Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-93

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Mr. Jeff Palamar** **Mr. Colon Settle. Q.C.**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Keith Addison.**
HEARING DATE:	**July 11, 2001**
ISSUE(S):	**Re-instatement of Income Replacement Indemnity Benefits**
RELEVANT SECTIONS:	**Sections 110(1)(a) and 81(1)(a) of the *Manitoba Public Insurance Corporation Act***

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

1. The Appellant [text deleted] is appealing an Internal Review Decision of MPIC dated May 11, 2000, wherein MPIC had denied the entitlement to [the Appellant] of Income Replacement Indemnity benefits (hereinafter referred to as IRI benefits) effective September 15, 1999, pursuant to Section 110(1)(a) of the *Manitoba Public Insurance Corporation Act* (hereinafter referred to as the *Act*).

2. Section 110(1)(a) of the *Act* states as follows:

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;…

3. On June 14, 1998, [the Appellant] was stopped in traffic when the vehicle he was operating was rear-ended and pushed into the vehicle in front of him. As a result of the accident, [the Appellant] suffered trauma to his neck, shoulder and jawbone together with an injury to his left ankle and was entitled to the receipt of IRI Benefits pursuant to section 81(a) of the *Act* which states:

A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

(a) he or she is unable to continue the full-time employment;…

4. At the time of the accident, [the Appellant] (who is [text deleted] years of age) had been working on a full-time basis for the [text deleted] (hereinafter referred to as the school division) in the dual capacities of a school bus driver (4 ¼ hours per day) and storekeeper (3 ¾ hours per day).

5. On August 17, 1998, [the Appellant] returned to the storekeeper position. He has never returned to the school bus driver's position. In late 1998 and early 1999 concerted efforts were made by Manitoba Public Insurance Corporation (hereinafter referred to as MPIC) to facilitate [the Appellant's] return to the position of school bus driver. This included:

(a) the Case Manager approving the purchase of an ankle brace;

(b) when [the Appellant] suggested he would not be able to operate a standard transmission bus because of his left ankle, the Case Manager confirmed to him

and to his employer that MPIC would fully fund the conversion of one of the school division's buses to an automatic transmission at the cost of approximately $12,000.00.

(c) when the school division inquired as to what would happen if the converted bus was inoperable on any given day, the Case Manager immediately confirmed that MPIC would pay [the Appellant's] IRI benefits for any such days (provided he was still disabled – due to his injuries – from driving a bus with a standard transmission.)

6. On August 17, 1999, [the Appellant] indicated that he would be prepared to return to his duties as a bus driver effective August 31, 1999.

7. As a result of receiving that information, the Case Manager contacted [text deleted] (the director of the transportation department of the school division) for the purpose of arranging for [the Appellant's] return to work. She informed the Case Manager that in order for [the Appellant] to be returned to work they would require a medical certificate clearly indicating that he was capable of returning back to his duties as a school bus driver. The Case Manager indicated that he would contact [the Appellant] and advise him to obtain the necessary medical certificate.

8. On August 23, 1999, [text deleted], the secretary-treasurer of the school division, wrote to the Case Manager subsequent to a telephone discussion between the two of them, to outline his understanding of the agreement between the school division and MPIC regarding [the Appellant's] return to his employment as a school bus driver. Paragraph one of his letter states:

> The [text deleted] School Division will receive full medical documentation that [the Appellant] is medically fit, … to return on a regular, recurring basis to his duties as a school bus driver with our division.

9. [Secretary-treasurer of the school division's] letter further stated that:

> [The Appellant] will be required to successfully complete the necessary in-vehicle training road tests to ensure that he is completely fit to return to work on a regular, recurring basis. These tests are conducted under the direction of the Director of Transportation and will be the determining factor as to [the Appellant's] ability to operate a school bus in a safe manner.
> We wish to emphasize that the safety of the students is paramount. The School Division will cooperate in order to accommodate [the Appellant's] return, however, if in our opinion, the students' safety is put at risk, we will seek to terminate this agreement. (underlining added)

10. MPIC had retained [MPIC's doctor #1] as a medical consultant in this matter. [MPIC's doctor #1] is a member of the Section of Physical Medicine and Rehabilitation, which is [text deleted]. On July 5, 1999, [MPIC's doctor #1] provided the Case Manager with a report indicating that [the Appellant] was capable of driving an extended cab truck without any obvious limitations or safety considerations.

11. On August 18, 1999, [Appellant's pain specialist], [text deleted] who had been consulted by [the Appellant's] personal physician, [text deleted], provided a medical opinion to MPIC with respect to [the Appellant's] left foot pain. In this letter, [Appellant's pain specialist] indicated that in his view the installation of an automatic transmission into a school bus would assist [the Appellant] with the problems he was having using his left foot with a manual transmission.

12. However, [Appellant's pain specialist] further stated in his letter dated August 18, 1999:

> It is my opinion that the combination of [the Appellant's] physical limitations along with his doubts and concerns regarding his ability to safely operate a school bus should raise some concern regarding this appropriateness of allowing [the Appellant] to return o work as a school bus driver. In light of these considerations I do not feel that it would be in the best interest of [the Appellant],

> his school bus passengers, other motorists, or pedestrians to allow [the Appellant] to return to work as a school bus driver.

13. On August 27, 1999, [Appellant's doctor] wrote to [Director of the transportation department of the school division] confirming that [the Appellant] was capable of returning to work in order to operate a school bus with an automatic transmission. In doing this he provided the medical clearance that [director of the transportation department of the school division] had earlier required as a condition to allow [the Appellant] to resume his duties as a school bus driver.

14. On August 31, 1999, the Case Manager wrote to [Secretary-treasurer of the school division] enclosing a copy of [Appellant's doctor's] medical report of August 27, 1999, and [Appellant's pain specialist's] report of May 11, 1999, and noted that [Appellant's doctor] had indicated in his medical report of August 27, 1999, that [the Appellant] was capable of returning to work operating a school bus.

15. The Case Manager requested further medical reports from [Appellant's pain specialist] and [text deleted], an orthopedic surgeon.

(a) On August 31, 1999, the Case Manager wrote to [Appellant's pain specialist] providing him with a copy of [MPIC's doctor #1's] report of July 5, 1999, along with the reports of a private investigation firm dated April 29 and May 14, 1999, and a condensed videotape. The Case Manager requested [Appellant's pain specialist] to provide a medical report in respect of [the Appellant's] capacity to resume his occupation as a school bus driver having regard to this information. (In reply, [Appellant's pain specialist] provided a medical report on October 13, 1999, which will be referred to later in these reasons in paragraph 43 herein.)

(b) On September 13, 1999, the Case Manager also wrote to [Appellant's orthopedic surgeon], and indicated that [the Appellant] had advised that he had seen [Appellant's orthopedic surgeon] on August 30, 1999. The Case Manager requested that [Appellant's orthopedic surgeon] advise him as to whether or not there were any functional or restrictions or limitations that he would place on [the Appellant] that would affect his ability to return to work as a school bus driver. (In reply, [Appellant's orthopedic surgeon] provided a medical report on October 13, 1999, which will be referred to later in these reasons in paragraph 42 herein.)

16. [The Appellant] did not return to work on August 31, 1999. Negotiations were taking place between [Secretary-treasurer of the school division] and the Case Manager in respect to a number of matters relating to [the Appellant's] return to work. These matters included MPIC agreeing to pay the cost of the conversion of a school bus from a standard transmission to an automatic transmission, the payment by MPIC to [the Appellant] of IRI benefits when the bus with automatic transmission was not available for him to use, and the requirement of [the Appellant] to undergo an in-vehicle training road test to insure he was completely fit to return to work on a regularly re-occurring basis.

17. On September 3, 1999, [Director of the transportation department of the school division], (at the request of [text deleted], a staff officer with [text deleted] and a consultant to the school division), wrote to [School division consultant], providing him with a list of some of the physical demands that persons must be capable of performing in their duties as a school bus driver. On this list was the following requirement:

> "Drivers must be medically and physically fit to assist students out of the bus in an emergency" (underline added)

18. In order to deal with the issues raised in [Director of the transportation department of the school division's] letter to [School division consultant], relating to [the Appellant's] return to work, a meeting took place between [School division consultant], [Director of the transportation department of the school division], [the Appellant] and the Case Manager on September 13, 1999.

19. A description of what took place at this meeting is set out in the handwritten notes of [School division consultant], a copy of which was subsequently provided to [text deleted] ([the Appellant's] solicitor), [Director of the transportation department of the school division] and the Case Manager. [School division consultant] in his notes indicates that:

1. It appeared that there was a consensus among the persons present at the meeting that [the Appellant] was fit and able to return to school bus driving if the bus was converted to an automatic transmission;
2. However there was one major outstanding issue related to the safety of [the Appellant] driving a school bus. [School division consultant] referred to [Appellant's pain specialist's] letter dated August 18, 1999, and to [the Appellant's] comments concerning his capability in the area of safety in the operation of a school bus. These issues [School division consultant] stated raised a concern with the school division;
3. [School division consultant] noted that he had earlier requested [Director of the transportation department of the school division] to prepare a list of the duties and responsibilities which had been provided to [School division consultant] by [Director of the transportation department of the school division] in a letter dated September 3, 1999; and

4. [School division consultant] requested [the Appellant] to review carefully [Director of the transportation department of the school division's] written description of the physical demands bus drivers must be capable of performing in carrying out their duties as a bus driver. [School division consultant] requested [the Appellant] to advise him whether [the Appellant] felt he was capable of safely performing these duties as a school bus driver. In response [the Appellant] replied that he definitely had concerns with his ability to safely perform his duties as a bus driver.

20. After the meeting of September 13, 1999, [Director of the transportation department of the school division] wrote to the Case Manager on September 14, 1999, and stated as follows:

> This letter is to outline the results of our meeting on September 13, 1999, with [the Appellant], [School division consultant] and [Director of the transportation department of the school division].
>
> 1. [School division consultant] asked [the Appellant] to review carefully [Director of the transportation department of the school division's] written job description of the physical demands bus drivers must be capable of performing;
>
> 2. [School division consultant] then asked [the Appellant] if he felt he was capable of safely performing his duties as a school bus driver.
>
> 3. [The Appellant] replied that he definitely had concerns with his ability to safely perform his duties as a school bus driver.
>
> Based on concerns expressed by [the Appellant] regarding his ability to safely perform his duties as a school bus driver, the [text deleted] School Division is not prepared, at this time, to have [the Appellant] return to his position as a school bus driver.

21. The school division has an obvious and fundamental duty to ensure that the children transported in school buses are safe. If the school division had any concern as to [the Appellant's] capacity to carry out the physical demands of his job as a bus driver in an

emergency situation, then it was absolutely justified in refusing to permit him to continue to work as a bus driver. [The Appellant] was required, as a responsible employee, to respond candidly and honestly to the questions put to him in respect to safety by [School division consultant]. Safety was not only an issue of concern to the school division, but it was also of concern to [the Appellant] as well.

TERMINATION OF IRI BENEFITS BY CASE MANAGER

22. On September 14, 1999, the Case Manager contacted [the Appellant] and abruptly terminated his IRI benefits effective September 15, 1999.

23. [The Appellant] testified under oath at the Appeal Commission hearing and stated that on September 14, 1999, the Case Manager contacted him by phone and criticized [the Appellant] for informing the representatives of the school division that he did not feel that he was 100% fit to return to his employment.

24. The same complaint is contained in a letter dated October 4, 1999, from [Appellant's representative] to the Case Manager. In this letter, [Appellant's representative] stated:

> I was deeply concerned to hear about your comments to [the Appellant] in your telephone conversation of September 14, 1999, where you indicated to [the Appellant] that you expected him to advise his employer that he was 100% fit to return to his employment. As a representative of a Public Insurance Corporation you have a duty to promote the safety of everyone using our highways particularly the safety of young school age children. It is quite evident that you have completely neglected, in assessing [the Appellant's] situation, any of those safety concerns which directly impact upon their welfare.

25. At the Appeal Commission hearing, the legal counsel for MPIC did not challenge either [the Appellant's] testimony on this issue nor [Appellant's representative's] above mentioned comments in his letter dated October 4, 1999.

26. On October 1, 1999, the Case Manager wrote to [the Appellant] setting out the reasons for terminating the IRI benefits. In this letter, the Case Manager referred to the September 13 meeting and stated:

> Based on the safety concerns you expressed to your employer, they are not prepared to accept your return back to work as a school bus driver. Your employer confirmed that as long as you continued to express any concerns whatsoever about safety issues they are not prepared to accept your return back to work as a school bus driver. You were aware that the medical information stated that you were capable of returning safely, yet you chose to state otherwise. (underlining added)
>
> . . .
>
> In accordance with Section 160, we have identified the following:
> 1. The activities you display outside the medical setting are not in keeping with what you have displayed in the medical setting.
> 2. Medical information supports that you are functionally capable of resuming your occupation as a school bus driver safely. You continue to indicate to the contrary knowing full well that your employer would not be prepared to allow your return back to work as a school bus driver as long as you continue to voice any concern regarding safety issues. (underlining added)
>
> Given all of the above, you have demonstrated an unwillingness to comply and work with Manitoba Public Insurance towards your rehabilitation. You have been advised previously of the importance of your involvement in this program yet you have chosen not to comply with the statutory requirements as outlined under Section 160. Accordingly, there is no further entitlement to Income Replacement Indemnity and other benefits in accordance with Section 160 effective September 15, 1999.

27. The Case Manager's letter asserts that [the Appellant] failed to comply with Section 160(g) of the *Act* by failing to follow or participate in a rehabilitation program made available by MPIC. The Case Manager also stated in his letter:

> 2. Medical information supports that you are functionally capable of resuming your occupation as a school bus driver safely. You continue to indicate to the contrary knowing full well that your employer would not be prepared to allow your return back to work as a school bus driver as long as you continue to voice any concern regarding safety issues.

28. The Case Manager concluded that despite medical evidence available to [the Appellant] which demonstrated that he was functionally capable of safely resuming his occupation as a school bus driver, he intentionally prevented his return to work by voicing concerns about safety. This persuaded the school division to refuse to continue to employ him as a school bus driver.

29. There was no evidence before the Case Manager to support these serious allegations. An examination of [School division consultant's] notes referred to in paragraph 19 herein clearly indicates that it was at his request that [Director of the transportation department of the school division] prepared a list of physical demands in respect of the duties of a bus driver. It was [School division consultant] who raised the concern at the September 13, 1999 meeting as to the physical capacity of [the Appellant] to carry out emergency duties. [The Appellant] was required to respond as candidly and honestly as he could to the question put to him by [School division consultant]. [The Appellant] did not unjustifiably raise concerns about safety in order to persuade the school division not to permit him to return to work.

30. The medical information referred to by the Case Manager in order to justify his criticism of [the Appellant] and on which the Case Manager relied to terminate the IRI benefits of [the Appellant], were the medical reports of [MPIC's doctor #1] dated July 5, 1999, and [Appellant's doctor] dated August 27, 1999. In both reports, the doctors indicated that [the Appellant] was capable of operating a bus in a safe manner.

31. However, both reports were incomplete as they did not take into account the following::

(a) The information in the letter [Director of the transportation department of the school division] had written to [School division consultant] outlining the physical demands of a bus driver in an emergency situation;

(b) the information contained in the discussions between [School division consultant] and [the Appellant] at the meeting of September 13, 1999;

(c) the decision of the school division not to permit [the Appellant] to return to his duties as a bus driver in view of the safety concerns.

32. As a result, neither [Appellant's doctor] nor [MPIC's doctor #1] had the opportunity to address the critical safety issue arising out of the physical and medical capacity of [the Appellant] to act effectively as a bus driver in an emergency situation. This safety issue was the primary reason why the school division made its decision not to permit [the Appellant] to return to his duties as a bus driver.

33. After the meeting of September 13, 1999, the Case Manager should have provided [Appellant's doctor] and [MPIC's doctor #1] with the information he obtained at that meeting and asked them to comment on the physical and medical capacity of [the Appellant] to operate effectively as a bus driver in an emergency situation. Unfortunately, the Case Manager did not do so, but instead made a decision based on the obviously incomplete medical information available at that point, and terminated the IRI benefits.

34. It therefore appears to the Commission that on September 14, 1999 there was insufficient medical information available to the Case Manager to abruptly terminate the IRI benefits, pursuant to Section 110(1)(a) of the *Act*.

35. The Case Manager had the opportunity shortly after terminating the IRI benefits to reconsider his decision and he failed to do so.

36. Four days after the IRI benefits were terminated, [the Appellant's] lawyer, [text deleted], wrote to the Case Manager by letter dated October 4, 1999, and stated:

> I have also reviewed the medical report of [MPIC's doctor #1] dated July 5, 1999 dealing with [the Appellant's] capabilities of resuming his occupation. It is clearly evident that the full extent of [the Appellant's] duties and the safety concerns that are raised regarding the discharge of those duties, given the fact that he would be in charge of anywhere up to 66 students at any one time, were not addressed nor considered.
>
> These issues were, however, considered at the meeting among yourself and representatives of [the Appellant's] employer.
>
> I note that [Director of the transportation department of the school division's] letter is unequivocally clear that "[text deleted] School Division is not prepared, at this time, to have [the Appellant] return to his position as a school bus driver". I am advised that notwithstanding the definitive position of [the Appellant's] employer that you have proceeded to terminate his wage indemnity benefits, which in my opinion is outrageous in the circumstances.

37. The Commission agrees with [Appellant's representative's] comments in respect of weight to be given to [MPIC's doctor #1's] report dated July 5, 1999. The same criticism could be applied in respect to the weight which could be attributed to [Appellant's doctor's] report dated August 27, 1999.

38. In the light of [Appellant's representative's] letter to the Case Manager dated October 4, 1999, the Case Manager should have:

(a) rescinded his previous decision to terminate the IRI benefits;

(b) conducted an investigation as set out in paragraph 33 herein.

If the Case Manager had conducted the appropriate investigation he would have had available to him objective medical information, which would have permitted him to determine whether or not [the Appellant's] concerns were correct, and whether or not [the Appellant] was physically and medically capable of safely operating a bus in an emergency situation.

39. Notwithstanding that there was new information available to the Case Manager arising out of the meeting of September 13, 1999, which could have materially affected the medical reports of [Appellant's doctor] and [MPIC's doctor #1], and despite comments in [Appellant's representative's] letter to the Case Manager referred to in paragraph 36 herein, the Case Manager ignored the new information and [Appellant's representative's] comments.

40. The Case Manager rejected [the Appellant's] concerns, and concluded that having regard to the incomplete medical reports of [MPIC's doctor #1] and [Appellant's doctor] that [the Appellant] was functionally capable of returning to work.

41. It should also be noted that the Case Manager did not provide the new information available through the meeting of September 13, 1999 to [Appellant's orthopedic surgeon] or [Appellant's pain specialist].

42. [Appellant's orthopedic surgeon's] report dated October 13, 1999, was provided by [Appellant's orthopedic surgeon] to the Case Manager in response to a letter from the Case Manager dated September 13, 1999 (referred to paragraph 15(b) herein). In this letter, [Appellant's orthopedic surgeon] indicated that in his opinion as far as the ankle injury was concerned [the Appellant] should be able to return to his former job as a school bus driver. Unfortunately, [Appellant's orthopedic surgeon] was not provided with the new information arising out of the meeting of September 13, 1999, and was not given an opportunity to address the safety issue which caused the school division to refuse to permit [the Appellant] to return to work as a bus driver.

43. [Appellant's pain specialist's] report dated October 13, 1999, was in reply to a request by the Case Manager for a report on August 31, 1999 (referred to paragraph 15(a) herein). This request obviously occurred prior to the meeting of September 13, 1999, and so the Case Manager could not have at that time have provided [Appellant's pain specialist] with any information arising out of the September 13, 1999, meeting. However, this information obviously was relevant and when it became available it should have been provided to [Appellant's pain specialist].

44. It should also be noted that when [Appellant's doctor] subsequently became aware of the safety issue, he revised his medical opinion and wrote a letter dated December 13, 1999, which [Appellant's representative] provided to MPIC by letter dated January 31, 2000. In this letter, [Appellant's doctor] stated:

> Would [the Appellant], due to his dysfunction, be able to evacuate a bus if a supervisory role did occur?
> Therefore, the issue is, "Is he physically fit to assist students out of a bus in an emergency situation?". He and I both believe that he may not be capable of handling this duty. There are two problems: range of motion of his neck as well as ambulation with the left ankle. Due to these factors, he would not be capable of handling a crisis.
> Another issue is performing a complete pre-trip inspection. He would not be able to examine the exhaust pipes, to assess whether they are leaking or hanging.
> In addition, he would have a difficult time carrying bigger students off the bus if there were an emergency problem.
> There is also a four-foot drop at the back of the bus and he does not believe he could land on his ankle easily.
> On the basis of the above, and certain concerns that I have I believe he is not fit to carry on with his duties. (underlining added)

45. When the Case Manager received a copy of [Appellant's doctor's] letter from [Appellant's representative] shortly after January 31, 2000, the Case Manager had a second opportunity to reconsider his decision to terminate the IRI benefits, and he chose not to do so. Upon receiving [Appellant's doctor's] letter, the Case Manager should have communicated with

[MPIC's doctor #1], [Appellant's pain specialist] and [Appellant's orthopedic surgeon], and at that time provided them with [Appellant's doctor's] report dated December 13, 1999, all the relevant information with respect to the meeting of September 13, 1999, and requested their medical opinion as to whether or not [the Appellant] had the physical and medical capacity to act safely in dealing with children in an emergency situation when he was performing his duties as a bus driver. Unfortunately, the Case Manager did not obtain these medical opinions.

46. It is reasonable to assume if [Appellant's doctor] changed his opinion as to whether or not [the Appellant] could operate a bus safely in an emergency situation, that [Appellant's orthopedic surgeon], [Appellant's pain specialist] and [MPIC's doctor #1] may have come to the same conclusion and changed their medical opinions in this respect. However, none of the doctors were given the opportunity to reconsider their medical opinions.

APPLICATION FOR REVIEW

47. The Appellant, [text deleted], applied to review the claim in an application dated November 17, 1999, which stated as follows:

> 1. MPI's adjudication neglected to account for a variety of safety issues associated with the operation of a public school bus with responsibility for approx. 60 young children which safety duties were discussed in detail with MPI adjuster and employer for the first time on Sept. 13, 1999;
> 2. Claimant remains unable to perform evacuation procedures required of a school bus driver and his employer is not prepared to permit claimant to operate a school bus.

48. The review took place on April 13, 2000 and the review decision was issued on May 11, 2000. The Internal Review Officer accepted the decision of the Case Manager and confirmed the

termination of the IRI Benefits. However, he found that the termination of these benefits was justified under Section 110(1)(a) of the *Act* and not under section 160 of the *Act*, as determined by the Case Manager.

49. In this decision, the Review Officer indicated that he was troubled by the fact that on September 13, 1999, on the very eve of the expected return to work, another barrier suddenly appeared. This barrier was [the Appellant's] statement that he did not feel he was physically capable of dealing with small children in an emergency situation when driving the bus.

50. The Review Officer, like the Case Manager, was extremely skeptical of [the Appellant's] position in this regard. The Review Officer, like the Case Manager, accepted incomplete medical reports to conclude that there was no justification for [the Appellant's] raising concerns about his physical and medical capacity to return to work as a bus driver.

51. The criticism by the Internal Review Officer of [the Appellant] was not justified. [The Appellant], when questioned by [School division consultant] was entitled to raise concerns about his physical capacity to drive a school bus in an emergency situation. The school division accepted [the Appellant's] concerns as legitimate and refused to have him returned to work as a bus driver. It was open to the school division, if they believed that [the Appellant] had been unjustifiably refusing to return to work, to take disciplinary action against [the Appellant], but they did not do so at that time.

52. As it turned out, [the Appellant's] concerns have been corroborated by [Appellant's doctor's] medical report dated December 13, 1999. In addition, [the Appellant's] concerns were

confirmed by [Appellant's pain specialist's] letter to [text deleted] dated August 18, 1999, which is referred to in paragraph 12 herein.

53. Unfortunately, the Internal Review Officer, like the Case Manager, in concluding that the IRI benefits should be terminated effective September 14, 1999, failed to give any weight to the following evidence:

1) The information arising out of the September 13, 1999 meeting, the correspondence between the various parties, and the hand-written notes of [school division consultant] (referred to in paragraphs 17-20, herein).
2) [Appellant's representative's] letter to the Case Manager, dated October 4, 1999, wherein he criticizes the manner in which the Case Manager had spoken to [the Appellant] on September 14, 1999, and [MPIC's doctor #1's] medical report which had not taken into account the safety issue. (referred to in paragraph 36 herein).
3) The revised medical report of September 13, 1999, wherein [Appellant's doctor] determined that [the Appellant] was not capable of operating a school bus in an emergency situation. (referred to in paragraph 44 herein). [Appellant's doctor] was the only medical doctor who had the opportunity in regard to [the Appellant's] ankle injury to determine whether or not [the Appellant] was capable of operating a bus safely in an emergency situation.

54. In the Commission's view, this evidence was of sufficient weight to have caused the Internal Review Officer to rescind the Case Manager's decision to terminate the IRI benefits and refer the matter back to the Case Manager to conduct a proper investigation into this matter.

55. In addition to ignoring this material evidence, the Internal Review Officer, like the Case Manager accepted the incomplete medical reports of [Appellant's orthopedic surgeon], [Appellant's pain specialist], [MPIC's doctor #1] and [MPIC's doctor #2]. As indicated earlier in these reasons, none of these reports addressed the central issue of the physical and medical capacity of [the Appellant] to effectively operate a bus safely in an emergency situation.

56. It should be noted that when arriving at his decision, the Review Officer accepted [Appellant's doctor's] medical report dated August 27, 1999 but rejected [Appellant's doctor's] revised medical report dated December 13, 1999. As indicated earlier, [Appellant's doctor] was the only medical doctor who addressed the issue as to whether or not [the Appellant] had the medical and physical capacity to operate a bus safely in an emergency situation, in his report dated December 13, 1999.

57. In justifying his decision to reject [Appellant's doctor's] medical report of December 13, 1999, the Review Officer asserted that since [Appellant's doctor's] opinion was at variance with [MPIC's doctor #1] as it related to the ranges of motion of the neck and that [Appellant's doctor's] opinion relating to the problems of the left ankle was at odds with [Appellant's orthopedic surgeon's] medical opinion, he could not give much weight to [Appellant's doctor's] report. However, in drawing this conclusion, the Review Officer ignored the comments of [Appellant's pain specialist], who in his reports of August 18, 1999 and October 13, 1999, supported [Appellant's doctor's] concerns as to the limited range of [the Appellant's] neck movements. Although [Appellant's orthopedic surgeon's] medical opinion is at variance with [Appellant's doctor's] medical opinion, [Appellant's orthopedic surgeon's] medical opinion does not address the fundamental issue of safety in an emergency situation.

58. As a result, the Review Officer should not have given any weight to [Appellant's orthopedic surgeon's] medical report when rejecting [Appellant's doctor's] medical report of December 13, 1999. The Review Officer, in rejecting [Appellant's doctor's] medical report dated December 13, 1999, asserted that [Appellant's doctor's] opinion was a theory only and had never been tested. The same criticism can be made in respect to the medical reports of [MPIC's doctor #1], [MPIC's doctor #2], [Appellant's pain specialist] and [Appellant's orthopedic surgeon], yet the Review Officer had no problem accepting these reports.

59. [The Appellant] testified under oath at the hearing that he was not physically capable of carrying on his duties as a bus driver in an emergency situation. He further testified that the back of the bus that he is required to operate has a four foot drop. In an emergency situation, he may be required to physically carry small children from the bus by jumping off the back of the bus. [The Appellant] testified that he was unable, having regard to the condition of his ankle, to land on his ankle easily if he jumped. [The Appellant] testified in a candid and direct manner, and the Commission accepts his testimony that he was not physically capable of carrying out the duties of a bus driver in a safe manner in an emergency situation.

DECISION

60. In summary, the Commission determines that the Internal Review Officer erred:

1. in concluding that there was sufficient evidence for the Case Manager to have abruptly terminated the entitlement of [the Appellant] to IRI benefits, pursuant to 110(1)(a) of the *Act*;
2. in failing to rescind the decision of the Case Manager and refer the matter back to the Case Manager;

3. by accepting the medical reports of [MPIC's doctor #1], [MPIC's doctor #2] and [Appellant's orthopedic surgeon] in respect to [the Appellant's] left ankle injury;
4. in failing to give appropriate weight to the medical report of [Appellant's doctor] dated December 13, 1999;
5. in failing to give appropriate weight to the relevant portions of [Appellant's pain specialist's] medical reports dated August 18, 1999 and October 13, 1999 in respect of the range [the Appellant's] neck movements;
6. in failing to give appropriate weight to [the Appellant's] testimony that the injury he suffered to his ankle as a result of the accident prevented him from safely fulfilling all aspects of his job as a school bus driver including any physical activity required to respond to an emergency situation.

61. The Commission:

1. accepting the medical opinions of [Appellant's doctor] dated December 13, 1999 and the relevant portions, as set out in [Appellant's pain specialist's] medical reports dated August 18, 1999 and October 13, 1999, in respect to the range of [the Appellant's] neck movements; and
2. accepting the sworn testimony of [the Appellant] that the accident of June 14, 1998, contributed to his continuing ankle problems and prevented him from having the physical and medical capacity on September 14, 1999 to operate a school bus safely in an emergency situation;
3. determines that pursuant to section 81(1)(a) of the *Act*, [the Appellant] has established on the balance of probabilities that on September 14, 1999, he was unable to continue his employment as a bus driver because of the injury he sustained in the accident which occurred on June 14, 1998; and

4. further determines that [the Appellant's] entitlement to Income Replacement Indemnity benefits should be reinstated effective September 15, 1999, and interest to the date of payment at the prescribed rate shall be added to the amount due and owing to him; and

5. the Commission retains jurisdiction in this matter and if the parties are unable to agree as to the amount of the Income Replacement Indemnity benefits, then either party may refer this dispute back to this Commission for final determination; and

6. the decision of the MPIC's Internal Review Officer dated May 11, 2000 is therefore rescinded.

Dated at Winnipeg this 13th day of August, 2001.

MEL MYERS, Q.C.

JEFF PALAMAR

COLON SETTLE, Q.C.