

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-37**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Robert Malazdrewich
Ms Sandra Oakley

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Danielle Robinson and Mr. Kirk Kirby.

HEARING DATE: September 24, 2008 and April 16, 2009

ISSUE(S):

1. Appellant's entitlement to further Income Replacement Indemnity benefits (IRI);
2. Entitlement to reimbursement for travel expenses.

RELEVANT SECTIONS: Sections 83(1)(a) and 111(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 19 of Manitoba Regulation 40/94

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

[The Appellant] was involved in a motor vehicle accident September 12, 2007. In the Appellant's initial application for compensation dated September 19, 2007 the Appellant indicated he had sustained injuries of neck pain, back pain and lower right rib pain. He further indicated he would be attending a physiotherapist three times a week when he went to see [Appellant's doctor] regarding a specialist referral.

At the time of the motor vehicle accident the Appellant reported he was employed part-time (as a cleaner) at the [text deleted] and was self-employed as a recycler picking up scrap metal, lifting metal and driving a truck. He further reported his annual income with the [text deleted] was \$10,000.00, and as a recycler \$15,000.00.

On September 19, 2007 the physiotherapist, [Appellant's physiotherapist], indicated in her initial therapy report that the Appellant had sustained a whiplash injury. This report indicated that the Appellant was currently at work and his occupation was noted to be as a cleaner. It was also noted that a return to the workplace would not adversely affect the natural history of the clinical condition.

In a note to file dated September 20, 2007 the case manager met with the Appellant in respect of his application for compensation. The Appellant indicated to the case manager that in addition to being employed on a part-time basis as a cleaner at the [text deleted], he had a self-employed business and that the Appellant and his girlfriend drove around every day to pick up sheet metal and take it to the scrap yard. The Appellant further advised the case manager that because of the injuries he sustained in the motor vehicle accident, he and his girlfriend were now unable to do this job at which he would be making from between \$125.00 to \$150.00 per day. The Appellant further indicated to the case manager that this job was not recognized by the government and therefore he did not claim this income on his Income Tax Return.

In a note to file the case manager reported that she met with the Appellant on September 21, 2007 and during this time the Appellant spoke with [text deleted], formerly of the IRI unit, who requested the Appellant's 2006 Income Tax return.

On September 25, 2007 MPIC received a letter from [text deleted] indicating the Appellant had often hauled two to three loads on a daily basis generating a weekly income of \$300.00. As well, a fax was received from [text deleted] dated October 1, 2007 which indicated that certain amounts were paid to [text deleted], which the Appellant indentified as his girlfriend [text deleted]. The case manager noted that the income the Appellant received from [text deleted] and [text deleted] were not included in the Notice of Assessment dated March 16, 2006.

In response to a request from the case manager the [text deleted] provided a declaration that the Appellant was working about 20 hours per week at the rate of \$9.50 per hour.

On October 9, 2007 the receptionist from [text deleted] Physiotherapy Clinic left a message with the case manager indicating that the Appellant had attended appointments on September 19, 21, and 24, 2007 but had not shown up for an appointment on September 25, 2007. It was further reported that the Appellant had attended a physiotherapy therapy appointments for September 26 and 27 and after cancelling an appointment on October 1, he had attended on October 2, 2007. The receptionist further reported that he did not show up for the appointments booked for October 3, and October 5, 2007.

In a note to file dated November 5, 2007 the case manager reports that she had been advised by the [text deleted] Physiotherapy Clinic that the Appellant's attendance had been so sporadic and as a result they could not comment on the Appellant's status. As well there was no actual return to work date available.

On November 5, 2007 the case manager sent a letter to the Appellant requesting additional information to support his position as a self-employed recycler of scrap metal. In particular, she

requested a copy of the 2005 and 2006 Income Tax Returns with accompanying Notices of Assessment in order that the IRI benefits could be determined.

In a note to file dated November 7, 2007 the case manager reported that the physiotherapist, [Appellant's physiotherapist] left a voicemail message indicating that the Appellant had a return to work date of October 22, 2007.

On November 13, 2007 the case manager wrote to the Appellant and advised the Appellant that in order to support a claim for income for IRI in respect of his employment as a recycler MPIC required copies of the Appellant's 2005 and 2006 Income Tax Returns with accompanying Notices of Assessment. The case manager further advised that until such time as the Appellant provided this information MPIC would be unable to finalize the Appellant's calculation for entitlement and could only recognize his employment with the [text deleted] working 20 hours per week which was supported by the Employer Verification of Earnings form.

Case Manager's Decision:

The case manager further advised that in accordance with Section 5 of the Manitoba Regulation 37/94 the Appellant was classified as a "part time earner" and as a result his entitlement to IRI was governed by Section 83(1) of the MPIC Act. The case manager further advised that based on the income the Appellant reported from his employment with the [text deleted], he is entitled to an estimated by-weekly IRI payment of \$325.00 based on Section 111(1) of the MPIC Act.

The case manager further advised that the Appellant's physiotherapist, [text deleted], had confirmed he was able to return to employment on a full-time basis as of October 22, 2007 and

therefore his entitlement to IRI terminated as of October 21, 2007 in accordance with Section 110(1)(a) of the MPIC Act.

The case manager noted that IRI is subject to a seven day waiting period which ended on September 19, 2007 pursuant to Section 152(2) of the MPIC Act. As a result the case manager advised the Appellant a cheque in the amount of \$742.86 had been sent to him under separate cover representing his IRI for the period September 20, 2007 to October 21, 2007.

The Commission notes that MPIC did not provide any IRI to the Appellant in respect of any income he earned from the recycling business.

The case manager, in a note to file dated November 14, 2007, reported that the Appellant left a voicemail message with her indicating that he no longer required physiotherapy as "he is better". The Appellant further indicated he was not required to file Income Tax Returns in respect of the recycling business so filing would be pointless.

In a note to file dated November 23, 2007, [text deleted] of MPIC's IRI Unit indicated that if the Appellant was able to provide Personal Tax Returns, Notices of Assessment and Statement of Business Activities for 2006, 2005 and 2004, the metal recycler employment could be reviewed.

In a note to file dated December 10, 2007 the case manager reported that [text deleted] had reviewed the Appellant's file and indicated that the earnings stemming from the metal recycling were unreported for taxation. As a result MPIC did not recognize these earnings for IRI purposes and accordingly MPIC determined that the Appellant was entitled to an IRI bi-weekly payment of \$324.46 based on his employment with the [text deleted].

In a note to file dated December 11 2007 the case manager reported receipt of a Therapy Discharge Report from [Appellant's physiotherapist], which indicated the Appellant had not returned to physiotherapy since November 6, 2007.

On December 12, 2007 the case manager forwarded a letter to the Appellant which indicated that in order to support his earnings from the metal recycling employment, MPIC would require his 2005 and 2006 Income Tax Returns with accompanying Notices of Assessment and that MPIC does not recognize unreported earnings for IRI purposes.

On January 28, 2008 the Appellant filed an application for review of the Internal Review Officer's decision and in this application the Appellant reiterated his belief that no Notices of Assessment should be required.

Internal Review Officer's Decision:

On February 20, 2008 the Appellant's Internal Review hearing took place. In a report dated March 25, 2008, the Internal Review Officer Report determined that the Appellant was entitled to IRI for the period September 20, 2007 to October 21, 2007 when he was unable to conduct his cleaning employment due to the injuries he sustained in the motor vehicle accident.

At the request of the Internal Review Officer the Appellant provided a Notice of Assessment for the 2005 and 2006 tax years. These assessments reported income from the [text deleted] and the income benefits the Appellant received from Worker's Compensation which he had been receiving since 1988. In her decision, the Internal Review officer stated:

“Unless recycling amounts are included in your Income Tax Return and Notice of Assessment of 2007 with substantiation of your business activities, I cannot consider them based upon your past practice of not reporting such income in your personal income tax for 2005 and 2006.

I see no basis of overturning the classification that you are deemed a “part-time earner” with the [text deleted] as defined by section 83(1) of the *Act*. Coupled with your sporadic attendance with physiotherapy and your declaration to [text deleted] indicating that you no longer required physiotherapy as you were “better” in November 2007, I am satisfied that [text deleted]’s IRI decision is correct. I find that you are entitled to IRI for the period of September 20, 2007 (after the mandatory seven day waiting period under section 152(2) of the *Act*) to October 21, 2007 based upon the evidence. (underlining added)

Appeal:

The Appellant had filed a Notice of Appeal dated April 7, 2008. The relevant provisions of the MPIC Act and Regulations in respect of this appeal are:

MPIC Act:

Entitlement to I.R.I. for first 180 days

[83\(1\)](#) A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:

(a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;

I.R.I. is 90% of net income

[111\(1\)](#) The income replacement indemnity of a victim under this Division is equal to 90% of his or her net income computed on a yearly basis.

Manitoba Regulation 40/94:

Travel and accommodation

19 Subject to sections 20 to 29 and Schedule B, the corporation shall pay travel or accommodation expenses incurred by a victim for the purpose of receiving care.

The appeal hearing before the Commission commenced on September 24, 2008 and continued on April 16, 2009. The Appellant appeared on his own behalf and MPIC was represented by Ms Danielle Robinson.

Travel Expenses

The Appellant, in his testimony, claimed reimbursement for travel expenses. MPIC's legal counsel indicated that the Appellant's travel expenses related to the property damage of the Appellant's motor vehicle which occurred in the accident and the Appellant should discuss this matter with the case manager who deals with property damage. The Appellant agreed to follow up on this matter, and indicated that he did not wish to proceed on this matter in this appeal.

The Appellant did provide three gasoline receipts for which he sought reimbursement from MPIC. These three receipts were all from [text deleted] on the same date – 10/9/08. The first receipt which was recorded at the time of 12:52:54 pm indicated the purchase of 22.04 litres of gas in the amount of \$25.00. The next receipt was recorded at 1:22:55 pm for 35.270 litres in the amount of \$40.00. The third receipt was recorded at 1:26:33 pm and indicated two purchases of gasoline; the first at pump 87 for 8.818 litres in the amount of \$10.00 and the second at pump 94 for 15.948 litres for an amount of \$20.00. The total amount of this receipt was \$30.00

In cross-examination the Appellant was unable to explain why he was seeking reimbursement of travel expenses in respect of three separate gasoline receipts that occurred on the same date within minutes of each purchase. The inability of the Appellant to explain his absurd attempt to seek reimbursement of these travel expenses resulted in the Commission dismissing his claim for travel expenses.

Income Replacement Indemnity (IRI)

The Appellant testified at the appeal hearing that during the period of time from September 13, 2007 to December 1, 2007 he was unable to work delivering scrap metal to [text deleted] and [text deleted]. As a result the Appellant claimed this loss of income from MPIC during this period of time.

The Appellant testified that:

1. An undated report from [text deleted] (filed in these proceedings) established the amount he was paid by [text deleted] on a daily basis for the purchase of scrap between June 1, 2007 and November 1, 2007 in the total amount of \$4,980.71.
2. His girlfriend, [text deleted] assisted him in collecting the scrap metal which was sold to [text deleted].
3. Although [text deleted]'s payment records indicated that the majority of the payments were made to [Appellant's girlfriend], they were in fact payments he was entitled to and which he received.

The Appellant also filed a letter with the Commission signed by [Appellant's girlfriend] which indicated that the scrap was the Appellant's and not hers.

In his testimony the Appellant referred to a letter from [text deleted] (filed in these proceedings) which indicated that:

- a) the Appellant had been hauling scrap metal to the company for several years;
- b) he often hauls two or three loads on a daily basis; and
- c) this would generate a weekly income of \$300.00 depending on the size of each load.

In respect of the failure to file Income Tax Returns in respect of his recycling business, the Appellant testified he was told that he was not required to do so and therefore did not file the Income Tax Returns in respect of any income earned from this business.

MPIC did not call any witnesses.

Submissions:

The Appellant, in his submission, repeated his testimony that as a result of the injuries sustained in the motor vehicle accident he was unable to deliver scrap metal to [text deleted] and [text deleted] and as a result claimed this loss of income from the period September 13, 2007 to December 1, 2007.

MPIC's legal counsel, in her submission, indicated that:

1. MPIC was correct in rejecting any reimbursement to the Appellant for IRI in respect of his recycling business because he could not substantiate any income he had received from these activities as reflected in his Income Tax Return and Notice of Assessment for the year 2007.
2. Without substantiating the income from his business activity as reflected in his Income Tax Return and Notice of Assessment, MPIC would not consider the payment for any loss of income.

MPIC's legal counsel further asserted that MPIC had correctly determined that the period of time that the Appellant may be entitled to IRI was only for the period September 20, 2007 to October 21, 2007. In support of this position, MPIC's legal counsel referred to:

1. the evidence of [Appellant's physiotherapist], who indicated that the Appellant's attendance of physiotherapy treatments had been sporadic and she had confirmed to MPIC that the Appellant's return to work would be on October 22, 2007; and
2. the case manager's report on November 14, 2007, which indicated that the Appellant had left a voice mail indicating that he no longer required any physiotherapy as "he is better".

MPIC's legal counsel submitted that:

1. The [text deleted] payment records indicated that the Appellant had not sold any scrap metal to [text deleted] for the period September 19, 2007 to October 10, 2007 and as a result the Appellant was not entitled to any IRI for that period.
2. The Appellant was not entitled to receive any IRI for the period after November 1, 2007. MPIC's legal counsel referred to her letter to the Commission dated January 21, 2009 which indicated that [text deleted] had advised that as of November 1, 2007 he ceased doing business with both [the Appellant] and [Appellant's girlfriend].
3. In response to a question from the Commission the Appellant has confirmed that [text deleted] ceased doing business with him and [Appellant's girlfriend] on November 1, 2007.

MPIC's legal counsel noted that the Appellant was claiming IRI for the period September 13, 2007 to December 1, 2007 because he was unable to conduct his recycling business due to the injuries he sustained in the motor vehicle accident. MPIC's legal counsel rejected the Appellant's submission on the grounds that an examination of [text deleted]'s payment record indicated:

1. for the period January 2, 4, 9 and 10, and March 26, 2007 the customer being paid with respect to the sale of scrap metal was the Appellant;

2. for the period thereafter from April 9, 2007 to November 1, 2007, the customer being paid was not the Appellant, but [text deleted], the Appellant's girlfriend.

MPIC's legal counsel submitted that the person entitled to payment of the sale of scrap metal to [text deleted] during these periods of time was [Appellant's girlfriend] and not the Appellant.

MPIC's legal counsel referred to her letter to the Commission dated January 21, 2009:

"Further to your letter of November 7, 2008, I have now been in contact with [text deleted] who has confirmed the following;

1. The party whose name is on their paper work is the party who gets the monies for any material sold;
2. To ensure that they do not have any problems, they have that person sign when he or she is paid;
3. Any arrangement that [the Appellant] may have had with [Appellant's girlfriend] for the monies that they paid out to her is unknown to them."

MPIC's legal counsel therefore submitted that there was no evidence that the Appellant was entitled to receive any IRI for the period September 13, 2007 to December 1, 2007 since [Appellant's girlfriend], and not the Appellant, had a contract to sell scrap metal to [text deleted]..

Discussion – Failure to Report Income Tax:

The Commission disagrees with MPIC's position that they are entitled to reject any consideration for the payment of IRI to the Appellant on the grounds that he had not filed an Income Tax Return and as a result there was no substantiation of a loss of income upon an examination of the Appellant's Income Tax Return or Notice of Assessment. The Commission finds that there is no statutory provision in the MPIC Act which permits MPIC to exclude payment of IRI solely on the ground that an Income Tax Return had not been filed by the Appellant in respect of the income he earned from [text deleted]s and [text deleted].

The Commission finds that the non-payment of Income Tax is only one of the factors which MPIC may consider in determining whether or not an Appellant is entitled to IRI as a result of injuries sustained in a motor vehicle accident. MPIC, before determining the entitlement of an Appellant to IRI must consider a number of factors including the relevant provisions of the MPIC Act and Regulations, documentary evidence, the testimony of the witnesses, as well as the failure of the Appellant to file Income Tax Returns.

The Commission notes, for example, that MPIC would not agree that if an Appellant was claiming the sum of \$50,000.00 in respect of IRI and provided an Income Tax Return substantiating the Appellant had in fact earned \$50,000.00 for the period of time that IRI was claimed for, MPIC would not necessarily be required to pay the Appellant the amount of \$50,000.00 as claimed. MPIC would be entitled to consider not only the Income Tax Return substantiating the income of \$50,000.00 but all of the other relevant factors before determining whether the Appellant was entitled to IRI in the amount of \$50,000.00 or any other amount.

Entitlement to IRI:

The Commission finds that MPIC correctly determined that the period of time the Appellant was entitled to receive IRI was September 20, 2007 to October 21, 2007. The Appellant has established on a balance of probabilities that as a result of his motor vehicle accident injuries, he was unable to work at the [text deleted] during the period September 20, 2007 to October 21, 2007. The Commission, however, finds that after October 21, 2007, the Appellant has not established, on a balance of probabilities that he was unable to work due to the injuries he sustained in the motor vehicle accident.

MPIC correctly determined that the Appellant was entitled to receive IRI for the loss of income from his work with the [text deleted] and income benefits from the Worker's Compensation Board. However, the Commission rejects the Appellant's claim for IRI for the period September 20, 2007 to December 1, 2007 in respect of any loss of income from the sale of scrap metal to [text deleted]. In coming to this conclusion the Commission has carefully considered the documentary evidence filed in the proceedings, and the testimony of the Appellant, and determined that as a result of several significant contradictions in his testimony the Commission cannot give any weight to this testimony.

The Commission finds that the Appellant's explanation that he did not pay Income Tax in respect of the income earned from his recycling business because he was told from an unknown source he was not required to is not credible. The Appellant is familiar with the requirements of a citizen to file an Income Tax Return and the obligation to pay Income Tax in respect of earned income. The Appellant did file an Income Tax Return in respect of his earned from the [text deleted] and from the income benefits he received from Worker's Compensation Board.

The Appellant did not in his testimony provide the source of the information which permitted him not to file an Income Tax Return. The Appellant did not testify that he sought professional advice from a Chartered Accountant, a bookkeeper or the Income Tax Department to determine whether or not he was required to pay income tax in respect of his recycling business. In order for the Commission to accept the Appellant's explanation, the Appellant needed to name the source of this information and call evidence to corroborate the Appellant's testimony in this respect. However, the Appellant failed to do so.

For these reasons the Appellant did not provide a convincing explanation in respect of his failure to file an Income Tax Return and this raised a concern with the Commission in respect of the Appellant's credibility

The Appellant testified that he was unable to work after October 21, 2007. This testimony is contradicted by:

1. the evidence of [Appellant's physiotherapist], the physiotherapist, who indicated that the Appellant's attendance of physiotherapy treatments had been sporadic and she had confirmed to MPIC that the Appellant's return to work would be on October 22, 2007; and
2. the case manager's report on November 14, 2007, which indicated that the Appellant had left a voice mail indicating that he no longer required any physiotherapy as "he is better".

The Commission also notes that the Appellant, in his testimony, did admit that he returned to work after October 21, 2007 but was unable to work to his full capacity.

The Commission further notes that the Appellant was unable to work after October 21, 2007 until December 1, 2007, arising out of the injuries sustained in the motor vehicle accident, and therefore claimed a loss of income from his recycling business. The Commission finds that the payment records of [text deleted], after October 10, 2007 until November 1, 2007 indicate scrap was being sold to [text deleted] on a fairly regular basis and that these sales were consistent with the sale of scrap metal prior to the motor vehicle accident on September 12, 2007. The payment records of [text deleted] contradict the testimony that he was unable to work after October 21, 2007 due to the injuries sustained in the motor vehicle accident.

In response to this apparent contradiction, the Appellant submitted that because of the injuries sustained in the motor vehicle accident, he was unable to work at his full capacity and therefore he was not claiming the total loss of income during the period after October 10, 2007, but was only claiming partial loss of the income during that period of time.

The Commission notes however, that in providing this explanation the Appellant has shifted ground in respect of the income he alleged to have lost from [text deleted] during the period from October 10, 2007 to November 1, 2007.

The Appellant in his discussions with the Internal Review Officer and in his initial statement to the Commission at the commencement of the appeal hearing asserted that he was seeking loss of income for the period September 13, 2007 to December 1, 2007 and he made no claim that he was only seeking top-up for his loss of income during this period of time and not the full amount.

The Commission determines that the Appellant changed his testimony:

1. Only after it was pointed out to the Appellant by the Commission that [text deleted]'s records indicated that scrap was being purchased by [text deleted] after October 10, 2007 until November 1, 2007; and
2. There did not appear to be any reduction in the average amount of scrap that was being purchased by [text deleted] during this period of time.

For these reasons, the Commission rejects the Appellant's testimony that he was only seeking a top-up of income for this period of time from [text deleted].

The Commission also notes that the Appellant was claiming IRI in respect of loss of income from [text deleted] after November 1, 2007. The Commission further notes that MPIC's legal

counsel pointed out in her letter of January 21, 2009 to the Commission that [text deleted] had advised her that as of November 1, 2007, [text deleted] had ceased to do business with the Appellant and [Appellant's girlfriend]. The Appellant, in his testimony, confirmed to the Commission that he had ceased to do business with [text deleted] after November 1, 2007. However, the Appellant was unable to explain why he had claimed a loss of income from [text deleted] for the period November 1, 2007 to December 1, 2007 when in fact he wasn't selling any scrap metal to [text deleted] during the month of November.

Decision:

IRI – [text deleted]:

The Commission finds that the Appellant has failed to establish, on a balance of probabilities, that he was entitled to receive IRI in respect of his recycling business relating to [text deleted] for the entire period September 13, 2007 to December 1, 2007. In arriving at this conclusion, the Commission gives very little weight to the Appellant's testimony on the following grounds:

- 1) The Appellant's absurd attempt to obtain travel expenses from MPIC by producing three gasoline receipts all from [text deleted] on the same date for purchases of gasoline in the amounts of \$25.00, \$40.00 and \$30.00 in respect of purchases minutes apart.
- 2) The implausible explanation by the Appellant for his failure to file an Income Tax Return in respect of the earnings from his recycling business.
- 3) The Appellant's testimony that he was unable to return to work after October 21, 2007 is contradicted by the report of the physiotherapist that he was able to work after October 21, 2007 and the Appellant's report to the case manager on November 14, 2007 that he no longer required any physiotherapy as "he is better".

- 4) The attempt by the Appellant to shift grounds when he initially claimed full payment of loss of income after October 21, 2007 and subsequently asserted he was only entitled to a top-up in respect of his loss of income.
- 5) The Appellant claimed IRI for the period November 1, 2007 to December 1, 2007 in respect of the loss of income from [text deleted]. However he admitted in his testimony that [text deleted] had ceased to do business with him after November 1, 2007. The Appellant was unable to explain why he claimed the loss of income from [text deleted] for the period November 1, 2007 to December 1, 2007 when in fact there is no record of any scrap sold to [text deleted] after November 1, 2007

The Appellant had testified that the recycling business was his business and not [Appellant's girlfriend]'s and she had just worked along with him. [Appellant's girlfriend], in a letter signed by both herself and the Appellant on January 29, 2009, which was filed with the Commission, indicates that "as far as the Scrap goes the Scrap was [the Appellant]'s".

An examination of [text deleted] payment records does not support either the Appellant's testimony or [Appellant's girlfriend]'s statements in her letter. These records indicate:

1. For the period January 2, 4, 9 and 10, and March 26, 2007 the customer being paid with respect to the sale of scrap metal was the Appellant.
2. For the period thereafter from April 9, 2007 to September 18, 2007, the customer being paid was not the Appellant, but [Appellant's girlfriend], the Appellant's girlfriend.
3. No sales were made by either [Appellant's girlfriend] or the Appellant between September 18, 2007 and October 10, 2007.

4. After October 10, 2007, [text deleted] payment records indicate payment to [Appellant's girlfriend] for October 10, 11, 12, 15, 16, 17 22, 23, 24, 26, 30 and November 1, 2007 and thereafter payments ceased.

The Commission notes therefore that with the exception of five payments in which the Appellant is named as the customer, all of the other payments were made to [Appellant's girlfriend]. The Commission further notes that [text deleted] reported to MPIC's legal counsel the manner in which he determined who would be the customer to receive payment for the sale of scrap metal. MPIC's legal counsel filed a letter with the Commission dated January 31, 2009 that states:

- “1. The party whose name is on their paper work is the party who gets the monies for any material sold;
2. To ensure that they do not have any problems, they have that person sign when he or she is paid;
3. Any arrangement that [the Appellant] may have had with [Appellant's girlfriend] for the monies that they paid out to her is unknown to them.”

In providing his explanation, the Appellant challenged [text deleted] statement that [text deleted] gave to MPIC's legal counsel and which is set out in her letter to the Commission dated February 21, 2009. The Commission finds that the Appellant's explanation was unclear and ambiguous and as a result the Commission gives no weight to this explanation.

The Commission notes that the Appellant's girlfriend, [text deleted], was not called by the Appellant to be a witness in these proceedings in order to corroborate his testimony. The Commission determines that in accordance with [text deleted]'s statement that [Appellant's girlfriend] was the person proper who received payments for the sale of scrap metal to [text deleted] between April 9, 2007 and November 1, 2007. The Commission therefore finds that the Appellant has failed to establish on a balance of probabilities that he is entitled to IRI in respect

to the loss of income for sales of scrap metal to [text deleted] for the period September 20, 2007 to October 21, 2007.

IRI – [text deleted]:

The Commission finds that MPIC rejected the Appellant's claim for IRI from [text deleted] on the grounds that he had not filed appropriate tax documents to substantiate his claim. The Commission finds, as it did in respect of [text deleted], that MPIC did not properly consider all of the factors required to be considered in determining whether or not the Appellant was entitled to IRI.

The Commission has concluded that the Appellant, as a result of the motor vehicle accident injuries, was incapable of working between the period of September 20, 2007 and October 21, 2007. On September 21, 2007 MPIC received a letter from [text deleted] indicating the Appellant had often hauled two or three of loads on a daily basis generating a weekly income of \$300.00.

For these reasons, the Commission is referring the Appellant's claim for IRI loss of income from [text deleted] for the period September 20, 2007 to October 21, 2007 back to MPIC to determine whether as a result of the injuries the Appellant sustained in the motor vehicle accident, he was unable to sell any scrap metals to [text deleted] resulting in a loss of income during that period of time entitling him to IRI.

If MPIC determines there was a loss of income to the Appellant during that period of time, then the Commission directs that MPIC determine the amount of IRI that the Appellant was entitled to and to provide payment to him.

In conclusion, the Commission determines that:

- a) The Appellant's appeal in respect of the Internal Review Officer's decision bearing date March 28, 2008 pertaining to the claim for IRI benefits relating to loss of income from [text deleted] is dismissed;
- b) In respect of the Appellant's claim for IRI benefits relating to loss of income from [text deleted] for the period September 20, 2007 to October 21, 2007 is referred back to MPIC to determine the Appellant's entitlement to IRI benefits.

Subject to paragraph b) hereof, the decision of the Internal Review Officer bearing date March 25, 2008 is varied and the foregoing is substituted for it.

Dated at Winnipeg this 28th day of May, 2009.

MEL MYERS, Q.C.

ROBERT MALAZDREWICH

SANDRA OAKLEY