

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-134**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Trevor Anderson
Mr. Wilf DeGraves

APPEARANCES: The Appellant, [text deleted], was represented by Ms Nicole Napoleone of the Claimant Adviser Office;
Interpreter: [text deleted],
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Cynthia Lau.

HEARING DATE: June 29, 2010

ISSUE(S): Whether the Appellant was properly determined as an "Alarm System Sales Representative".

RELEVANT SECTIONS: Sections 107, 109(1) and (2) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

[The Appellant] was injured in a motor vehicle accident on March 4, 2006. It was determined by MPIC that the Appellant would not be able to return to his work as an alarm technician, even on a part-time basis, because of difficulties he would have raising his arms and hypertension of his neck. However, it was determined by both [Appellant's Doctor], and by [Appellant's Neurologist], that the Appellant was capable of sedentary light work.

The Appellant graduated with an electrical engineering degree in [text deleted] and for many years worked as an electrical engineer servicing several power dams in that country. Due to the turbulent events in [text deleted], the Appellant was forced to emigrate to Canada with his wife and [text deleted] children. Since his electrical engineering degree was not recognized in this country, and because of his limited communication skills, the only employment he found initially was that of a cleaner. He subsequently obtained his electrician's licence and was employed for a period of 9 years installing alarm systems. At the time of the motor vehicle accident he was employed on two jobs, at [text deleted] working 35 hours per week and at the [text deleted] working 16 hours per week.

The Appellant was advised, on the basis of the medical reports of the [Appellant's Doctor] and the [Appellant's Neurologist] that pursuant to Sections 107, 109(1) and (2) of the MPIC Act, MPIC was required to determine an employment for him having regard to his work history, education, transferable skills and physical abilities. He was referred to [Appellant's Vocational Rehabilitation (Rehab) Consultant] in order to produce a Transferable Skills Analysis (hereinafter referred to as "TSA") which identifies alternative employment opportunities a person could have in regard to his or her physical limitations.

On March 19, 2007, [Appellant's Vocational Rehab Consultant] provided a TSA Report. In this report she stated that in addition to a degree in Electrical Engineering, the Appellant had an Electrician's Licence (Class M). She also stated that all occupations that required a background in electrical engineering would be eliminated in finding employment for the Appellant.

"Please note that in order for [the Appellant] to pursue employment in the electrical engineering field, he would need to challenge his degree he obtained in [text deleted]. This process can potentially be lengthy and would involve that he attend the Association of Professional Engineers to complete an application. He would be required to obtain detailed information regarding his degree in [text deleted] and his

application would be reviewed by an Assessment Officer and then by a committee. He would be required to write exams, which take place twice per year. It would likely take at least one year for [the Appellant] to challenge his degree. Therefore, all occupations that would require a background in electrical engineering were eliminated. Thus, in reviewing the ten employment options, it is my opinion that [the Appellant] would be best suited for the following occupations: (underlining added)

This report further states, in part:

1. Sales Representative – Wholesale Trade (Non-Technical), Alarm System Sales Representative

In combination with Human Resources and Skills Development Canada, the Choices Software program and the enclosed labor market survey, it appears that this occupation matches [the Appellant's] skills, aptitudes, abilities (vocational and medical).

Skills: Based on [the Appellant's] self reported transferable skills which include answering questions about products and services, and computing and totalling charges, this occupation matches his skills (in reference to Choices). Further his lengthy work experience and knowledge in the alarm industry would increase his employability and transition into this type of work.

Aptitude: With regards to his aptitudes, I cross-referenced his aptitudes required of his past employment to ensure that this occupation matches his abilities. All of his aptitudes matches (sic) except for Clerical Perception. However, employers indicated they would hire someone with the skills and experience that [the Appellant] possesses. (underlining added)

Educational Requirements: Employers in this industry reported that they provide on the job training experience in the field would take the place of formal education.

2. Dental Laboratory Bench Worker

In combination with Human Resources and Skills Development Canada, the Choices Software program and the enclosed labor market survey, it appears that this occupation matches [the Appellant's] skills, aptitudes, abilities (vocational and medical) and interests.

Skills: Based on [the Appellant's] self reported transferable skills, which include using simple hand and power tools and repairing small objects, this occupation matches his skills (in reference to Choices).

Aptitude: With regards to his aptitudes, I cross-referenced his aptitudes required of his past employment to ensure that this occupation matches his abilities. All of his aptitudes matched except for Finger Dexterity. However, employers report they provide on the job training, and no skills are necessary.

Educational Requirements: Employers in this industry reported that they provide on the job training and do not require any formal education for employment selection.

Physical Job Demands: Based on the National Occupational Classification, this occupation is classified as limited, involving standing and/or walking. Employers indicate there is sitting, standing, and walking involved. As well, there may be some lifting of up to 50 pounds, but there would be other workers to assist with the lifting. Therefore, it appears that the physical job demands would be within [the Appellant's] functional abilities.

Labor Market: In reference to the Labor Market Survey, the occupation of a Dental Laboratory Bench Worker appears to have good employment potential in [text deleted], Manitoba. Please refer to the enclosed Labor Market Survey for a detailed account of the labor market.

It is my understanding that upon reviewing this report, you would like to proceed with the residual earning capacity for [the Appellant]. As noted above, either occupation (NOC 6411 or NOC 3223.2) would be suitable for the determination process. Further, this report also suggests eight other suitable occupations that match [the Appellant's] skills and abilities. An in depth overview of these occupations can be provided, if you deem appropriate.” (underlining added)

[Appellant's Vocational Rehab Consultant] in support of her position that the Appellant had the skills to be a sales representative, even though he lacked sales experience, provided a Labor Market Survey to MPIC dated March 19, 2007. In this analysis, she indicates that she contacted four employers involved in the sale of alarm systems. She reported that Employer A asserted that sales experience was not a requirement. Employer B stated experience in a related field (i.e. alarm installation) takes the place of education. However this Employer did prefer three (3) to five (5) years sales experience or other related experience. Employer C made no mention of sales experience but indicated that good written and oral communication skills were required. Under the heading “skills and experience required” Employer D indicated “be able to communicate well with clients”.

Case Manager's Decision:

On April 11, 2007, the case manager advised the Appellant that the TSA and Labour Market Survey had been completed and had identified alternate employment that the Appellant had a capacity to hold. The case manager further stated:

“To determine employment, your work history, education, transferable skills and physical abilities were identified to determine suitable alternate employments.

Based upon your work experience, level of function, skills and abilities suitable, the alternate employment that was identified from the National Occupational Classification (NOC) has been determined as a “Sales Representative – Wholesale Trade (Non-Technical), Alarm System Sales Representative NOC:6411).” (underlining added)

The case manager further stated:

“Based upon the medical information, you have the physical capacity to perform the duties of the determined occupation, given your present physical restrictions.

As of the date of the two-year determination, March 19, 2007, you have one year to secure the employment, in accordance with Section 110(1)(d) or (e) of The Manitoba Public Insurance Corporation Act (attached).”

In a letter to the case manager [Appellant's Vocational Rehab Consultant] reported on a team meeting held with the Appellant on April 10, 2007 and stated:

“[The Appellant] advised that he did not agree with the determination of employment as a Sales Representative – Alarm Sales (NOC 6411) and that he would be appealing this decision. He reported that the main barrier to gaining this type of employment is his limited knowledge of the English language. Further, he did not understand how his years of experience as an Alarm Technician could be a transferable skill within a sales type role in the alarm industry. I reported that I felt with his strong technical background in the alarm industry, training (i.e. Certificate), good presentation skills, and discussions with employers, he would be marketable in this industry. Further, I indicated that I felt his listening, speaking and reading skills were proficient enough for this type of work. Additionally, in reviewing [the Appellant's] “verbal ability” aptitude level generated from the Career Handbook of the NOC (based on previous work experiences), it appears that he has the “verbal ability” aptitude to be successful in the Sales Representative occupation.” (underlining added)

Application for Review:

On June 6, 2007, the Appellant applied for a review of the case manager's decision. In this application he disagreed with a finding that he could be employed as an alarm system sales representative. The Appellant indicated that English was not his first language, he had difficulties talking with people and, because of his limited vocabulary he would not be able to impress customers when he had a meeting with them. He further stated that there were lots of jobs where he felt he had a good possibility of employment, especially in a technical field (electronics and communications) because he had worked in that field for more than 20 years.

Internal Review Officer's Decision:

On August 27, 2007, the Internal Review Officer wrote to the Appellant and advised him that she was dismissing his Application for Review and confirming the case manager's decision of April 11, 2007. In setting out her reasons for decision she indicated that she had discussed the Appellant's file with [Appellant's Vocational Rehab Consultant], who had advised that in her opinion the Appellant had the language skills to perform the duties required of an alarm system sales representative. The Internal Review Officer further indicated that [Appellant's Vocational Rehab Consultant] advised her that the Appellant had some training when he attended school in Canada and he received a certificate which showed that he was able to understand and speak English satisfactorily in this field.

Notice of Appeal:

The Appellant filed a Notice of Appeal on February 26, 2008. Attached to it was a letter addressed to the Automobile Injury Compensation Appeal Commission, in which the Appellant discusses the lack of his communication skills in the English language as follows:

“When I worked as the alarm technician I did install alarm systems that were sold by a salesman who would explain to customers the kind of systems they were, what the system would contain and how it would work. After the systems were sold by the salesman my duty was to install the systems, report it to a monitoring station zones and program a code to customers. It means I did not have any opportunity to improve my oral language skills. I usually installed two alarm systems a day.

The English language is my second language. I started learning English when I was [text deleted] years old. It is very difficult to learn English at that age and it is still very difficult for me. I can understand English language (not 100%) but the problem is that people can not understand my English and because of that I do not feel confident and I get frustrated quickly. I do not have the verbal ability to work as a sales representative.” (underlining added)

In a submission to the Internal Review Officer dated February 22, 2010, [Appellant’s Vocational Rehab Consultant] stated in part:

“Secondly, in reference to the National Occupational Classification and Career Handbook, [the Appellant] (sic) has the verbal ability/aptitude and general learning ability to perform the duties of an Alarm Sales Representative...

With respect to his limited sales experience, I am not disputing the fact that he does not have sales experience. However, according to my Labor Market Survey of March 19, 2007, employers advised that sales experience would be an asset not a requirement. Additionally, employers advised that his work as a Alarm Technician and product/technical knowledge can replace sales experience. This was confirmed by human resources at [Alarm System Company] on March 5, 2007, among other employers. Similarly, the National Occupation Classification states the same. Under employment requirements, it states that “experience in sales or in an occupation related to the product or service is usually required”. In light of his nine years of experience as an Alarm Technician, it would be reasonable to assume that he has the employment requirements. I have enclosed supporting documents from the National Occupational Classification.

With respect to his personality, my first contact with [the Appellant] occurred on October 6, 2006 and my last meeting occurred with him on November 13, 2007. In total, I had nine meetings with him at my office. In my opinion, I would describe [the Appellant] as assertive, proven negotiator, methodical, persistent, problem solver, takes initiative, resourceful and competitive. Based on his aptitude/ability and traits, the determined employment would be a match.” (underlining added)

Appeal:

The relevant provisions in respect of this appeal are Sections 107, 109(1) and (2) of the MPIC

Act:

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.

The Appellant testified at the hearing and required assistance from the Interpreter, [text deleted], both when he was examined and when he was cross-examined.

The Appellant stated:

1. That he graduated in electrical engineering in his home country of [text deleted] and he was employed by the hydro company in [text deleted] as an electrical engineer. The Appellant's C.V. indicate his duties as "Supervised and inspected the installation, modification, testing and operation of electrical and electronic systems and equipment.

Prepared material cost and timing estimates, reports and design specifications for electrical and electronic systems and equipment.”

2. Because of the turbulent conditions in [text deleted] he and his wife decided to immigrate to [Manitoba] with their [text deleted] children.
3. He was required to make a living as a cleaner because his electrical engineer degree was not recognized in Manitoba.
4. Eventually he obtained a specialized electrician’s license as an alarm installer and worked in that capacity for 9 years.
5. At the time of the motor vehicle accident he had two part-time jobs with two alarm system companies working 14 to 16 hours per day.
6. He was always on call and always available evenings and weekends.
7. As a result of the motor vehicle accident he was unable to raise his arms in order to do overhead work.
8. MPIC erred in determining his employment as an alarm system sales representative.
9. Such employment specified that a successful sales representative would have to have good language and communication skills, be aggressive, be confident and be able to deal with the public. He did not have such skills and therefore had no interest in becoming a sales representative.
10. By nature he was very shy and quiet, not aggressive, and therefore could not be a good sales representative.
11. After installing an alarm system he was required to explain to the customer how to use the alarm system keypad and how to enter the code.
12. He was able to deal with the public as an installer of alarm systems because he had limited contact with the customers and in a brief discussion with them he would be able

to easily answer their questions in respect of how to use the keypad of the alarm system and enter the code.

13. His language vocabulary was quite limited and there were many words in the English language that he did not understand.

14. He attempted to find employment as a sales representative but had no success in obtaining such employment.

MPIC's legal counsel cross-examined the Appellant and challenged his assertion that he did not have the communication skills to be employed as a sales representative of alarm systems. She suggested that having regard to his professional degree in Electrical Engineering and licence as an electrician in Manitoba and his years working as a technician installing alarm systems that he was fully capable of being employed as a sales representative of these alarm systems.

In response, the Appellant indicated that although he had the technical knowledge of the alarm systems, he did not have the finesse or skills to be a successful sales representative of alarm systems.

MPIC's legal counsel further suggested that the Appellant was capable when installing alarm systems to communicate with customers and as a result he had the communication skills to communicate with persons interested in buying alarm systems. In response the Appellant indicated that he required very little skill in the English language to advise customers as to the use of a keypad and how to install the code. He further stated that when attempting to convince a customer to buy an alarm system he did not need to have an extensive knowledge of the English language or the ability to quickly respond to questions from customers and the confidence to

close a sale. The Appellant further testified that he had none of these skills and therefore was not interested in becoming a sales representative.

MPIC's legal counsel also suggested that the Appellant had not made a sincere attempt to find employment as an alarm system sales representative. The Appellant denied he was attempting to evade being employed as a sales representative of alarm systems.

MPIC's legal counsel also suggested that the Appellant failed to obtain a complete C.V. prepared by [Appellant's Vocational Rehab Consultant] and used an incomplete C.V. in approaching employers in order to obtain employment and as a result employers would not hire him. The Appellant responded that he was never told that the C.V. he obtained from [Appellant's Vocational Rehab Consultant] was incomplete and he sincerely tried to obtain employment but was unsuccessful. He further stated that on many occasions he sought employment but was unsuccessful.

MPIC's legal counsel suggested to the Appellant that he had made no serious attempt to seek employment and therefore he was not successful. In response, the Appellant denied this suggestion but acknowledged that he was not interested in being a sales representative because he did not have the personality or the communication skills to carry out this employment successfully.

[Alarm System Company Branch Manager] testified on behalf of the Appellant. He indicated he had been an [text deleted] for 30 years in Manitoba. On retirement he had been employed for 10 years as Branch Manager for [Alarm System Company], residential sales and service in [text deleted], Manitoba from 1997 to 2007. As Branch Manager he was responsible for the offices in

[text deleted] and [text deleted] and was also responsible for the sale of commercial and residential alarm systems, service, customer care, installations and office staff at both locations. He was also responsible for interviewing, hiring and training new staff to fill vacant positions in both [text deleted] and [text deleted].

At the request of the Claimant Adviser Officer, he agreed to meet with the Appellant for the purpose of determining whether he would have hired him as an Alarm Service Sales Representative.

He testified that the criteria for hiring a sales representative were:

1. Good communication skills which required a good command of the English language.
2. A person who wanted to sell and had the ability to close a sale.
3. A person must be a self-starter but not aggressive in dealing with the customer.
4. A sales representative's income is dependent on commissions earned.
5. A sales representative would have to be very outgoing and be able to relate to the members of the public.
6. A shy person would not do well as a sales representative.
7. Sales representatives had to generate their own leads and persuade customers to buy the product.
8. A sales representative needs the skills to become a closer, that is a person who is able to close a sale.

[Alarm System Company Branch Manager] testified that:

1. The critical feature to be successful as a sales representative was to have good communication skills in dealing with the public.
2. A sales representative need not have technical knowledge since he could be trained in respect of product knowledge.
3. On the other hand, a person with product knowledge could not necessarily be trained as a sales representative.
4. He had trained natural sales representatives on product knowledge but he had never trained technicians to become sales representatives.

5. Every person he had employed at [Alarm System Company] had previous sales experience, not only in alarm system sales but in respect of other products (even hotdogs).

He further testified that:

1. A sales representative initially worked on salary for several months and then commenced to work on a commission basis and as a result had to be forceful in order to make a sale.
2. Sales targets were generally set at 25 to 30 sales a month, and as a result a sales representative would have to see at least 50 customers during the course of a month.
3. If a sales representative on commission does not successfully sell at least 20 alarms in a month, that sales representative would be terminated from employment.

He testified that:

1. In determining whether or not he would hire the Appellant, he used the same interview techniques on the Appellant as he would use when hiring sales representatives to work at [Alarm System Company].
2. The Appellant was very quiet and reserved
3. As a technician he had worked on his own and had not acquired the skills of a sales representative.
4. He asked the Appellant to demonstrate his ability to sell a pen.
5. In response the Appellant was unable to verbally demonstrate his ability to sell a pen to [Alarm System Company Branch Manager].

The Commission notes that [Alarm System Company Branch Manager] immediately retrieved the pen from the Appellant and verbally communicated to the Commission the manner in which he would sell this pen.

[Alarm System Company Branch Manager] further testified that:

1. The communication skills required of a technician were far less than that of a sales representative.
2. A technician is not required to sell the product to the customer.
3. A technician would be required to demonstrate to the customer how to use a keypad and how to enter a code.
4. As a result, a technician would be required to spend a few minutes discussing this matter with a customer.
5. On the other hand, a sales representative who could earn up to One Hundred Fifty Dollars (\$150) per sale would often be required to have an extensive discussion with the customer in order to convince the customer to buy the product.

[Alarm System Company Branch Manager] further testified that:

1. The Appellant did not have the communication skills needed to become a successful sales representative.
2. He found that the Appellant did not have a good command of the English language and was often difficult to understand.
3. He had met the Appellant 7 years previously when he was Branch Manager of [Alarm System Company] and had not hired him because he perceived that the Appellant would have communication problems.

[Text deleted] testified on behalf of the Appellant. He was the finance/human resources person at [Alarm System Company] between the years 2004 and 2007 and he stated:

1. He said sales experience and ability to sell were far different from the skills of a technician.
2. Some sales techniques could be taught or acquired.
3. In the selling process there was an intertwining between the technical knowledge and selling.
4. However, he emphasized that the important skill of a sales representative was the ability to effectively communicate with the customer, the ability to respond to any questions raised by the customer and to deal with any challenges that may occur in discussion with a customer.

He further testified that:

1. It was important for a sales representative to distinguish between what the client wanted and what the client needed.
2. In order to make a successful sale, the sales representative had to determine what the client's needs were and meet those needs.
3. He would not hire a shy, self-effacing person.
4. A sales representative had to have the confidence but not be overbearing or arrogant.
5. The sales manager did the hiring of the sales representatives working under him or her.
6. He did not meet with the Appellant.
7. He knew the Claimant Adviser Officer when she was employed by [text deleted].

[Alarm System Company Sales Manager] testified that for approximately 1 year he has been the [Alarm System Company] Sales Manager. He further testified that he had 25 years in sales and

15 of those in management. He had been requested by the Claimant Adviser to meet with the Appellant to determine whether or not he would hire him as a sales representative with [Alarm System Company]. He informed the Claimant Adviser that he would do so, but only on the basis that he would provide an independent opinion.

[Alarm System Company Sales Manager] testified that:

1. He met with the Appellant on June 7th, 2010 and had a discussion with him for approximately 15 to 25 minutes.
2. Having regard to his sales experience, he was able to judge whether or not a person would or would not be a successful sales representative.
3. The primary ability of a successful sales representative was the ability to communicate well with clients.
4. Technical knowledge was not a substitute for communication skills.
5. A successful sales representative could not be tentative, but must be confident and strongly motivated with a lot of drive and energy.

He further testified that:

1. As a result of his discussion with the Appellant he would not hire him as a sales representative for [Alarm System Company].
2. The Appellant had a serious deficiency in communication in the English language.
3. Any English courses the Appellant would take would not assist him in improving his communication skills because the Appellant had spent a long time living in Canada and was not able to communicate effectively in the English language.
4. In his conversation the Appellant appeared to be very tentative and hesitant.

5. During the course of discussion, the Appellant often delayed in responding to him and it appeared to [Alarm System Company Sales Manager] that the Appellant was processing the questions put to him before responding.
6. These delays occurred even when the issue discussed was not complex in nature.

[Alarm System Company Sales Manager] further stated:

1. The Appellant appeared to be very reserved and quiet was not the kind of person required of a successful sales representative.
2. Successful sales representatives are not tentative but confident and strongly motivated with lots of drive and energy.
3. The Appellant did not have any of these qualities.
4. He reviewed the Appellant's C.V. and was aware of the Appellant's technical knowledge but said that this knowledge did not guarantee sales ability.
5. Although a sales representative could use a script to communicate with customers, this would not necessarily compensate for the necessity of a free-flowing discussion which takes place between a customer and a sales representative.
6. Notwithstanding the Appellant's technical knowledge, [Alarm System Company Sales Manager] felt the Appellant could not be trained to be an effective communicator.

[Alarm System Company Sales Manager] further testified that:

1. When he was hiring people he initially had a discussion with them about general matters to obtain an initial impression.
2. If he believed the person could make a good sales representative, that person would be invited back again to meet with him to discuss employment.

3. The only persons he invited to meet again with him were those he felt had the potential to make a good sales representative.
4. He would not have asked the Appellant to come back for a second interview.

He further testified that in his view it would be ludicrous to expect the Appellant to be a good sales representative. The Commission asked whether [Alarm System Company Sales Manager] had meant ludicrous in the full sense of that word, and [Alarm System Company Sales Manager] indicated that he did and repeated again that it would be ludicrous for the Appellant to be employed as a sales representative.

Discussion:

In her cross-examination of the Appellant and in her submission, MPIC's legal counsel suggested the Appellant had not made a sincere attempt to find employment as an alarm systems sales representative. The Commission rejects that suggestion and finds that the Appellant was not attempting to evade employment. Having regard to the problems in [text deleted] the Appellant had brought his wife and [text deleted] children to Canada to provide a better life for them. He worked initially as a cleaner then as an alarm system technician working 14 to 16 hours per day. [Appellant's Vocational Rehab Consultant] in her February 22, 2010 letter clearly indicates that the Appellant demonstrated initiative in attempting to contact employers in order to obtain employment as an alarm system sales representative.

In determining the Appellant's employment as an alarm system sales representative, MPIC is required to consider under Section 109(1)(a) of the MPIC Act, the education, training, work experience and physical and intellectual capabilities of the Appellant at the time of the employment determination. In arriving at their decision, MPIC relied on the TSA Report dated

March 19, 2007 together with the Labor Market Survey of March 19, 2007, prepared by [Appellant's Vocational Rehab Consultant]. The Commission finds that [Appellant's Vocational Rehab Consultant] erred in failing to consider the Appellant's professional education, the nature of his work as a technician installing alarm systems, his limited verbal skills in respect of the English language, his lack of sales experience, his personality and his lack of interest in becoming a sales representative.

In arriving at her decision [Appellant's Vocational Rehab Consultant] relied on a report from Human Resources and Skills Development Canada in respect of the position of 6411 – Sales Representatives – Wholesale Trade (Non-Technical). This position had a number of requirements including:

“Verbal ability to prepare sales contracts and consult with clients after sales or signed contracts to resolve problems and provide ongoing support

... interest in persuading to promote sales to existing clients; in providing clients with presentations on the benefits and uses of goods and services; and in representing companies that export and import products or services to and from foreign countries

Employment Requirements...

- Experience in sales or in an occupation related to the product or service is usually required.”

The position of Sales Representatives – Wholesale Trade (Non-Technical) created by the Federal Government is a generic description setting out the requirements for a person to occupy that position. This document does not take into account the specific requirements of a person who would be hired in the Province of Manitoba to be a sales representative in respect of alarm systems.

Verbal Ability:

The Occupation No. 6411 – Sales Representatives – Wholesale Trade (Non-Technical) requires a person who wishes to work as a sales representative of alarm systems to have the verbal ability

to communicate with a customer for the purpose of selling an alarm system. Having regard to the TSA and the Labor Market survey [Appellant's Vocational Rehab Consultant] concluded that the Appellant did have the verbal ability to be an alarm system sales representative.

The Commission notes that the Appellant initially objected to the determination of his employment as an alarm system sales representative and continued to object to this determination up to and including at the appeal hearing.

In a memo dated April 19, 2007, [Appellant's Vocational Rehab Consultant] reported of a meeting with the Appellant who indicated he did not agree with her determination of his employment as a sales representative and that he would be appealing this decision. [Appellant's Vocational Rehab Consultant] stated:

“He reported that the main barrier to gaining this type of employment is his limited knowledge of the English language. Further, he did not understand how his years of experience as an Alarm Technician could be a transferable skill within a sales type role in the alarm industry.”

In his Application for Review dated June 6, 2007, the Appellant clearly indicated that English was not his first language and he had difficulties talking with people and especially if he is required to talk longer his vocabulary would not be wide enough to impress customers. He further indicated that he did not accept a sales representative position but indicated there would be “good possibility for me especially in the technical field (electronics and communications) because I worked in that field more than 20 years”.

After the Internal Review Officer rejected the Appellant's Application for Review, the Appellant filed a Notice of Appeal and attached thereto was a letter dated November 24, 2007 where again he reiterated that the English language was his second language and stated:

“I started learning English when I was [text deleted] years of age. It is very difficult to learn English at that age and it still very difficult for me.”

He further indicated:

“I can understand the English language (not 100%) but the problem is that people can not understand my English and because of that I do not feel confident and I get frustrated quickly. I do not have the verbal ability to work as a sales representative.”

In response, [Appellant’s Vocational Rehab Consultant] forwarded a letter to the Internal Review Officer dated February 22, 2010 wherein she indicated she had nine meetings with the Appellant at her office and stated:

“During my meetings, I did not see his English skills, primarily speaking and listening as a barrier to the determined employment.

Secondly, in reference to the National Occupational Classification and Career Handbook, [the Appellant] (sic) has the verbal ability/aptitude and general learning ability to perform the duties of an Alarm Sales Representative. The Career Handbook defines verbal ability as the “ability to understanding the meaning of words and the ideas associated with them, and to use them effectively; to comprehend language, to understand relationships between words and to understand the meaning of whole sentences and paragraphs: to present information or ideas clearly”.”

The Appellant testified at the appeal hearing that he struggled in speaking English, was hesitant and tentative in communicating with other people in the English language and had no confidence in speaking the English language. The Commission notes that throughout the Appellant’s examination and cross-examination, he demonstrated his inability to effectively communicate in the English language and he required an Interpreter to assist him throughout his testimony.

[Alarm System Company Branch Manager] and [Alarm System Company Sales Manager], highly experienced sales representatives in the alarm system sales field, both of whom had been employed by [Alarm System Company] with the responsibility of hiring sales representatives, testified that the Appellant’s verbal skills were deficient and they would not have hired him as a

sales representative to sell alarm systems. They described his inability to speak with confidence in the English language and noted that the Appellant would often delay in responding until he had the opportunity to process the information. Having regard to the definition of verbal ability in the National Occupation Classification Career Handbook, the Commission finds that these two witnesses determined that the Appellant did not have the ability to use the English language effectively.

The Commission concludes that the testimony of [Alarm System Company Branch Manager] and [Alarm System Company Sales Manager] corroborates the Appellant's testimony that he did not have the verbal skills to be employed as an alarm system sales representative.

Sales Experience and Technical Knowledge.

The Commission notes that in respect of position NOC 6411 – Sales Representatives – Wholesale Trade (Non-technical) one of the requirements of this position is an interest in promoting sales to existing clients. This requirement means that a person who wishes to be employed as an alarm system sales representative must have an interest in selling the alarm systems, and the ability to sell this product.

The Commission finds, having regard to the testimony of the Appellant's three witnesses that it would be unusual for someone without sales experience to be a successful alarm system sales representative and it would also be highly unlikely someone would be hired without prior sales experience or evidence of sales ability.

The Commission also notes that in respect to position NOC 6411 one of the requirements was:

Employment Requirements...

“experience in sales or in an occupation related to the product or service is usually required”.

In her letter of February 22, 2010 [Appellant’s Vocational Rehab Consultant] stated that although the Appellant did not have sales experience, having regard to her Labor Market Survey which she conducted on March 19, 2007, employers advised that sales experience would be an asset and not a requirement. She further stated “(A)dditionally, employers advised that his work as a Alarm Technician and product/technical knowledge can replace sales experience”.

[Appellant’s Vocational Rehab Consultant], in support of her position that the Appellant had the skills to be a sales representative even though he lacked sales experience, provided a Labor Market Survey to MPIC dated March 19, 2007. In this analysis, she indicates that she contacted four employers involved in the sale of alarm systems. She indicated in respect of Employer A that sales experience was not a requirement. In respect of Employer B they stated experience in a related field (i.e. alarm installation) takes the place of education. However this Employer did prefer 3 to 5 years sales experience or other related experience. Employer C made no mention of sales experience but indicated that good written and oral communication skills were required. Under the heading skills and experience required Employer D indicated “be able to communicate well with clients”.

Neither [Appellant’s Vocational Rehab Consultant] nor the employers referred to in the Labor Market Survey were called to testify as to the contents of this survey. As a result, the Claimant Adviser Officer did not have the opportunity to cross-examine either [Appellant’s Vocational Rehab Consultant] or any of the employers in respect of the contents of the Labor Market Survey. As a result the Commission does not know whether [Appellant’s Vocational Rehab

Consultant] contacted these four employers personally or by telephone. Nor does the Commission know whether these brief reports from the four employers were their complete reports or whether they constituted a summary of their reports. In these circumstances the Commission prefers the sworn testimony of the Appellant, [Alarm System Company Branch Manager], [Alarm System Company Sales Manager] and [Alarm System Company Finance/HR Consultant].

In his testimony and written documentation, the Appellant indicated that his skills as a technician installing alarm systems were not transferable to the job of a sales representative. He testified that his basic job was to install the system and then to briefly explain to the customer the use of the keypad and the code. As a result, the Appellant had limited contact and minimal communication with the customer.

He further testified that in selling alarm systems to customers would require a degree of communication skills for which he did not have the ability or the confidence to effectively communicate to customers when attempting to sell them an alarm system. He further indicated that since he had no sales experience he was unable to be a successful sales representative.

The Appellant's testimony in this respect was corroborated by the testimony of [Alarm System Company Branch Manager] and [Alarm System Company Finance/HR Consultant] and [Alarm System Company Sales Manager]. All three had extensive sales experience with alarm systems and all concluded that it was fundamental that a person not only needed verbal skills to sell the product but that sales experience was also needed. All three testified that they would not hire a sales representative unless that person had sales experience.

They further testified that it was not essential for the Applicant to have technical knowledge of the alarm system since they would train the Applicant in respect of the product knowledge he needed to sell the alarm system. They were all of the view contrary to the opinion of [Appellant's Vocational Rehab Consultant] that any technical knowledge that the Appellant had in respect of installing alarm systems did not trump sales experience.

In concluding that technical knowledge can override sales experience, [Appellant's Vocational Rehab Consultant] relied on a Labor Market Survey which the Commission has found it can only give limited weight to. The Appellant's testimony that his technical knowledge of installing alarm systems does not translate into sales experience was corroborated by the testimony of three experienced witnesses who have knowledge of alarm system sales. In these circumstances the Commission prefers the evidence of the Appellant, [Alarm System Company Branch Manager], [Alarm System Company Sales Manager] and [Alarm System Company Finance/HR Consultant] to the opinion of [Appellant's Vocational Rehab Consultant] and finds that:

1. sales experience is essential to successfully sell alarm systems;
2. the technical knowledge of alarm systems is no substitute for sales experience.

Personality:

In her letter of February 22, 2010, [Appellant's Vocational Rehab Consultant] advised the Internal Review Officer that she had nine meetings with the Appellant and would describe him "as assertive, proven negotiator, methodical, persistent, problem solver, takes initiative, resourceful and competitive. Based on his aptitude/ability and traits, the determined employment would be a match."

After a brief conversation with the Appellant, both [Alarm System Company Branch Manager] and [Alarm System Company Sales Manager] concluded he was a self-effacing, non-assertive, quiet person who did not have the drive or the confidence to become a successful sales representative. [Alarm System Company Branch Manager] demonstrated that when he asked the Appellant to sell a pen the Appellant was unable to communicate the ability to do so. On the other hand, [Alarm System Company Branch Manager] took a pen and effectively demonstrated to the Commission how to sell the pen.

[Alarm System Company Sales Manager], who is the present manager of [Alarm System Company], indicated that after his discussion with the Appellant that it would be ludicrous to employ him as a person to sell alarm systems and he would not have provided him with a second interview. The Commission asked [Alarm System Company Sales Manager] whether he intended to describe the employment of the Appellant as a person who could successfully sell alarm systems as ludicrous and he confirmed that was his opinion.

The Commission noted the Appellant appeared to be a very quiet, self-effacing, non-assertive person, in total contrast to [Appellant's Vocational Rehab Consultant's] description of the Appellant's personality in her letter of February 22, 2010. The Commission further finds that the testimony of both [Alarm System Company Branch Manager] and [Alarm System Company Sales Manager] corroborate the Appellant's opinion that he did not have the aptitude, ability, or personality to be an alarm system sales representative.

Alternative Employment:

The Commission finds that MPIC's case manager consistently disregarded the Appellant's desire to be employed in a position other than that of an alarm system sales representative.

The Commission also notes that [Appellant's Vocational Rehab Consultant] in her TSA Report initially rejected the Appellant's ability to pursue employment in the electrical engineering field. She found that the difficulty that the Appellant would encounter in having his degree recognized in Canada and requiring to file an application with the Association of Professional Engineers, provide information with respect to his degree from [text deleted] and the assessment by the Association of Professional Engineers would likely to take one year to attempt to obtain his degree. Therefore, [Appellant's Vocational Rehab Consultant] concluded "all occupations that would require a background in electrical engineering were eliminated".

The Commission finds that MPIC erred in failing to consider whether or not the Appellant could be employed as a Professional Electrical Engineer. The Appellant was employed in that capacity for many years with [text deleted] Hydro. There was no attempt made by the case manager to assist the Appellant in obtaining a degree in Electrical Engineering in Canada. As well there was no attempt made by the case manager to determine whether or not there were any occupations that the Appellant could be trained in to be employed as a technician in the electrical engineering field.

In the Appellant's Application for Review dated June 6, 2007, the Appellant clearly indicated having regard to the difficulties in the English language he would not be a successful sales representative. The Appellant was apparently content to be employed as an installer of alarm systems. However, as a result of the motor vehicle accident injuries he was unable to continue with that employment and indicated to MPIC that there were lots of jobs where he felt there was a good possibility of employment, especially in a technical field (electronics and communications) because he had worked in the field for more than 20 years. The Appellant's suggestions were ignored by the case manager who insisted on determining an employment for

the Appellant for which he had no ability and no interest. In the Commission's view the case manager's approach for finding an appropriate employment for the Appellant was a recipe for failure.

[Appellant's Vocational Rehab Consultant] had also recommended to the case manager in her TSA Report that the Appellant could be employed as a Dental Laboratory Bench Worker. In the report she indicates that the description for this job was:

“Dental laboratory bench workers assist dental technologists and technicians in preparing and fabricating dentures and other dental devices.”

An examination of this occupation indicated that the Appellant may have had the aptitude to carry out this occupation. A job of this nature would not require the Appellant to have strong verbal skills nor sales skills, or be required to be assertive in dealing with members of the public. In the Commission's view the occupation of a dental laboratory bench worker although not the best match for the Appellant's interest and skills, would have been a much better match than that of a sales representative. However, in the Commission's view, having regard to the Appellant's testimony as to his interest and skills a better match for a determined employment for him would have been as a technician in the electrical engineering field, or in the electronics or communications fields.

For these reasons the Commission therefore concludes that the Appellant has established on a balance of probabilities that MPIC failed to correctly consider the education, training, work experience and physical and intellectual abilities of the Appellant at the time it made the determination of his employment as an alarm systems sales representative. The Commission therefore allows the Appellant's appeal and rescinds the Internal Review Officer's decision dated August 27, 2007.

Dated at Winnipeg this 22nd day of July, 2010.

MEL MYERS, Q.C.

TREVOR ANDERSON

WILF DEGRAVES