

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Estate of the Appellant]
AICAC File No.: AC-04-30**

PANEL: Mr. Mel Myers, Chairperson
Mr. Errol Black
Mr. Paul Johnston

APPEARANCES: The Estate of [the Appellant] was represented by Ms Nicole Napoleone of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: March 22, 2011

ISSUE(S): Capacity to hold the determined employment as a truck driver.

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94.

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 a passenger in the front seat of a tractor-trailer which was involved in a motor vehicle accident on July 20, 2001. As a result of the motor vehicle accident the Appellant suffered a direct blow to his left shoulder which prevented him from continuing his employment as a truck driver. As a result the Appellant applied for and received Income Replacement Indemnity ("IRI") benefits from MPIC. At the time of the accident the Appellant was a full-time farmer but was also employed on a part-time basis as a truck driver for [text deleted] of [text deleted], Manitoba.

On February 11, 2001 [Appellant's Orthopaedic Surgeon] wrote to MPIC confirming that the Appellant had a soft tissue injury to the left shoulder and that he was unable to work.

In an Initial Health Care Report dated November 6, 2001, [Appellant's Doctor #1] [text deleted], indicated that the Appellant had sustained soft tissue injury to his left shoulder and was complaining about this pain.

On January 29, 2002 [Appellant's Doctor #1] provided a narrative report to MPIC which indicated that the Appellant had shown no improvement to his left shoulder pain and that the Appellant has not responded to physical therapy and acupuncture treatments. [Appellant's Doctor #1] further stated that because of these symptoms the Appellant was unable to fulfill his normal work duties since the motor vehicle accident.

Case Manager's Decision:

On February 15, 2002, MPIC's case manager informed the Appellant that:

1. The Appellant's determined employment was that of a truck driver
2. The Appellant would continue to receive IRI benefits in the bi-weekly amount of \$1,103.16.

MPIC retained [text deleted] to conduct a Work Site Analysis Report of the Appellant's employment as a truck driver. On March 21, 2002, [Appellant's Occupational Therapist #1], an occupational therapist, provided a report to MPIC indicating that:

1. The classification of the Appellant's employment as a truck driver with [text deleted] was determined to be that of a light strength classification.

2. The Appellant's current physical abilities matched most of the requirements of his occupation except for the sustained use of his left arm and for operating the vehicle.
3. It may be possible to educate the Appellant on different techniques for driving or modify the vehicle to assist him with this but further research was required.
4. The occupation therapist recommended:
 - A. Await results of MRI to determine need for surgery. The follow-up on recommendations from physician following this assessment.
 - B. If the Appellant is going to have surgery put file on hold until recovery is completed. If surgery is not recommended then proceed with a gradual return to work and provide the claimant with education on reducing left arm movements in operating the truck.
 - C. If the Appellant is unsuccessful with his gradual return to work it is recommended that he be assessed for a multidisciplinary rehabilitation program.

In a report to MPIC dated April 29, 2002, [Appellant's Orthopaedic Surgeon] indicated that:

1. The Appellant's MRI showed no evidence of abnormality of his left shoulder.
2. Although the Appellant was suffering pain from a muscle injury to his left shoulder there is no evidence of a lesion requiring a surgical intervention.
3. He recommended that the Appellant continue his physiotherapy and would benefit from a consultation with a physical medicine specialist (physiatrist).

Pursuant to [Appellant's Orthopaedic Surgeon's] recommendation MPIC arranged for the Appellant to be assessed by [Independent Physiatrist #1] who is a physiatrist. [Independent Physiatrist #1] provided a report to MPIC dated August 15, 2002 wherein he stated that:

1. He had examined the Appellant on August 8, 2002 and found the Appellant was suffering from a myofascial pain syndrome in his left shoulder with mild to moderate severity.
2. The prognosis for a complete resolution of pain complaints was fair to good and that the Appellant had not reached his Maximal Medical Improvement from a physical point of view.

3. A graduated reconditioning program should be established concentrating on the muscles of the Appellant's left shoulder and neck area in order to prepare him for return to his previous occupation.
4. In respect of the myofascial pain syndrome the Appellant should receive soft tissue treatments such as acupuncture or trigger point injection.

In a report to [Appellant's Occupational Therapist #1] of [text deleted] dated September 9, 2002, [Independent Physiatriest #1] advised:

1. That the Appellant should receive 4 weeks reconditioning program concentrated on building his tolerance in a sitting position as well as stretching and strengthening his left shoulder and neck muscle.
2. The Appellant should be able to return to his pre-accident job after a reconditioning program.

On April 1, 2003 [Appellant's Doctor #2] provided a report to the occupational therapist advising that:

1. The Appellant does not feel he is able to return to work.
2. The Appellant's symptoms have not changed since his injury.
3. The Appellant feels that even minimal time spent driving causes him aggravation in his symptoms.

In a note to file dated April 15, 2003, the case manager had a discussion with the occupational therapist who reported a discussion that the occupational therapist had with the Appellant regarding [Appellant's Doctor #2's] report of April 1, 2003. In that conversation the occupational therapist stated that the Appellant was adamant that he could not return to work as a

truck driver. The occupational therapist advised the case manager that it did not appear that the Appellant intended to cooperate in respect of a return to work plan.

In a further note to the case manager, the occupational therapist reported of a further conversation with the Appellant on May 6, 2003 wherein he stated:

1. The Appellant again indicated that he was not able to return to work as a truck driver because of his shoulder injury.
2. The occupational therapist advised the Appellant that a gradual return to work program would be available and that he would assist him with some education and monitoring.
3. In response the Appellant stated that he was not interested in attempting a return to work program since he knew he could not work in this occupation.

At the request of the Appellant he was referred by MPIC to [Independent Physiatrist #2] for assessment. [Independent Physiatrist #2] provided a report to the case manager dated May 29, 2003 wherein he indicated that he would be ordering a CT scan of the Appellant's cervical spine. He further indicated that while the Appellant was waiting for the CT scan the Appellant did not require any formal physiotherapy or any organized rehab program but should be encouraged to return to work for 2 – 2½ hours, five times per week and hopefully his tolerance would improve and his working hours could be increased gradually.

On June 18, 2003 the occupational therapist wrote to the case manager indicating that the Appellant was not cooperating with him in respect of a return to work program and provided the case manager with a copy of the schedule of a progressive re-entry of the Appellant into the work force over a period of 11 weeks.

On July 2, 2003, [Independent Physiatrist #2] wrote to the case manager in response to her letter requesting a follow-up medical report including the report of the CT scan. In this letter, [Independent Physiatrist #2] stated that:

1. He had reviewed the Appellant in the [text deleted] at the [Hospital] on June 9, 2003.
2. The CT scan of the cervical spine done on May 29, 2003 showed minor disc degeneration at the C5-6 level and no suggestion of disc herniation and there was no suggestion of fracture or subluxation.
3. The Appellant was informed of the results of the CT scan.
4. “There is no evidence of significant radiculopathy but he does have some symptoms of left C6 radiculitis. I would recommend that he should be seen by a neurosurgeon to do the assessment and advise further management. I do not see that there is any contraindication for him to return to a sedentary type of job as you have recommended in your letter of June 20, 2003 at 5 hours 3 days a week as a passenger (no driving) and this will be increased slowly over a 11 week period. At approximately week 7 he should be able to manage truck driving on a gradual/progressive basis. He should continue self management stretching, resistive and lightweight strengthening exercises to improve his strength, endurance, sitting and standing as well as working tolerance.” (underlining added)

On July 3, 2003 the case manager provided the Appellant with information supporting a return to work plan and rehabilitation program and stated:

“This return to work plan involves a gradual return with [text deleted], effective July 7, 2003. [Text deleted] employer of [text deleted], is willing to accommodate this gradual return to work plan. A return to work plan will involve consistent contact with you and your employer.”

In a note to file on July 16, 2003 the case manager indicated that:

1. She made an unannounced home visit to the Appellant.
2. She noted that the Appellant was not at home and his wife indicated that he was out swathing hay.
3. On July 18, 2003, the Appellant telephoned her to discuss the return to work plan.
4. The Appellant explained that he was active and not sitting around doing nothing.

5. The Appellant further informed the case manager that he was unable to commence the return to work program due to wet weather conditions.

[MPIC's Doctor], Medical Consultant with MPIC Health Care Services, provided an interdepartmental memorandum to the case manager on August 7, 2003 and stated that:

1. A review of the documentation on file indicates the Appellant had made no progress despite a lapse of two years in which he received treatment.
2. "This is inconsistent with normal recovery from soft tissue injury as described for the claimant.

There is (sic) no structural deficits that have been uncovered despite extensive investigation that would prevent the claimant from attempting to progressively return to previous physical activities and work demands." (underlining added)

3. "Healing from the relatively minor soft tissue injuries associated with the July 20 episode would have occurred in the few weeks to few months post-motor vehicle collision...

There is no documented structural basis for not resuming employment. The claimant's occupation has been given as a truck driver. Reference is made in a March 11, 2003 report from [Appellant's Occupational Therapist #1], of the claimant's previous employer being willing to accommodate the claimant in a graduated return to work program. A June 18, 2003 report is on file from [Appellant's Occupational Therapist #2] outlining a proposed return to work program. Scaled down hours of involvement are penned in. It is this writer's opinion that every effort should be made to return the claimant to a more active lifestyle including return to work, given that an organic basis for not proceeding with same is not evident." (underlining added)

[Appellant's Doctor #2] provided a report to MPIC dated September 23, 2003 in which he stated:

"[The Appellant] has indicated to me that he has appealed his disability claim and has asked that I express my opinion regarding his injury. I will not reiterate his full history, as you are well aware of the circumstances.

I have seen [the Appellant] on several occasions over the last year. I am of the opinion that he is permanently disabled as a result of the motor vehicle accident that he was involved in. His symptoms have not improved at all. He continues to have considerable amount of pain in the left scapular area, which is closely related to his level of activity. I do not think that he is a good candidate for rehabilitation."

Case Manager's Decision:

On December 23, 2003 the case manager wrote to the Appellant and indicated:

“The MPI Health Care Services department reviewed this file August 7, 2003.

The outcome of the review (copy attached) indicates there is no structural basis for not resuming your employment as a truck driver. Additionally, the medical evidence supports a long-standing history of transient left shoulder problems.

Based on this medical review, it is our opinion that you have regained the functional capacity to perform the duties required of your job as a truck driver. Furthermore, the review indicates there is no basis that your lifestyle habits should continue to be put on hold in anticipation that symptom resolution will occur...(underlining added)

Your determined employment was that of a truck driver, however, you continue with your farming activities. You reported as the outset of this accident, you were winding down your farm operation, with the intent of truck driving full time. To date, you continue to farm. In the summer of 2003, I attended at your farm residence and you were actively demonstrating or performing farming activities. You have reported your activity on the farm as well.

Section 110(1)(a) of the Manitoba Public Insurance Act states that once you are capable of holding a job of a truck driver, IRI benefits will no longer be payable. This decision is supported by the medical review of August 7, 2003.”

The case manager concluded her letter by stating:

“You are not entitled to further income benefits as you have regained the capacity to drive truck.” (underlining added)

On April 8, 2004, the Internal Review Officer wrote to the Appellant indicating that the Internal Review Hearing had been held on March 26, 2004. The Internal Review Officer indicated that she was recently informed that the Appellant was driving a truck hauling furniture to [California] on February 8, 2004 when he was involved in a single vehicle collision. The Internal Review Officer stated:

“It would seem then that not only are you capable of performing your determined employment as a truck driver, but you are, in fact, performing that employment.”

On April 22, 2004 [Appellant's Neurologist], [text deleted] wrote to [the Appellant's Doctor #2] advising that he saw the Appellant on April 22, 2004 for a neurological examination and that the examination was normal.

On May 27, 2004 the Internal Review Officer wrote to the Appellant and stated:

“Further to my letter to you of April 8, 2004, wherein I inquired as to the name of the trucking firm and date that you began working for that firm as a truck driver. Please provide this information as soon as possible so that I may complete my review of your file.”

In reply, the Appellant wrote to the Internal Review Officer on June 5, 2004:

“In reply to your letter of May 27, I did not return to work for anyone. I used to drive for [text deleted], and I asked [text deleted] if I could make a trip to see if I could drive for any length of time, and I couldn't.” (underlining added)

In a note to file dated June 28, 2004, [text deleted], Investigator with MPIC's Special Investigations Unit, wrote to [text deleted], Senior Solicitor, Legal Department and stated in part:

“On March 29, 2004 [Appellant's case manager] (sic) that [the Appellant] had opened another claim with M.P.I. where he was operating a semi tractor / trailer unit. Investigation revealed on February 8, 2004 [the Appellant] was the driver of a semi tractor / trailer unit, hauling a load of furniture to [text deleted], California, USA, when he was involved in the accident near [text deleted], Manitoba.

On April 13th, 2004 M.P.I. obtained a statutory declaration from [text deleted], who was the passenger in the semi tractor / trailer unit, being operated by [the Appellant]. [Text deleted] in his declaration confirmed that over the last year and a half he had traveled to California, four or five times with [the Appellant] who was the driving long distance hauls.

Investigation of this matter revealed that at the time of the accident February 8th, 2004 [the Appellant] was operating a semi tractor / trailer unit belonging to [text deleted] and was enroute to [text deleted], California, USA to deliver a load of furniture.

On May 19th, 2004 M.P.I. Investigators attended [text deleted], [text deleted] and met with office manager [text deleted]. [Office manager] advised that [the Appellant] who had worked for the firm previously, approached her husband near Christmas 2003 and was looking for work. [The Appellant] entered into a contract with [text deleted] which was signed December 20th, 2003 which was prior to his receiving the decision letter of December 23, 2003. [Office manger] advised [the Appellant] worked for them driving

until the end of February 2004 and has not returned to work since that time. [Text deleted] provided investigators with copies of the Drivers Daily Logs showing [the Appellant] made his 1st trip on January 13th, 2004 and his final trip on February 16th, 2004 according to log books. Payroll records show that during this period [the Appellant] earned \$5883.07 in wages, none of which was reported to M.P.I. or [Internal Review Officer] during the Internal Review.”

In this report the Investigator referred to the Appellant’s letter to [Internal Review Officer] indicating that he did not return to work as a truck driver, that he used to work for [text deleted] and he was unable to carry out any trucking duties. The Investigator further stated:

“During the period [the Appellant] was working [text deleted] records revealed [the Appellant] drove a total of 15625 miles, working 155.5 hours driving truck, and earned a total of \$5883.07 in wages, none of which were ever reported to M.P.I. at any time.”

Internal Review Decision:

On November 5, 2004 the Internal Review Officer wrote to the Appellant confirming the decision of the case manager of December 23, 2003 and dismissing the Appellant’s Application for Review. In her letter the Internal Review Officer stated:

“On April 1, 2004, I received an e-mail from your Case Manager [text deleted] informing me that you were operating a semi-truck unit hauling furniture to [California] on February 8, 2004, at which time you were involved in a single vehicle collision. You then attended at the Claim Centre on March 29, 2004 and advised that Adjuster that you were traveling to [text deleted], Manitoba to drop off this semi-truck. The accident itself took place near [text deleted], Manitoba. The Adjuster, however, had received a phone call from the trucking firm for which you were driving earlier indicating that you were in fact hauling furniture to [California].

When the Adjuster told you that he knew this information, you then withdrew your initial statement that you were only dropping off the semi-truck in [Manitoba] and your final statement agreed with the information provided by the trucking company.

I then wrote to you on April 8, 2004 informing you that I knew this information and asking about your involvement with this trucking firm. I received your response dated June 5, 2004 on June 15, 2004. In that letter, you advised that you had not returned to work for anyone and you advised that you had only taken one trip to see if you could drive and you found that you could not...

During the period that you were working, [text deleted] records show that you drove a total of 15,625 miles, working 155.5 hours driving truck.

All of this information clearly shows that you are capable of working in the occupation of truck driver and as a result, I am confirming your Case Manager's decision and dismissing your Application for Review.

The Appellant filed a Notice of Appeal on January 25, 2005.

Appeal:

The relevant provisions of the MPIC Act and Manitoba Regulation 37/94 are:

Events that end entitlement to I.R.I.

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

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

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The Appellant died on October 18, 2009, prior to the appeal hearing and the Estate of the Appellant was represented by the Claimant Adviser Office.

At the appeal hearing, [text deleted] testified on behalf of the Appellant in respect of the contents of his Statutory Declaration dated April 13, 2004. [Text deleted] declared he was a passenger in a truck driven by the Appellant on February 8, 2004. He recalled that after the truck was repaired, he was a passenger in the truck driven by the Appellant on a trip to California the next day. However, the Appellant was unable to recall the following statement in his Statutory Declaration of April 13, 2004:

“...In the last year and a half, we’ve gone this same route four or five times to go down to the states...”

The commission notes that the witness was testifying on March 22, 2011 in respect of events which occurred approximately seven years prior to that time.

[Text deleted], the son of the deceased (Appellant), is employed by [text deleted] and lives in [text deleted]. He testified that he grew up on the family farm and assisted the family and farming operation during his boyhood years. He further indicated that as a result of the motor vehicle accident in 2001, his father was unable to physically continue the farm operation due to the injuries he sustained in the motor vehicle accident in July of 2001.

[Appellant’s son] further testified that as a result, he would take a leave of absence from his employment in the spring and fall in order to assist at the family farm carrying out the farming duties relating to seeding, crop spraying and harvesting. He further testified that his father acted only in a supervisory capacity in respect of the farming activities and could for short periods of time operate a tractor. [Appellant’s son] did acknowledge that he was residing in [text deleted] and outside of the leave of absences he took to work on the family farm, he would visit the family farm from time to time.

The Appellant’s wife, [text deleted], also testified and corroborated the testimony of her son, [Appellant’s son]. She indicated that her husband enjoyed being a farmer and driving a truck and was very frustrated that as a result of the motor vehicle accident he was unable to carry out these activities. She indicated her husband was really unable to carry out the regular duties of a farmer and only acted in a supervisory capacity in respect of these activities.

She further testified that after [Independent Physiatrist #1] told the Appellant that he could go back to work, he decided to try it by going on a couple of trips to see how he could function and she further testified that the Appellant took two trips for [text deleted] after the accident and did not make any further trips. She did testify that on one occasion the Appellant did go with [text deleted] to deliver rabbits to California but he did not do much driving. He was just along for the ride and that [text deleted] paid for her husband's basic expenses.

Submissions:

The Claimant Adviser submitted that [Appellant's wife] and [Appellant's son's] testimony that the Appellant was unable to work as a truck driver and unable to operate the family farm should be accepted. The Claimant Adviser referred to the medical reports of [Appellant's Orthopaedic Surgeon] and [Appellant's Doctor #2] which corroborated their testimony that the Appellant was unable to continue his employment as a truck driver or as a farmer.

The Claimant Adviser therefore submitted that the Appellant had established on a balance of probabilities that he was incapable of returning to work as a truck driver after the motor vehicle accident and requested that the appeal be allowed.

MPIC's legal counsel submitted that the medical report of [MPIC's Doctor] which indicated that the Appellant was capable of returning to work as a truck was corroborated by the independent medical opinions of the two physiatrists, [Independent Physiatrist #1] and [Independent Physiatrist #2].

MPIC's legal counsel further submitted that the Appellant entered into a contract with [text deleted] and the documentary evidence established that his first trip was made on January 13, 2004 and his final trip was in February 2004. During this time, income of \$5,883.07 was earned which was never reported to MPIC. MPIC's counsel therefore submitted that MPIC had established on a balance of probabilities that the Appellant was capable of returning to work as a truck driver and therefore MPIC was justified in terminating the Appellant's IRI benefits. MPIC's legal counsel therefore submitted that the Appellant's appeal be rejected and the Internal Review Officer's decision of November 5, 2004 be confirmed.

Decision:

Unfortunately the Appellant died on October 18, 2009, and therefore was unable to testify on his own behalf and to defend his position in respect of this appeal. However, the Estate of [the Appellant] has chosen to proceed with this appeal and the Commission therefore must consider the evidence that was submitted before it in rendering its decision.

The Commission, after reviewing the testimony of the witnesses and the documentary evidence on file, concludes that MPIC has established, on a balance of probabilities that the Appellant was capable of his pre-accident employment as a truck driver and as a result the Commission dismisses the Appellant's appeal and confirms the Internal Review Officer's decision dated November 5, 2004.

At the time of the motor vehicle accident in July of 2001, the Appellant was a full-time farmer and was also employed on a part-time basis as a truck driver. As a result of the motor vehicle accident, the Appellant's wife and son testified that the Appellant was incapable of carrying out the duties on his farm and that these were substantially undertaken by the Appellant's wife, older

son and to some extent her younger son. [Appellant's wife] testified that the Appellant would act in a supervisory capacity in respect of the farm but he did not do any of the regular duties of seeding, crop spraying and harvesting in the fall.

The Commission finds that this testimony is inconsistent with the written comments of the case manager who reported that she:

1. Had attended the Appellant's farm in the summer of 2003 when she was advised by his wife that the Appellant was not at home but was out swathing hay.
2. In a telephone conversation with the Appellant, he subsequently advised that he was active and not sitting around doing nothing.
3. Concluded that the Appellant had not in fact scaled down his farm operation but was continuing to actively perform farming activities.

The Appellant misinformed MPIC in respect of the circumstances surrounding the motor vehicle accident which occurred on February 8, 2004. On this date the Appellant was operating a semi-truck unit hauling furniture to [California] and was involved in a single vehicle collision. He attended at the MPIC Claims Centre on March 29, 2004 and advised the claims manager that he was travelling to [text deleted], Manitoba to drop off the semi-truck. The accident took place near [text deleted], Manitoba. However, the claims manager received a telephone call from the trucking firm for which the Appellant was driving indicating that in fact the Appellant was hauling furniture to [California]. The claims manager advised the Appellant of this information and the Appellant withdrew his initial statement that he was dropping off the semi-truck in [Manitoba] and confirmed the information of the trucking company.

The Internal Review Officer wrote to the Appellant on April 8, 2004 and asked him about his involvement with the trucking firm. In response, the Appellant wrote to the Internal Review Officer on June 5, 2004 indicating that he did not return to work for anyone and had only taken one trip for [text deleted] to see if he could drive and he found that he could not.

The Appellant's statement to the Internal Review Officer is inconsistent with the Statutory Declaration of [text deleted] dated April 13, 2004. In this Statutory Declaration [text deleted] was referring to events that took place one and half months before he signed the Statutory Declaration. The Commission notes that at the appeal hearing on March 22, 2011 [text deleted] could not recall the statements he had made in the Statutory Declaration dated April 13, 2004. It is not surprising to the Commission that [text deleted] would be unable to recall statements he made in the Statutory Declaration seven years prior to giving his testimony at the appeal hearing.

The Commission, however, finds that [text deleted] was a candid witness and concludes that the statement he gave in the Statutory Declaration dated April 13, 2004 occurred at a time when the events in question were fairly fresh in his mind. As a result, the Commission finds that [text deleted] recollection of these events in his Statutory Declaration were accurate. In these circumstances the Commission accepts the statements made by [text deleted] in his Statutory Declaration when he asserted that over the last year and a half he travelled to California four or five times with the Appellant who acted as a driver on these long-distance hauls.

The Commission further finds that the Appellant's statements are inconsistent with MPIC's investigative report which determined:

1. The Appellant had entered into a contract for driving with [text deleted] on December 20, 2003 and had worked until the end of February 2004.

2. The first trip the Appellant made was on January 13, 2004 and the final trip was on February 16, 2004.
3. The payroll records indicated the Appellant earned \$5,883 in wages which he never reported to MPIC or to the Internal Review Officer at the Internal Review Hearing.
4. The records of [text deleted] indicated that the Appellant had driven 15,625 miles working 155.5 hours driving a truck.

[Text deleted] provided a written statement on behalf of the Appellant and indicated that in 2004 he had been employed as a truck driver trainee with the Appellant for [text deleted] of [Manitoba]. In this statement he indicates that in the trucking company's logbook it appears that he has shared the driving with the Appellant but in reality [truck driver trainee] indicated that he did almost all of the driving because the Appellant was taking painkillers constantly because of his severe pain. [Truck driver trainee] did not testify at the hearing and was therefore not subject to cross-examination.

The Commission notes that the payroll records of [text deleted] indicate that the Appellant earned the sum of \$5,883.07 in wages for the trips he made between January 13, 2004 and February 16, 2004. The Commission finds it difficult to accept [truck driver trainee's] statement he did almost all the driving while the Appellant did very little driving yet the records of [text deleted] indicates that the Appellant received the sum of \$5,883.07 in wages for the trips made between January 13, 2004 and February 16, 2004. As well, documentary evidence from [text deleted] indicates the Appellant had driven 15,625 miles working 155.5 hours driving a truck. In view of the payroll records from [text deleted], the Commission rejects [truck driver trainee's] statement that the Appellant did not share the truck driving duties with [truck driver trainee] on these long-distance hauls. The Commission also notes that [truck driver trainee] does indicate

that the Appellant did participate in driving a truck on long-distance hauls which corroborates MPIC's position that the Appellant was capable of returning to work after the motor vehicle accident as a long-distance truck driver.

The Commission also finds that [Appellant's friend], in his written statement on behalf of the Appellant, corroborates MPIC's position that the Appellant was capable of returning to work as a long-distance truck driver after the motor vehicle accident. In his statement, [Appellant's friend] indicates that as a friend of the Appellant he went along to [Colorado] to help load personal belongings of the Appellant's father which were brought back to [text deleted], Canada. [Appellant's friend] further indicates that he did not have a Class 1 licence and therefore could not drive at all. In his statement [Appellant's friend] indicates that the Appellant had severe pain and difficulty in driving the truck from Manitoba to [Colorado] and back to [text deleted]. The Commission notes that [Appellant's friend] did not testify at the appeal hearing and therefore was not subject to cross-examination.

[Appellant's friend] in his statement, confirms that the Appellant was the sole driver of a truck he operated over a very long distance to and from [Colorado]. [Appellant's friend's] statement therefore confirms MPIC's position that the Appellant was capable of returning to work as a truck driver after the motor vehicle accident.

Having regard to the Statutory Declaration of [text deleted], MPIC's investigative reports, and the statements of the case manager, the Internal Review Officer, [Appellant's friend] and [truck driver trainee], the Commission rejects the Appellant's position that he was not capable of carrying out the duties of a long distance truck driver after the motor vehicle accident. The documentary evidence indicates that the Appellant entered into a contract with [text deleted] and

proceeded to carry out long-distance truck driving during the months of January and February 2004 driving a total of 15,625 miles, working 155.5 hours and receiving wages of \$5,883 in respect of this work and was unchallenged by the Appellant's witnesses.

The Commission also finds that the medical evidence provided by the Appellant's doctors, [Appellant's Doctor #2] and [Appellant's Orthopaedic Surgeon], is in conflict with the medical opinions of the two independent physiatrists, [Independent Physiatrist #1] and [Independent Physiatrist #2]. [Independent Physiatrist #1] concluded in his assessment of the Appellant in August 2002 that the Appellant was suffering from a myofascial syndrome of the left shoulder which was of a mild to moderate severity and his prognosis was for complete resolution of the pain complaint. [Independent Physiatrist #1] further stated in a report to the [Appellant's Occupational Therapist #1], on September 9, 2002, that the Appellant should be able to return to his pre-accident employment after a reconditioning program and that the Appellant did not require a graduated return to work program at that point.

The Appellant wished to see a different physiatrist. As a result [Independent Physiatrist #2] was requested to provide an assessment and in a report dated May 27, 2003 he indicated that the Appellant did not require any formal physiotherapy or any organized rehabilitation program but should be encouraged to return to work for 2½ hours five times per week. On July 2, 2003 [Independent Physiatrist #2] wrote to the case manager indicating that the Appellant's CT scan showed minor disc degeneration at the C5-6 level with no suggestion of disc herniation or any suggestion of fracture or subluxation. [Independent Physiatrist #2] further concluded there was no reason the Appellant could not return to truck driving after a graduated return to work program.

[MPIC's Doctor], [text deleted], in an interdepartmental memorandum to the case manager on August 7, 2003 reviewed all the medical reports and concluded that the Appellant had suffered soft tissue injuries in the motor vehicle accident and this was inconsistent with normal recovery. [MPIC's Doctor] noted that despite extensive investigation there were no structural defects uncovered to prevent the Appellant from attempting to progressively return to his previous physical activities and work demands.

On April 22, 2004, [Appellant's Neurologist], [text deleted] wrote to [Appellant's Doctor #2] advising that he had seen the Appellant on April 22, 2004 for a neurological examination. The examination was normal.

The Commission finds there is no objective evidence provided by [Appellant's Orthopaedic Surgeon], [Appellant's Doctor #1] or [Appellant's Doctor #2] to establish that the Appellant was physically incapable of returning to work as a truck driver. In these circumstances, the Commission accepts the medical opinions of the physiatrists, [Independent Physiatrist #1], [Independent Physiatrist #2], and [Appellant's Neurologist] who found that there was no medical reason why the Appellant could not return to work as a truck driver. These medical opinions have been corroborated by the medical opinion of [MPIC's Doctor]. For these reasons the Commission gives greater weight to the medical opinions of [Independent Physiatrist #1], [Independent Physiatrist #2] and [MPIC's Doctor] than it does to the medical opinions of [Appellant's Orthopaedic Surgeon], [Appellant's Doctor #1] and [Appellant's Doctor #2]. The Commission agrees with [Independent Physiatrist #1], [Independent Physiatrist #2] and [MPIC's Doctor] that there was no objective medical basis which would prevent the Appellant from returning to work as a truck driver.

Decision:

The Commission determines, after reviewing the testimony of the witnesses, the documentary evidence, including the medical reports of [Independent Psychiatrist #2], [Independent Psychiatrist #1], [MPIC's Doctor], and [Appellant's Neurologist] that the Appellant was not only capable of working as a truck driver but in fact he did work as a truck driver after the motor vehicle accident. The Commission finds that the Appellant has failed to establish on a balance of probabilities that as a result of the motor vehicle accident he was prevented from returning to his pre-accident employment as a truck driver. The Commission concludes, having regard to Section 110(1)(a) of the MPIC Act, that the Appellant was able to hold employment he held at the time of the motor vehicle accident. The Commission therefore dismisses the Appellant's appeal and confirms the decision of the Internal Review Officer dated November 5, 2004.

Dated at Winnipeg this 29th day of April, 2011.

MEL MYERS

ERROL BLACK

PAUL JOHNSTON