

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File Nos.: AC-09-146 and AC-10-076**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Tom Freeman
Ms Susan Sookram

APPEARANCES: The Appellant, [text deleted], attended the hearing by teleconference and was represented by Mr. Dan Joannis of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: October 26, 2015

ISSUE(S): 1. Whether MPIC is obligated to fund educational costs related to retraining in a different employment.
2. Whether the Appellant's Income Replacement Indemnity ("IRI") benefits were correctly terminated on February 15, 2009.

RELEVANT SECTIONS: Sections 110(1)(a), 138, and 150 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 10(1)(e) and 10(2) of Manitoba Regulation 49/94

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 on March 3, 2004 and he sustained a loss of consciousness and concussion, neck and low back pain, left knee and left hip pain.

In [Appellant's doctor's] report to MPIC dated April 16, 2004, he stated that the Appellant was totally disabled from the date of his accident and would remain totally disabled for any gainful employment, at least until reassessed in early May.

To address these ongoing problems, the Appellant's treatments included referrals to different specialists, including physiotherapy, psychology, otolaryngology, physical medicine and rehabilitation and chiropractic treatments. MPIC's case manager referred the Appellant to [Appellant's neuropsychologist], a clinical neuropsychologist.

[Appellant's neuropsychologist] assessed the Appellant and provided a report to the case manager on July 31, 2004 in which he stated that the Appellant was mildly impaired in his ability to recall pictures that stimulate "real life" scenes both immediately after presentation of the material as well as after a half-hour delay. [Appellant's neuropsychologist] also reported:

"He has a moderate impairment in his "incidental" nonverbal memory (for information that he is not expecting to recall later, or where information is presented casually). Here, he was significantly below average in his ability to remember information right away, and was approximately moderately impaired after a half-hour delay. He was not assisted by a recognition format, suggesting that information was not efficiently "stored".

[Appellant's neuropsychologist] indicated that it is important to note that the Appellant has found the tinnitus and vertigo to have been distracting:

"... He describes the tinnitus in typical postconcussive terms (e.g. being more aware of it when it is quiet in the room etc.). The vertigo he described included an onset to rapid movement, or changes in body posture, or even while watching changing of scenes on television. He also feels this is more pronounced if he is tired, or if he is doing his stretching exercises from physiotherapy. ..."

[Appellant's neuropsychologist] indicated that the Appellant was understandably frustrated by the combination of his tinnitus, vertigo, headaches, cervical discomfort and fatigue.

[Appellant's doctor] sent a report to MPIC on October 12, 2004 indicating he last assessed the Appellant on September 24, 2004 and stated that:

1. The Appellant "... was still suffering from easy fatiguability with any sustained light work, particularly activities requiring concentration and reading. This is associated with recurrence of mild muscle contraction type headaches on a daily basis. He also complained of associated persisting aching in his upper back, neck and occipital areas associated with the headaches."
2. The Appellant said he was able to concentrate in regards to reading or doing office work for up to two hours before fatigue and headaches became disabling and that this has been gradually improving over the last several months.
3. The Appellant's diagnosis remains the same and he continues to suffer from post concussion syndrome with the above symptoms.

[Appellant's neuropsychologist] provided a report to the case manager on November 26, 2004 and stated:

1. The Appellant's reduced efficiency from his work was due not only to his specific memory difficulty but also to post-concussive symptoms, particularly the vertigo and the internal distractions from his tinnitus.
2. Based on the Appellant's information, fatigue may be playing a greater role at present rather than his specific cognitive limitations and that both tinnitus and dizziness might be potentially distracting for him.
3. Although fatigue can be a component of a post-concussive syndrome, it has been more significant and lasted longer than is typical for his patients.

[Appellant's doctor], in a report to MPIC dated January 3, 2006, stated that:

1. The Appellant was reassessed on December 1, 2005 and that he was suffering from post-concussion syndrome directly related to the motor vehicle accident.
2. "At his latest reassessment he continues to suffer from chronic headaches with associated chronic myofascial pain in his posterior neck and shoulders. His headaches are consistent with muscle contraction headaches and are chronic but are also aggravated by any sustained mental activity which is causing significantly restricted work hours at his office.

Physical examination discloses tenderness to his posterior scalp, paracervical, posterior shoulder and back muscles. He has full range of movements of his neck. Neurologically he continues to have vertigo with some mild ataxia and suffers from chronic bilateral tinnitus. Previous neurophysiological testing by [Appellant's neuropsychologist] in [text deleted] has also confirmed some significant memory impairment.

Due to his (sic) man's significant post concussion syndrome with chronic headaches and myofascial neck and back pain as well as easy fatigue ability and exertional weakness he continues to be very restricted to working approximately 12 hours a week at his office. This does (sic) very slightly according to how he is feeling and he does try and work as much as possible on his better days.

In view of this man's persisting chronic headaches with neurological signs and symptoms I have ordered an MRI scan of his head and neck. I have not yet heard when this will be done."

At MPIC's request, [independent physiatrist], physiatrist, conducted an independent medical examination on February 6, 2006 and provided a report to the case manager on February 12, 2006 and stated:

Diagnoses

- Mild traumatic brain injury
- Subjective headaches.

...

The claimant appears to be at the point of maximal medical improvement, 2 years post-injury, with respect to mild difficulty with persisting visual memory deficits.

There does not appear to be any impairment on a physical basis to prevent increasing his work hours from 20 hours / week to full hours of his regular work duties.”

In a letter to MPIC from [Appellant’s doctor] dated April 17, 2006, [Appellant’s doctor] reassessed the Appellant on April 6, 2006 and stated:

“At his latest reassessment [the Appellant] stated that he continues to function at approximately a half time basis which varies from day to day. He particularly has difficulty with activities that require more mental concentration which causes him significant mental fatigue and headaches. His ability to do mental work with concentration is approximately 1 to 2 hours and on some days even less. Please find enclosed a copy of his MRI which is reported as normal.

In summary, this man continues unfortunately to suffer from significant post concussion syndrome with chronic symptoms of fatigue and headaches and to a lesser degree with some symptoms of chronic myofascial pain in his posterior neck.”

[Appellant’s neuropsychologist] provided a report to the case manager dated June 27, 2006 and stated:

“In my opinion, [the Appellant] is left with a permanent limitation in a highly specific type of non-verbal memory. The implications of this would be for him to be more forgetful of people he may meet briefly, such as new customers.

...

At this point [the Appellant] is still reporting a triad of symptoms that include chronic headaches; fatigue; and some residual tinnitus in his right ear. There are still prospects for improvements in the tinnitus (since he is anticipating another masking device for the right ear). I suspect that his fatigue is partly related to these other two symptoms of the headaches and the tinnitus, since they do require more effort and concentration on his part to avoid their potential distractions.

...

[The Appellant] reports still working on gradually increasing his hours in his business. The very specific non-verbal memory deficit likely plays a minimal role here. In contrast I feel that it is more the combination of the fatigue, headaches and tinnitus that may have adversely affected his speed in completing tasks at work.

...

To address the question you had posed in your March 7, 2006 report, yes [the Appellant] would be capable of “performing all of his work duties”. This means as an example that he would be capable of interacting with customers; troubleshooting; technical problems; managing his financial aspects of the business, etc. However he has not yet worked himself up to full time hours, and I do still have some hope for this. Generally patients do resume full time hours, with [the Appellant’s] types of sequelae. In rare cases, some patients are left with reduced hours, and these are generally in situations where there is not just cognitive sequelae, but a combination of physical and emotional limitations as well.” (Underlining added)

[Appellant's doctor] reported to MPIC on November 23, 2006 and stated that the Appellant was seen for a reassessment on August 9, September 6 and October 10, 2006 and stated:

1. “At his office assessment of August 9, this man continued to suffer from chronic daily disabling headaches. At least once or twice a week these headaches become so severe that he had to stop doing his regular activities. His neurological examination did not show any changes and [the Appellant] was becoming quite frustrated with these chronic and disabling headaches. He had also recently completed a neuropsychological assessment by [Appellant's neuropsychologist] who had found some mild persisting memory impairment particularly in his recall. He also continued to have some chronic tinnitus and chronic fatigue.” (Underlining added)
2. In view of the Appellant's persistent chronic headaches which were not showing any significant improvement, he referred him to [Appellant's neurologist], a neurologist, for a neurological assessment.

[MPIC's doctor], MPIC's Health Care Services medical consultant, was requested to provide an opinion on whether the Appellant's motor vehicle accident injuries continue to prevent him from returning to his full-time employment. On March 20, 2007 [MPIC's doctor] reported that:

1. At present the Appellant was limited in his ability to perform his full daily activities due to the reported fatigue, headaches and concentration difficulties associated with his traumatic brain injury.
2. These difficulties were documented by both his treating family physician as well as by [Appellant's neuropsychologist], a neuropsychologist.
3. Based on their reports, it was his opinion that the Appellant likely had ongoing impairments of mental function that would affect his ability to perform his full time occupation.

In a note to file dated June 26, 2007, the case manager reports that she met with the Appellant and determined the Appellant was functioning and working at his self-employed business for 37 hours per week and that he was not able to work his regular 45 hours per week. The Appellant explained that he was not meeting the functional demands of his workplace and this was due to his fatigues. His headaches had improved and he was hopeful that over the next month or two that the fatigue would improve as well due to the medication adjustments.

The case manager further noted:

“[The Appellant] explained that his business has deteriorated since the MVA. He reports he is not able to work to the capacity that he used to and as a result, his business has lost income. He and his partner have discussed dissolution (sic) of the business and a decision will be made at the end of the summer 2006. I asked [the Appellant] whether he was slow and peek (sic) periods throughout the year and he indicated that is not the case. The business is normally pretty consistent through the year. He indicated that his partner plans to [text deleted]. [The Appellant] is unsure of what he would do. He may finish his [text deleted] Degree with the [text deleted] and indicates it would not be difficult to do that by obtaining the last 3 or 4 courses needed completing it by satellite and correspondence. [The Appellant] indicated he never had any academic difficulties and enjoys reading. He does not plan to relocate and would find work in the [text deleted] region. [The Appellant] indicated he is not concerned about this change in careers. [The Appellant] believes the computer business is in huge demand and the business failure attributes to his inability to perform due to the MVA injury.”
(Underlining added)

[Appellant’s doctor] wrote to the case manager on July 23, 2007 and indicated he had reassessed the Appellant on June 19, 2007 and reported:

“At that time [the Appellant] did state that his chronic headaches had in general decreased in frequency and severity. However, he still stated that he experienced approximately one significantly severe headache weekly. This is associated with some chronic significant exertional fatigue which is brought on both by mental and physical activities but more so by mental function such as calculations and decision making.

His diagnosis remains the same i.e. post concussion syndrome with chronic muscle contraction headaches with associated chronic fatigue and chronic tinnitus. Although his headaches have improved and in view that he is still experiencing significant headaches on a regular basis his Effexor XR was increased further to 300 mg o.d.

In regards to his work capability I specifically questioned [the Appellant] in that regard and he expressed to me that he has actually been putting in nearly full time hours at his place of employment but his level of functioning is significantly below his previous capabilities and he is only achieving approximately one-third of his previous work capacity which is significantly less than you implied in your letter of June 6, 2007. In my opinion [the Appellant] is being honest and not exaggerating his work restrictions whatsoever. He still remains quite frustrated with his restricted capabilities to be (sic) perform his work duties as he did before.

He still almost weekly on one or two days has to go home early due to a development of a significant headache with associated fatigue.” (Underlining added)

[MPIC’s occupational therapist], occupational therapist, had assessed the percentage of duties for the Appellant on August 23, 2007 and reported that:

1. “[The Appellant] indicated that he has slowly increased his level of participation in work related tasks. He reported that chronic fatigue and headaches continue to impact on his tolerance and ability to complete all required hours and tasks.”
2. She noted the Appellant’s “typical” duties and estimated times. The Appellant was determined to have the capacity to carry out 73% of his duties. His primary areas of difficulty pertained to repairing computers, wireless networking, network installation, monitoring and troubleshooting. Overall he noted these tasks were mentally demanding tasks and his chronic fatigue and headaches negatively affected his tolerance levels.

The Appellant wrote to the case manager on November 12, 2008 and stated:

“Over the past few years the realization of returning to my current business in full capacity was highly unlikely. As advised by the many professionals I have seen and [Appellant’s neuropsychologist] in particular, it was recommended that I need to consider the likelihood of focusing on more social science type work as opposed to technical work as a result of my new limitations. Having pondered this I enrolled in a university [text deleted] course through distance education to see if I could meet the challenge, thinking that [text deleted] was a good balance between the technical and social skills. I was unable to complete the course as the tasks involving memorization was to (sic) great. I decided however not to give up and enrolled in a [text deleted] course as I found myself constantly reading about current events. The course work was reading and research and proved a good fit for my abilities, while the exam was very rough on me I decided to continue taking similar courses as I was able too (sic). There are further courses I am considering taking to facilitate a career change.

I would like to enquire to what extent MPI will cover education costs as well as the possibility of covering massage therapy costs. If we need to set an appointment for a meeting please make it on a Thursday so that both [text deleted] and I could be present.” (Underlining added)

[Appellant's doctor] wrote to the case manager on November 19, 2008 and stated he had conducted a medical reassessment of the Appellant on November 17, 2008 and reported:

“Subjectively, [the Appellant] continues to note daily, chronic muscle contraction headaches more right-sided, which are aggravated by sustained physical and mental activity later in the day. These headaches generally are mild not requiring analgesia, but do necessitate some rest periods when the headaches become more severe later in the day.

...

This man continues to suffer from post concussion syndrome with chronic muscle contraction headaches and chronic fatigue. He also has chronic bilateral paracervical muscle strain related to his accident.

Although [the Appellant] remains relatively stable at this present level of functioning there has been no further significant improvement since my last medical report to you six months ago. In regards to his functional capacity it is estimated that he is functioning at approximately 70% of his physical and mental capacity prior to his accident which has not changed significantly over the past year.” Underlining added

In a note to file on December 4, 2008 the case manager indicated that a referral was made to [MPIC's vocational rehab consultant #1] to conduct a Vocational Rehab Evaluation and Aptitude Test and requested her to contact [Appellant's neuropsychologist] for another assessment addressing the Appellant's occupational restrictions. The case manager further stated that on December 3, 2008 [Appellant's neuropsychologist] recommended another IME with [independent physiatrist] and asked him to address whether anything can be done relating to the Appellant's fatigue.

In a note to file dated December 4, 2008 the case manager had a discussion with the Appellant and reported that arrangements were being made for [Appellant's neuropsychologist] to communicate with [independent physiatrist] to arrange for an MRI of the Appellant's head and spine. She further explained to the Appellant a vocational rehab consultant would contact him to set up an appointment relating to aptitude testing and evaluation. She noted:

“... I explained we need to determine [the Appellant’s] restrictions relating to his employment and determine whether is it (sic) necessary to explore alternate employment which could involve some re-training and education. [The Appellant] was anxious to know how long this may all take as he indicated he cannot live on what MPI is paying him. He stated he lost his business due to the MVA injury and is starting over. He has no income coming from his business any longer. I explained I did not know how long this will take and we will need to hear from [independent physiatrist] following the IME. [The Appellant] could not recall the first IME and through out this meeting, [the Appellant] was reliant on [text deleted] memory concerning specifics such as his initial assessment with [independent physiatrist].

I asked [the Appellant] about his further vocational planning. In the Spring of 2008, [the Appellant] reported he was letting his business close so he could concentrate on his recovery. He expected to be employed by the Fall time. In November 2008, when speaking with [the Appellant], he did not know what he would do for a living. Today, he explained he found on the internet, a placement company offering an [text deleted] internship program which he was signed up for. He said he is interested in looking into this further. The cost is \$17,000.00. They will give the applicant about 6 weeks notice of prepare for the program and he is not earning an income during the internship. (He did not know how long the internship would be). He stated he will get some experience which will lead him to employment, he stated this is similar to a Master’s degree. I asked him how he planned to manage to do this, and he admitted he did not know, but was willing to try, with no effort one will not know. I asked [text deleted] about location of work and he said it was possible he would be placed outside the country of Canada and away from home. I explained to [the Appellant] and [text deleted] that MPI is making no commitment toward vocational/educational costs at this time. I said to keep their receipts and a decision would be made concerning funding at a later date. I basically explained we cannot make any decision right now.” (Underlining added)

The Appellant wrote to the case manager on December 8, 2008 and stated:

“Following our meeting last Thursday, I was reviewing details about my claim and I noticed that my IRI GYEI classification is as a Business and Commercial Machine Mechanics and Repairer, in accordance with regulation 39/94 Schedule C and is included in Product Fabricating, Assembling and Repairing Occupations (NOC #2242 & SOC 8585), and only at Level 2.

This classification grossly underestimates my entitlement as it neglects to account for the general management, accounting and legal, computer systems management, and network management functions of my employment.

I was not employed by [text deleted] as a computer repair person. I had over six years’ prior experience and education in public accounting and computer network management. I started this company from nothing and invested my time into the business for future benefits. The percentage of duties calculated by the occupational therapist reflects the management capacities as the majority of the workload I performed.”

The Appellant wrote to the case manager on December 17, 2008 about his professional experience in operating his business:

“PROFESSIONAL EXPERIENCE

- **CEO/CFO/co-founder of small business – technology company (2001 to present)**
 - built from ground up successful technology company [text deleted]
 - diverse and extensive knowledge in the technology field at a professional level
 - management and hands on implementation and development of an exhaustive list of technology projects
 - Web development, implementation of sites, updating, publishing, email, security monitoring, network administration, application maintenance, wireless networking, and database management, power point presentations are only to name a few.
 - Technical support has also been a major aspect of my employment [text deleted]
 - primary support for [text deleted]
 - manage all financial and legal aspects of the company’s operations and reporting requirements to government and other outside sources
 - business forecasting/budgeting, payroll, human resources, employee hiring and training
 - employee management, supervisor, monitoring
 - advertising and publicity”

In a note to file on December 18, 2008, the case manager recorded a voice message from [Appellant’s neuropsychologist] to her and he stated in part:

“... What we have found is that in patients that have significant fatigue post injury, that there is a correlation between post-traumatic gliosis on MRI and prolonged tiredness and post-traumatic gliosis is g-l-i-o-s-i-s which represents gradual cell death. It is normally not seen until a number of years post-injury... That’s basically the two-year point following his accident, but, when the post-traumatic gliosis was found, as I said it’s usually several years post-injury. So we wouldn’t necessarily have expected to have seen it at that point in time. ... “

In a note to file on December 24, 2008 the case manager reported that she spoke with [MPIC’s vocational rehab consultant #1], the vocational rehab consultant, on December 23, 2008 who advised that she had met with the Appellant and his wife to determine why the Appellant could not be a network technician. She explained to the Appellant that the rehab goal was to return him ideally to the job he was working at prior to the motor vehicle accident. The Appellant

advised that his future plan was to obtain work through the [text deleted] and [MPIC's vocational rehab consultant #1] explained that in the event he is not accepted, he needs to look at other options such as working with local services in the field he is trained in. The Appellant was not interested in hearing this and was frustrated discussing computer related work as a back-up plan.

On December 30, 2008 the Appellant wrote to [MPIC's vocational rehab consultant #1] in response to her request that he provide a list of reasons why he cannot work as a network technician and stated that:

1. He noted this ignored the business management functions of his employment.
2. He indicated that this greatly undermines the level of work he was performing prior to the accident.
3. He considered being employed as a network technician was an entry level position that is overseen by some other managing supervisor.
4. He proceeded to outline his experience in business management and as a communications, network and information systems manager.

In response to a question that [MPIC's vocational rehab consultant] asked the Appellant, he stated:

“To answer the question, of the above tasks related to my employment, what can I not do – it is not that I can not do the tasks individually but the combination of the work load and commitment to investing unpaid time is overwhelming for me to complete given my current capabilities. My goal then would be to find employment at the same level that I was currently employed. As I have indicated above this would be in a management level position possibly in one or the other of the two categories. During our interview I explained how I took it upon myself to achieve training in the social sciences because previous professionals had indicated that I may find the social science field of work less difficult given the brain damage I now live with. Regardless of which route is taken to achieve employment, an employer will most likely require that I have some formal training specific to requirements of their company if I am expected to be employed to a similar job description equivalent to what I was doing prior to the accident.”

In December 2008, at MPIC's request, [MPIC's vocational rehab consultant #1] in her report to MPIC recommended that [independent physiatrist] and [Appellant's neuropsychologist] be provided with a list of the Appellant's pre-injury duties and after their review, the two doctors provide an opinion on any medical factors which would preclude the Appellant's ability to carry out the tasks of his pre-injury position. [MPIC's vocational rehab consultant] noted that this review was never conducted by [independent physiatrist] and [Appellant's neuropsychologist].

On January 30, 2009 the Appellant wrote to the case manager and noted that he accepted a position as Assistant Human Resources for the [text deleted]. He explained the responsibilities and activities of the position and confirmed his departure from Canada on February 18, 2009.

The Commission notes that there are two separate appeals that were heard by the Commission on October 26, 2015. The first appeal refers to whether the Appellant's IRI benefits were correctly terminated on February 15, 2009. The second appeal is related to whether MPIC was obligated to fund the educational costs related to retraining the Appellant in a different employment.

Whether the Appellant's IRI benefits were correctly terminated on February 15, 2009

Case Manager's Decision – February 12, 2009:

On February 12, 2009 the case manager wrote to the Appellant acknowledging receipt of the Appellant's letter of January 30, 2009 indicating he was accepting a position with [text deleted].

She stated:

“Based on Section 110(1)(a) of the Manitoba Public Insurance Corporation Act, your entitlement to IRI ends as of February 15, 2009. The final IRI bi-weekly entitlement of \$314.45 will be deposited into your account on February 13, 2009.”

Application for Review

The Appellant made an Application for Review of the case manager's decision on February 26, 2010.

Internal Review Officer's Decision – April 30, 2010:

The Internal Review Officer wrote to the Appellant on April 30, 2010 and indicated the Appellant did not request a hearing. In his decision, the Internal Review Officer referred to his earlier decision of September 24, 2009 relating to the Appellant's request for reimbursement of educational expenses and stated from that decision:

“[Appellant's neuropsychologist] also wrote in his report of June 27, 2006, in response to your comment that you were working on gradually increasing your hours in your business, it was “more the combination of the fatigue, headaches and tinnitus that may have adversely affected his speed in completing tasks at work.” It was his further belief that you would ultimately resume full-time hours and enhance your efficiency at work with the abatement of your headaches and tinnitus which “could be understandably distracting, and contributing to his fatigue”.

You and a partner co-owned [text deleted] in [text deleted], from April 2000 to 2008. This was a technology company which was formed with a focus on servicing [text deleted]. Previously, you had completed two years in the [text deleted], your third level of the [text deleted] and received numerous diplomas and certificates in computer technology. In 2008, you successfully completed a [text deleted] degree in [text deleted] as well as recently learning to converse in [text deleted].”

The Internal Review Officer stated in his April 30, 2010 decision:

“You will also note in my said Internal Review hearing decision under the heading “Reasons for Decision”, I had written that “You had returned to your pre-accident employment in your business in a very reduced capacity within several months of your accident. You steadily increased your ability to efficiently perform the myriad of tasks required of you as an owner and employee of [text deleted].”

Your accident was in 2004 and in 2008 you decided to close [text deleted]. I had written in my decision at that time, as I do now, that “You have certainly demonstrated an ability to perform the essential duties of your employment pre-accident, albeit not as efficiently as before the accident.

I reiterate that in 2006 you enrolled in a [text deleted] program at [text deleted] and in 2008 received your [text deleted] degree in [text deleted] while still owning and operating [text deleted].”

The Internal Review Officer further stated in his April 30, 2010 decision:

“You have amply exhibited the ability to perform your pre-accident employment. You returned to your pre-accident occupation shortly after the time of the accident and your hours of employment steadily lengthened thereafter to the time that you decided to close [text deleted] in 2008.”

The Internal Review Officer referred to [Appellant’s neuropsychologist’s] report of June 27, 2006, where he indicated the Appellant was capable of performing all his work duties. The

Internal Review Officer further stated:

“Not only did you continue to perform your work duties related to [text deleted] into 2008, but you also completed a [text deleted] degree in [text deleted] in 2008, as well as learning to converse in [text deleted].

You went on to accept a position as an Assistant Human Resource for the [text deleted] which began on January 19, 2009. [Appellant’s doctor] in his chart notes of February 5, 2009 confirmed that your position actually began in mid-February and that he reviewed the job description with you and he agreed with your acceptance of this position. The work description of that position can be easily described as extremely challenging, demanding, socially interactive and requiring a very high degree of organizational and communication skills. You must have admirably accomplished the requirements of this position as you indicated that you were in contract negotiations with [text deleted] for a contract to work out of your home in [text deleted] upon your return to Manitoba in July, 2009.”

The Internal Review Officer’s decision of April 30, 2010 dismissed the Appellant’s Application for Review and confirmed the decision of the case manager dated February 12, 2009.

Notice of Appeal:

The Appellant filed a Notice of Appeal on May 17, 2010 appealing the decision of the Internal Review Officer dated April 30, 2010.

The relevant provision of the MPIC Act in respect of this appeal is:

Events that end entitlement to I.R.I.

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

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

[Appellant's doctor] wrote to the Claimant Adviser representing the Appellant on September 12, 2011 and stated that he had seen the Appellant regularly on a medical basis since his motor vehicle accident on March 3, 2004 to the present with the last medical reassessment on March 2, 2011. [Appellant's doctor] reported that:

1. He was the Appellant's medical doctor and treated him in respect of his injuries sustained in the motor vehicle accident.
2. He reported the Appellant was initially able to work 12 hours a week, limited to 2 to 3 hours a day due to fatigue, limited mental capacity with poor concentration.
3. As result of a medical assessment on November 18, 2008, the Appellant was clinically suffering from significant post-concussion syndrome with chronic muscle contraction headaches, chronic paracervical muscle strain and associated chronic fatigue and tiredness.
4. He stated at that time that it was his opinion that the Appellant was functioning approximately 70% of his normal capacity.
5. He assessed the Appellant on February 5, 2009 and his clinical condition had not changed significantly.
6. A subsequent medical follow-up on July 22, 2009 found the Appellant had significant symptomatology from his post-concussion syndrome and was still suffering from significant muscle contraction headaches with easy fatigability and chronic myofascial

pains in his posterior neck and at times lower back with no evidence of any further significant improvement in his level of functioning or his capacity to perform employment beyond approximately 70% of his pre-accident employment.

[Appellant's doctor] stated:

“Thus on the balance of probabilities Mr. [the Appellant] did not have the capacity as of February 15, 2009 to perform all of the essential duties of his preaccident employment.”
(Underlining added)

[Appellant's doctor] noted that on his assessment of March 2, 2011, the Appellant's condition had not changed.

The Claimant Adviser wrote to [MPIC's vocational rehab consultant #2], of [vocational rehabilitation consulting company], on October 5, 2011 and discussed the injuries the Appellant sustained in the motor vehicle accident and the various treatments the Appellant received as a result of these injuries. He further stated:

“As a result of these treatments, and despite ongoing limitations related to chronic headaches and fatigue, [the Appellant] gradually increased his work tolerance to the point where he was capable of performing approximately 73% of his pre-accident employment duties, according to the report of [MPIC's occupational therapist] dated August 23, 2007.”

The Claimant Adviser further stated that the Appellant was never able to return to his job on a full-time basis, performing all his pre-accident duties and as a result [text deleted] ceased operations on November 30, 2008. The Claimant Adviser stated:

“On January 15, 2009 the case manager wrote to [the Appellant] confirming his ongoing entitlement to IRI benefits on the basis of his continuing partial work disability, which continued to prevent him from performing 22.2% of his pre-accident employment duties (able to perform of (sic) 77.8% of pre-accident duties).” (Underlining added)

On January 30, 2009, [the Appellant] informed the case manager of his acceptance in a voluntary (unpaid) internship position as a human resource assistant with [text deleted]

based in the [text deleted], and that he would be leaving on February 18, 2009. However, after learning about this opportunity, the case manager terminated [the Appellant's] IRI benefits on the basis that he had regained the capacity to hold the employment he held at the time of the motor vehicle accident. [the Appellant] requested a review but the case manager's decision was subsequently confirmed by the internal review office at MPIC, and he has now filed an appeal with the Automobile Injury Compensation Appeal Commission.

REQUEST

The essence of this dispute is the case manager's belief that the internship position with [text deleted] was an "equal or better job" compared to [the Appellant's] pre-accident occupation. However, there is no medical evidence on file to support the conclusion that [text deleted] had regained the capacity to hold his pre-accident employment as of February 15, 2009. Therefore, at this time, I am simply requesting an initial review of the documentation contained in appendix A, consisting of medical and vocational records, for the purpose of indicating whether or not you believe there is sufficient information to conduct a thorough analysis and comparison of the pre-MVA occupation and the internship position with [text deleted]."

On February 17, 2012 [MPIC's vocational rehab consultant #2] provided a response to the Claimant Adviser. [MPIC's vocational rehab consultant #2] outlined that she had reviewed all the relevant medical reports in respect of the Appellant. In particular, she referred to the Initial Vocational Rehabilitation Assessment by [MPIC's vocational rehab consultant #1] dated December 31, 2008, wherein [MPIC's vocational rehab consultant #1] set out a table of the Vocational Profile Comparison between the Appellant's pre-motor vehicle accident occupation as determined by MPIC as NOC 2171.1 Information Systems Business Analysts and Consultants and his six month volunteer position at [text deleted] of Assistant, Human Resources. This table was a guideline of the level of complexity vocational descriptors and aptitudes required to carry out these vocations. [MPIC's vocational rehab consultant #1] stated that the table highlights that overall the Information Systems Business Analysts and Consultants vocation requires a higher level of complexity than the Assistant, Human Resources position.

[MPIC's vocational rehab consultant #2] made the following recommendation:

“Recommendations/ Conclusions:

As per documentation provided, it is not objectively conclusive that [the Appellant] has the ability to carry out his pre-injury occupation as owner/ operator of [text deleted]. Also, the premise that his volunteer interim as assistant, human resources is similar in complexity to his pre-injury occupation is not objectively determined.

[The Appellant]'s capacity to work at his pre-injury occupation, his pre and post-injury vocational profile, and the mental/ cognitive and physical demands of both his pre-injury occupation and volunteer position at [text deleted] needs to be objectified. Therefore, I recommend the following:

- Provide [Appellant's neuropsychologist], Neuropsychologist, and [independent physiatrist], Physiatrist with:
 - Copies of [Appellant's doctor's] reports
 - A copy of [MPIC's vocational rehab consultant #1's] December 31, 2008 report outlining his pre-injury job tasks
 - [text deleted] job description, including project timelines, as provided to [Appellant's doctor], as well as, [the Appellant's] performance evaluation form
 - Details regarding [the Appellant's] completion of [text deleted] diploma outlining courses, topics, timeframe and grades
 - After their review of this information, and any other information deemed necessary by either specialist, request their opinion regarding any medically related diagnoses of symptoms which would prevent [the Appellant] from performing his pre-injury occupation/ tasks and where, applicable, outline any restricting factors that would impact his ability to work.
- Provide the documentation outlined and requested above to a vocational rehabilitation specialist to opine on:
 - [the Appellant's] ability to work at his pre-injury occupation and applicable, alternate occupations
 - [the Appellant's] pre and post occupational profile

The Claimant Adviser wrote to [Appellant's neuropsychologist] on November 15, 2012 and set out the recommendations of [MPIC's vocational rehab consultant #2] and requested [Appellant's neuropsychologist's] response.

[Appellant's neuropsychologist] responded to the Claimant Adviser on December 14, 2012 and reported:

"You asked for:

- 1) "medical diagnoses and/or symptoms arising from the motor vehicle accident which would have impacted [the Appellant's] ability to perform the duties of his pre-accident employment as of February 12, 2009".

When I last saw [the Appellant] in 2006, he had the following diagnoses and/or symptoms:

- a) very specific nonverbal memory difficulty
- b) fatigue
- c) chronic headaches
- d) tinnitus

At that point [the Appellant] had indicated to me that he was performing all of the types of tasks that he was doing pre-injury at work, but was not putting in his usual hours in completing those tasks.

Unfortunately, by the beginning of 2009, I see that his records indicate that he had not been able to resume his pre-accident hours. The records indicate that at least two types of symptoms continued. The combination of his headaches plus fatigue are described the reason why he was not able to increase his hours maximally. There are several references to this:

- [Appellant's neurologist's] report of November 21, 2006 discussed his headaches and then stated:

"Several times per week he has to leave work to rest which helps"...

- [Appellant's doctor's] report of November 23, 2007 indicates he was working approximately 35 hours a week, but apparently his usual workload had been 60 hours per week.

- MPI had followed up my suggestion that he see a headache specialist (as discussed on page 3 of my report of June 27, 2006). This resulted in treatment with [Appellant's headache specialist] in [text deleted]. However [Appellant's doctor] indicates that the first medication that [Appellant's headache specialist] had recommended has "failed miserably" (page 1 of [Appellant's doctor's] April 23, 2007 report). The headaches were only just starting to improve by then.

- He continued to leave work early in [Appellant's doctor's] report of July 23, 2007.

- In the occupational therapy report by [MPIC's occupational therapist] of August 23, 2007 the reason that he was not increasing his work hours was repeatedly referred to as being due to "chronic fatigue and headaches" as listed on pages 3 and 4 of her report.

- [Appellant's doctor's] report of January 2, 2008 indicates that he was intermittently requiring periods of rest during the day and [Appellant's doctor] made reference to chronic headache, earlier in that paragraph.

- [Appellant's doctor] then indicates that he was considering closing his business due to the headaches and the chronic fatigue in his April 18, 2008 report.

- There is then a related diagnosis by [Appellant's doctor] in his November 19, 2008 report, which refers to having "intermittent insomnia"...

...

2) "any restrictions that would have limited his ability to work in general as of February 12, 2009".

The issue here is his work hours, rather than his work duties. In my final report to MPI of June 27, 2006 I indicated: "however he has not yet worked himself up to full time hours, and I do still have some hope for this"... I indicated that in rare cases patients are left with reduced hours.

In [the Appellant's] case, my conclusion is that the attempts to increase his hours were not fully successful. The records indicate that he didn't feel he moved beyond 35 hours per week, and/or he wasn't putting in several hours in a row without needing to leave work for rest. He had the benefit of two specialists for his headaches ([Appellant's headache specialist] and [Appellant's neurologist]), as well as regular follow-ups with his family physician [Appellant's doctor], but the headaches and fatigue did not fully resolve. So his documents indicated that [the Appellant] had in essence been "restricted" to 35 hours a week maximum, and/or had the need for occasional rest breaks for alleviation of chronic headaches. (For some claimants of MPI, a 35 hour work week could be full-time, but in this case, he had indicated a longer work week was necessary before the MVA, particularly recognizing that he had ownership duties in addition to other responsibilities).

In conclusion, on the balance of probabilities [the Appellant] was still restricted in his work hours as of February 12, 2009." (Underlining added)

MPIC's legal counsel wrote to [Appellant's neuropsychologist] on June 28, 2013, with agreement from the Claimant Adviser Office, submitting new information to [Appellant's neuropsychologist] requesting whether his opinion had changed in respect of the Appellant. [Appellant's neuropsychologist] was provided with a transcript of the University courses taken by the Appellant and the marks he received, as well as the Appellant's answers in respect of his ability to take these courses.

In response, [Appellant's neuropsychologist] wrote to MPIC's legal counsel on July 24, 2013 and indicated that:

1. The transcript provided resulted in a change in his conclusion to the question whether any restrictions would have limited his ability to work in general as of February 12, 2009.
2. [Appellant's neuropsychologist] responded that he could no longer identify restrictions related to his mental productivity for the summer of 2008.

[Appellant's neuropsychologist], however, indicated that:

1. It does not mean that the Appellant was free from any symptoms in 2008 and 2009 but it means that he coped sufficiently with them to complete his university degree.
2. His focus as a psychologist in his report had been on the Appellant's mental productivity or mental stamina as the Appellant still had physical symptoms in 2008 that were monitored by his physician, [Appellant's doctor].
3. The symptoms closest to MPIC's interest in February 2009 were the 2 visits to [Appellant's doctor] on November 18, 2008 when he reported a combination of headaches, chronic paracervical muscle strain, chronic fatigue and tiredness and on February 5, 2009 when "his clinical condition had not changed significantly".

On June 6, 2014 MPIC's legal counsel wrote to [Appellant's neuropsychologist] setting out certain comments the Appellant had made in respect of the hours he had worked at his business and sought clarification from [Appellant's neuropsychologist].

In response [Appellant's neuropsychologist] wrote to MPIC's legal counsel on July 11, 2015 and stated:

- “a) I still can’t identify a restriction on his mental productivity to work in general, in light of the evidence that he completed 5 university courses in 3 months in the summer of 2008 plus his statement to MPI from June 11, 2013 that for the other courses, he was completing them part-time while still working.
- b) However I can state that he was restricted in his ability to work from 2006-2008 in his pre-accident employment rather than employment in general. This is because he stated he needed to work more than a typical 35 hour workweek pre-injury (which is a point I already made in the last paragraph of page 3 of my December 14, 2012 report), yet he was fatigued and reportedly did not achieve his pre-accident productivity, and because his recent information from your June 6 letter stated he wasn’t working during the final 5 courses from May to July in 2008 (contrary to the impression given in his statement of MPI of June 11, 2013 that he was working during all coursework).”

MPIC’s legal counsel, on February 9, 2015, wrote to [Appellant’s neuropsychologist] and requested he respond to two questions. [Appellant’s neuropsychologist] replied to MPIC’s legal counsel on February 27, 2015 and stated:

“I am responding to the questions that you posed earlier this month, in your February 9, 2015 letter to me. You referred to my December 14, 2012 report. Your first question is as follows:

“My read of your report indicates that you concluded that [the Appellant] was restricted in his work hours as of February 12, 2009 due to physical issues (headaches and fatigue). Kindly confirm whether I am correct in my read of your report...”

Yes.

Your second question is as follows:

“...and if I am [correct], kindly confirm whether there were any accident-related psychological or mental conditions or impairments that would have prevented [the Appellant] from returning to his pre-accident work duties or his pre-accident work hours (45 hours/week as confirmed by an occupational therapist that conducted a percentage of duties assessment).”

Yes. [The Appellant’s] fatigue can be regarded as both a physical and psychological symptom (in the form of reduced mental stamina). So, I have already concluded as follows: “However I can state he was restricted in his ability to work from 2006-2008 in his pre-accident employment rather than employment in general”...

Discussion:**Whether the Appellant's IRI benefits were correctly terminated on February 12, 2009.**

The Commission finds that the Internal Review Officer erred in his decision dated April 30, 2010 that the Appellant exhibited the ability to perform his pre-accident employment. In arriving at this decision, the Internal Review Officer relied on the medical report from [Appellant's neuropsychologist] dated June 27, 2006 who indicated that the Appellant was capable of performing all the work duties involved in operating [text deleted].

The Commission notes that in arriving at this decision, the Internal Review Officer ignored the medical reports of [Appellant's doctor], the Appellant's family physician who commenced treating the Appellant in respect of his motor vehicle accident injuries shortly after the motor vehicle accident and continued to treat the Appellant in respect of these injuries for several years. The Commission finds that [Appellant's doctor] was in the best position to determine whether the Appellant was able to return to his pre-accident employment following the motor vehicle accident.

[Appellant's doctor] reported to MPIC that the Appellant:

1. On April 16, 2004 was totally disabled from the day of the accident and would remain totally disabled for any gainful employment at least until reassessed in early May.
2. On October 12, 2004 was recovering from post-concussion syndrome with symptoms of fatigue and headaches which disabled him from working more than two hours per day.
3. On January 3, 2006 continued to suffer from chronic headaches, tinnitus and fatigue and was restricted to working approximately 12 hours per week.
4. On April 17, 2006:

- a) showed that he continued to function at approximately a half-time basis which varied from day to day;
 - b) has difficulty with activities that require mental concentration which cause significant mental fatigue and headaches;
 - c) has the ability to do mental work with concentration for approximately one to two hours per day, and some days even less.
5. On November 23, 2006, he had reassessed the Appellant on August 9, 2006 and October 10, 2006 and he continued to suffer from chronic daily disabling headaches and at least once or twice a week these headaches become so severe he had to stop doing his regular activities.

[Appellant's doctor] reported on July 23, 2007 to MPIC that:

1. He had reassessed the Appellant on June 19, 2007 and noted his diagnosis remained the same; i.e. post-concussion syndrome, chronic muscle contraction, headaches associated with chronic fatigue and chronic tinnitus.
2. The Appellant reported that although he was attending full-time at his place of employment he was only achieving one-third of his previous work capacity.
3. In his opinion the Appellant was being honest and not exaggerating his work restrictions whatsoever.

On April 18, 2008 [Appellant's doctor] wrote to MPIC's case manager and reported:

1. The Appellant continued to complain of chronic pain which becomes disabling with mental or physical activity, restricting his capabilities of regular activities including his employment.
2. This is associated with recurrent frequent headaches of a chronic nature.

3. The Appellant informed him he wanted to close down his business if he did not show further improvement.

On November 19, 2008 [Appellant's doctor] wrote to the case manager indicating he conducted a reassessment of the Appellant on November 17, 2008 and indicated:

1. The Appellant continued to suffer post-concussion syndrome with chronic muscle contraction headaches and chronic pain.
2. The Appellant estimated that he was functioning at approximately 70% of his physical mental capacity prior to his accident which had not changed significantly over the past year.

The Commission notes that the Internal Review Officer issued his decision on April 30, 2010 and did not refer to the medical reports of [Appellant's doctor] who personally examined the Appellant and provided reports to MPIC on a number of occasions between April 16, 2004 and February 5, 2009, a period of approximately 5 years.

Subsequent to the decision of the Internal Review Officer [Appellant's doctor] wrote to MPIC on September 12, 2011 stating:

1. He had seen the Appellant regularly on a medical basis since his motor vehicle accident of March 3, 2004 to the present with his last medical reassessment being March 2, 2011.
2. The result of a medical assessment on November 18, 2008 indicated the Appellant was clinically suffering from significant post-concussion syndrome with chronic muscle contraction, headaches, chronic paracervical muscle strain, associated fatigue and tiredness.

3. He assessed the Appellant on February 5, 2009 and his clinical condition had not changed significantly.
4. A subsequent medical follow-up on July 22, 2009 found the Appellant's condition had not changed. [Appellant's doctor] stated:

“Thus on the balance of probabilities [the Appellant] did not have the capacity as of February 15, 2009 to perform all of the essential duties of his preaccident employment.” (Underlining added)

MPIC's case manager referred the Appellant to [Appellant's neuropsychologist], a clinical neuropsychologist, to assess the Appellant. [Appellant's neuropsychologist] provided a report to the case manager on November 26, 2004 and indicated that:

1. The Appellant's reduced deficiency from his work was due not only to his specific memory difficulty but also to post-concussive symptoms, particularly vertigo and tinnitus.
2. Fatigue may be playing a greater role at present rather than his specific cognitive limitations.

[Appellant's neuropsychologist] subsequently saw the Appellant on June 27, 2006 and reported to the case manager the Appellant had the following diagnosis:

- a) very specific non-verbal memory
- b) fatigue;
- c) chronic headaches; and
- d) tinnitus.

[Appellant's neuropsychologist] stated that these symptoms had impacted on the Appellant's ability to perform his pre-accident employment. However, at this time [Appellant's

neuropsychologist] indicated that the Appellant would be able to perform all his work duties but he would have to work up to full-time hours.

In response to a request from the Claimant Adviser, [Appellant's neuropsychologist] advised that on December 14, 2012 he had last seen the Appellant in 2006 and described the same diagnosis and symptoms that he had reported to the case manager on June 27, 2006.

[Appellant's neuropsychologist] stated, after examining the medical records provided to him, that at the beginning of 2009 the Appellant had not been able to resume his pre-accident hours and that the combination of the Appellant's headaches plus fatigue were described as the reason why he was not able to increase his hours maximally. [Appellant's neuropsychologist] stated there were several references to this:

- [Appellant's neurologist's] report of November 21, 2006 discussed his headaches and then stated:
"Several times per week he has to leave work to rest which helps"...
- [Appellant's doctor's] report of November 23, 2007 indicates he was working approximately 35 hours a week, but apparently his usual workload had been 60 hours per week.
- MPI had followed up my suggestion that he see a headache specialist (as discussed on page 3 of my report of June 27, 2006). This resulted in treatment with [Appellant's headache specialist] in [text deleted]. However [Appellant's doctor] indicates that the first medication that [Appellant's headache specialist] had recommended has "failed miserably" (page 1 of [Appellant's doctor's] April 23, 2007 report). The headaches were only just starting to improve by then.
- He continued to leave work early in [Appellant's doctor's] report of July 23, 2007.
- In the occupational therapy report by [MPIC's occupational therapist] of August 23, 2007 the reason that he was not increasing his work hours was repeatedly referred to as being due to "chronic fatigue and headaches" as listed on pages 3 and 4 of her report.
- [Appellant's doctor's] report of January 2, 2008 indicates that he was intermittently requiring periods of rest during the day and [Appellant's doctor's] made reference to chronic headache, earlier in that paragraph.

- [Appellant's doctor] then indicates that he was considering closing his business due to the headaches and the chronic fatigue in his April 18, 2008 report.

- There is then a related diagnosis by [Appellant's doctor] in his November 19, 2008 report, which refers to having "intermittent insomnia"...

The Claimant Adviser Office also asked [Appellant's neuropsychologist] whether there were any restrictions that would limit the Appellant's ability to work in general as of February 12, 2009, being the date the Appellant's IRI benefits were terminated by MPIC. In response, [Appellant's neuropsychologist] stated that:

1. The issue was the Appellant's work hours rather than his work duties.
2. In his report to MPIC of June 27, 2006 he had stated that "however he has not yet worked himself up to full time hours, and I do still have some hope for this".
3. It was his conclusion that the Appellant's attempts to increase his hours were not fully successful.
4. He stated that the Appellant had the benefit of two specialists for headaches, [Appellant's headache specialist] and [Appellant's neurologist], as well as regular follow-ups with his family physician, [Appellant's doctor], but the headaches and fatigue did not fully resolve.
5. As a result, the Appellant had been restricted to 35 hours a week maximum.
6. He set out in his report of December 14, 2012 the same opinion that he had provided earlier to MPIC that the Appellant had been restricted to 35 hours a week maximum.
7. He concluded that on the balance of probabilities the Appellant was still restricted in his work hours as of February 12, 2009 (being the date that MPIC terminated the Appellant's IRI).

In agreement with the Claimant Adviser, MPIC's legal counsel wrote to [Appellant's neuropsychologist] on June 28, 2013 and in response [Appellant's neuropsychologist] stated on July 24, 2013 that he no longer believed the Appellant was restricted from working due to his mental productivity. He further stated that the symptoms closest to MPIC's interest in February 2009 were the 2 visits by the Appellant to [Appellant's doctor] on November 18, 2008 when he reported a combination of headaches, chronic paracervical muscle strain, chronic fatigue and tiredness and on February 5, 2009 when "his clinical condition had not changed significantly".

On February 9, 2015 MPIC's legal counsel wrote to [Appellant's neuropsychologist] requesting clarification. In response to questions put to him, [Appellant's neuropsychologist] stated on February 27, 2015 the Appellant was restricted in his work hours as of February 12, 2009 due to physical issues (headaches and fatigue). He also indicated that the Appellant's fatigue could be regarded as both a physical and psychological symptom and concluded by stating that the Appellant was restricted in his ability to work from 2006 to 2008 in his pre-accident employment rather than his employment in general.

The Commission notes that [Appellant's neuropsychologist] concluded after reviewing all the relevant documents that the Appellant's cognitive memory problems did not restrict the Appellant from working but that the Appellant's fatigue restricted his ability to return to his pre-accident work duties. The Commission finds that [Appellant's neuropsychologist] agreed with [Appellant's doctor] that the Appellant was incapable as of February 12, 2009 of returning to his full-time employment due to the injuries he sustained in the motor vehicle accident.

The Commission notes that [Appellant's neuropsychologist] initially advised MPIC's case manager in a report dated June 27, 2006 that the Appellant was capable of performing all the

work duties involved in operating [text deleted]. However, [Appellant's neuropsychologist], after reviewing subsequent reports of [Appellant's doctor] after June 27, 2006, changed his position and concluded in his report to MPIC's legal counsel on February 27, 2015 that on the balance of probabilities the Appellant was still restricted in his work hours as of February 12, 2009 and he was not capable of performing all the work duties involved in operating [text deleted].

The Commission notes that the Internal Review Officer, in arriving at his decision of April 30, 2010, relied primarily on [Appellant's neuropsychologist's] medical report of June 27, 2006 where he indicated the Appellant was capable of performing all the work duties involved in operating [text deleted] to determine that pursuant to Section 110(1)(a) that the Appellant was able to return to his pre-accident employment and as a result terminated the Appellant's IRI benefits. However, [Appellant's neuropsychologist] in his report to MPIC's legal counsel on February 27, 2015 had reversed his position and determined that the Appellant, as of February 12, 2009 (the date of the termination of the Appellant's IRI benefits) was not able to return to his pre-accident employment.

The Commission notes that MPIC's legal counsel made no submission to the Commission in respect of the change in [Appellant's neuropsychologist's] position on the ability of the Appellant to return to his pre-accident employment. The Commission finds, based on [Appellant's neuropsychologist's] new position, that the decision of the Internal Review Officer dated April 30, 2010, which terminated the Appellant's IRI benefits is no longer valid. As a result the Commission cannot give any weight to this decision.

The Commission notes that [independent physiatrist], a physiatrist, was requested by MPIC to

assess the Appellant and provide a third party report to MPIC. [Independent physiatrist] provided two reports to MPIC. In his first report dated February 12, 2006, [independent physiatrist] concluded that the Appellant did not appear to be physically impaired and that he was at maximum medical improvement with no physical impairment that would prevent him from increasing his work hours on a graduated basis.

[Independent physiatrist] provided a further report on November 24, 2006 and indicated there were no accident related physical impairments that would prevent the Appellant from progressing in his full hours at his usual employment.

MPIC's legal counsel submitted [independent physiatrist's] reports in support of MPIC's position that given the Appellant's demonstrated capacity to return to his pre-accident employment, the Commission should dismiss the Appellant's appeal in respect of the termination of the IRI benefits.

The Commission notes, however, that the Internal Review Officer in his decision dated April 30, 2010 confirming the case manager's decision to terminate the Appellant's IRI benefits because he had the capacity to return to his pre-accident employment did not refer to [independent physiatrist's] report that the Appellant had the ability to return to full-time pre-motor vehicle accident employment.

The Commission also has noted that the Internal Review Officer did not refer to any reports by [Appellant's doctor] in arriving at his decision to terminate the Appellant's IRI benefits.

The Commission further notes that [Appellant's neuropsychologist] was given the opportunity of reviewing all the subsequent medical reports by [Appellant's doctor] and as a result he modified his position and determined the Appellant was incapable of returning to his pre-accident employment.

Unfortunately, [independent physiatrist] was not given the same opportunity to reconsider his position having regard to the reports of [Appellant's doctor] and [Appellant's neuropsychologist]. The Commission has found that [Appellant's neuropsychologist] changed his position on the ability of the Appellant to return to his pre-accident employment based on [Appellant's doctor's] reports. In these circumstances the Commission finds that it gives greater weight to the opinions of [Appellant's doctor] and the subsequent opinion of [Appellant's neuropsychologist] than it does to [independent physiatrist] in determining that the Internal Review Officer erred in terminating the Appellant's IRI benefits.

The Commission agrees with the submission by the Claimant Adviser Office that there was no medical evidence upon which the Internal Review Officer could determine the Appellant had the ability to return full-time to his pre-accident employment.

The Claimant Adviser wrote to [MPIC's vocational rehab consultant #2] of [vocational rehabilitation consultant company] on October 5, 2011 and provided her with all the medical and vocational records in respect of the Appellant and requested her to review the documents for the purpose of indicating whether there was sufficient information to conduct a thorough analysis and comparison of the pre-motor vehicle accident occupation and the internship with [text deleted]. [MPIC's vocational rehab consultant #2] responded on February 17, 2012 and stated:

“Recommendations/ Conclusions:

As per documentation provided, it is not objectively conclusive that [the Appellant] has the ability to carry out his pre-injury occupation as owner/ operator of [text deleted]. Also, the premise that his volunteer interim as assistant, human resources is similar in complexity to his pre-injury occupation is not objectively determined.

[The Appellant’s] capacity to work at his pre-injury occupation, his pre and post-injury vocational profile, and the mental/ cognitive and physical demands of both his pre-injury occupation and volunteer position at [text deleted] needs to be objectified. ...”
(Underlining added)

[MPIC’s vocational rehab consultant #2], MPIC’s consultant, recommended a process by which an objective assessment, rather than a subjective assessment, should be made on whether the Appellant had the ability to carry-out his pre-motor vehicle accident occupation as owner/operator of [text deleted]. MPIC did not undertake to conduct an objective assessment that the Appellant had the ability to carry out his pre-accident employment as the owner/operator of [text deleted].

[MPIC’s vocational rehab consultant #2] further noted that on December 21, 2008 [MPIC’s vocational rehab consultant #1] had been retained by MPIC and had recommended that [independent physiatrist] and [Appellant’s neuropsychologist] be provided with a lists of the Appellant’s pre-injury duties for their review to provide an opinion on any medical factors which would preclude the Appellant’s ability to carry out the tasks of his pre-injury position. [MPIC’s vocational rehab consultant #1] noted that this review was never conducted by [independent physiatrist] and [Appellant’s neuropsychologist].

[MPIC’s vocational rehab consultant #2’s] report corroborates the Appellant’s position that an objective investigation was not undertaken by MPIC to determine whether the Appellant had the ability to carry out his pre-injury occupation as owner/operator of [text deleted] when it

determined to terminate the Appellant's IRI benefits as of February 15, 2009.

The Commission agrees with the Claimant Adviser's submission that MPIC did not carry out such an investigation and instead the Internal Review Officer issued a decision on April 30, 2010 and found that the Appellant amply exhibited the ability to perform his pre-accident employment pursuant to Section 110(a) of the MPIC Act because:

1. Shortly after the time of the accident the Appellant's hours of employment were steadily lengthened up to the time the Appellant decided to close [text deleted] in 2008.
2. [Appellant's neuropsychologist's] medical evidence was that the only difficulty the Appellant had arising out of the motor vehicle accident was a cognitive difficulty with one type of non-verbal memory and at that time confirmed the Appellant was performing all his duties.
3. In addition to performing his work duties, the Appellant also completed a [text deleted] degree at the [text deleted], as well as learning to converse in [text deleted].
4. The Appellant accepted a position as assistant human resources at [text deleted] in [text deleted] in January 2009.

The Commission notes that MPIC had decided that an equivalent position to the Appellant's occupation as owner/operator of the computer company was the Information Business Systems Analysts and Consultants. On February 17, 2012, [MPIC's vocational rehab consultant #2] in her report to the Claimant Adviser Office set out a table of vocational profile comparisons between the Information Systems Analysts and Consultants and the [text deleted] Assistant Human Resources position. This table provided a guideline as to the level of complexity, vocational descriptors and aptitudes required to carry out these vocations. [MPIC's vocational rehab consultant #2's] table highlights that overall the Information Systems Business Analysts

and Consultants vocation requires a higher level of complexity than the [text deleted] Assistant, Human Resources position.

The Commission determines that since MPIC determined the Information Systems Business Analysts and Consultants' position was equivalent to the pre-accident employment of the Appellant, the Internal Review Officer erred in concluding that the [text deleted] Assistant, Human Resources position was equivalent to the determined employment of the Information Systems Business Analysts and Consultants. As a result the Commission finds that the Internal Review Officer erred in concluding that having accomplished the requirements of the [text deleted] position, the Appellant was capable of performing his pre-accident employment or the determined employment as an Information Systems Business Analyst and Consultant.

The Commission further notes that the Appellant, in his testimony and in his written statements, objected to the determined employment of the Information Systems Business Analysts and Consultants on the grounds that this determined employment:

- 1) Ignored the business management functions of his pre-accident employment.
- 2) It greatly undermined the level of work he was performing prior to the accident.
- 3) He considered being employed as a network technician as an entry level position that is overseen by some other manager.
- 4) That his experience in business management as a Communications, Network and Information Systems Manager was a far more complex and sophisticated job than the determined employment.

The Commission finds that the Appellant, in his testimony and written statements, made a compelling argument that the determined employment as Information Systems Business Analysts

and Consultants was not as complex and demanding as the Appellant's pre-accident employment in operating a computer business.

The Commission finds that MPIC failed to give sufficient consideration to the Appellant's objection to the determined employment of the Information Systems Business Analysts and Consultants position and did not carry out an appropriate objective investigation in order to determine if the two positions were equivalent.

The Commission notes that [MPIC's occupational therapist], MPIC's, consultant, in her report of August 16, 2007, had been requested by the case manager to report on the percentage of duties the Appellant had completed on June 27, 2007. The Appellant reported to [MPIC's occupational therapist] that he had slowly increased his level of participation and work related tasks. However, he reported that chronic fatigue and headaches continued to impact on his tolerance and ability to complete all required hours and tasks.

In her report, [MPIC's occupational therapist] referred to the reports of [Appellant's headache specialist], who in his report of November 22, 2006 indicated the Appellant's functional limitations were due to decreased energy and headaches. [MPIC's occupational therapist] conducted an investigation into the work the Appellant carried out at his pre-accident employment and concluded:

“Total hours required to complete:	45	
Total hours able to complete:	33	
Overall Percentage of duties reportedly completing:	73%	”

[MPIC's occupational therapist], in her report, noted the Appellant's typical duties and estimated time he was determined to have the capacity to carry out was 73% of his duties. His primary

areas of difficulty pertained to repairing computers, wireless networking, network installation, monitoring, and troubleshooting and overall the Appellant noted these tasks were mentally demanding and his chronic fatigue and headaches negatively affected his tolerance levels.

The Commission has noted that [Appellant's doctor] commenced his assessments of the Appellant shortly after the motor vehicle accident and he continued these assessments for a number of years. [Appellant's doctor], in all of these assessments, consistently reported the Appellant's complaints of fatigue, headaches and tinnitus and that this affected the Appellant's ability to perform 100% of the duties he performed before the motor vehicle accident.

[Appellant's neuropsychologist], in responding to the Claimant Adviser's request on December 14, 2012, indicated that he had reviewed some of the reports of [Appellant's doctor] and concluded that the Appellant's attempts to increase his hours were not fully successful. [Appellant's neuropsychologist] stated that the records indicated that the Appellant did not feel he moved beyond 35 hours per week. [Appellant's neuropsychologist] concluded on the balance of probabilities that the Appellant was still restricted in his work hours as of February 12, 2009.

[Appellant's doctor], in his report to MPIC dated October 27, 2007, stated that in his opinion the Appellant was being honest and not exaggerating his work restrictions whatsoever. The Commission found the Appellant testified in a direct and unequivocal fashion. We agree with [Appellant's doctor] the Appellant was being honest and not exaggerating his work restrictions whatsoever. We accept the Appellant's testimony in all issues in dispute between the Appellant and MPIC in respect of the Appellant's appeal for IRI benefits..

Pursuant to Section 110(1)(a) of the MPIC Act, a victim ceases to be entitled to IRI benefits when the victim is able to hold the employment he held at the time of the accident. It is clear to the Commission, from the Appellant's testimony, the reports of [Appellant's doctor] and [Appellant's neuropsychologist] and [MPIC's occupational therapist], that the Appellant was not able to hold the employment he held at the time of the accident.

The Commission finds that:

1. The Appellant could not be said to be holding the employment he held at the time of the motor vehicle accident in accordance with Section 110(1)(a) of the MPIC Act if he is only able to carry out 73% of his work duties.
2. As in a previous decision of the Commission, AC-09-81, the Commission finds that "the Appellant cannot do the same amount of work that he did at the time of the motor vehicle accident and therefore he is not able to hold the same employment that he held at the time of the accident".

For these reasons, the Commission finds the Appellant has established on a balance of probabilities MPIC incorrectly terminated the Appellant's IRI benefits on February 15, 2009 pursuant to Section 110(1)(a) of the MPIC Act. The Commission therefore allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated April 30, 2010.

MPIC's Obligation to Fund Educational Costs Relating to Retraining

The Appellant had returned to his pre-accident employment in a reduced capacity several months after the motor vehicle accident. The Appellant steadily increased his ability to efficiently perform the myriad tasks required of him as the owner/employee of [text deleted]. In 2006 the

Appellant enrolled in a [text deleted] program at the [text deleted] and in 2008 received his [text deleted] degree in [text deleted], still owning and operating [text deleted].

On February 28, 2008 the Appellant wrote to MPIC's case manager and advised her that the only option he had left was to close his business and concentrate on the healing process. He further indicated that his plan was to close his business on March 7, 2008.

The Commission also dealt with the Appellant's appeal in respect of his claim for costs relating to the completion of a [text deleted] degree in the amount of \$25,745.68.

The case manager reviewed the Appellant's claim for reimbursement of his educational costs and issued a decision on July 31, 2009 dismissing the claim.

Case Manager's Decision – July 31, 2009:

The case manager issued a decision on July 31, 2009 rejecting the Appellant's request for reimbursement of education costs. The case manager stated:

“As you regained the ability to hold your pre-accident employment, which was outlined in our decision letter dated February 12, 2009, we will not consider funding toward those educational course charges.”

The Appellant applied to the Internal Review Officer for a review of the case manager's decision.

Internal Review Officer’s Decision – September 24, 2009:

The Internal Review Officer’s decision of September 24, 2009 confirmed the case manager’s decision of July 31, 2009 and dismissed the Appellant’s Application for Review. In his reasons for decision the Internal Review Officer asserted:

1. The Appellant had demonstrated an ability to perform the essential duties of his employment following the motor vehicle accident, although not as efficiently as before the accident.
2. A claimant may be entitled to vocational training if as a result of the motor vehicle accident he was unable to return to the employment which he had at the time of the motor vehicle accident and referred to Section 138 of the MPIC Act and Section 10(1)(e) of Manitoba Regulation 40/94.
3. “I am not satisfied based on a balance of probabilities, that your completing a [text deleted] degree in [text deleted] was required to either lessen the disability resulting from injuries sustained in the accident and to facilitate your return to a normal life or reintegration into society or the labour market. You have proven by your return to your pre-accident employment and the continued ownership and operation of your technology company from several months after your accident to when the company closed in 2008 that you were able to perform your pre-accident employment, albeit not as efficiently as before the accident. ...”

The Internal Review Officer further stated:

“... Your decision to change the course of your chosen career by enrolling in the [text deleted] program and then becoming involved with [text deleted] is admirable. However, the cost of your education in the amount of \$25,745.68 is not a cost that MPIC can be properly required to pay as the provisions of s. 138 of the Act and s. 10(1)(e) of Regulation 40/94 have not been met by the evidence in this claim.”

The Commission notes that the Internal Review Officer, in his decision, neglected to refer to the specific section in Manitoba Regulation 40/94 which states:

Consent of corporation required

10(2) Unless the victim first obtains the consent of the corporation prior to incurring a cost under subsection (1), the corporation is not liable for paying it.

However, the Commission finds pursuant to Section 10(2) of Manitoba Regulation 40/94, the Internal Review Officer dismissed the Appellant's Application for Review of the case manager's decision on the grounds that the Appellant had not first obtained the consent of MPIC prior to incurring educational costs of \$25,745.68 and confirmed the decision of the case manager dated July 31, 2009.

Notice of Appeal – November 20, 2009:

The Appellant filed a Notice of Appeal to this Commission in respect of the rejection by MPIC to reimburse the Appellant for educational costs in the amount of \$25,745.68.

The relevant provisions of this appeal are set out in Manitoba Regulation 40/94 as follows:

Rehabilitation expenses

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

(e) funds for occupational, educational or vocational rehabilitation that is consistent with the victim's occupation before the accident and his or her skills and abilities after the accident, and that could return the victim as nearly as practicable to his or her condition before the accident or improve his or her earning capacity and level of independence.

Consent of corporation required

10(2) Unless the victim first obtains the consent of the corporation prior to incurring a cost under subsection (1), the corporation is not liable for paying it.

Appeal Hearing:

At the Commission hearing, MPIC's legal counsel submitted to the Commission:

“In the fall of 2006, while working 35 hours/week, [the Appellant] started taking University courses to complete his [text deleted] degree. Between the fall of 2006 and the summer of 2008, [the Appellant] took anywhere from 1-3 courses per university session (Tab 1 – pages 3-4). In the 2008 summer session, he took 5 courses. [The Appellant] reported (page 5 of Tab 1) that the coursework did not take away from work time and that the coursework was completed after working hours.”

The Appellant, in his testimony, stated that:

1. He had advised MPIC that he was intending on taking these University courses and asked whether MPIC would reimburse him for the educational costs.
2. He was advised by the case manager that he should complete his course work and then provide MPIC with receipts indicating the amount of the educational costs.
3. He agreed that MPIC had never agreed to pay these costs.

In a note to file dated July 2009 the case manager reported that the Appellant had submitted two letters dated July 21 and July 27, 2009 concerning outstanding issues that required resolution. The first issue was IRI and the second issue was educational costs. In respect of the educational costs, the case manager stated:

“[The Appellant] inquired as to what extent MPI will cover education costs relating to courses he started a few years ago. A decision letter was never provided and today we have addressed this issue. This claim for funding in the amount of \$25,745.68 was denied on the basis of the following:

1. See IRI decision letter dated February 12, 2009, indicating that [the Appellant] has regained the capacity to hold employment he held at the time of the accident.
2. [The Appellant] initiated the educational component since 2006, focusing on completion of his [text deleted] Degree in the event of any future career change.”

The Claimant Adviser submitted that MPIC had determined that the Appellant was capable of duties of an Information Systems Analyst and Consultant, which duties were:

- Information Systems Business Analysts and Consultants confer with clients.
- Systems security analysts confer with clients.
- Information systems quality assurance analysts develop and implement policies and procedures.
- Systems auditors conduct independent third party reviews.

The Claimant Adviser further submitted that the Appellant:

1. Rejected this classification of employment on the grounds that he could not work as a network technician which ignored the business management function of his employment.
2. He considered the position of a network technician as an entry level position which is overseen by some other managing supervisor or unit.
3. He had nine years experience in business management and that the work he did at his company was well beyond the duties that would be provided by a network technician.
4. Because of the injuries sustained in the motor vehicle accident he was unable to continue operating the computer company as we was unable to work the number of hours required to ensure the company was operating successfully.
5. He decided to close his company and to seek other opportunities of employment.
6. In order to secure other employment he proceeded to attend the [text deleted] to obtain a [text deleted] degree which would lead to opportunities for employment of interest to him.
7. As a result, in February 2009 he accepted an apprenticeship with [text deleted].
8. This demonstrated that having the university degree was essential for him to find employment in a new field and as a result MPIC should reimburse him for his educational costs.

The Claimant Adviser, in his submission, referred to Sections 138 and 150 of the MPIC Act which state.

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

Corporation to advise and assist claimants

150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

The Claimant Adviser submitted that pursuant to these provisions, MPIC was legally obligated to reimburse the Appellant for his education expenses since his degree contributed to the Appellant's rehabilitation and facilitated his return to a normal life and reintegration into the labour market.

MPIC's legal counsel further submitted that having regard to Manitoba Regulation 40/94, the Appellant's appeal ought to be dismissed since the Appellant had no authority to seek reimbursement of educational costs without first obtaining the consent of MPIC.

DECISION:

The Commission notes that Sections 138 and 150 of the MPIC Act are of general application and that Section 10(2) of Manitoba Regulation 40/94 is of specific application. In *Driedger on the Construction of Statutes, Third Edition by Ruth Sullivan*, the authors, on page 188, referred to the decision in *R. v. Canadian Broadcasting Corp* (1992), 72 C.C.C. (3d) 545 (Ont. Gen. Div.) affd 84 C.C.C. (3d) 574 (Ont. C.A.) and stated that where there are conflicting provisions in a statute relating to the same subject matter, the specific enactment takes precedence over a general enactment. As a result, the specific provision of Section 10(2) of Manitoba Regulation 40/94 overrides Sections 138 and 150 of the MPIC Act.

The Commission recognizes the Appellant was unable to carry out his business duties due to the injuries suffered in the motor vehicle accident and MPIC erred in:

1. Determining the Appellant could return to work in pre-accident employment even though he could not work efficiently due to the lack of hours he was able to work.
2. Determining the position of an Information Systems Business Analysts and Consultants was equivalent to the duties performed by the Appellant in the operation of his business.

However, the Appellant admitted he did not obtain the consent of MPIC prior to incurring the cost of obtaining a [text deleted] degree in accordance with Section 10(2) of Manitoba Regulation 40/94. As a result, MPIC was not legally obligated to reimburse the Appellant for his education costs.

For these reasons the Commission finds that the Appellant has failed to establish on a balance of probabilities that MPIC erred in failing to reimburse the Appellant for his educational costs in obtaining a [text deleted] degree. The Commission therefore confirms the decision of the Internal Review Officer dated September 24, 2009 and dismisses the Appellant's appeal.

Dated at Winnipeg this 3rd day of December, 2015.

MEL MYERS, Q.C.

TOM FREEMAN

SUSAN SOOKRAM