>
> Based on information obtained from [Appellant's Physiotherapist #2] indicating that [the Appellant] was only able to flex his shoulder to 85° and abduct to 70°, it appears that [the Appellant] has developed a significant limitation of active shoulder range of motion in the absence of an underlying structural abnormality that might account for the marked limitation of movement." (underlining added)

The Appellant testified in a direct and unequivocal fashion and was subject to examination and cross-examination. The Appellant's testimony was corroborated [Appellant's brother] and [Appellant's brother's friend] who were both subject to cross-examination. Under these circumstances the Commission gives greater weight to the testimony of the Appellant, [the Appellant's brother] and [Appellant's brother's friend] on all issues in dispute between MPIC and the Appellant relating to the Appellant's ability to require assistance in respect of meal preparation – dinner, heavy housecleaning or community outings.

The Commission finds that having regard to the testimony of the Appellant, his brother and his friend, the Appellant has established on a balance of probabilities that he was unable to do heavy housecleaning, dinner meal preparation and his own shopping on February 28, 2007. The Commission therefore finds that MPIC's Internal Review Officer erred in confirming the case manager's decision of March 13, 2007 in reducing the Appellant's assessment from 11.0 to 5.0. For these reasons the Commission rescinds the decision of the Internal Review Officer dated May 16, 2007 and allows the Appellant's appeal in this respect.

Dated at Winnipeg this 18th day of August, 2010.

MEL MYERS, Q.C.

DIANE BERESFORD

LINDA NEWTON