

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-120**

PANEL: Mr. Mel Myers, Chairperson
Ms Mary Lynn Brooks
Ms Jean Moor

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka and Ms Danielle Robinson.

HEARING DATES: November 15, 16, 18, 19, and 23, 2010

ISSUE(S): 1. Entitlement to further Income Replacement Indemnity Benefits.
2. Whether the Appellant's Personal Injury Protection Plan Benefits were properly terminated.

RELEVANT SECTIONS: Sections 107, 109(1), 109(2), 110(1)(a) and (d), 149, 160 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.

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BACKGROUND

[The Appellant] [text deleted] was involved in a motor vehicle accident on August 17, 1995. The Appellant was driving a motorcycle in [text deleted] when he collided with a truck which was attempting to make a left-hand turn on the highway. The Appellant flew off the bike and landed in a ditch. He was taken to a local hospital and within a few hours was discharged. The

hospital's Emergency Room Report noted that the Appellant "had difficulty remembering parts of accident at first, 2 hours later remembers all of accident".

On or about August 24, 1995 the Appellant made an Application for Compensation to MPIC and in this application he described his injuries as follows: bruises and scrapes to right knee, bruised right arm, bruised back, neck strain, back strain, and right hand painful.

At the time of the motor vehicle accident the Appellant was employed as a sales representative for [text deleted]. The Appellant returned to work in the month of September 1995 but was only able to work a few days.

In a memo to file on October 31, 1995 the case manager reports meeting with the Appellant on October 23, 1995. The Appellant complained of a lack of concentration, poor memory initiative, and a lack of direction and drive. As a result he was unable to continue with his employment.

MPIC retained [MPIC's Occupational Therapist] with the [text deleted] to assist the Appellant in returning to work. In a report dated January 26, 1996, [MPIC's Occupational Therapist] indicates that the Appellant reports that his cognitive difficulties lie in the inability to initiate, organize and recall details. [MPIC's Occupational Therapist] made a number of recommendations including transition of the Appellant into the workplace, initially on an unpaid basis.

The Appellant initially saw [Appellant's Neuropsychologist] for a neuropsychological assessment in January 1996. [Appellant's Neuropsychologist] found that the Appellant was neuropsychologically intact although he thought the Appellant had some acute psychological

issues with Post Traumatic Stress Disorder. [Appellant's Neuropsychologist] commenced treating the Appellant in respect of symptoms.

[Appellant's Doctor], the Appellant's personal physician, believed the Appellant could return to work on a graduated basis in July 4, 1996. On February 1, 1996 the Appellant entered into a letter of understanding with the [text deleted] and MPIC. At that time the Appellant was placed on Income Replacement Indemnity ("IRI") benefits and undertook to work for his previous employer, [text deleted] for a graduated return to work program for 5 weeks after which time the Appellant's progress would be evaluated.

In the fall of 1995 after the motor vehicle accident, [Appellant's Doctor] referred the Appellant to [Appellant's Psychiatrist] at the [Hospital].

In a report to MPIC dated February 7, 1996 [Appellant's Psychiatrist] stated that the Appellant's primary concern was with his short term memory loss and the ability to concentrate, plan and execute tasks. [Appellant's Psychiatrist] diagnosed the Appellant with Major Depression and a possible Organic Brain Syndrome relating to a head injury. The Appellant had been taking some medication for depression before the accident, namely Zoloft. This medication was increased by [Appellant's Psychiatrist] following the accident and supplemented with some Lithium medication. [Appellant's Psychiatrist] indicated that the Appellant's pre-existing depression and alcohol abuse may be contributing factors to his inability to work at that time, although [Appellant's Psychiatrist] thought that the Appellant's prognosis for recovery was good.

On August 22, 1996 a note to file from the case manager reported that the Appellant's former employer [text deleted] indicated that they have no position for him to either work or do a work hardening program.

On December 2, 1996 [Appellant's Neuropsychologist] completed a follow-up neuropsychological assessment of the Appellant where he found significant improvement in the Appellant's psychological status and recommended a graduated return to work program be initiated with certain conditions. [Appellant's Neuropsychologist] also indicated that the Appellant had recovered from the post-traumatic stress disorder. In his report to MPIC [Appellant's Neuropsychologist] stated:

"...[The Appellant] has made what are impressive gains with respect to his psychological status reflected in the MMPI-2 and on clinical interviews conducted since that time, and in several areas of the neuropsychological evaluation reflecting improvements in intellectual ability, memory skill (most notably in verbal contextual and non-contextual memory and on the Localization memory subscale of the Tactual Performance Test), psychomotor strength (left hand) and speed (bilaterally), speeded tactile processing (bilaterally), and in abstract problem-solving skill. These improvements are generally beyond that expected due to tests – retest effects alone..."

...[The Appellant] has made what are impressive improvements in his psychological status reflecting resolution of many symptoms noted in assessment in January reflective of Post Traumatic Stress Disorder..."

While [the Appellant] continues to present as a generally intact individual neuropsychologically, and substantial improvements are noted on the present reassessment, stamina and distractibility will likely present as substantial issues with respect to return to work. A graduated return to work experience, initially in an environment which would be relatively non-stimulating (i.e., low distractions, low noise) would likely be more optimal in terms of initial placements. Providing ample opportunities for over-learning and mastery will be of assistance in limiting normal issues involving confidence and self-efficacy as becoming barriers." (Underlining added)

The Appellant began a work experience program at [text deleted] Canada in December 1996 as a marketing assistant but unfortunately he was unable to obtain full-time employment with this

company and his employment ended after two months. The Appellant subsequently enrolled in a computer course at [text deleted].

In the month of May 1997 [Appellant's Neuropsychologist] reported to MPIC that the Appellant's mood was relatively stable and this stability continued for several years with the exception of irritability relating to various things that happened in the Appellant's life.

The Appellant worked for a few months in sales for [text deleted] in early 1998 but was unfortunately laid-off from his employment. He then began to work for [text deleted] in September 1998.

In a report dated January 12, 1999 [Appellant's Neuropsychologist] reflects on the Appellant's moving back to [text deleted] sales and stated:

"During the month of December, I had the opportunity of meeting with [the Appellant] on several occasions, with his continuing to evidence relatively good adjustment and reported good outcomes with respect to his vocational experience." (Underlining added)

Unfortunately in the month of May 1999 the Appellant's vehicle was stolen, along with \$5,000 worth of products and magazines and his day timer. This was a catastrophic event for the Appellant since his day timer containing all his business contacts as well as his personal information was lost. As a result he was unable to contact his customers in order to make sales.

In a memorandum dated June 10, 1999, [Appellant's Occupational Rehab Consultant] of [text deleted] reported that:

1. He was informed by the Appellant that he is currently driving [text deleted] part-time.

2. He described the work he had been doing with the Appellant in respect of obtaining employment.
3. The Appellant expressed an interest in advertising and had discussed desktop publishing as a potential career path.
4. The Appellant received a tour of [text deleted] and visited several employers.
5. The Appellant advised [Appellant's Occupational Rehab Consultant] that based on his tours of the graphic arts places this option did appeal to him and he indicated that he wished to proceed with a re-training program in the area of graphic arts.
6. The Appellant met with [Appellant's Occupational Rehab Consultant] at [text deleted] in the month of January 2000 and after reviewing the program, the Appellant indicated he would like to try to obtain a certificate in the area of production arts courses offered by [text deleted].

The case manager reported on January 25, 2000 that in a telephone discussion with [Appellant's Occupational Rehab Consultant] he indicated that the Appellant was to start a desktop computer graphics course at [text deleted] on February 1, 2000.

In a letter from [Appellant's Occupational Rehab Consultant] to the case manager dated February 1, 2000 [Appellant's Occupational Rehab Consultant] outlined the process under which the Appellant would commence the graphics arts program at [text deleted] and stated:

1. The Appellant met with the director of Student Services and the instructor of the program in January of 2000.
2. The Appellant indicated that his preference would be to try the course for a month or two to determine the demands of the course.

3. The Appellant indicated that he was to avoid loud environments and he elected to attempt the course in the evenings as it was his understanding that it would be less noisy than during the day.

[Appellant's Occupational Rehab Consultant] further indicated in his letter that:

1. He discussed this option with [Appellant's Neuropsychologist] who lent his support to the Appellant in attempting the program.
2. He discussed the program with MPIC who had agreed they would support the Appellant in this respect.
3. He had advised the Appellant on completion of his studies at [text deleted] MPIC would determine his employment in accordance with the provisions of the MPIC Act.
4. As such he would be provided with a one year job search assistance and his IRI benefits would be reduced based on his earning capacity in accordance with the classification as set out in the National Occupational Classification.
5. The Appellant expressed his understanding of this and stated he was in agreement with it.
6. The assumption was that the Appellant would be able to successfully complete the 10 month course at [text deleted].
7. It was agreed that the Appellant would commence the course on February 1, 2000.

In a memo to file dated December 29, 2000 the case manager indicated that:

1. The Appellant's program was normally 10 months in duration with the end goal of securing employment in the production art/desktop publishing field.
2. However, given the moderately severe head injury that the Appellant sustained the completion of the course in the prescribed timeframe would not be achievable.

3. It was hopeful that the course would be completed by the Appellant sometime in the year 2001.

In a report to file on May 25, 2001 the case manager indicated that:

1. The Appellant was continuing his schooling but at a slower rate than expected.
2. The school would provide him with 2 months off in the summer and they would extend the program an additional 2 months for him to finish.

In a letter from the rehabilitation consultant to the case manager dated October 22, 2001, he reported that:

1. The Appellant had returned to [text deleted] after the summer.
2. He was currently involved in working half-days at an on-site training practicum at [text deleted].
3. Upon returning to the classroom in November for the final month of training, the consultant offered his attendance at any meeting that might assist the Appellant in completing his program.

In a report to file dated November 26, 2001, the case manager reported that:

1. The Appellant was at the [Hospital] for a CT scan which indicated a large mass on his brain.
2. The Appellant was in the process of arranging to be seen by the [Appellant's Surgeon].
3. As a result, the Appellant's training would be on hold until his health problem has been resolved.
4. In December 2001 the Appellant had a benign tumour removed from his brain which was not related to the 1995 motor vehicle accident.

In a note to file dated December 5, 2001, the case manager reports that the Appellant had completed his training at [text deleted].

In an undated note to file the case manager indicated that:

1. He had met with the Appellant who was recovering from the recent tumour surgery and he was doing extremely well.
2. The Appellant reported that he had spoken to his employer, [text deleted] and he was scheduled to return to work on February 4th on a half-time basis.
3. The Appellant's duties to date at [text deleted] had been assembly line tasks with menial repetitive duties.
4. He had worked the printing press and had done a lot of tasks which would drive him crazy if he had to do that for a living.
5. The case manager explained to [the Appellant] the two-year determination process and how it would affect his IRI.
6. The Appellant understood what was involved.
7. In the interim the Appellant would continue his work at [text deleted] and would press the employer for some type of commitment regarding a job.

In a letter dated January 18, 2002 from the Appellant to the principal, [text deleted], at [text deleted], the Appellant stated that through the work practicum arranged by [text deleted], he had been offered employment at [text deleted] and would start working on a regular basis in February 2002.

In a letter from the rehabilitation consultant to the case manager dated January 21, 2002, the consultant indicates that:

1. The Appellant was hoping to secure full-time employment with [text deleted].
2. If subsequent opportunity was not presented within a reasonable time (six months) efforts would be made to search for employment elsewhere while the Appellant continued to work part-time at [text deleted].

Case Manager's Decision – Determined Employment – April 3, 2002:

The case manager wrote to the Appellant on April 3, 2002 stating that:

1. At a meeting on April 3, 2002 the Appellant and the case manager had discussed the two-year determination of employment. The case manager outlined the employment that was determined for him and the effect it would have on his IRI benefits.
2. A complete review of the medical information on file supported that the Appellant was unable to work as a salesman which was a job he held at the time of his motor vehicle accident.
3. In completing his training in graphic arts design the Appellant demonstrated he was capable of working at the job at [text deleted].

The case manager further stated:

“Based on the above, we have determined you as a full-time advertising illustrating artist, with a potential annual income of \$21,439.00. To establish the salary for an entry level position, we rely on the National Occupation Classification, NOC code no. 5241, which is then matched with our Schedule C, level 1. This determination is effective April 1, 2002.

As discussed, you will continue to receive your current Income Replacement Indemnity of \$1,408.27 biweekly for one year following the date of April 1, 2002. An employment income during this period must be reported to me. We will reduce your IRI by 75% of the net income you earn. If at any time the income you earn is equal to or exceeds your Gross Yearly Employment Income that your IRI is based upon, your benefits will end.

Starting April 1, 2003, even if you do not obtain full-time employment in the field of graphic arts design, we are still required to reduce your IRI benefits based on the greater of actual net earnings, or the net income of your determined employment. The net yearly income of your determined employment calculates to \$18,677.94 per year. Therefore

your IRI benefits will be reduced by \$718.38 biweekly (18,678.090 ÷ 26).” (Underlining added)

In the month of December 2002 in a letter to MPIC [Appellant’s Neuropsychologist] stated that:

1. The Appellant was dealing with a number of ongoing and chronic challenges involving financial issues, family based issues, the break-up of his relationship approximately one month ago, anniversary issues associated with family losses, as well as job dissatisfaction and concerns.
2. The Appellant also found the work environment noisy and fatiguing.

In a note to file dated January 20, 2003 the case manager stated:

“I spoke with [the Appellant] in regard to his concerns listed in [Appellant’s Neuropsychologist’s] report. He hasn’t approached his employer as he has been awaiting his yearly review. He started in Feb last year so he is due for a review. His employer has been asking the other press men if [the Appellant] would be ready for the presswork but they don’t feel he is. He agrees with that assessment but not because he doesn’t feel he can do it, but rather because he has never been taught. He has difficulty learning in noisy environments but once he learns, he can work in that environment.”

In a note to file dated January 22, 2003 the case manager reports that although the Appellant was determined as a graphic design artist under schedule C of the Regulations, his work in the past year at [text deleted] in the production area consisted of doing all type of odd jobs but no graphic design work.

In a note to file on March 13, 2003 the case manager reports of a meeting held with the Appellant to discuss his claim and stated:

[The Appellant’s] frustration with his job has obviously increased since we last spoke. We were attempting to set up a meeting with his boss for his one year review and to discuss [the Appellant’s] future. I have been playing phone tag with his boss, [text deleted] and haven’t been able to set it up. [The Appellant] feels that physically he won’t be able to continue working at this job for the long term, as it is taking its toll on his arms and back. He is very (sic) concerned that his body will not be able to stand the pace of

working full time on the press line and this is a traumatic emotional admission for him to accept.

He is unable to increase his hours at work past the 50-60 hours he has been doing bi-weekly. This is supported by [Appellant's Neuropsychologist]. [The Appellant] is again on anti-depressant medication and as he described his inability to continue he started to cry. This was very embarrassing for him and was an awkward moment. I was able to calm him down and assured him there was no need to feel embarrassed about his show of emotion. I also advised him that if the printing job won't work then we would not force him do it.

I got the sense that [the Appellant] is ready to give up on his job and situation in [text deleted]. He told me he wanted to move to [text deleted] to work in the summer and head to [text deleted] for the winter months. He has no firm job opportunities in either location but feels emotionally it will be better for him. He has a friend who owns a [text deleted] in [text deleted] and he thinks he could find work with him for the summer months. As for [text deleted], he feels he could find something once he is down there. This has been something he has been thinking about for a long time and wanted to know how it would affect his claim." (Underlining added)

In an undated note to file the case manager indicated that over the one year job search period the Appellant had attempted to increase his hours to full-time but had been unable to achieve full-time hours. Over the past 6 months, he had averaged 27.02 hours per week.

Revised Case Manager's Decision – April 9, 2003:

On April 9, 2003 the Appellant was sent a revised two year determination letter as he was only able to have 27 hours of work per week at his job. In this letter the Appellant was informed of a new residual earning capacity and that the expiry date for the receipt of IRI would be April 2004.

In a memo to file dated August 27, 2003 the case manager reported a meeting with the Appellant and [Appellant's Neuropsychologist] to discuss the Appellant's termination of employment at [text deleted] and that he was moving to [text deleted]. The case manager reported that:

- 1) [Appellant's Neuropsychologist] had previously called him to advise that the Appellant was extremely unhappy working at [text deleted] and that he had not had an opportunity to change his duties from general labourer to what he was trained to do.
- 2) In a meeting with the Appellant in the month of March 2003, the Appellant had advised that [text deleted] had made no attempt to increase his duties to work on the press.
- 3) The Appellant reported that he had a job immediately available in [text deleted] at [text deleted].
- 4) The Appellant advised him that his employment was seasonal and that he had been offered accommodations in an old cabin in addition to the employment.
- 5) He would have to insulate the cabin and install running water. He was very excited about it.
- 6) The Appellant indicated that there were some printing companies in [text deleted] and that he would try to get work there during the winter.
- 7) The Appellant indicated that he had a lot of personal issues arising during the last year including:
 - a) family relations had suffered and his attempts to start a business had failed.
 - b) he was in debt and as a result it was difficult for him to make a living in [text deleted]
- 8) All things considered, the Appellant indicated he would be looking at a clean break and starting a new life in a new city.

The Appellant moved to [text deleted] and began working at [text deleted] but received a layoff notice and left his employment in the month of October 2003. The Appellant advised the case manager that rather than working he would be better renovating his cabin in the month of December 2003, getting it winterized and that he would begin actively looking for work in [text deleted] in January 2004.

On December 8, 2003 the case manager wrote to the Appellant and advised him that in view of the fact that he was no longer employed and had no solid job prospects, the Appellant's IRI would continue until April 1, 2004. On June 8, 2004 the case manager wrote to [Appellant's Neuropsychologist] who had been treating the Appellant and advised him that the Appellant had not filed an Application to Review MPIC's two-year determination to an Internal Review Officer

In a note to file dated October 29, 2004 the case manager reported a discussion held with [Appellant's Neuropsychologist] wherein he indicated he was acting more as an advocate on behalf of the Appellant rather than as a psychologist. The case manager reports as follows:

"The first issue that [Appellant's Neuropsychologist] addressed was that the claimant has moved into a cabin in the [text deleted] area with no water or electricity. [Appellant's Neuropsychologist] indicated that he was concerned about winter approaching and the difficulties that [the Appellant] may face residing in a cabin with no heat or running water throughout the winter. [Appellant's Neuropsychologist] indicated that he is addressing this issue with [the Appellant]."

The second issue that [Appellant's Neuropsychologist] raised was [the Appellant's] employability. [Appellant's Neuropsychologist] then went on to indicate that, in his opinion, he believes [the Appellant] is not employable, "psychologically speaking". He then went on to ask that Manitoba Public Insurance review the Two Year Determination process, taking into consideration [Appellant's Neuropsychologist's] opinion that [the Appellant] is not employable from a psychological prospective.

[Appellant's Neuropsychologist] then concluded the discussion with respect to [the Appellant's] employability by indicating that, at present, he has been involved with [the Appellant] for a number of years and he questions his own prospective (sic) and objectivity with respect to [the Appellant] and indicated that he may be acting more as an advocate than as a psychologist.

[Appellant's Neuropsychologist] concluded his conversation with me indicating that it is his opinion that [the Appellant] is psychologically brittle, though [Appellant's Neuropsychologist] did not define what this meant.

I asked [Appellant's Neuropsychologist] specifically if [the Appellant] was in any danger in hurting himself. [Appellant's Neuropsychologist] indicated that this was not the case.

I then indicated to [Appellant's Neuropsychologist] that I would like an opportunity to review in detail [the Appellant's] file and then perhaps set up a meeting with him to discuss the file. I indicated to [Appellant's Neuropsychologist] that I would contact him after I review [the Appellant's] file." (Underlining added)

In a note to file dated November 2004 the case manager reported a meeting with [Appellant's Neuropsychologist] on November 10, 2004 for the purpose of discussing the Appellant's file where again the case manager noted that [Appellant's Neuropsychologist] was continuing to act as the Appellant's advocate. At this meeting [Appellant's Neuropsychologist] indicated that he would like to see MPIC revisit the issue of whether the Appellant remains employable from a psychological perspective and to revisit the two-year determination process. [Appellant's Neuropsychologist] indicated that he thought the position that MPIC determined the Appellant into was inappropriate because of the noise level in the typical work setting of the determined employment. [Appellant's Neuropsychologist] suggested that MPIC look at more retraining options for the Appellant. The case manager reported that:

“[Appellant's Neuropsychologist] then indicated, that if MPI would re-visit the Two Determination (sic) process and possibly look at training options, that this would not be possible for a period of six months as [Appellant's Neuropsychologist] revealed that the claimant is planning on re-locating to [text deleted] for six months. [Appellant's Neuropsychologist] indicated that the claimant is planning to re-locate to [text deleted] as soon as possible. [Appellant's Neuropsychologist] indicated that the claimant is planning on residing with the claimant's sister in [text deleted].

[Appellant's Neuropsychologist] then conceded that he recognized that the claimant's actions (i.e. – a six month vacation in [text deleted]) are incongruent with his own findings and treatment recommendations. [Appellant's Neuropsychologist] went on to indicate that this behaviour would typically not be aligned with an individual who is requiring counseling (sic) on a bi-weekly basis and, in the opinion of the attending psychologist, not psychologically prepared to maintain his determined employment.”
(Underlining added)

The case manager advised [Appellant's Neuropsychologist] that he would consider his request but that in the interim he had requested that the Appellant's medical file be reviewed by the Health Care Services team.

On November 19, 2004 the case manager wrote to the psychologist, [MPIC's Psychologist] of MPIC's Health Care Services, and requested a review of the Appellant's medical file including

the reports of [Appellant's Neurologist] and [Appellant's Neuropsychologist]. In this letter the case manager requested that [MPIC's Psychologist] provide a medical opinion as to the causal relationship between the motor vehicle accident and the Appellant's symptoms.

[MPIC's Psychologist] and [text deleted] (an Acquired Brain Injury Specialist) provided an extensive report dated March 2, 2005 which included a review of approximately 170 medical/vocational documents. In his report [MPIC's Psychologist] reviewed [Appellant's Neurologist's] report dated April 18, 1994. [Appellant's Neurologist's] report stated that:

1. He had diagnosed that the Appellant had a Post Concussive Syndrome as the result of a hockey accident in March of 1994.
2. Following the motor vehicle accident the Appellant was again seen by [Appellant's Neurologist] for an assessment of his injuries. At that time he complained to [Appellant's Neurologist] about:
 - a. head and neck pain, with occasional headaches
 - b. he hadn't recovered from the last hockey injury where he had a head injury
 - c. he had problems with memory and organization
3. The results of his neurological examination at that time were "entirely normal" and concluded that the Appellant's problems "seems to be much the same as in April 1994"

[MPIC's Psychologist], in his report of March 2, 2005 also stated that:

1. The Appellant's past mental health history was significant for depression which dates back to February 1995. At that time the Appellant was taking a daily dosage of Zoloft (150 mg) for his depression and was on a sleeping aid, Imovane (7.5 mg) prescribed by [Appellant's Doctor], the Appellant's general practitioner.

2. [Appellant's Neuropsychologist's] report dated December 2, 1996 stated that on all objective measures of neuropsychological functioning the claimant's performance was in the average range or higher, including tests of attention, concentration, and memory.

[MPIC's Psychologist], in his report of March 2, 2005 determined that the Appellant's current psychological symptoms were related to non-motor vehicle accident factors and not from the motor vehicle accident. [MPIC's Psychologist] concluded that the Appellant's current symptoms along with his possible depression appeared to be related to pre-existing depression and to life events unrelated to the motor vehicle accident, including stress that occurred as a result of his decision to leave [text deleted] and move to the [text deleted] area which led to financial stress, lack of consistent employment and poor living conditions.

[MPIC's Psychologist] further stated in this report:

“This writer will attempt to summarize answers to the questions of this referral:

The claimant's initial diagnosis was that of Post Traumatic Stress Disorder which resolved 15 months post accident according to [Appellant's Neuropsychologist's] report of December 1996. This diagnosis appears, on the balance of probabilities, to be related to the motor vehicle accident in question.

The claimant's current psychiatric diagnosis is not documented. The available information suggests a probable diagnosis of Major Depression. The available information indicates that the claimant's depressive symptoms are not probably related to the motor vehicle accident in question. It is more probable that the claimant's depressive symptoms are related to a pre-existing depression, and to life events unrelated to the motor vehicle accident. There is no information in the claimant's file indicating his current psychological status while he is in [text deleted].

Further treatment for conditions related to the motor vehicle accident is not indicated. The claimant may require further treatment for depression, but as noted, his current mental status cannot be determined. In any case, such treatment, if necessary, would be for a condition not causally related to the motor vehicle accident.” (Underlining added)

Case Manager's Decision – April 18, 2005:

The case manager issued a decision on April 18, 2005 wherein he indicated to the Appellant that:

1. His IRI benefits were being discontinued because:
 - a) his present psychological status was not caused by the motor vehicle accident;
 - b) he had the ability to work or to hold employment pursuant to Section 110(1)(a) of the MPIC Act.
2. He would be allowed an additional one year's benefits as a bridge, until May 1, 2006, in recognition of the fact that the Appellant had been receiving IRI benefits for such a long time and that it would be unduly harsh to end his benefits without providing him with ample time to make appropriate adjustments.
3. He would be allowed vocational assistance and 6 months additional sessions with [Appellant's Neuropsychologist].

In response to [MPIC's Psychologist's] report of March 2, 2005, [Appellant's Neuropsychologist] provided a report to MPIC on September 26, 2005. In this report (37 pages) [Appellant's Neuropsychologist] provided extensive collateral information from various people who had known the Appellant over the history of his claim. [Appellant's Neuropsychologist] also indicates, for the first time, that he felt the Appellant had a mild traumatic brain injury along with post concussive syndrome, and a decrease in cognitive functioning. [Appellant's Neuropsychologist] concluded that the motor vehicle accident of 1995 continues to be the causal factor for the majority of the Appellant's symptoms. He reported that on a balance of probabilities the Appellant's current and past psychological symptoms were primarily related to cognitive mood personality and behaviour changes resulting from the 1995 accident.

[MPIC's Psychologist] provided a response to MPIC in a letter dated January 6, 2006 and stated that:

1. The Appellant did not have a mild traumatic brain injury or a significant head injury.
2. The post-concussive syndrome diagnosis from [Appellant's Neuropsychologist] was made for the first time in September 2005 which was a period of ten years after the motor vehicle accident.
3. He did not think threshold requirements for this diagnosis were met in this case.

The Commission notes that [Appellant's Neuropsychologist] responded to [MPIC's Psychologist's] memorandum with two reports dated March 7 and March 14, 2006. [MPIC's Psychologist] again provided a response to [Appellant's Neuropsychologist's] reports on April 18, 2006. In these reports, both psychologists defended their previous assessments.

The Appellant made an Application for Review of the case manager's decision on May 26, 2005.

Internal Review Officer's Decision – June 8, 2006:

The Internal Review Officer held a hearing on March 9, 2006 and issued a decision on June 8, 2006 dismissing the Appellant's Application for Review and confirming the case manager's decision of April 18, 2005.

The Internal Review Officer noted that the issue under review centered on a disagreement between the opinions of [Appellant's Neuropsychologist] and [MPIC's Psychologist]. [Appellant's Neuropsychologist] was of the view the Appellant did suffer a mild traumatic brain injury as a result of the motor vehicle accident and [MPIC's Psychologist] came to a contrary opinion.

In respect of the Internal Review Officer's decision relating to cognitive impairment he stated:

“[MPIC’s Psychologist] felt the documentation showed no cognitive impairment as of December 1996. [MPIC’s Psychologist] reviewed the following in particular, in coming to his conclusion:

- brief loss of consciousness, based on emergency records;
- no evidence of amnesia based on hospital records and nurses’ notes;
- hospital discharge was two hours after admission with a diagnosis of multiple contusions to the head, right shoulder, cervical neck strain and lumbar sacral strain;
- neuropsychological functioning in December 1996 was in the average range or higher showing no documentation of a significant decline in cognitive functioning as a result of the motor vehicle accident;
- [Appellant’s Neuropsychologist’s] own reports from January 9, 1996 and then again December 2, 1996 show no anterograde or retrograde amnesia.

Based on [MPIC’s Psychologist’s] analysis, I am inclined to favour [MPIC’s Psychologist’s] impression on this matter involving whether you sustained a significant head injury in the accident.”

In respect of post-concussive syndrome, the Internal Review Officer stated:

“The extent of any loss of cognitive functioning is related to the question of whether you suffered from post concussive syndrome. [MPIC’s Psychologist] points out that [Appellant’s Neuropsychologist] never diagnosed you with post concussive syndrome until September 26, 2005. [MPIC’s Psychologist] noted that post concussive syndrome is not applicable here for the following reasons:

- There was no prolonged period of loss of consciousness.
- There was no post-traumatic amnesia.
- There were no seizures.
- The December 1996 neuropsychological assessments do not contain cognitive deficits in attention or memory.
- The neuropsychological assessment by [Appellant’s Psychologist #1] in 1998 showed only minor differences from [Appellant’s Neuropsychologist’s] December 1996 assessment and there was an indication there of exaggerated symptoms and overstated depression and anxiety.

Further, [MPIC’s Psychologist] cited the following evidence to support his comment that you had a pre-existing history of depression which was being actively treated at the time of the accident:

- [Appellant’s Neuropsychologist’s] January 9, 1996 report that you had a history of depression which occurred around the time of your separation in 1995;
- [Appellant’s Psychiatrist’s] report of February 7, 1996 noting that the depression was a pre-existing condition;
- [Appellant’s Psychiatrist’s] other report of February 7, 1996 to the family doctor noting past history of depression dating back to marital difficulties in February 1995 and that medication was changed from Prozac to Zoloft.

[MPIC's Psychologist] acknowledged that your psychological status may have deteriorated immediately following the motor vehicle accident, but this was attributed to a Post Traumatic Stress Disorder which had essentially resolved by December 1996. [MPIC's Psychologist] notes that [Appellant's Neuropsychologist] did not diagnose you with depression in January 1996 or again in December 1996 or any time in between.

[MPIC's Psychologist] also found that from 1996 to 2005 your psychological functioning was generally stable with relatively brief periods of time when you were described as dysphoric or discouraged, generally associated with non-motor vehicle accident stressors in your life...

I specifically asked [Appellant's Neuropsychologist] and [MPIC's Psychologist] to comment on your employability because the case manager's decision letter also said that your benefits were ending because of your ability to hold employment.

[Appellant's Neuropsychologist], however, did not believe that you were totally disabled from working and identified several ideal conditions such as job duties well learned, stable, quiet environment, little need to learn or deal with rapid change, and stable working schedule.

On the other hand, [MPIC's Psychologist] reiterated that any cognitive issues you had were not from the motor vehicle accident injuries. He indicated there was nothing in the file which would indicate your inability to hold employment in graphic arts. The experience at [text deleted] does not bear on the issue since this was not a graphic arts job.

The issue to my mind is not whether you were competitively employable in graphic arts. It is whether you were able to hold employment as a graphic artist. The evidence is not convincing that you were not able to hold this employment. That you were never employed in the graphic arts field is not the point. You completed the retraining. You had the skills. You could do the work. I cannot see any logical basis to come to any other conclusion." (Underlining added)

Appeal:

The Appellant filed Notices of Appeal dated August 2, 2006 and September 17, 2006,.

The relevant provisions of the MPIC Act relating to these appeals 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.

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;
- (d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;

[Independent Neuropsychologist's] Report – April 17, 2008:

MPIC requested that [Independent Neuropsychologist], who has a practice in clinical psychology and clinical neuropsychology, conduct an independent neuropsychological assessment of the Appellant and advise whether his current reported cognitive functional/psychological concerns were causally related to the motor vehicle accident of August 17, 1995. [Independent Neuropsychologist] was provided with all of the relevant medical documentation and had the

opportunity of interviewing the Appellant. [Independent Neuropsychologist's] reports confirm the opinion of [MPIC's Psychologist] on the issue of causation and employability. [Independent Neuropsychologist] also agrees with the assessment made by [Appellant's Psychologist #2] and [Appellant's Psychologist #1], in their assessment in 1998 which concluded there was no real evidence of a cognitive deficit.

In review of [Appellant's Neuropsychologist's] second assessment in December 1996, [Independent Neuropsychologist] notes that the test results were not significantly different from the results obtained by [Appellant's Psychologists #2 & #1]. [Independent Neuropsychologist] also notes that [Appellant's Psychologists #2 & #1] in their report indicated that the Appellant revealed a pattern of systematic exaggeration of his symptoms.

In her report [Independent Neuropsychologist] also noted a high degree of exaggeration of symptoms by the Appellant. Under the heading of "Results – Personality & Emotional Functioning" [Independent Neuropsychologist] indicated that the Appellant's responses to a questionnaire were invalid due to a high degree of exaggeration of psychopathology as well as a pattern of non-acquiescence in responding. [Independent Neuropsychologist] stated:

"...Behaviourally, [the Appellant] reported to the examiner that he was "not going to bother" attempting to figure out the meaning of items containing double negatives, so he was "just going to answer them false." [The Appellant] additionally obtained an FBS score of 28, with 21 being the typically accepted cut-off used to detect likely malingering on this measure. His profile was, therefore, not interpreted.

Given [the Appellant's] presentation and his performance on effort testing, he was also asked to complete a 75 item, multi-axial, self-report screening measure used for the detection of malingering of psychological and neuropsychological symptoms. [The Appellant's] score of 24 on this measure was well above the recommended cut-off (of 14) for the identification of suspected malingering...

[The Appellant's] self-reported symptoms were also at odds with his observed clinical presentation during the assessment. While [the Appellant] impressed as being distressed and angry regarding situational factors in his life at present (not the least being feelings of injustice regarding his current disability claim as well as conflict with his sister to whom he owes money), he did not impress as exhibiting obvious signs of a major depressive disorder." (Underlining added)

[Independent Neuropsychologist] noted the long periods of mood stability exhibited by the Appellant between the time he was initially assessed by [Appellant's Neuropsychologist] in 1996 and the time that the Appellant quit his job and moved to the cabin in [text deleted] in 2003.

[Independent Neuropsychologist] concluded her assessment by stating:

"In sum, there is little evidence to suggest that [the Appellant] sustained a significant traumatic brain injury (or Post Concussive Syndrome) secondary to his MVA. There is also little evidence to suggest that his current emotional difficulties are directly related to the MVA. As noted in [the Appellant's] file, while he initially appeared to be exhibiting symptoms of Post-Traumatic Stress Disorder, these had resolved by December 1996. What followed was apparently a period of relatively stable functioning punctuated by episodes of distress precipitated by a variety of psychosocial stressors (sic). While [the Appellant] does appear to be experiencing significant feelings of distress relating to the processing of his MPI claim, any further assessment of his psychological functioning was prohibited by the degree of symptom exaggeration demonstrated by [the Appellant] throughout the current assessment." (Underlining added)

[Appellant's Neuropsychologist] was given an opportunity of reviewing [Independent Neuropsychologist's] report and he provided a reply on March 19, 2010. In this report he defended his position that as a result of the motor vehicle accident the Appellant sustained a mild traumatic brain injury and post-concussive syndrome.

[Independent Neuropsychologist] in her report dated May 12, 2010 indicated she had not changed her opinion on the issue of causality.

APPEAL HEARING

Appellant's Testimony:

The Appellant testified that:

1. At the time of the accident on August 17, 1995 he had been employed in selling [text deleted] for [text deleted].
2. As a result of the accident he complained that he suffered pain to his right shoulder, neck and low back.
3. Prior to the motor vehicle accident he had been involved in a hockey accident in March 1994 when he ran into another player head-on with no loss of consciousness and stated that as a result of those injuries he had difficulties with concentration, headaches, neck soreness and difficulty with noise tolerance.
4. At the time of the motor vehicle accident in August 1995 he had not recovered from the injuries he sustained in the hockey accident.
5. As a result of the motor vehicle accident injuries he suffered from an inability to sleep, low energy, depression, lack of concentration and memory problems.
6. When he was able to return to work he found that he was unable to be an effective salesman and build trust with customers and he had trouble remembering the sales he made or forgetting to order the products for his customers.
7. There had been a significant change in his abilities subsequent to the motor vehicle accident.
8. He was unable to return to his job at the [text deleted] sales company because they had changed his territory and he was not prepared to travel both in Manitoba and Saskatchewan.

The Appellant further testified that:

1. Sometime in early 1997 he began an unpaid work experience in the marketing department at [text deleted] (a chemical company in the agriculture industry). Although

he thoroughly enjoyed his work at [text deleted] and hoped to be able to obtain employment with them, he was laid off when a downsizing occurred.

2. On January 6, 1998 with the ongoing assistance of [text deleted] he was able to enter into an on the job training agreement with [text deleted] (seller of computer software and maintenance and computer support contracts). Unfortunately there was no full time job available for him where he could earn commission income from sales and he left this employment March 31, 1998.
3. In September 1998 the Appellant began a three month work experience with [text deleted] in their warehouse earning minimum wages on a reduced 20 hour per week schedule. While he was employed with [text deleted] he commenced making contact with customers for the purpose of selling [text deleted] products. Unfortunately his car was stolen in May 1999 and his records were lost and he had no back-up system for these records. As a result he was unable to maintain his sales contacts with his customers.

The Appellant also testified that:

1. As a result of the efforts by [text deleted] and MPIC he agreed to take a course in graphic arts at [text deleted].
2. He did have some difficulty with the course and obtained the use of a tutor to assist him in successfully completing the course.
3. Subsequent to the practical component of the course which he did at [text deleted], he continued employment there for a period of two years in a labourer's position with the hope that he would obtain a graphic arts position.
4. When this did not materialize, he terminated his employment on or about August 2003, as the job was physically demanding, the environment was noisy and he saw no openings for a graphic artist occurring there.

5. He decided to move to a cabin in [text deleted] and obtained employment with a [text deleted] in the city.
6. The cabin that he would be living in had no running water, no electricity and was unheated.
7. The [text deleted] job ended due to lay off and he worked at a [text deleted] and a [text deleted].

The Appellant further testified that:

1. Prior to the motor vehicle accident he was a very energetic and successful salesman earning a significant salary.
2. After the motor vehicle accident he was essentially unable to work due to the injuries sustained in the accident.
3. He suffered from loss of concentration, memory problems, inability to organize matters, headaches and inability to multi-task.

The Appellant also testified that:

1. He visited [text deleted] for a short period of time in 2003/2004 and also in 2004/2005. On a third trip in the winter of 2005/2006 it was his intention to establish himself as he found the climate less depressing and the cost of living less than in Canada.
2. He acknowledged that in April 2005 he received the case manager's decision that his IRI payments were terminated effective May 1, 2006.
3. While in [text deleted] in 2007 he was able to obtain employment as a [text deleted] salesperson and earned approximately \$37,000 in a ten month period selling [text deleted].

4. Unfortunately, due to the economic conditions in Canada and the United States he was unable to make any [text deleted] sales in 2008.
5. He was successful as a salesperson because he was not required to multi-task and he was able to work in a quiet and stable environment.
6. As a result of these conditions he was able to successfully complete a number of [text deleted] sales in [text deleted].

In cross-examination MPIC's legal counsel suggested to the Appellant that at the initial Case Conference on May 19, 2009 the Appellant advised the Commission he was not working in [text deleted]. The Appellant responded that he did not make that statement to the Commission.

The Commission notes that at the next meeting with the Commission on May 26, 2009 the Appellant was advised that MPIC had received information that he was in fact employed in [text deleted] as a [text deleted] salesperson. At that time the Appellant did acknowledge to the Commission that he had been employed for a time in [text deleted] as a [text deleted] salesperson and had earned an income as a result thereof.

[Independent Neuropsychologist's] report dated April 17, 2008 discusses her interview with the Appellant wherein he described his current cognitive issues and indicated that his main difficulties were in his concentration in the presence of distractions, navigational issues when he was driving and also described memory problems. [Independent Neuropsychologist] further stated:

“As a result of the extent of his difficulties with memory, organization, and planning, [the Appellant] reported that he has never been able to return to working in sales, nor does he feel able to work in any other meaningful capacity.” (Underlining added)

In cross-examination by MPIC's counsel the Appellant did not recall making that statement to [Independent Neuropsychologist].

He further testified in cross-examination that:

1. He had refused to answer questions put by [Independent Neuropsychologist].
2. He misinformed [Independent Neuropsychologist] in response to several questions she put to him.
3. He was justified in doing so because [Independent Neuropsychologist] was an agent for MPIC and her purpose was to deprive him of benefits.
4. The questions put to him by [Independent Neuropsychologist] were often "personally intrusive", and as a result he would not answer them or misinform [Independent Neuropsychologist] in his response.
5. He lied when he found it necessary to do so.
6. When he became aware that MPIC discovered that he was using a website to sell [text deleted] in [text deleted] he caused to be removed any reference to himself as a salesperson on this website.

In his testimony, the Appellant advised the Commission that he did not challenge MPIC's determination that he be employed in the graphics art field since he had chosen to be employed in that field and voluntarily undertook training for this position at [text deleted]. The Commission notes that as a result the Appellant did not file an Application for Review of the case manager's decision in respect of determined employment.

Testimony of the Witnesses:

[Appellant's friend] testified at the hearing on behalf of the Appellant and stated:

1. He was a friend of the Appellant and also a relative by marriage.
2. For many years prior to the motor vehicle accident, the Appellant was employed at [text deleted] where [Appellant's friend] was the General Manager and supervised the Appellant.
3. Prior to the motor vehicle accident he acted as the Appellant's solicitor.
4. Prior to the motor vehicle accident the Appellant had an excellent memory, was quick thinking and very focused in a disciplined manner and did not suffer from any depression.

[Appellant's friend] further testified that after the motor vehicle accident:

1. The Appellant was never the same person that he was prior to the motor vehicle accident.
2. The Appellant suffered from depression, had a poor memory, was very slow and deliberate and not focused.
3. The Appellant no longer had the drive or the energy he had prior to the motor vehicle accident.
4. In his view there was a change in the Appellant's personality due to the motor vehicle accident.

The Commission notes that [Appellant's friend] indicated to the Commission that he was going to be acting as the Appellant's representative at the hearing but subsequently decided that he would be a witness. [Appellant's friend] further advised the Commission that he had a great deal of contact with the Appellant prior to the motor vehicle accident but had very little contact with him after the motor vehicle accident occurred.

[Appellant's tutor] testified at the hearing on behalf of the Appellant and stated:

1. She was his tutor during an educational re-training with [text deleted] in 2000-2001.
2. She did not know the Appellant prior to the motor vehicle accident.
3. While tutoring the Appellant he experienced significant cognitive challenges, poor attention and concentration, he could not work in a noisy environment and the Appellant was moved to study in the school library.
4. She worked on a one to one basis with him.
5. She developed a friendship with the Appellant and on one occasion he called her and requested her assistance in printing a sign he required because he was starting a business on a boat and she agreed to do so.
6. The Appellant did pass the graphic arts course with some difficulty.
7. Subsequent to acting as the Appellant's tutor in 2000 – 2001 she had very little contact with the Appellant.

Submission for the Appellant:

[Text deleted], the Appellant's representative, submitted that:

1. As a result of the motor vehicle accident the Appellant suffered from a brain injury and this caused the Appellant's loss of memory, loss of concentration, loss of ability to organize matters and prevented him from working.
2. Notwithstanding these difficulties the Appellant did attempt to return to work selling [text deleted] but was unable to do so.
3. The Appellant attempted a number of other jobs including being employed at [text deleted], [text deleted] and [text deleted].
4. Unfortunately because of the loss of his car and loss of his sales records he was unable to continue selling [text deleted] with [text deleted].

5. The Appellant's efforts in obtaining employment despite his difficulties indicate the Appellant was not a malingerer.

[Appellant's representative] further submitted that the Appellant:

1. Decided to become a graphic artist and graduated with a diploma from [text deleted] in that field.
2. Commenced working at [text deleted] in a labouring position hoping that he would be promoted to a position as a graphic artist but unfortunately [text deleted] did not promote him .
3. Became frustrated that he was not able to obtain employment as a graphic artist, quit his job at [text deleted] and decided to move to [text deleted] where he had a seasonal job waiting for him.
4. Went to [text deleted] for a visit in the winter of 2003-2004 for several weeks.
5. On his third trip to [text deleted] he decided to stay as it was less depressing and the cost of living was less than in Canada.
6. Was able to earn a substantial income selling [text deleted] in [text deleted].

[Appellant's representative] also submitted that the Appellant:

1. Did not inform [Independent Neuropsychologist] of his employment in [text deleted] when he was tested by her in 2008.
2. In response to a question from the Chair of the Commission he immediately disclosed the information on his affairs in [text deleted] which included the disclosure of substantial income during a 10 or 11 month period.
3. Was reluctant to provide information to [Independent Neuropsychologist] when tested because his IRI benefits had been terminated for almost two years at that point.

4. Did provide a substantial amount of information to [Independent Neuropsychologist] as illustrated in her reports.

[Appellant's representative] further submitted that [Independent Neuropsychologist] found that the tests were invalid, as a result these tests are inconsistent with [Independent Neuropsychologist's] finding that the test results were sufficiently valid to indicate malingering by the Appellant.

[Appellant's representative] asserted that the Appellant:

1. Was able to work effectively and productively prior to the motor vehicle accident but after the motor vehicle accident was unable to perform at the same level.
2. Testified that he was unable to find work due to the brain injury he had suffered as a result of the motor vehicle accident and this was corroborated by the medical reports of [Appellant's Neuropsychologist] and the testimony of [Appellant's friend] and [Appellant's tutor].
3. Did not provide false or misleading information under Section 160 of the MPIC Act.
4. Did not violate Section 149 of the MPIC Act since he disclosed his employment income to MPIC.

[Appellant's representative] further submitted that:

1. In discussions with [Independent Neuropsychologist], the Appellant was never advised that she was a representative of MPIC.
2. The Appellant did disclose his activities in [text deleted] to [Independent Neuropsychologist].

3. He did not believe that when he was speaking to [Independent Neuropsychologist] that he was knowingly providing false information to MPIC.
4. He did not provide false information to the Chief Commissioner at the first Case Conference.

[Appellant's representative] concluded her submission by stating that the Appellant has established there was a causal connection between the motor vehicle accident and the brain injury he suffered as a result of his accident. The brain injury caused loss of memory, loss of concentration, loss of ability to organize matters and adversely affected the Appellant's ability to work. As a result MPIC was not justified in terminating the Appellant's IRI benefits. [Appellant's representative] further submitted that the Appellant did not provide false or misleading information to MPIC and fully disclosed his financial activities when requested to provide this information to MPIC.

[Appellant's representative] therefore requested that the Commission allow the Appellant's appeal and rescind the Internal Review Officer's decision terminating the Appellant's IRI benefits.

Submission for MPIC:

In his submission MPIC's legal counsel extensively reviewed the testimony of the Appellant and the two witnesses called by the Appellant, as well as the medical reports of [Appellant's Neuropsychologist], [MPIC's Psychologist], [Independent Neuropsychologist], [Appellant's Psychologist #1] and [Appellant's Psychologist #2]. MPIC's legal counsel submitted that:

1. The Appellant was not a credible witness and his self-reports to [Appellant's Neuropsychologist] should not be relied upon.

2. The Appellant's complaints subsequent to the motor vehicle accident were inconsistent with the medical reports of [Appellant's Neuropsychologist], [Appellant's Neurologist], [Appellant's Psychologist #1], [MPIC's Psychologist] and [Independent Neuropsychologist].
3. Although the Appellant claimed that as a result of the injuries he sustained in the motor vehicle accident he was unable to work, an examination of his work record from the date of the accident to the time he quit his employment at [text deleted] clearly indicates he was capable of obtaining employment on a regular basis.

MPIC's legal counsel also submitted:

1. The medical evidence further supported MPIC's position that the Appellant did not suffer from any cognitive deficits as a result of the motor vehicle accident.
2. Any difficulties the Appellant suffered in carrying out his employment were due to emotional difficulties arising out of certain life stressors.
3. [Appellant's Neuropsychologist's] report of September 26, 2005 which diagnosed the Appellant's brain injury should be rejected because it was provided many years after the motor vehicle accident and was not based on objective medical facts.
4. [Appellant's Neuropsychologist] admitted that he had crossed the line in becoming an advocate for the Appellant.
5. On the other hand the reports of [MPIC's Psychologist] and [Independent Neuropsychologist] were objective and based on the reports of [Appellant's Neuropsychologist] (with the exception of the September 26, 2005 report) and concluded there was no causal connection between the motor vehicle accident and the injuries the Appellant claimed prevented him from continuing his employment.

MPIC's legal counsel also asserted that the Appellant was not a credible witness, had lied to the Commission and had lied to [Independent Neuropsychologist]. The Appellant's complaints of loss of memory, loss of concentration, loss of ability to organize matters were inconsistent with [Appellant's Neuropsychologist's] reports (with the exception of the September 26, 2005 report) and inconsistent with the reports of [Appellant's Neurologist], [Appellant's Psychologist #1], [MPIC's Psychologist] and [Independent Neuropsychologist].

On the other hand, the reports from [MPIC's Psychologist] and [Independent Neuropsychologist] were objective and based on the reports of [Appellant's Neuropsychologist] they concluded there was no causal connection between the motor vehicle accident and the injuries the Appellant claimed prevented him from continuing with his employment. MPIC's legal counsel further submitted that [MPIC's Psychologist] and [Independent Neuropsychologist] concluded that any difficulties the Appellant had in carrying out employment had nothing to do with any injuries sustained in the motor vehicle accident but due to emotional difficulties arising out of certain life stressors.

MPIC's legal counsel also indicated that the two witnesses in support of the Appellant were friends of the Appellant who had not seen him for many years since the motor vehicle accident and were relying on the self-reporting of the Appellant which MPIC's legal counsel submits was unreliable.

For these reasons, MPIC's legal counsel submits that the Appellant has failed to establish on a balance of probabilities that there was a causal connection between the motor vehicle accident and the traumatic brain injury the Appellant suffered. MPIC's legal counsel submitted that the Appellant had a pre-existing problem with depression and from time to time due to the

challenges in his life he became depressed and therefore it was difficult for him to work at those times. MPIC's legal counsel concluded by saying that none of the problems that the Appellant complained about were motor vehicle accident related.

MPIC's legal counsel therefore submitted that the Appellant's appeal should be dismissed and the Internal Review Officer's decision dated June 8, 2006 should be confirmed.

DISCUSSION

Testimony – Credibility:

The Appellant testified that as a result of the motor vehicle accident injuries he suffered from depression, lack of concentration, memory problems, and an inability to organize or multi-task and therefore he was unable to carry on his pre-accident employment selling [text deleted] or his determined employment as a graphic artist.

The Commission finds that these complaints are not consistent with the medical reports for the following reasons:

1. The Appellant's complaints are inconsistent with the medical reports of [Appellant's Neurologist] and [Appellant's Neuropsychologist].
2. Shortly after the motor vehicle accident the Appellant was examined by [Appellant's Neurologist] who reported a normal neurological examination despite complaints by the Appellant of memory organization.
3. The Appellant first saw [Appellant's Neuropsychologist] for a neuropsychological assessment in January 1996. [Appellant's Neuropsychologist] found the Appellant was "neuropsychologically intact" although he diagnosed Post Traumatic Stress Disorder.

[Appellant's Neuropsychologist] reported that the Post Traumatic Stress Disorder resolved itself within a few months after he first saw the Appellant.

4. [Appellant's Neuropsychologist's] medical reports and charts generally reported stability in respect to the Appellant's moods from the time the Appellant recovered from Post Traumatic Stress Disorder in December of 1996 until October 2005.
5. [Appellant's Neuropsychologist's] report dated September 20, 1996 also indicated that [the Appellant] was presenting as "in good spirits," "in terms of his mood, stable over the past number of months" and with "no mood based issues at present." No cognitive difficulties were reported other than mild self-reported concerns regarding memory.
6. On December 2, 1996 [Appellant's Neuropsychologist] completed another neuropsychological assessment. He found that the Appellant had made some impressive gains and his overall performance was in the average range or higher. He also found a resolution of the Post Traumatic Stress Disorder symptoms. [Appellant's Neuropsychologist] reported no concerns regarding the Appellant's ability to engage in a graduated return to work plan.
7. In March 1997 [Appellant's Neuropsychologist's] notes indicate that issues of physical stamina and headaches were [the Appellant's] primary vocational barriers, and that "Memory issues not a barrier."
8. On December 28, 2000 [Appellant's Neuropsychologist] stated in a report to MPIC:

" [The Appellant] continues to evidence clinical status generally characterized by stable mood, continued gradual improvements in his ability to deal with stressors as they arise, his adjustment and his psychological status."
9. Chart notes from [Appellant's Neuropsychologist] dated April 30, 2003 indicate that [the Appellant] received a good job rating from [text deleted]. No indication of cognitive issues was noted.
10. No cognitive complaints are documented in [Appellant's Neuropsychologist's] chart

notes regarding his therapeutic contact with [the Appellant] between May 2002 and October 2005.

The Commission finds that the Appellant consistently exaggerated his symptoms:

The medical reports of [Appellant's Psychologist #2] and [Appellant's Psychologist #1] in August 1998 and the reports of [Independent Neuropsychologist] in 2008 indicate that the Appellant had a tendency to exaggerate his symptoms.

In her report of April 17, 2008 [Independent Neuropsychologist] describes the manner in which the Appellant responded when she attempted to interview him for the purpose of making an assessment. In order to determine whether or not there was exaggeration about difficulty in concentrating in a noisy environment, [Independent Neuropsychologist] reported:

“...Due to [the Appellant's] self-reported difficulties with coping with noise distraction, testing was conducted both within the context of a quiet testing room, and in my office where loud conversations are regularly held just outside the door (a busy outpatient psychiatric clinic has its waiting room directly beside my office door, and was working to full capacity at the time of [the Appellant's] assessment, which included conversations being held, music from the waiting room radio being played, and appointment (sic) being called at regular intervals). [The Appellant] did not demonstrate any observable difference in his ability to follow instructions or manage the testing demands between either environment, nor were any differences in test scores noted. All measures of test effort were obtained within the context of the quiet testing room.”

[Independent Neuropsychologist] noted that the Appellant refused to provide detailed information regarding any medical or health issues unrelated to the events associated with his motor vehicle accident, including any past or current medication use and refused to disclose any information regarding past or present alcohol, drug or tobacco use. She further indicated:

“...His descriptions of his ongoing cognitive issues were vague and somewhat evasive, as were his responses to questions regarding any ongoing barriers to his being able to return to work.”

[Independent Neuropsychologist] reported that the Appellant refused to participate meaningfully in tests. For one test dealing with individuals who had severe head injuries the Appellant's scores measured similar to those obtained by advanced dementia patients.

[Independent Neuropsychologist] reported:

“[The Appellant] completed a self-report questionnaire designed to explore personality and emotional functioning (MMPI-2). Validity indices within this questionnaire indicate that it is invalid due to a high degree of exaggeration of psychopathology as well as a pattern of non-acquiescence in responding. Behaviourally, [the Appellant] reported to the examiner that he was “not going to bother” attempting to figure out the meaning of items containing double negatives, so he was “just going to answer them false.” [The Appellant] additionally obtained an FBS score of 28, with 21 being the typically accepted cut-off used to detect likely malingering on this measure. His profile was therefore, not interpreted...(Underlining added)

In terms of his emotional functioning, there is also little new information which can be provided. [The Appellant's] performance on a test of personality and emotional functioning revealed only an invalid test profile due to the exaggeration of psychopathology and a pattern of non-acquiescence in responding.”

The Commission finds that the Appellant misinformed and lied to [Independent Neuropsychologist] during the tests she conducted:

[Independent Neuropsychologist's] report dated April 17, 2008 details her interview with the Appellant wherein he described his current cognitive issues and indicated that his main difficulties were in his concentration in the presence of distractions, navigational issues when he was driving and also described memory problems. [Independent Neuropsychologist] further stated:

“As a result of the extent of his difficulties with memory, organization, and planning, [the Appellant] reported that he has never been able to return to working in sales, nor does he feel able to work in any other meaningful capacity.” (Underlining added)

[Independent Neuropsychologist] testified that during the course of her interviews with the Appellant he did not inform her that he was employed in [text deleted] selling [text deleted]. At the appeal hearing the Appellant, in his testimony, did admit that he was selling [text deleted] in [text deleted] but in response to a question from MPIC's legal counsel he indicated that he did not recall making the statement to [Independent Neuropsychologist] that he was not employed in [text deleted].

The Commission finds that [Independent Neuropsychologist] was an impressive witness who testified in a direct and unequivocal fashion and accepts her testimony in respect of her discussion with the Appellant. As a result the Commission finds that the Appellant did lie when he told [Independent Neuropsychologist] that he was not working in [text deleted].

In his testimony the Appellant acknowledged that he viewed [Independent Neuropsychologist] as someone who would not further his interests and as a result he did not honestly participate in the tests, refused to answer many of the questions she put to him or alternatively acknowledged providing false information. He indicated that he lied when it was convenient for him to lie and when it was in his self-interest. He also viewed the tests as being personally intrusive and as a result did not wish to provide information to [Independent Neuropsychologist].

The Commission finds that the Appellant misinformed the Commission:

The Commission notes that a Case Conference was held on May 19, 2009 for the purpose of resolving certain issues before the actual hearing could take place. During the course of discussions with the Appellant and his [representative], the Commission asked the Appellant a number of questions leading to his background. In answer to one of the questions he indicated that he was not working in [text deleted].

On May 21, 2009 the Commission wrote to [Appellant's representative] and MPIC's legal counsel advising them that the Commission had received information that the Appellant had been employed as a [text deleted] salesperson in [text deleted]. Mr. Kumka, MPIC's legal counsel wrote to the Commission on August 25, 2009 and stated:

“This letter followed the Case Conference of May 19, 2009 where [the Appellant] indicated in answer to a question by the Chief Commissioner that he was not working in [text deleted].”

At that time a copy of this letter was provided to [Appellant's representative]. At no time after the receipt of this letter by [Appellant's representative] did the Commission receive correspondence from [Appellant's representative] or the Appellant denying the above mentioned response to the Commission. However, during his cross-examination before the Commission, the Appellant indicated that he did not make that statement to the Commission.

The Commission finds, having regard to the Appellant's testimony to the Commission, that he lied when it was convenient to do so and finds that the Appellant misinformed the Commission on May 19, 2009 when he indicated that he had not been working in [text deleted].

In summary the Commission finds that for the following reasons the Appellant was not a credible witness in any dispute between him and MPIC in respect of the facts and the Commission accepts the position of MPIC:

1. Inconsistency in his complaints made to [Appellant's Neuropsychologist] between the months of January 1996 when he began to see him and [Appellant's Neuropsychologist's] assessment of September 26, 2005.
2. His tendency to exaggerate his symptoms as reported by [Appellant's Psychologist #1] and [Independent Neuropsychologist].

3. His admission in his testimony that he lied to [Independent Neuropsychologist] when he stated that he had not worked in [text deleted] during the course of her interview with him.
4. His admissions that he misrepresented certain information in his discussions with [Independent Neuropsychologist].
5. He lied to the Commission at the initial Case Conference when he stated that he was not working in [text deleted] and in his testimony subsequently denied making such a statement to the Commission.
6. He complained he was unable to carry on his work as a salesperson selling [text deleted] because of a lack of concentration, lack of organization, memory problems and inability to multi-task, yet he acknowledged that he was able to sell [text deleted] in [text deleted] and earn \$37,000.
7. [Independent Neuropsychologist], contrary to the Appellant's submission, found that the Appellant was capable of working both in noisy conditions as well as in a quiet environment.

For these reasons, the Commission gives no weight to the Appellant's testimony on the issue of whether he suffered a brain injury which impaired his ability to either return to his pre-accident employment selling [text deleted] or his post-accident determined employment as a graphic artist.

Psychological Reports:

The Commission agrees with the opinions of [MPIC's Psychologist] and [Independent Neuropsychologist] on the issue of causality and rejects the opinion of [Appellant's Neuropsychologist] on this issue. Both [MPIC's Psychologist] and [Independent

Neuropsychologist] conclude that any symptoms the Appellant suffered in the motor vehicle accident were not a factor in his complaints that he was unable to return to work as a salesman, an occupation he held prior to the motor vehicle accident or that he was unable to work at his determined employment as a graphic artist. Both doctors conclude that any psychological and emotional difficulties the Appellant had in respect of his employment were due to a pre-existing depression and to challenges that the Appellant confronted during the course of his life.

[MPIC's Psychologist] and [Independent Neuropsychologist] agreed with the initial two assessments of the Appellant made by [Appellant's Neuropsychologist] in respect of his diagnosis. Both rejected [Appellant's Neuropsychologist's] opinion as set out in his letter of September 26, 2005 that as a result of the motor vehicle accident the Appellant suffered a mild traumatic brain injury. Both noted that had the Appellant suffered a mild brain injury, the medical literature indicates that symptoms would resolve themselves in a very short period of time.

In January 1996 [Appellant's Neuropsychologist] found that the Appellant was neuropsychologically intact although he diagnosed a Post Traumatic Stress Disorder (which resolved itself). The Commission further notes that [Appellant's Neuropsychologist]:

1. Did not report any cognitive complaints of the Appellant from the time he first saw him in January 1996 until the report of September 26, 2005 when he diagnosed the Appellant as having a mild traumatic brain injury (post-concussive syndrome).
2. Saw the Appellant on numerous occasions in the ten year period between the motor vehicle accident of August 17, 1995 and the September 26, 2005 report and made no diagnosis of a mild traumatic brain injury.
3. Prior to his report of September 26, 2005 he indicated that the Appellant demonstrated a

generally stable mood over the course of approximately nine years post-motor vehicle accident.

The Commission notes that [Appellant's Neurologist] examined the Appellant after the motor vehicle accident and reported a normal neurological examination. [Appellant's Psychologist #2] and [Appellant's Psychologist #1] who conducted further neuropsychological assessments of the Appellant after the motor vehicle accident reported, on August 4, 1998, minor differences between their assessment and [Appellant's Neuropsychologist's] initial assessment in 1996.

In his testimony [Appellant's Neuropsychologist] explained why he made the diagnosis of a brain injury. He testified that when he first saw the Appellant he was an inexperienced psychologist and the Appellant was one of his first cases. He acknowledged that he agreed to assess the Appellant, subsequently began to treat him and he admitted that he crossed the line when he became an advocate on behalf of the Appellant in an attempt to persuade MPIC to reverse the Internal Review Officer's decision to terminate the Appellant's IRI benefits.

The case manager wrote to the Appellant on April 3, 2002 and stated that:

1. MPIC had determined his employment as a full-time advertising and illustrating artist and top-up of IRI was provided for one year until April 1, 2003.
2. On April 1, 2003 he determined that even if the Appellant did not obtain full-time employment in the field of graphic arts and design there would be a discontinuance of his IRI benefits.
3. On April 9, 2003 he revised the Appellant's IRI as he was only able to work 27 hours per week on his job at [text deleted].

The Commission concluded that as a result of the two year determination [Appellant's Neuropsychologist] began to advocate on behalf of the Appellant and communicated to MPIC that he would like to see MPIC revisit the two year determination in respect of the issue of whether the Appellant remains employable from a psychological perspective. In a note to file dated October 29, 2004 the case manager reported a discussion he had with [Appellant's Neuropsychologist] and stated:

"The first issue that [Appellant's Neuropsychologist] addressed was that the claimant has moved into a cabin in the [text deleted] area with no water or electricity. [Appellant's Neuropsychologist] indicated that he was concerned about winter approaching and the difficulties that [the Appellant] may face residing in a cabin with no heat or running water throughout the winter. [Appellant's Neuropsychologist] indicated that he is addressing this issue with [the Appellant]."

The second issue that [Appellant's Neuropsychologist] raised was [the Appellant's] employability. [Appellant's Neuropsychologist] then went on to indicate that, in his opinion, he believes [the Appellant] is not employable, "psychologically speaking". He then went on to ask that Manitoba Public Insurance review the Two Year Determination process, taking into consideration [Appellant's Neuropsychologist's] opinion that [the Appellant] is not employable from a psychological prospective (sic).

[Appellant's Neuropsychologist] then concluded the discussion with respect to [the Appellant's] employability by indicating that, at present, he has been involved with [the Appellant] for a number of years and he questions his own prospective (sic) and objectivity with respect to [the Appellant] and indicated that he may be acting more as an advocate than as a psychologist.

[Appellant's Neuropsychologist] concluded his conversation with me indicating that it is his opinion that [the Appellant] is psychologically brittle, though [Appellant's Neuropsychologist] did not define what this meant...

I then indicated to [Appellant's Neuropsychologist] that I would like an opportunity to review in detail [the Appellant's] file and then perhaps set up a meeting with him to discuss the file. I indicated to [Appellant's Neuropsychologist] that I would contact him after I review [the Appellant's] file." (Underlining added)

As a result of the case manager's discussions with [Appellant's Neuropsychologist], the case manager reviewed the Appellant's medical file and sought to obtain an independent review of the medical file from MPIC's Health Care Services Team. [MPIC's Psychologist] was retained to

provide such a report. Upon receipt of this report the case manager issued a decision on April 18, 2005 terminating the Appellant's IRI benefits. The Appellant made Application for Review of the case manager's decision.

On September 26, 2005 [Appellant's Neuropsychologist] wrote to MPIC, who after treating the Appellant for approximately 9 years, for the first time diagnosed that the Appellant had suffered a mild traumatic brain injury as a result of the motor vehicle accident. The Commission finds that [Appellant's Neuropsychologist] wrote this report at the request of the Appellant and in support of the Appellant's objection to the case manager's decision to terminate the IRI benefits.

In these circumstances the Commission gives no weight to [Appellant's Neuropsychologist's] opinion set out in his report of September 26, 2005 that as a result of the motor vehicle accident the Appellant suffered a mild traumatic brain injury which impaired his ability to work.

Collateral Information – [Appellant's Neuropsychologist's] Report September 26, 2005:

The Commission also notes that in [Appellant's Neuropsychologist's] report of September 26, 2005 he placed a great deal of weight on the collateral information obtained by individuals who were either related to or were friends with or in a treating relationship with the Appellant. Two of the individuals, [Appellant's friend] and [Appellant's tutor] who are referred to in the report, testified at the hearing.

[Appellant's friend] acknowledged that he is a childhood friend of the Appellant and a relative by marriage. He also acknowledged that prior to the motor vehicle accident he had acted as the Appellant's supervisor and as his lawyer. He further testified that prior to the

motor vehicle accident he was in close contact with the Appellant but in the period subsequent to the accident he rarely saw the Appellant.

The Commission also notes that:

1. [Appellant's representative], who represented her brother at the appeal hearing, initially indicated that [Appellant's friend] was going to act as the Appellant's representative but subsequently decided he would be a witness.
2. [Appellant's friend] was prepared to represent the Appellant and in that capacity would have acted as his advocate.

The Commission further notes that [Appellant's friend] acknowledged that he rarely saw the Appellant after the motor vehicle accident therefore would have had very little knowledge of the Appellant's psychological condition following the motor vehicle accident. [Appellant's friend] testified 15 years after the motor vehicle accident on the psychological status of the Appellant at the time of the motor vehicle accident. As well, [Appellant's friend] acknowledged that he was a friend of the Appellant and had acted as his lawyer in the past and was prepared to represent him in these proceedings and would have acted as his advocate. In these circumstances the Commission cannot give a great deal of weight to the testimony of [Appellant's friend]

The second witness, [Appellant's tutor], who tutored the Appellant during his educational retraining at [text deleted] in 2000 – 2001 testified that she became a friend of the Appellant in the course of her tutoring. On one occasion, at his request she assisted him in obtaining signs for a business he hoped to establish.

[Appellant's tutor] acknowledged that subsequent to the period when she tutored the Appellant she did not maintain any real contact with the Appellant. Like [Appellant's friend], [Appellant's tutor] testified as to matters that had occurred approximately nine years ago. [Appellant's tutor] acknowledged that she had no knowledge of the Appellant's psychological status prior to the motor vehicle accident and could only describe her recollection of events that occurred in 2000 and 2001.

The Commission finds that [Appellant's tutor] had very little knowledge of the Appellant's psychological condition before and after the motor vehicle accident. In these circumstances the Commission cannot give a great deal of weight to her testimony.

The Commission agrees with [Independent Neuropsychologist's] comments in her report of May 12, 2010 as to the weight to be given to the testimony of both [Appellant's tutor] and [Appellant's friend]. [Independent Neuropsychologist] stated:

“[Appellant's Neuropsychologist] seems to place significant weight on collateral information obtained by individuals either related to, friends with, or in a treating relationship with [the Appellant]. In addition to the potential lack of objectivity associated with interviewing people who have an emotional investment in [the Appellant] and the outcome of his case, these interviews occurred ten years after the MVA. In the case of the service providers, the interviews occurred several years following their discontinuation of contact with [the Appellant]. This information was also obtained by individuals who could not be expected to be able to differentiate symptoms caused by issues of psychological disturbance, situational stressors, or motivational issues versus what would be attributable to a traumatic brain injury. As a result, the risk of misattribution of any observed symptoms to being caused by a head injury is high, particularly if this was the explanation provided to them throughout the years by [the Appellant], himself, regarding any changes in his behaviour. This raises concern regarding the reliability of this information.”

For these reasons the Commission does not find that the testimony of [Appellant's friend] or [Appellant's tutor] corroborates the diagnosis of [Appellant's Neuropsychologist] that the Appellant suffered a traumatic brain injury as a result of the motor vehicle accident. The

Commission finds that [Appellant's friend's] and [Appellant's tutor's] observations of the Appellant's conduct after the motor vehicle accident are consistent with the Appellant's underlying depression and the personal crises in the Appellant's life.

For these reasons the Commission accepts the opinions of [Independent Neuropsychologist] and [MPIC's Psychologist] after reviewing all of the medical reports of [Appellant's Neuropsychologist], [Appellant's Neurologist], [Appellant's Psychologist #2] and [Appellant's Psychologist #1] that there was no evidence, as a result of the motor vehicle accident, that the Appellant suffered a mild brain injury, together with a post-concussive syndrome, which adversely affected his ability to work.

Depression:

The Commission has indicated that it accepts the opinions of both [MPIC's Psychologist] and [Independent Neuropsychologist] that any psychological and emotional difficulties which adversely affected the Appellant's ability to work were due to a pre-existing depression and to challenges the Appellant confronted during the course of his life and not due to the motor vehicle accident. The Commission notes that the Appellant suffered from a number of depressive episodes which clearly had an adverse effect on his memory, ability to organize and his concentration.

In his report of January 6, 2006 [MPIC's Psychologist] concluded, based on medical documentation in the Appellant's file that it was clear the Appellant had a pre-existing history of depression and he was being treated for depression with medication at the time of the motor vehicle accident. In this report [MPIC's Psychologist] stated:

“[Appellant’s Psychiatrist], who in one report has suggested that the claimant was “dysphoric” prior to the motor vehicle accident and that he became more “depressed” following the motor vehicle accident... Yet, in [Appellant’s Neuropsychologist] report of January 9, 1996, he indicates that the claimant has “*a history of depression which occurred around the time of his separation in 1995 where he was off work for several weeks*”. (underlining added throughout this paragraph)...In [Appellant’s Psychiatrist’s] report of February 7, 1996 she notes that “*there is a possibility that the depression and alcohol abuse which were pre-existing conditions could be contributing to this as well.*” In another report also dated February 7, 1996 to the family physician, [Appellant’s Doctor], [Appellant’s Psychiatrist] indicates that “*past history is significant for depression that dates back to February of 1995.*” [Appellant’s Psychiatrist] further indicates that the claimant was initially on Prozac which he did not tolerate and he was switched to Zoloft.”

[MPIC’s Psychologist] further concluded that:

“The claimant’s mood disorder was being actively treated at the time of the motor vehicle accident.

The documented pre-MVA history of Depression and Dysthymia placed the claimant at high risk for further episodes of Depression, and therefore is directly relevant to his post-MVA clinical status.

The claimant’s depressive episodes post-MVA are, on the balance of probability, best accounted for by his pre-existing Depression, and environmental stressors unrelated to the motor vehicle accident in question.”

In her report dated May 12, 2010 [Independent Neuropsychologist] stated:

“[The Appellant’s] described cognitive and functional difficulties in [Appellant’s Neuropsychologist’s] report of September 26, 2005 are not consistent with his noted abilities on formal testing. What is, however, evident from this report is the extent of emotional distress reported by [the Appellant] in response to a number of non-accident related issues, as well as his feelings of frustration and impatience regarding the vocational rehabilitation opportunities provided to him. [The Appellant] also appears to have made a number of impulsive decisions which led to additional issues of chronic stress which is the context in which his many of reported cognitive difficulties occurred.”

[Independent Neuropsychologist] also stated:

“[Appellant’s Neuropsychologist’s] provided chart notes dating from December, 1996 though (sic) October, 2005 describe variable mood complaints in response to a variety of non-accident related situational stressors rather than ongoing cognitive symptoms. Described situational stressors included [the Appellant’s] ongoing relationship difficulties with his former spouse and children, difficulties in romantic relationships subsequent to the ending of his marriage, issues of grief, stresses associated with health issues unrelated to the MVA, stresses associated with his car being stolen, issues with alcoholism, and

stresses associated with a number of his life choices including a failed business venture, an injury to his shoulder that prohibited him from doing work that he had planned to do upon his move to [text deleted], ensuing financial difficulties, and difficulties coping with the uninhabitable conditions in his chosen home including not having running water, heat, or other basic amenities of life. These stressors often caused [the Appellant's] sufficient distress as to be associated with reported symptoms of suicidal ideation.

Based on [the Appellant's] writings to [Appellant's Neuropsychologist], many of his episodes of increased self-reported cognitive complaints appear to have occurred during associated times of increased stress.”

Decision:

The Commission finds, having regard to the documentary evidence including the opinions of [Appellant's Neurologist], [Appellant's Psychologist #2], [Appellant's Psychologist #1], [Independent Neuropsychologist], [MPIC's Psychologist] as well as the testimony of the Appellant and [Independent Neuropsychologist], that the Appellant has failed to establish on a balance of probabilities that there was a causal connection between the motor vehicle accident and the Appellant's emotional and psychological difficulties which he alleged adversely affected his ability to work. For these reasons the Commission dismisses the Appellant's appeal and confirms the Internal Review Decision dated June 8, 2006.

APPELLANT'S EMPLOYMENT – SECTIONS 110(1)(A) AND (D) OF THE MPIC ACT

The MPIC Act provides:

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;

(d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;

The Commission notes that in a decision dated April 18, 2005 the case manager terminated the Appellant's IRI benefits on the grounds that the Appellant was able to hold the employment that he held prior to the motor vehicle accident pursuant to Section 110(1) of the MPIC Act.

The Internal Review Officer however found that MPIC was justified in terminating the Appellant's IRI benefits pursuant to Section 110(1)(d) of the Act. In his decision dated June 8, 2006 the Internal Review Officer stated:

“The issue to my mind is not whether you were competitively employable in graphic arts. It is whether you were able to hold employment as a graphic artist. The evidence is not convincing that you were not able to hold this employment. That you were never employed in the graphic arts field is not the point. You completed the retraining. You had the skills. You could do the work. I cannot not see any logical basis to come to any other conclusion.

Thus, the termination under Section 110 was valid (although it probably should have referred to Section 110 (1)(d)) because at the time of the decision letter you were able to hold the new employment that you had been retrained to do.”

The Commission notes that MPIC's legal counsel agreed with the Internal Review Officer that MPIC was justified in terminating the Appellant's IRI benefits on both grounds. As a result the Commission intends to deal with the termination pursuant to Sections 110(1)(a) and (d) of the MPIC Act.

TERMINATION PURSUANT TO SECTION 110(1)(D) OF THE MPIC ACT

After the motor vehicle accident on August 17, 1995 the Appellant did not permanently return to his previous employment selling [text deleted]. The Appellant commenced employment at a number of jobs including [text deleted] Canada, [text deleted] and [text deleted].

With the assistance of [Appellant's Occupational Rehab Consultant] of the [text deleted] in June 1999 the Appellant toured [text deleted] and indicated that he wished to proceed with a retraining

program in graphic arts. Arrangements were made for the Appellant to commence a ten month course with the end result of securing employment in art/desktop publishing.

While attending the course the Appellant commenced employment at [text deleted] on a part-time basis and successfully graduated from the course in December of 2001. The Appellant hoped while working at [text deleted] that he would be promoted to work in the graphic arts area. The Appellant commenced employment at [text deleted] on a regular basis in February of 2002 in a labour position.

On April 3, 2002 the case manager wrote to the Appellant indicating that in completing his training in graphic arts and design the Appellant demonstrated that he was capable of working at [text deleted]. He further stated that MPIC determined the employment as a full-time advertising and illustrating artist and a top-up of IRI would be provided for one year until April 1, 2003.

The case manager further stated:

“Starting April 1, 2003, even if you do not obtain full-time employment in the field of graphic arts design, we are still required to reduce your IRI benefits based on the greater of actual net earnings, or the net income of your determined employment.” (Underlining added)

The Appellant did not file an Application to Review the case manager’s two year determination of his employment as a graphic artist. The Appellant decided to pursue a career as a graphic artist.

Unfortunately the Appellant was not given the opportunity by [text deleted] to work full-time as an advertising and illustrating artist but continued to work as a general labourer. In a note to the file dated March 13, 2003 the case manager stated:

“I got the sense that [the Appellant] is ready to give up on his job and situation in [text deleted]. He told me he wanted to move to [text deleted] to work in the summer and head to [text deleted] for the winter months. He has no firm job opportunities in either location but feels emotionally it will be better for him. He has a friend who owns a [text deleted] in [text deleted] and he thinks he could find work with him for the summer months. As for [text deleted], he feels he could find something once he is down there. This has been something he has been thinking about for a long time and wanted to know how it would affect his claim.”

On April 9, 2003 the case manager revised the Appellant’s IRI as he was only able to work 27 hours per week on his job at [text deleted]. In a memo to file dated August 27, 2003 the case manager reported that he met with the Appellant and [Appellant’s Neuropsychologist] wherein he was advised by the Appellant that:

1. He was extremely unhappy working at [text deleted] and he had not had the opportunity to change his duties from general labourer to what he was trained to do.
2. He intended to quit his employment at [text deleted].
3. He had a job immediately available in [text deleted] at the [text deleted] and that he had been offered accommodation in an old cabin in addition to his employment.
4. There were some printing companies in [text deleted] that he would try to get work at during the winter.
5. He had a lot of personal issues arising during the last year including family relations, failure of a business, financial debt and difficulty making a living in [text deleted].

On December 8, 2003 the case manager wrote to the Appellant and advised him that in view of the fact that he was no longer employed and had no solid job prospects his IRI would continue until April 1, 2004.

The Appellant filed an Application for Review in respect of the decision by the case manager.

The Internal Review Officer issued his decision on June 8, 2006 which indicated that the Appellant was capable of holding employment as a graphic artist pursuant to Section 101(d) of the MPIC Act. The Appellant graduated from the graphic arts course and attained a certificate in the area of production arts and desktop publishing and was qualified to work in his determined employment as a graphic artist.

The Commission finds there is no evidence before the Commission that the Appellant was unable to be employed in that capacity. The Appellant acknowledged in his testimony that there were other printing firms in [text deleted] that employed people in the graphic arts area, but the Appellant did not seek employment from any of these firms as a graphic artist.

The Commission finds that MPIC did comply with the provisions of Section 109(2) of the MPIC Act which states:

Type of employment

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

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

The Commission determines that this provision does not require that the Appellant be employed in his determined employment, but only that such employment was available in the [text deleted] region and that the Appellant was capable of holding such employment.

The Commission notes that the Appellant became frustrated with his employment at [text deleted] and decided to quit that job instead of looking for other employment in the graphic arts

field in the [text deleted] and moved to [text deleted] where he obtained employment at [text deleted]. There is no evidence that he sought employment from printing firms in the graphic arts field in [text deleted] or elsewhere. The Commission concludes that the Appellant, unhappy with his employment, his financial difficulties, and other stressors in his personal life decided to move to [text deleted] and expected that based on his IRI benefits that he would not need to seek employment as a graphic artist.

The Commissions agrees with the opinions of [MPIC's Psychologist] and [Independent Neuropsychologist] that the Appellant voluntarily chose not to seek employment as a graphic artist:

1. Because of his frustrations with his employment at [text deleted] and because of other stressful matters within his personal life; and
2. not because of any brain injury that he may have sustained in the motor vehicle accident.

[Independent Neuropsychologist] stated:

“Consistent with this, [the Appellant] was able to complete vocational retraining in graphic arts despite the unexpected setback of having experienced a benign epidermoid brain tumour in his right frontal lobe with subsequent craniotomy required to remove it. From his provided self-report information, he was subsequently able to obtain and sustain employment, and chose to leave this position after approximately two years’ of employment due to feelings of dissatisfaction with his prospects for career advancement, his feeling that the job was not making use of his newly acquired job skills, feelings of unhappiness regarding the work environment and the physical demands of the job, and his belief that he could live comfortably on the benefit payments provided by MPI in the absence of any additional work income should he reduce his living costs by means of moving into his cottage in [text deleted] full time. From [the Appellant’s] self-report information and documentation provided within his medical records, it seems that emotional factors subsequent to this decision have been the major barriers to [the Appellant’s] obtaining and maintain employment since that time.” (Underlining added)

[MPIC's Psychologist] came to the same conclusion:

“The writer would also suggest that even if one were to accept the possibility that the

claimant's emotional, personality, behavioral, and cognitive functioning were altered in the way described by the informants in [Appellant's Neuropsychologist's] recent report, there is little evidence to indicate that said alterations had a significant effect on the claimant's neuropsychological functioning, psychological functioning, or occupational functioning. Results of assessment of psychological and neuropsychological functioning have consistently contraindicated significant cognitive impairment, a conclusion which [Appellant's Neuropsychologist] agreed with in his most recent report of September 26, 2005. There are also numerous reports, cited above and in the previous review by the writer, that the claimant performed well in job search and job interview situations, and he was able to secure employment in some situations which could have conceivably led to long term employment and advancement. Finally, the claimant's decision to quit his job at [text deleted] and move to [text deleted] appears, based upon [Appellant's Neuropsychologist's] reports, to have been as a result of the claimant's dissatisfaction with the job, citing that it was not challenging, was boring, and did not provide adequate opportunities for advancement, and some unspecified difficulties with his living situation. "Ultimately, [the Appellant] was unable to tolerate further the constraints and difficulties represented by his living situation and unchanging work prospects" ([Appellant's Neuropsychologist], November 30, 2003). Of particular significance are the reports from [Appellant's Neuropsychologist] of May 20, 2003 and November 30, 2003, in which he indicates that it was for the aforementioned reasons that the claimant made the decision to leave his employment at [text deleted], and that the claimant participated in a meeting with [Appellant's Neuropsychologist] and the MPI Case Manager to discuss the implications of his leaving work and his plans to move to [text deleted]". (Underlining added)

Decision:

For these reasons the Commission concludes that the Appellant has failed to establish on a balance of probabilities that he was unable to hold his determined employment in the area of graphic arts due to the motor vehicle accident. As a result the Commission finds that MPIC was justified in terminating the Appellant's IRI benefits pursuant to Section 110(1)(d) of the MPIC Act. The Commission therefore dismisses the Appellant's appeal and confirms the Internal Review Officer's decision dated June 8, 2006.

EMPLOYMENT – PURSUANT TO SECTION 110(1)(A) OF THE MPIC ACT

The evidence before the Commission indicated that the Appellant chose not to pursue a position in sales after the motor vehicle accident on the grounds he was not capable of carrying out this work. The Commission notes that subsequent to the motor vehicle accident the Appellant had an

opportunity of returning to his previous employment as a salesperson at [text deleted] but because there was a dispute over the sales territory where he was to conduct his sales, he chose not to take that job.

After being employed at [text deleted] and [text deleted], the Appellant commenced employment at [text deleted] and was in the process of building a sales practice when unfortunately his car was stolen and sales records were destroyed. As a result the Appellant decided he was unable to continue employment in this field.

In the Commission's view there was nothing to prevent the Appellant attempting to establish a successful career in selling [text deleted] at that time. Instead the Appellant chose to attend [text deleted] to obtain a graphic arts diploma. The commission further finds that once the Appellant decided to quit his employment at [text deleted] there was nothing to prevent the Appellant from returning to work selling [text deleted]. Instead he chose to live in [text deleted] in an unheated cabin without running water and where the prospects of employment were very limited.

The Commission notes that [Appellant's Neuropsychologist's] reports prior to the September 26, 2005 report clearly indicated that the Appellant on the whole was emotionally stable and there was no evidence of any cognitive deficits. The Appellant claims that due to his lack of concentration, loss of memory, inability to organize and work in a noisy environment, he was unable to continue employment as a salesperson. However, the Commission rejects this position since the Appellant acknowledged that when he moved to [text deleted] he was able to successfully commence a career in selling [text deleted] and during a period of several months he was able to earn \$37,000.

The Appellant testified that he was able to do this because he worked in a structured environment on a one on one basis with each client and without the need to multi-task. He testified he would pick up potential customers at the airport, drive them to the location where the [text deleted] were for sale, and then proceed to display the [text deleted] to the customer in an attempt to make a sale. The Commission finds that since the Appellant was successfully able to sell [text deleted] in [text deleted] there is no particular reason why the Appellant could not, in a structured environment, exercise the same selling skills by returning to his previous employment in selling [text deleted] in [text deleted] or elsewhere.

The Commission also finds it was certainly open for the Appellant that if he did not wish to return to selling [text deleted] to establish a career in selling [text deleted] in a structured environment similar to the one he worked under in [text deleted].

Decision:

For these reasons the Commission determines that the Appellant has failed to establish on a balance of probabilities that he was unable to return to his pre-accident employment selling [text deleted]. The Commission finds that MPIC was entitled to terminate the Appellant's IRI benefits pursuant to Section 110(a) of the MPIC Act. The Commission therefore confirms the decision of the Internal Review Officer dated June 8, 2006 and dismisses the Appellant's Notice of Appeal.

TERMINATION OF IRI – SECTIONS 149 AND 160 OF THE MPIC ACT

On May 26, 2009 the Commission set a date to hear the Appellant's appeal in respect of the termination of his IRI benefits on the grounds that:

1. There was no causal connection between the motor vehicle accident injuries the

Appellant sustained on August 17, 1995 and his symptoms.

2. The Appellant was capable of carrying out his determined employment under Section 110(1)(d) of the Act and/or was capable of carrying out his employment that he held prior to the motor vehicle accident pursuant to Section 110(a) of the Act.

The Commission set a Case Conference for May 19, 2009 to hear the parties on preliminary issues prior to the commencement of the hearing on May 26, 2009. The Appellant attended the hearing together with his sister, [text deleted], who was acting as his representative, and Mr. Terry Kumka appeared on behalf of MPIC.

During the course of the hearing the Appellant informed the Commission that he was residing in [text deleted]. The Commission asked the Appellant certain questions relating to his residence in [text deleted]. The Case Conference was adjourned to May 26, 2009 when the hearing on the Appellant's appeal would take place. On May 21, 2009 the Commission wrote to [Appellant's representative] and Mr. Kumka and stated:

“In order to assist a relative who expressed interest in moving to [text deleted] from [text deleted], a member of the Commission decided to conduct an internet search of possible locations in [text deleted] where the relative could move to. As a result of the internet search, the member of the Commission came across several sites which noted a reference to [the Appellant]. The member of the Commission provided me with printouts of several sited (sic) which included the reference to [the Appellant] as follows;

Page 3 at [text deleted]

“If you are looking at the \$90,000 USD to \$160,000 USD price range, I highly suggest [the Appellant]. He represents [text deleted] which owns [text deleted]. His website is [text deleted]. You can email him here or call [text deleted]. “

[text deleted] This site refers to testimonials in respect of [the Appellant] at pages 4 to 7 and contact information at page 8.

In addition, there is a video of a person who identifies himself as [the Appellant] which can be accessed at [text deleted] See page 9 - photograph.

The Commission has decided to bring these matters to your attention in order that you may wish to comment on these matters at the commencement of the hearing on Tuesday, May 26th, 2009 at 9:30 a.m.”

In response to this letter Mr. Kumka wrote to the Commission on May 21, 2009 and stated:

“I have now had the opportunity of reviewing your letter dated May 21, 2009.

The information contained in the three websites referred to is highly significant to the issue before the Commission and in stark contrast to [the Appellant’s] direct statement to the Commission on May 19, 2009 that he was not working in [text deleted]. I note as well that following the independent neuro-psychological examination of April 17, 2008, [Independent Neuropsychologist] noted in her report:

“As a result of the extent of his difficulties with memory, organization, and planning, [the Appellant] reported that he has never been able to return to working sales, nor does he feel able to work in any other meaningful capacity.”

It is our position that this new information warrants further investigation and accordingly the Corporation is requesting an adjournment of the hearing scheduled to commence on May 26, 2009. The results of that investigation will determine whether any further proceedings and/or decisions are warranted.”

At the appeal hearing on May 26, 2009 [Appellant’s representative] appeared together with the Appellant, while Mr. Kumka and Ms Robinson appeared on behalf of MPIC. The Commission granted Mr. Kumka’s request to permit MPIC to conduct an investigation into the allegations that there may have been a violation of Section 160 of the MPIC Act by the Appellant. The Commission advised the parties that an adjournment would be granted for a period of three months to permit MPIC to conduct an investigation.

In a letter to the Commission dated August 25, 2009 Mr. Kumka stated that he had requested Ms Robinson to assist him in this matter and to take notes of the Appellant’s lengthy and detailed comments setting out his commercial activities in [text deleted]. The Commission notes that a copy of Ms Robinson’s notes to file was enclosed as Tab 2 of the Indexed material. In a subsequent decision by the Internal Review Officer dated February 9, 2010 the Appellant’s

comments were summarized from Ms Robinson's notes as follows:

“At the Hearing on May 26, 2009 before AICAC, you spoke non-stop for approximately 20 to 25 minutes. You confirmed to the Commission that you had a website advertising yourself as a [text deleted] in [text deleted] for the past one to one and a half years. You also confirmed that you advertised in Canadian newspapers and on Craig's List as a [text deleted]. You confirmed that you sold [text deleted] and was paid commissions from the sale [text deleted]. You confirmed that you had a friend build a webpage setting out your services as [text deleted] in [text deleted]. You also stated that you had sold [text deleted] which generated approximately \$20,000 - \$30,000 of income during that one and half year period.”

Case Manager's Decision:

MPIC's case manager issued a decision dated August 27, 2009 and found that the Appellant had contravened Sections 160(a) and 149 of the MPIC Act. The case manager reviewed the comments the Appellant made to [Independent Neuropsychologist] in her report of April 17, 2008 where he indicated he had never been able to return to work in sales, nor did he feel able to work in any other meaningful capacity. The case manager also referred to comments made to the Commission where he advised the Commission in the presence of MPIC's counsel that he had not been working in [text deleted]. The case manager further stated that new information had been received by MPIC indicating that in fact the Appellant had been working in [text deleted] in sales since 2007. As a result, the case manager concluded that the Appellant had provided false and inaccurate information in contravention of Section 160(a) of the MPIC Act which states:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(a) knowingly provides false or inaccurate information to the corporation;

The case manager further stated:

“Therefore, had your benefits not ended under 110(1)(a) in our decision letter of April 18, 2005 (which is currently a matter before AICAC), no further PIPP benefits would have been payable as of April 12, 2008.

Moreover, your failure to advise MPI of changes in your circumstance, which would affect your entitlement to benefits, contravenes Section 149 of The Manitoba Public Insurance Corporation Act, which states:

Claimant to advise of change in situation

149 A person who applies to the corporation for compensation shall notify the corporation without delay of any change in his or her situation that affects, or might affect, his or her right to an indemnity or the amount of the indemnity.”

Internal Review Officer’s Decision:

The Appellant filed an Application for Review of the case manager’s decision, dated November 2, 2009. An Internal Review Hearing was conducted on December 23, 2009 and [Appellant’s representative] appeared as the Appellant’s representative at the hearing.

In his decision the Internal Review Officer reviewed the evidence in MPIC’s possession relating to the [text deleted] activities of the Appellant.

“On the internet, under the heading “[text deleted]” you advertised as a [text deleted] expert associated with the [text deleted] which was a full service [text deleted] company and being “your source for finding your dream home on [text deleted] of [text deleted]”.

There were also numerous testimonials on a website described as [text deleted] which made specific reference to the [text deleted] and [the Appellant].

The [text deleted] website contained testimonials as to “his professionalism, knowledge of [text deleted] laws and [text deleted]” and that “[the Appellant] listened to our wants and needs and assisted in every aspect from finding the right [text deleted], staying within our price point, Bank Trusts, lawyers, and even options for financing”. In another testimonial, you were described as being “your number one asset, while purchasing in [text deleted]” and one who [text deleted].

There was a video of yourself where you state in the video that you are the owner of [text deleted] of [text deleted].

On April 17, 2008, you had attended a neuropsychological examination conducted by

[Independent Neuropsychologist], who, in her report dated April 17, 2008, wrote: “As a result of the extent of his difficulties with memory, organization and planning, [the Appellant] reported that he has never been able to return to working in sales, nor does he feel able to work in any other meaningful capacity”...

At the said Internal Review Hearing, [Appellant’s representative] provided me with 3 sheets of paper, not on letterhead, which, in part, set out that during the period October 29, 2007 to August 28, 2008, you earned \$37,000.00 “while I worked for [text deleted] as an employee”. Notwithstanding my request for further particulars as to contact information regarding [text deleted], the nature of your work, the names and information of the people that you allegedly worked for together with more detailed information as to what transactions you completed, [Appellant’s representative] responded by letter dated January 20, 2010 that “the information that I presented to you on December 23, 2009 is the correct and complete information about [the Appellant’s] work history in [text deleted]”. None of the detailed information I requested was provided to me.”

The Internal Review Officer stated:

“REVIEW DECISION

The documentation previously referred to above unequivocally confirms that you were working in sales in [text deleted] since at least 2007 and that your work generated an income to you as a result. At no time prior to the appearance before AICAC on May 26, 2009 did you make known your work activities in [text deleted] to Manitoba Public Insurance Corporation. I am satisfied that you were well aware of your obligation to advise Manitoba Public Insurance of changes in your circumstances that would affect your entitlement to benefits as [Appellant’s representative] at the Internal Review Hearing acknowledged to me that you “knew that when he worked that would reduce his income replacement indemnity payment”. To not disclose this information in these circumstances to the Manitoba Public Insurance Corporation was in contravention of s. 149. By stating to [Independent Neuropsychologist] in April, 2008 that you were incapable of working, and on May 19, 2009 while before AICAC denying that you had been working you knowingly provided false or inaccurate information to the Corporation contrary to S. 160 of *The Manitoba Public Insurance Corporation Act*.

REASONS FOR DECISION

You have not satisfied the onus of proving that you had not knowingly provided false or inaccurate information to the Corporation or even that you had previously advised the Corporation of changes in your circumstances regarding your employment and as a result there is no reason to alter the said decision of August 27, 2009 and I, accordingly, confirm the same.”

Appeal:

The Appellant filed a Notice of Appeal to the Commission dated February 19, 2010.

The relevant provisions in respect of this appeal are:

Claimant to advise of change in situation

149 A person who applies to the corporation for compensation shall notify the corporation without delay of any change in his or her situation that affects, or might affect, his or her right to an indemnity or the amount of the indemnity.”

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(a) knowingly provides false or inaccurate information to the corporation;

One of the documents referred to by the Internal Review Officer at the Internal Review hearing on December 23, 2009 was filed in evidence at the appeal hearing as Exhibit No. 1. This document indicated that between the period October 29, 2007 and August 28, 2008 the Appellant earned \$37,000 working for [text deleted] (a [text deleted] company) as an employee.

The Appellant testified at the appeal hearing that he did earn \$37,000 in the period October 29, 2007 to August 28, 2008 selling [text deleted] to both American and Canadian buyers. He testified that after August 28, 2008 he no longer was able to sell [text deleted] because the difficult economic conditions in the United States and Canada resulted in a significant decrease in the interest of both Canadians and Americans to buy [text deleted] in [text deleted].

During the course of the Appellant’s cross-examination the Commission asked the Appellant whether or not he had informed [Independent Neuropsychologist] when she was interviewing him that he was never able to return to working in sales and whether he felt he was able to work in any other meaningful capacity. In response the Appellant did not recall making that statement to [Independent Neuropsychologist]. The Commission notes that when [Independent

Neuropsychologist] testified under oath at the appeal hearing she confirmed that the Appellant had in fact made that statement to her.

The Commission notes that in a letter from Mr. Kumka to the Commission dated May 21, 2009, a copy of which was provided to [Appellant's representative], Mr. Kumka stated:

“The information contained in the three websites referred to is highly significant to the issue before the Commission and in stark contrast to [the Appellant's] direct statement to the Commission on May 19, 2009 that he was not working in [text deleted]. I note as well that following the independent neuro-psychological examination of April 17, 2008, [Independent Neuropsychologist] noted in her report:

“As a result of the extent of his difficulties with memory, organization, and planning, [the Appellant] reported that he has never been able to return to working sales, nor does he feel able to work in any other meaningful capacity.”

The Commission finds that since the Appellant cannot recall making the statements in April 2008 to [Independent Neuropsychologist] in her interview with him and since [Independent Neuropsychologist] testified under oath that the Appellant did make these statements, the Commission determines that the Appellant did inform [Independent Neuropsychologist] that he was never able to return to working in sales or that he was unable to work in any other meaningful capacity.

The Commission further notes that:

1. The Appellant testified at the Case Conference on May 19, 2009.
2. Mr. Kumka wrote to the Commission on May 21, 2009, a copy of which was provided to [Appellant's representative], where he asserts that the Appellant told the Commission on May 19, 2009 that he was not working in [text deleted].
3. At no time during the next six months or prior to the commencement of the appeal hearing on November 15, 2010 did the Appellant or [Appellant's representative]

challenge Mr. Kumka's comments in his letter of May 21, 2009.

4. At the resumption of the appeal hearing in November 2010 the Appellant, in his testimony, denied having made a statement to the Commission on May 19, 2009 that he was not working in [text deleted].
5. The Appellant and his representative provided no explanation why the Appellant had not in a timely fashion challenged Mr. Kumka's statement in his letter of May 21, 2009.

For these reasons the Commission rejects the Appellant's testimony that he had not informed the Commission on May 12, 2009 that he was not working in [text deleted].

Decision:

The Commission agrees with the decision of the Internal Review Officer that the Appellant was aware of his obligation to advise MPIC that as a result of the change in his circumstances in becoming employed and earning an income that this would result in a reduction or elimination of IRI benefits. The Commission therefore finds that MPIC has established on a balance of probabilities that the Appellant contravened Section 149 of the MPIC Act by failing to notify MPIC that he had commenced employment as a [text deleted] and that during the period of October 29, 2007 to August 28, 2008 he had earned approximately \$37,000 in income.

The Commission further finds that the Appellant knowingly provided false or inaccurate information to MPIC contrary to Section 160 of the MPIC Act for the following reasons:

1. In interviews with [Independent Neuropsychologist] in April 2008 the Appellant advised that he was never able to return to working in sales and would be unable to work in any other meaningful capacity.

2. On May 19, 2009 the Appellant advised the Commission that he had not been working in [text deleted].

The Commission therefore finds that the Appellant has failed to establish on a balance of probabilities that he did not contravene Section 160 of the MPIC Act.

For these reasons the Commission confirms the decision of the Internal Review Officer dated February 9, 2010 and dismisses the Appellant's appeal.

Dated at Winnipeg this 11th day of January, 2011.

MEL MYERS

MARY LYNN BROOKS

JEAN MOOR