



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-02-32

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Laura Diamond
Ms. Deborah Stewart

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms. Dianne Pemkowski.

HEARING DATE: November 4, 2002 and May 7, 2003

ISSUE(S): Entitlement to further Income Replacement Indemnity
benefits

RELEVANT SECTIONS: Sections 110(1)(a) and 110(2)(d) of the Manitoba Public
Insurance Corporation Act ("MPIC Act")

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

Reasons For Decision

On March 26, 1997, [the Appellant] was involved in a motor vehicle accident and sustained soft tissue injuries to his neck and shoulders and experienced troublesome ongoing headaches.

At the time of the accident the Appellant was employed as a heavy labourer (grinder) in a foundry operated by [text deleted]. On May 21, 1997, approximately two months after the

accident, the Appellant returned to work at [text deleted]. The Appellant left work again, effective June 13, 1997, because of pain in his neck and shoulders.

[Text deleted], a physiatrist, [text deleted], at the request of the Commission, provided a report dated January 14, 2003. In this report [Independent physiatrist] interviewed the Appellant and had access to the entire medical file in respect to the Appellant. [Independent physiatrist], in his report, provides a comprehensive description of the Appellant's job as a heavy grinder as follows:

[The Appellant's] job at [text deleted] was titled Heavy Grinder. I was not able to locate a specific job description supplied from his employer, [text deleted], in the medical brief. [Text deleted], occupational therapist, provided an on-site analysis of [the Appellant's] workplace and a Physical Demands Analysis 25.05.98. [Appellant's occupational therapist] noted that a "Heavy grinder works as part of a team whose job is to take raw material and create machinery parts like transmissions or other items like fire hydrants". There were eight-hour shifts with two breaks (10 and 20 minutes). He also noted that the job description was not available for the purpose of the analysis and the understanding of the job of Heavy Grinder was obtained from information at the time of the analysis. [The Appellant] had to: grind castings (use hand grinder or a wheel large grinder to grind off extra metal from the parts); separate castings (standby a conveyor belt and separate castings that are stuck together using a small or large sledge hammer); and shovel sand (may take anywhere from 4 hours to 2 full days of work). He was required to use equipment including: large wheeled grinder, hand-held grinders, air compressor and air gun, hammer and large sledge. The physical demands were noted to range from seldom (1-2%) to constant (67-100%) during a shift. Risk factors in [the Appellant's] work environment included: sustained muscular contraction of the upper extremity, upper torso and neck muscles which may contribute to muscle tension, fatigue in pain (required for grinding and lifting of equipment and castings); repetitive trunk flexion and extension with weight causing increased tension to the back and neck muscles contributing to fatigue and pain symptoms (repetitive shoveling); and repetitive shoulder flexion and extension movements to the extreme ranges of motion required to build up enough force to break castings causing tension in the rotator cuff muscles resulting in shoulder fatigue in pain (hammering). The latter tasks may require at least 17 swings per minute or the equivalent of 1000 swings per hour.

From this description, as well as [the Appellant's] comments (from a handwritten letter in January 1999), the work was heavy and unpredictable. (underlining added)

The Appellant started with physiotherapy at [text deleted] Physiotherapy after he left work on June 13, 1997. The Appellant found the treatment helpful and he was treated for approximately

ten months. The Appellant was referred by MPIC for an Occupational Therapy Worksite and Ergonomic Assessment at [vocational rehab consulting company].

The occupational therapist, [text deleted], provided a report to MPIC dated May 25, 1998 wherein he indicates that, at the time of the assessment, the Appellant had functional ranges of motion of his upper extremities (apart from an inability to raise his right arm, behind his back, higher than the small of his back), and full, functional ranges of motion of his neck, trunk, and lower extremities. He further states that the grip strength was at the upper end of the normal range bilaterally, and was more than sufficient for activities of daily living (but not necessarily for his job). [Appellant's occupational therapist] concluded that a graduated return to work was not an option because the employer insisted the Appellant be 100% capable of doing all of his duties at the time of his return to work. As a result, [Appellant's occupational therapist] recommended that a Functional Capacity Evaluation be done at the conclusion of the Appellant's physiotherapy program to determine his fitness to return to full time work.

On July 2, 1998 the physiotherapist provided a report to MPIC wherein she concluded that the Appellant was physically capable to participate in a work simulation/hardening program but that the Appellant had not reached the stage where he could return to full time duties as required by [text deleted]. A follow up report dated August 24, 1998 suggested the Appellant start the work hardening program the following week.

The [rehab clinic #1], which conducted the work hardening program, issued a report dated November 5, 1998 which indicated that the Appellant had successfully completed the work hardening program, had the ability to safely lift 90 lbs. horizontally, safely lift 80 lbs. from floor to waist, safely lift 60 lbs. overhead, tolerate shoveling, sledge hammering, and heavy duty

power tool use on a frequent basis, and tolerate the physical demands of a full work day with no apparent deterioration.

The Appellant provided MPIC with a list of his concerns in respect of the Assessment made by the [rehab clinic #1] and strongly disagreed with the conclusion that he was capable of returning to work on a full time basis. The Appellant's physician, [text deleted], and his chiropractor, [text deleted], reviewed the [rehab clinic #1] report and indicated the Appellant was capable of returning to work but on light duties only to start.

In his report of November 18, 1998, [Appellant's doctor #1] imposed the "lighter duties" restriction for only 1 – 2 weeks, but as late as June 2, 1999 he was still providing the Appellant with notes continuing this restriction for the next 4 – 6 months. [Appellant's chiropractor] provided a similar note dated June 3, 1999. A few days prior to this report being prepared, the Appellant dropped a heavy object and injured his foot. This, unfortunately, resulted in the employer terminating the Appellant's employment effective June 1, 1999.

The Appellant was referred by his physician to the [text deleted] for an assessment of the Appellant's ongoing complaints of his right shoulder difficulties. [Appellant's sports medicine specialist], of the [text deleted], provided a report to [Appellant's doctor #1], dated April 19, 1999, and states:

[The Appellant] has right shoulder pain with a broad differential. Including impingement, capsular pain, possible labral tear and myofascial pain. Before proceeding with any intervention I am going to arrange an arthrogram to rule out a rotator cuff tear and diminished joint capacitance. I will review him there after and will consider further diagnostic injections or imaging. Thank you for this interesting consultation.

[Appellant's sports medicine specialist], in his diagnosis of the Appellant, noted that he was suffering from myofascial pain.

On May 25, 1999 [Appellant's sports medicine specialist] wrote to [Appellant's doctor #1] and advised that the Appellant's arthrogram was normal ruling out a full thickness rotator cuff tear or adhesive capsulitis.

On April 3, 2000 the Appellant was assessed at [rehab clinic #2] by [text deleted], physiotherapist. He noted that the Appellant's functional limitations at the time were poor right shoulder range of motion, poor spinal stability, and a high rating of perceived disability. A six-week Work Hardening Program was suggested and, in fact, this program continued on for more than eight months until the Appellant was discharged in December 2000. Many of the duties required by the Appellant at [text deleted] were simulated to the extent possible in a clinical setting in order to gauge the Appellant's ability to perform these duties on a sustained basis.

[Appellant's physiatrist], who had been treating the Appellant, reported to MPIC on August 21, 2000 that his treatments were not providing much benefit to the Appellant.

On December 11, 2000 the Appellant was discharged from the [rehab clinic #2] program. The Discharge Summary Report from [rehab clinic #2] indicates that the Appellant had reached maximum medical improvement because they believe that the Appellant had the capacity to perform his pre-accident employment. The Appellant disagreed with the conclusion reached by [rehab clinic #2] as he had with the conclusion reached by the [rehab clinic #1] in respect of his ability to return to work as a grinder.

In his brief report dated January 23, 2001, [Appellant's doctor #2] notes that the MRI of the Appellant's right shoulder taken December 21, 2000 was essentially normal, and reiterates his firmly-held opinion that the Appellant then had the capacity to undertake his pre-accident occupation.

On the other hand, [text deleted], the Appellant's treating physiatrist, provided a further report to MPIC, dated March 22, 2001, where he opined that the Appellant was not, at that time, at maximum medical improvement.

As a result of the conflicting medical information, MPIC requested the MPIC Health Care Services Medical Team to provide an opinion as to whether the Appellant would be medically fit to return to his pre-accident employment. [MPIC's doctor #1] and [MPIC's doctor #2] provided a report dated October 22, 2001 which concluded there were no contraindications in respect to the Appellant's ability to return to work.

The case manager interviewed the Appellant on December 12, 2001 and in a note to file the case manager stated that the Appellant disagreed strongly with the report from [rehab clinic #2] indicating that he was physically incapable of returning to his employment and took exception to the report from the MPIC Health Care Services Team.

In a brief report dated February 18, 2002 which was provided to MPIC, [Appellant's doctor #1] states in respect to the Appellant:

. . . that, in his opinion, you are presently incapable of returning to your heavy labour position at [text deleted]. He writes: "I would strongly recommend however that he is capable of only lighter physical jobs."

On December 12, 2001 the case manager wrote to the Appellant and advised him that [MPIC's doctor #2] and [MPIC's doctor #1], of the MPIC Health Care Services Team, had reviewed the Appellant's medical file. Based on the review of the medical information, the opinion of both doctors was that the Appellant was capable of performing at the functional capacity consistent with his pre-accident employment and, therefore, the Appellant's entitlement to Income Replacement Indemnity ("IRI") benefits would cease one year from the date of the case manager's letter, being December 12, 2001.

As a result of the case manager's decision, the Appellant made an Application for Review of this decision and an Internal Review Officer conducted a hearing with the Appellant on February 20, 2002. On March 7, 2002 the Internal Review Officer wrote to the Appellant confirming the case manager's decision, dismissing the Application for Review.

Appeal

The Appellant appealed the Internal Review Officer's decision to this Commission in a Notice of Appeal dated April 5, 2002.

The issue in this appeal is whether MPIC correctly applied Sections 110(1)(a) and 110(2)(d) of the Act to terminate the entitlement of the Appellant to IRI benefits effective December 11, 2002.

Section 110(1)(a) of the Act states:

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;

Section 110(2)(d) of the Act states:

Temporary continuation of I.R.I. after victim regains capacity

110(2) Notwithstanding clauses (1)(a) to (c), a full-time earner or a part-time earner who lost his or her employment because of the accident is entitled to continue to receive the income replacement indemnity from the day the victim regains the ability to hold the employment, for the following period of time:

(d) one year, if entitlement to an income replacement indemnity lasted for more than two years.

Subsequent to the Internal Review, and prior to the appeal hearing before the Commission, the Appellant provided MPIC with a medical report from [Appellant's physiatrist], dated June 5, 2002, and a report from [Appellant's doctor #1], dated July 9, 2002.

[Appellant's physiatrist], in his report dated January 5, 2002, saw the Appellant on a regular basis between August 17, 1999 and June 5, 2002, and states in his report:

I suspect that [the Appellant] may require many more treatments over the next year or so before I have him at his maximal medical improvement. The reason for his slow improvement may be second to the fact that he is a slow healer. He may be a slow healer because of his underlying Crohn's disease. I also can only see him once a month for a treatment.

....

[The Appellant] is currently employable with restrictions. He is unable to handle heavy labor that he was required to do in his previous occupation. If he were able to secure a job that had reasonable light duties with no major repetitive activity of his right upper limb he would probably be able to tolerate the job quite well.

[Text deleted], who is the Appellant's personal physician, states in his report dated July 9, 2002 that he has followed the Appellant for the past five years and noted the numerous trials the Appellant had in respect of physiotherapy treatments, work environment assessments, qualifying and quantifying functional assessments, and prolotherapy treatments with [Appellant's physiatrist]:

Through out the past five years [the Appellant] has been motivated to return to the work force. He has followed all recommended treatments and has participated in all programs for rehabilitation and has willingly gone for functional assessment. I think these facts only support the legitimacy of his motivation. He is definitely not a malinger. He has persistently showed motivation to return to the workforce in a capacity that he is physically able to manage. However, he is unfortunately unable to tolerate the physical demands of the heavy grinder operation at work. I would mention that there was a lengthy period of time where he was functioning in light grinding duties at the same facility. He was comfortable and able to continue in this capacity however the workplace insisted that he return to the heavy grinding which soon aggravated his neck and shoulder injuries and caused him to have to discontinue work again. In my opinion, had [the Appellant] been allowed and encouraged to return to work in a lighter capacity such as light grinding several years back, he would still be actively in the work force today.

.....

In summary, [the Appellant] has suffered this soft tissue injury of his neck and shoulder muscles and ligaments and has symptoms involving cervical spine from C3 – C7, as well as both shoulders and trapezius muscles. This has been well documented through x-rays and MRI Scan. [The Appellant] has recovered to the point that he is able to participate in most physical activities and could subsequently optimally, work at most physically demanding jobs. He is not however capable of maintaining an eight hour day, five days a week, at the heavy grinder position which he was doing prior to the accident in 1997. In my opinion, [The Appellant] is definitely motivated to return to the work force. In my opinion revocational training for a less physically demanding job would have been most appropriate several years back and would still be appropriate at this time.

MPIC referred both of the medical reports of [Appellant's physiatrist] and [Appellant's doctor #1] to [MPIC's doctor #1], Medical Coordinator, MPIC Health Care Services, and requested that [MPIC's doctor #1] review the medical information on file with respect to the ability of the Appellant to return to his pre-accident occupation. [MPIC's doctor #1], in his Inter-Departmental Memorandum to MPIC dated October 1, 2002, notes the problem that the Appellant has in respect of Crohn's Disease and indicates that there is a difference of opinion on file with respect to whether the Appellant is physically fit to return to the work place. [MPIC's doctor #1] notes that [Appellant's doctor #2] has indicated that the Appellant is fit to return to work but [Appellant's doctor #1], and perhaps [Appellant's physiatrist], have suggested that he is not capable of returning to work. [MPIC's doctor #1] further indicates that the Appellant's

imaging studies, including his radiographs and MRI scan, have been reported as normal and do not support [Appellant's doctor #1's] diagnosis.

[MPIC's doctor #1] opines that there are alternative explanations, other than chronic soft tissue problems, that may include general deconditioning, exacerbation of the Appellant's Crohn's Disease and adverse effects of the essential tasks of the occupation itself which prevent the Appellant from returning to his pre-motor vehicle accident employment. [MPIC's doctor #1] concludes that, based on a review of the Appellant's file, the factors contributing to the Appellant's ongoing symptoms remain unclear. Moreover, he indicates it is difficult to attribute work incapacity to a particular event including motor vehicle collision – related sequelae.

In view of the conflicting medical evidence, and prior to any evidence being tendered at the hearing on November 4, 2002, the Commission desired to obtain an independent medical opinion in respect to the issues in appeal. As a result, the Commission wrote to [Independent physiatrist] at [text deleted], and requested his medical opinion as to whether, in his view, as of December 12, 2001 the Appellant was capable of returning to his employment as a heavy labourer (grinder), which employment he held at the time of the motor vehicle accident on March 26, 1997. [Independent physiatrist] was provided with all of the medical reports on file and was requested to examine this material, meet with the Appellant and provide a report in due course.

[Independent physiatrist] met with the Appellant, obtained a history, examined all of the medical reports and provided the Commission with a comprehensive report dated January 14, 2002 and a further short report dated March 10, 2002. Both reports were provided to legal counsel for MPIC and to the Appellant. [Independent physiatrist] noted the conflicting diagnoses of various doctors who had examined the Appellant and stated:

[The Appellant] has not been able to sustain the degree of heavy physical activity he was able to perform prior to his motor vehicle collision 26.03.97. The source of and reason for the continuance of [the Appellant's] pain has not been clearly identified. From reviewing the record, the examiners ([Appellant's doctor #3], [Appellant's chiropractor], [Appellant's doctor #1], [Appellant's sports medicine specialist], [Appellant's physiatrist] and [Appellant's doctor #2]) have included diagnoses related to injury/dysfunction of the soft tissues in the neck and right shoulder girdle as the source of [the Appellant's] problems. Diagnoses have included: subluxation complexes – WAD 3a ([Appellant's chiropractor]); cervical strain – WAD 2 ([Appellant's doctor #1]); impingement, capsular pain, possible labral tear, regional myofascial pain of neck and shoulder girdle with associated scapular Dysfunction ([Appellant's sports medicine specialist]); signs of myofascial pain in the right shoulder girdle region, possibly 2° to ligamentous injury at the right AC joint ([Appellant's physiatrist]); and chronic pain and myofascial pain syndrome – right shoulder girdle ([Appellant's doctor #2]). Essentially all agree that internal rotation of the right shoulder is the most difficult range of motion for [the Appellant]. Tenderness in the muscles of the right shoulder girdle and neck has also been noted by most of the assessors.

....

I feel the major problem affecting [the Appellant] is that of regional myofascial pain with tender taut bands palpable in the muscles around the right shoulder girdle. (underlining added)

[Independent physiatrist] stated in respect of the Appellant's sledge hammering activities:

Most of the muscles involved in this activity have been found to have active trigger points in them. As the hammer has to reach a relatively high terminal velocity to break the castings, the force of the swing is significant. The probability of aggravating the tight muscle bands and increasing nociceptive (pain) input with swinging up to 1000 times per hour on a regular basis is high. He reported no problems with his right shoulder prior to the motor vehicle collision. Although he had a high amount of absenteeism at work prior to the motor vehicle collision, it was for medical complications of Crohn's disease, not local problems of the musculoskeletal system.

[Independent physiatrist] concluded the Appellant could not, on a daily basis, carry out sledge hammering activities which were an integral part of the grinder's job. [Independent physiatrist] stated:

From my assessment of [the Appellant] 14.01.03 and reviewing the information in the extensive medical brief provided at the time of the assessment, it is my opinion that [the Appellant] would have significant difficulty using a 12-15 lb. sledgehammer to break apart steel castings for one to two days a time. He would also have significant difficulty

with prolonged shoveling of sand/steel shot. It is my impression from speaking with [the Appellant] as well as from my review of the on-site evaluation done by [Appellant's occupational therapist] in May 1998 that there is no routine regarding the amount of sledge hammering and/or shoveling required at any one time. There certainly may be days when there is very little of this, which would correspond to the amount of activity that he did during the work assessment. The requirement to shovel/hammer for half a day extending into many days at a time would, in my opinion, overreach his tolerance of this activity. From the agreement [the Appellant] had to sign for [text deleted], there was no leeway for any absenteeism and he had to be able to participate in his job 100%.

While he will not have any greater chance of damaging his shoulder now than prior to his accident, the pain that is produced by repetitive forceful activity is a factor now as compared to his pre-accident status. [The Appellant] indicated in his January 1999 letter that he was sleeping better with the reduction of activity. As his pain goes up, the probability of interrupted sleep increases. Non-restorative sleep will affect his ability to deal with pain as well as his ability to concentrate and pay attention. The probability of these issues affecting his work performance (including safety) is high. The level of pain he experiences is directly tied to the activity of hammering and as the amount that this activity is performed is variable, it is difficult to predict with certainty the degree that [the Appellant] will be affected by his work. I feel, however, there is a high probability that [the Appellant] will experience more pain in his unpredictable, pressured work environment than in a simulated, controlled work environment. (underlining added)

Therefore, I feel that [the Appellant] is fit for work but not the work that he did before his accident. He was not ready for his pre-accident job as of 12.12.00. I feel the inability to return to his work results from the injury to his neck and right shoulder girdle, which have occurred since the motor vehicle collision of 26.03.97. (underlining added)

[Independent physiatrist's] report was remitted by MPIC to [MPIC's doctor #1] for his response.

[MPIC's doctor #1] reviewed his Inter-Departmental Memorandums dated October 1, 2002 and October 30, 2002, as well as [Independent physiatrist's] January 14, 2003 report and [MPIC's doctor #1], in an Inter-Departmental Memorandum to the Internal Review Office, dated March 17, 2003, states:

CONCLUSIONS

My opinion as expressed in my most recent inter-departmental memorandum remains unchanged for the following reasons:

- There is insufficient documentation by medical means of a physical diagnosis that precludes the claimant from performing the essential tasks of his occupation.
- The diagnoses (Myofascial Pain Syndrome and Spinal Segmental Sensitization) proposed by [Independent physiatrist] are not valid explanations

for work incapacity arising from motor vehicle collisions (see attached appendix).

- The effect of the claimant's underlying Crohn's Disease still remains unclear and is not considered in the current review by [Independent physiatrist].

The Appellant testified at the appeal hearing and stated that:

- (a) he was unable to sustain the degree of heavy physical activity that he was required to perform prior to his motor vehicle accident;
- (b) he was able to do most of the aspects of his job as a grinder, but he was not capable of performing sledge hammering and shoveling on a continuous basis each day;
- (c) on some days he would not be required to do sledge hammering and shoveling for extended periods of time, but on other days he would be required to either sledge hammer and/or shovel eight hours per day, and was incapable of doing this;
- (d) his chief complaint was that the constant right shoulder pain was made worse by repetitive upper extremity physical activity and, as a result, he was incapable of working as a heavy grinder; and
- (e) that the work simulations were unable to measure his actual activity in the workplace of sledge hammering and shoveling.

Submission

Legal counsel for MPIC submitted that the Appellant has not established, on the balance of probabilities, that he was physically incapable of returning to work as a grinder. In support of its position, legal counsel for MPIC argued that the Commission should accept the report of [rehab clinic #2], dated December 11, 2000. In this report [rehab clinic #2] concluded that the Appellant had reached maximum medical improvement and that they believed he had the capacity to perform his pre-motor vehicle accident employment. [Appellant's doctor #2's] medical report of January 23, 2001 indicates that the MRI was performed on the Appellant's right shoulder on December 21, 2000, was essentially normal and reiterates [Appellant's doctor #2's] opinion that the Appellant has the capacity to undertake his pre-motor vehicle accident occupation.

Legal counsel also referred to the October 22, 2001 Inter-Departmental Memorandum of the MPIC Health Care Services Team which concluded that there were no contraindications to return to work were consistent with [MPIC's doctor #1's] comments in his Inter-Departmental Memorandums dated October 1, 2002, October 30, 2002 and March 17, 2003. [MPIC's doctor #1] concluded that the factors contributing to the Appellant's ongoing symptoms remained unclear, it was difficult to attribute work incapacity to a particular event including motor vehicle collision related sequelae.

MPIC's legal counsel also submitted that the diagnosis by [Independent physiatrist] of myofascial pain syndrome and spinal segmental sensitization were not valid explanations for work incapacity arising from the motor vehicle accident, but were the result of the Appellant's underlying Crohn's Disease.

The Appellant, on the other hand, argued that the medical opinions of [text deleted], his physician, [text deleted], his chiropractor, and [text deleted], his physiatrist, supported his position that he was physically incapable of returning to his pre-motor vehicle accident employment. The Appellant noted that these doctors had personally examined him over an extended period of time, had interviewed him in respect of his symptoms and were therefore in a much better position than [MPIC's doctor #1] to express a medical opinion about his capacity to return to work. The Appellant further submitted that the independent assessment by [Independent physiatrist] totally supported his position that he was incapable of returning to work as a grinder.

Analysis

The independent assessment by [Independent physiatrist] does support the Appellant's position of his incapacity to return to work as a grinder. [Independent physiatrist] found that the major problem affecting the Appellant was that of a regional myofascial pain with tender taut bands palpable in the muscles around the right shoulder girdle. [Text deleted], the sports medicine specialist, and [text deleted], the physiatrist, both determined that the Appellant suffered from myofascial pain in the right shoulder. These diagnoses corroborate the medical opinion of [Independent physiatrist] that the Appellant suffers from myofascial pain to his right shoulder girdle.

[Independent physiatrist], [Appellant's sports medicine specialist] and [Appellant's physiatrist] all personally interviewed and examined the Appellant and were in a position to assess the Appellant's credibility. On the other hand, [MPIC's doctor #1] only conducted a paper review of all of the medical opinions of these doctors and did not personally interview the Appellant and, therefore, was not in any position to assess his credibility. It is clear from an examination of the medical reports of [Independent physiatrist], [Appellant's sports medicine specialist] and [Appellant's physiatrist] that all of them found the Appellant to be credible and accepted his complaints about pain in arriving at their diagnosis. It is for this reason that the Commission prefers the medical opinions of [Independent physiatrist], [Appellant's sports medicine specialist] and [Appellant's physiatrist] instead of the medical opinion of [MPIC's doctor #1].

The Appellant impressed the Commission as a person who is not a malingerer but who wished to return to his pre-motor vehicle accident employment but was physically unable to do so. The Commission notes that the Appellant desired to follow all recommended treatments and

participate in all programs for rehabilitation to the extent that he was able to, having regard to the limitations imposed upon him by the Crohn's Disease from which he suffered.

The Commission finds that the testimony of the Appellant was consistent throughout both his examination in chief and cross-examination, and was also consistent with the discussions he had with the several medical practitioners who interviewed him. The Commission is satisfied that the Appellant was a credible witness and accepts his testimony that he was unable to perform the duties of shoveling and sledge hammering on a consistent basis during an eight hour day as a grinder and therefore was unable to carry out the core duties of his pre-motor vehicle accident employment.

The Commission also finds that the Appellant's testimony is corroborated by the medical opinions of [Independent physiatrist] and [Appellant's physiatrist] who determined that the Appellant was suffering from a myofascial pain syndrome affecting his right shoulder which renders him incapable of returning to his pre-motor vehicle accident employment.

The Commission therefore determines that having regard to the testimony of the Appellant, and the medical opinions of [Independent physiatrist] and [Appellant's physiatrist], the Appellant has established, on the balance of probabilities, that the motor vehicle injuries he sustained on March 26, 1997 rendered him incapable of returning to his pre-motor vehicle accident work as a grinder as of December 12, 2001.

The Commission therefore determines that:

1. MPIC incorrectly terminated the IRI benefits of the Appellant pursuant to Section 110(1)(a) of the Act;

2. The Appellant's IRI benefits are to be reinstated as of December 12, 2002. Interest shall be added to the amount due and owing to the Appellant in accordance with Section 163 of the MPIC Act.
3. The Commission shall retain jurisdiction in this matter and if the parties are unable to agree on the amount of compensation either party may refer this matter back to the Commission for final determination.

Dated at Winnipeg this 7th day of July, 2003.

MEL MYERS, Q.C.

LAURA DIAMOND

DEBORAH STEWART