Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-115

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Dr. Patrick Doyle** **The Honourable Mr. Armand Dureault**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATE:	**March 17, 2005**
ISSUE(S):	**1. Entitlement to Income Replacement Indemnity benefits for days missed from work;** **2. Entitlement to funding for further treatment benefits and medication as a result of motor vehicle accident of August 27, 2001;** **3. Whether current right arm symptoms are causally related to the motor vehicle accident of August 27, 2001.**
RELEVANT SECTIONS:	**Section 81(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94**

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 August 27, 2001 resulting in injuries to his left ankle, left hip, lower and upper back, right hand and right wrist and arm.

The Appellant had been employed for many years with [text deleted] who manufactures a variety of windows for commercial and residential use. At the time of the motor vehicle accident the Appellant had been on leave of absence in respect of injuries he sustained as a result of a previous motor vehicle accident which occurred on November 12, 2000. Shortly before the motor vehicle accident which occurred on August 27, 2001 the Appellant was about to commence a return to work program but, due to the August 27, 2001 motor vehicle accident was unable to return to work.

The Appellant's appeal relates to an entitlement to Income Replacement Indemnity ('IRI") benefits for days missed from work subsequent to the August 27, 2001 motor vehicle accident. The Appellant, at the appeal hearing, withdrew his request for funding in respect of further treatment benefits and medication. In order to determine the merits of this appeal the Commission decided that, having regard to the close proximity of the two motor vehicle accidents, it was necessary for the Commission to consider whether the injuries the Appellant sustained in the motor vehicle accident of November 12, 2000 had any significant impact in determining the Appellant's entitlement to IRI benefits in respect of the August 27, 2001 accident.

Motor Vehicle Accident of November 12, 2000

As a result of the motor vehicle accident of November 12, 2000 the Appellant was examined by [text deleted], an Orthopaedic Surgeon, on November 22, 2000 and December 6, 2000. He provided an Initial Health Care Report dated December 8, 2000 to MPIC which stated under the heading "Signs", "*paresis rt. shoulder – forearm & hand. Also numbness left 3-4-5- fingers".* [Appellant's orthopaedic surgeon] rendered a diagnosis of *"Rt. Brachial plexus palsy"*. (underlining added)

[Appellant's orthopaedic surgeon] further provided a narrative report to MPIC dated December 20, 2000 in respect of his examination of the Appellant's arm on November 22 and December 6, 2000 and stated:

1. in respect of his examination of the Appellant on November 22, 2000 he stated:

   (a) that he was advised by the Appellant that he was employed by [text deleted] in [text deleted] as a glass installer and warehouse worker.

   (b) that the Appellant's neck movements were slightly restricted and that the neck movements were painful at the extremes of neck motions;

   (c) there was a bruise over the right shoulder and right clavicle and diffuse tenderness was present in this region.

   (d) the right shoulder movements were moderately restricted and painful.

   (e) abduction of the right arm was to the 50° position.

   (f) the right biceps reflex and right brachioradialis reflex were weak.

2. In respect of his examination of the Appellant on December 6, 2000 he stated:

   (a) the Appellant complained of pain and aching to the right shoulder and upper limb;

   (b) on examination, right shoulder movements were moderately restricted due to weakness. The right elbow had moderate weakness of flexors and extensors (grade 4-). There was numbness of the right fingers;

   (c) the Appellant had been involved in a motor vehicle accident ". . .*and sustained a soft tissue strain of his neck and right shoulder and right brachial plexus palsy. The prognosis is guarded.*"

   (d) the Appellant is unable to resume his work and duties as a Super Spacer Applicator for [text deleted]. He has ongoing weakness in the right lower extremity and is unable to work at this time;

   (e) at this time, the Appellant is unable to work on a graduated or supernumerary basis. Since he is right-handed, the only possible type of work he could do is of a very sedentary nature using his left hand primarily;

(f) the Appellant was conducting certain exercises at home and was receiving physiotherapy treatments. (underlining added)

On January 24, 2001 [Appellant's orthopaedic surgeon] provided a further report to MPIC and stated that:

> I interviewed and examined this patient again in my office on January 22, 2001. He was attending [Appellant's doctor] and was also taking physiotherapy. He complained of pain in the right wrist and right forearm and numbness in the right fifth finger and ulnar aspect of the right forearm and hand. He felt that the strength in his right upper limb was improving.
>
> He is right handed.
>
> The right shoulder and right elbow had full movements. The right wrist had moderate weakness, Grade 4, of the extensors and flexors of the wrist. The right hand digits had weakness of abduction and adduction of the fingers, Grade 4+. The right hand grip was weak, Grade 4+.
>
> . . .
>
> He is making steady improvement in the function and power of his right upper extremity. At this time he has a major temporary impairment and is unable to work. Evaluation of possible permanent impairment should be deferred for a further three to six months. (underlining added)

MPIC requested [vocational rehab consulting company] to conduct a Physical Demands Analysis relating to the Appellant's physical capacity to do the job function of a "Super Spacer Applicator". In respect of his job functions the Appellant, at the appeal hearing, disagreed that his job function was that of a Super Spacer Applicator at [text deleted]. The Appellant testified that his primary job at [text deleted] was that of a warehouse worker and glass installer, and his duties included obtaining materials in various parts of the plant and delivering them to tradesmen, shipping and receiving from time to time, and occasionally working as a Super Space Applicator from time to time.

[Text deleted], an Occupational Therapist at [vocational rehab consulting company], provided a report to MPIC dated March 26, 2001 wherein he described the job of a Super Spacer Applicator as follows:

- Window orders are provided on sheets so employee knows what sizes and how many they are assembling.
- Glass sheets come through a conveyor belt system to the main work area. The employee picks up the sheets (waist height) and carries them to their work area (approximately 20 to 30 feet). The sheets are stacked upright on an incline bench (chest height); they are organized based on size.
- Once all the sheets have gone through the employee works on assembling the space between the sheets. One sheet is taken and placed on the main work bench (waist height). The super spacer gun is used to apply a spacer tape along the edge of the window. The spacer tape is one inch wide; the purpose of this tape is to create a space between the panes of glass to improve insulation and energy efficiency.
- Once the tape is applied all along the glass a second sheet of glass is taken from the incline bench and sealed on the first sheet. The glass is sealed by pressing down firmly as the edge of the spacer tape is sticky. Once completed the finished product is placed on a cart and labelled according to size and order specifications. The window orders are seperated on the cart by placing small wooden blocks between them. These are retrieved from a barrel close by.
- This process is repeated until the orders are completed. Once the cart is full it is pushed 1 5 feet to another area and the stack of windows is pushed onto a table. The cart and this table both have inverted castors on top so the stacks roll easily from one to the other.
- The Super Spacer Applicator will complete approximately 120 windows per shift.

With regard to the physical demands study, this report stated:

> Based on observations, conversations and measurements made during this analysis, the physical demands listed in the attached analysis are felt to be applicable to the position. The following classification applies to the relevant physical demands listed.
>
> | | |
> |---|---|
> | Seldom | - 1 to 2% |
> | Occasional | - 3% to 33% of a shift |
> | Frequent | - 34% to 66% of a shift |
> | Constant | - 67% to 100% of a shift |
>
> The following demands are felt to be significant in this position:
> - Standing – constant
> - Walking – frequent
> - Eye-hand coordination – constant

- Trunk flexion – minimal range – sustained – frequent
- Neck flexion – moderate range – sustained and repetitive – frequent
- Bilateral manual dexterity – frequent
- Bilateral simple grasp – frequent
- Lift/push/pull/carry – light

[Vocational rehab consulting company] provided a further report to MPIC dated April 2, 2001. Under the heading "Present Complaints" this report stated:

> l. Right arm pain/ dysfunction
> 2. Neck pain and headache
> 3. Sleep disturbance
> 4. Change in appetite
> 5. Financial stress
>
> [The Appellant] reported constant pain along his right arm. The pain is aggravated with movement or bumping the arm. When aggravated the pain shoots up his arm into the shoulder area. [The Appellant] reported he cannot move his arm properly and his hand is very weak. [The Appellant] also reported that his ring and pinky finger of the right hand are the most effected. His limited right arm function currently prevents him from returning to work at [text deleted]. [The Appellant] needs good function of the right arm to complete his essential job duties. . . . .
>
> [The Appellant] reported he has pain in one spot in the back of his neck. This pain increases with right arm movement. [The Appellant] also has headaches associated with the neck pain: they occur at the base of the skull. They are not constant, but can become quite severe, making [the Appellant] feel like he is going to pass out. His neck pain and headaches do not limit his function, and are not a significant barrier to his return to work. (underlining added)

The Appellant was referred by [vocational rehab consulting company] to [rehab clinic] for psychological assessment. [Appellant's psychologist] of [rehab clinic] provided a report to [vocational rehab consulting company] dated June 7, 2001 wherein he states:

> **Current Pain Complaints:**
>
> [The Appellant]is a [text deleted]-year-old Super Spacer Applicator with [text deleted] who was involved in a motor vehicle accident on November 12, 2000. He presents for the interview in no apparent distress although does demonstrate some pain behaviour in the form of avoidance of the use of his right arm and some stiff and pain avoidant posturing. He reports experiencing pain on an on and off basis that extend up his arm. He also has pain in his back and in the back of his head and numbness in his fingers. He reports what he describes as "lots of headaches" which he attributes to "the shocks from

> my arm". He describes the pain he experiences in his arm as "it is like a finger in a light socket" and notes again that when he has these shocking pain sensations he will experience a headache that is in the back of his head and causes him to have to sit and rest. He rates his present pain as a 7/10, his pain at its least as 3/10, and at its worst as 10/10 on an analog scale. He does note that his pain is intermittent and that he can be pain-free for up to 6-7 hours when he is very focused or is concentrating. (underlining added)
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> . . . . .
>
> **Summary:**
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> [The Appellant] is a [text deleted]-year-old (sic) Super Spacer Applicator with [text deleted] who was involved in a motor vehicle accident on November 20, 2000. He did sustain some soft tissue injuries secondary to his motor vehicle accident. Unfortunately, he has experienced a prolonged recovery and has demonstrated a poor response to conservative treatments. At present he is presenting with high levels of anxiety and depression and a strong tendency to somatize his emotional distress. He is being treated for his emotional distress with Benzodiazepines, which can be effective in short relief of anxiety symptoms but to date do not appear to have been a significant benefit to this gentleman. Based on this it is recommended that he be started on a trial of a SSRI anti-depressant such as Paxil or Celexa beginning at a relatively low dose (10 mg.) and then titraited upwards until a therapeutic response has been achieved. Additionally it is recommended that this gentleman become involved in individual counseling to address his symptoms of emotional distress and to monitor his vulnerability for substance abuse. (underlining added)

In a report to [vocational rehab consulting company] dated June 20, 2001 [text deleted], a Neurologist, indicated that he had seen the Appellant on two occasions, that the Appellant had undergone a nerve conduction test which had been normal, and that the Appellant's injuries were not neurological. He further stated that he suspected that the Appellant was suffering from a myofascial pain syndrome.

On July 3, 2001 [vocational rehab consulting company] provided a Progress Report to MPIC which indicated that the Appellant had reported that he was nervous that he was losing his position as he had been off work for over six (6) months. Under the heading "Current Complaints" the report states:

1. Right arm pain/ dysfunction. [The Appellant] was observed vacuuming his floors using his right arm. He still favours the arm and moves it slowly but reported his pain has decreased and his strength and range of motion have improved. [The Appellant] still feels his arm function would affect his ability to work as he would not be as safe when working with glass.
2. Neck pain and headache. [The Appellant] reported no significant change with his neck pain or headache. He does not report this as a barrier to his return to work.
3. Sleep disturbance. [The Appellant] reported he continues to have difficulty sleeping due to his right arm pain. He sleeps on and off throughout the night but is rested in the morning.
4. Decreased appetite. [The Appellant] started taking Celexa (anti-depressant) on June 15, 2001. He immediately had flu like symptoms and further loss of appetite. [The Appellant] reported he was unable to eat for four days. He felt this was a reaction to the medication and not the flu as he had a flu shot that year. [The Appellant] saw [Appellant's doctor] who recommended he stop taking the Celexa.

. . . . .

VOCATIONAL

- [The Appellant] has not returned to work in any capacity. We discussed plans for return to work now that [Appellant's neurologist] has confirmed there is no neurological injury. [The Appellant] feels that he is not quite ready for return to work as his arm is still moving slowly and his strength is still low. Due to the fact that [the Appellant] handles large pieces of glass constantly at work, it may be unsafe for him to return to work until his motor control is further improved. [The Appellant] feels he should be ready to return to work by September 2001. This should be further discussed with his physiotherapist and physicians.

[Vocational rehab consulting company] in a further report to MPIC dated August 20, 2001 stated:

1. Contact with [text deleted], physiotherapist. She reported the following:
    - [The Appellant] has improved significantly over the previous few months.
    - He still has dural irritability causing pain when he elevates his arm.
    - She has progressed [the Appellant] treatment aggressively and he has responded well.
    - Shoulder range of motion is still limited and he is still weak.
    - Manual dexterity has improved, but he will still have difficulty with tools and handling glass.
    - Recovery has been slower than expected but [Appellant's physiotherapist #1] recommended return to work on light duties at this time.

. . . . .

CURRENT COMPLAINTS

1. Right arm pain/ dysfunction. [The Appellant] reported he no longer has constant pain in his arm. He still experiences pain, when he elevates his arm to greater ranges of motion. He still also has the occasional shocking pain up his whole arm and into his back which he feels is causing his headaches. [The Appellant] feels his arm still prevents him from working in his full capacity at this time as he would be unable to handle larger pieces of glass and may injure himself or another employee. (underlining added)

2. Neck pain and headache. [The Appellant] reported a slight increase in the intensity of his headaches since last report. This is still not a significant barrier to his return to work.

3. Sleep disturbance. Under the direction of [Appellant's psychologist] [the Appellant] has started a program of relaxation to assist with his sleep disturbance. [The Appellant] feels this is already helping him to sleep more and his sleep is more restorative.

[Appellant's occupational therapist] provided a further report dated August 20, 2001 to [text deleted], the Appellant's medical doctor, dated August 20, 2001, wherein he indicated that the Appellant should be able to return to work on a graduated basis and he recommended a referral of the Appellant to a work hardening treatment program.

Motor Vehicle Accident of August 27, 2001

Unfortunately, a gradual return to work program was never implemented because the Appellant was involved in a motor vehicle accident on August 27, 2001. [Appellant's orthopaedic surgeon], in a report to [vocational rehab consulting company] dated September 10, 2001, reported that he examined the Appellant on August 7, 2001 (a period of approximately 20 days prior to the August 27, 2001 motor vehicle accident) and he subsequently examined the Appellant on September 7, 2001, approximately ten (10) days after this motor vehicle accident.

In respect of his examination of the Appellant on August 7, 2001 [Appellant's orthopaedic surgeon] stated:

> He stated he was attending physiotherapy and lifting 8 pound weight with his upper limbs and was also doing bicycling. He complained of numbness in the right fifth finger and right palm, and occasional paresthesia in his neck and right arm.
>
> On examination, his neck, shoulders, elbows, wrists and hands had full movements. There was slight numbness of the right fifth finger. There was slight weakness in his right hand grasp with slight weakness of the flexors to the right fourth and fifth fingers. His weight was 130 pounds.
>
> I advised him to carry on with his present regimen and gave him a follow-up appointment for one month, I told him that he would then be ready to return to work. (underlining added)

In respect of his examination of the Appellant on September 7, 2001 [Appellant's orthopaedic surgeon] stated:

> He attended my office on September 7th, 2001 regarding an accident which occurred to him on August 27th, 2001 when he was driving a [text deleted] motorcycle in [text deleted] and had a collision with a moving car and was taken by ambulance to [text deleted], [hospital #1]. He states he had no fractures. He states he had attended [Appellant's doctor] on August 28th 2001.
>
> He had multiple bruises to his left lateral ankle and foot, lateral left hip and about the left eyelids. He had complaints of pain in the low back, right hand and wrist, and radial side of right forearm. He was started on physiotherapy via [Appellant's doctor].

[Appellant's orthopaedic surgeon] further stated in response to questions put to him by [Appellant's occupational therapist]:

> 2. Prognosis is fair to good. He still has some numbness and slight weakness in the right hand, pertaining to this accident. This may clear with the passage of more time, up to one year further.
>
> 3. Continue with this regimen for one more month.
>
> 4. Since he has complaints in his right hand, I believe he would benefit from a gradual return to work on modified light duties for approximately two months. (underlining added)

An Initial Health Care Report in respect of the Appellant relating to the August 27, 2001 motor vehicle accident was submitted by [Appellant's physiotherapist #1] of Sports and Spine Physiotherapy. [Appellant's physiotherapist #1] reported numerous physical findings with respect to the lower back and left hip, as well as symptoms of left lateral ankle pain and reaggravation of previous arm and hand symptoms.

On October 23, 2001 [Appellant's occupational therapist], the Occupational Therapist at [vocational rehab consulting company], provided a report to the case manager at MPIC dated October 23, 2001. [Appellant's occupational therapist] reported that he saw the Appellant on October 10, 2001 and reported the following current complaints of the Appellant:

> 1. Right arm pain/dysfunction. Increased pain since last report due to second MVA. [The Appellant] demonstrated shoulder flexion and abduction of slightly greater than 90 degrees. [The Appellant] reported he still has "shocks" of pain running up his arm, this occurs mostly during the night when he is sleeping. [The Appellant] has no feeling in his right pinky and ring finger, and poor strength and control in his right hand. [The Appellant] is not reporting very good progress, but he still feels the physiotherapy treatment is helping. [The Appellant] feels he is still unable to perform his regular duties at work due to his weakness and pain; he feels that he would be unsafe lifting glass. (underlining added)

[Appellant's occupational therapist] further reported that:

1. the Appellant complained of neck pain and headaches, sleep disturbance and decreased appetite.
2. the Appellant advised him that he did not return to work since his motor vehicle accident and that he continued to feel it would be unsafe for him to return to work at this time because of weakness and poor motor control in respect of his right hand which may cause him to drop sheets of glass.

A report from [Appellant's psychologist] dated October 24, 2001 indicates that the Appellant underwent treatment for an Adjustment Disorder with Mixed Anxiety and Depressed Mood consisting of a trial of an SSRI antidepressant which was not tolerated. He entered a cognitive behavioural program to aid with sleep and was tried on Imipramine 25 mg OD. [Appellant's psychologist] further reports that both his sleep and appetite responded to this treatment to the point that [Appellant's psychologist] found that the Appellant's Adjustment Disorder has resolved and that there were no accident-related psychological barriers that would interfere with his ability to return to work and treatment was discontinued.

A graduated return to work program had been developed for the Appellant, however this program was never implemented due to employer concerns. As a result, the Appellant entered a work hardening program at [rehab clinic] on January 21, 2002 and continued until March 1, 2002.

On March 22, 2002 [rehab clinic] forwarded a Work Hardening Program Discharge Report to the case manager and this report indicated:

> **Treatment Overview**
>
> [The Appellant's] usual work is as a Super Spacer Applicator/Edger with [text deleted]. At the time of the Motor Vehicle Accident in question, He suffered soft tissue injuries to the cervical spine, right shoulder, and lumbosacral spine. He also sustained a right brachial plexus palsy, which has resolved without neurological deficit. His myofascial pain of the above noted regions has resolved such that he was able to progress to daily eight-hour rehabilitation sessions structure in the form of a workday, based upon those physical demands of his chosen occupation. [The Appellant] managed this with no forms of passive pain management treatment from the treatment team at [rehab clinic]. (underlining added)

This report also recommended that:

1. the Appellant return to his pre-accident occupation full time, full duties, with no restrictions.
2. no graduated return to work was recommended.

The case manager produced a Note to File dated April 23, 2002 which contained a discussion the case manager held with [Appellant's occupational therapist]. [Appellant's occupational therapist] described a telephone discussion he held with the Appellant on April 23, 2002 in which the Appellant advised [Appellant's occupational therapist] he was having difficulty at work, that he had missed two days of work due to fatigue and increased pain in his arm. The Appellant further stated that he was unable to "lift the heavy pieces" at work and that he was getting assistance from other co-workers.

[Vocational rehab consulting company] provided a report to [rehab clinic] dated May 9, 2002 which stated in part:

> **CLAIMANT'S FUNCTION SINCE RETURN TO WORK**
>
> [The Appellant's] function at work since his return to work on March 6, 2002 was discussed with [text deleted] and two employees ([text deleted]). [The two employees] provided similar statements, that [the Appellant] did not appear to be the same person as before he was off work initially. He did not seem to have any difficulty completing the regular job duties, but his effort and work performance were very poor. He moved slowly and took his time with all activities, regardless of the difficulty of the specific job task. (underlining added)

The Appellant was unable to return to work due to a work related accident until May 21, 2002. In a report to file dated May 28, 2002 the case manager states that he spoke to the Appellant on May 21, 2002 who indicated he was doing okay, had returned to work on May 21st *". . but finds it is hard."*

On May 29, 2002 [Appellant's rehab doctor #1] wrote to [Appellant's occupational therapist] at [vocational rehab consulting company] indicating that he was requested by [vocational rehab consulting company] to reassess the Appellant and that he did so on Thursday, May 9, 2002. In this report [Appellant's rehab doctor #1] states:

> [The Appellant] presented with a new chief complaint of right upper extremity pain of approximately 2 weeks duration. He indicated that the pain begins in the right hand, in association with flexion movement of the fingers. He indicated that the pain radiates to the right shoulder, right side neck, and then to the scalp. He indicated that this pain is constant, but associated with an intermittent "jerking and shaking" of the right upper extremity. He also indicated that he is experiencing bilateral throbbing type of headache. (underlining added)

[Appellant's rehab doctor #1] further stated:

> **Recommendation**
>
> Although [the Appellant] indicated that he was experiencing this sudden jerking motion of his right upper extremity while he was undergoing rehabilitation here at [rehab clinic], he had never reported such to myself, my assistant, or any of the therapists. In my opinion, the present hand injury is not related to the Motor Vehicle Accident (MVA) that he sustained previously. He was experiencing some sleeping difficulties while he was undergoing his physical rehabilitation program here at [rehab clinic], and in my opinion, his sleep problem is related to the Motor Vehicle Accident of November 14, 2000. (sic)
>
> I would recommend rehabilitation program of at least 1-2 weeks on a daily basis to focus on the hand. . .

MPIC requested [Appellant's rehab doctor #1] to reassess the Appellant and he did so on June 11, 2002. [Appellant's rehab doctor #1] provided a report to MPIC dated July 17, 2002 wherein he stated:

> [The Appellant] completed a 6-week Work Hardening Program at [rehab clinic], and returned back to his pre-accident job full-time, full-duties, without any restrictions on a graduated basis as a Glass Installer (Applicator) at [text deleted]. A few weeks after his return to work program was completed successfully, he sustained a work-related injury to his right had (sic) for which he was assessed by myself at [rehab clinic] on May 09, 2002, and underwent one week of hand rehabilitation program. He completed the one-week hand rehabilitation program and returned back to his job on full-time, full-duties, without any restrictions three weeks ago.

> [The Appellant] reported that presently he is experiencing neck pain, low back pain, and right upper extremity pain which has been aggravated after he went back to work on a full-time, full-duties basis. He indicated that he has no strength in his right upper extremity, and thinks that he cannot do his job or any heavy job anymore. He has been utilizing Codeine 50 mg twice per day, which is providing good pain relief. He reported that if he doesn't use the medication, the headache and generalized body pain starts to become unbearable. He reported that the medication provides approximately 70% pain relief. He has also been utilizing Nitrazodone 10 mg before going to bed regularly, except on weekends (Fridays and Saturdays) according to him. He indicated that if he doesn't use the Nitrazodone, he usually wakes up about 3 to 4 times per night. . . (underlining added)

[Appellant's rehab doctor #1's] physical examination noted no muscle atrophy, normal joint range of motion of neck, shoulder, elbow, wrist and IP joints. Muscle power was intact and no neurological abnormalities was detected.

On July 18, 2002 the case manager produced a note to file which stated:

> Performance at work is deteriorating
> . . . .
> July 18 – [Appellant's rehab doctor #1] called to let MPI know that [the Appellant's] performance at work is deterioriating (sic). The supervisor called [Appellant's rehab doctor #1]. [Appellant's rehab doctor #1] said that he did a work site assessment + watched [the Appellant] perform his duties. It is [Appellant's rehab doctor #1's] opinion that [the Appellant] can do the job. There is no objective evidence to support any physical dysfunction or inability to do his job. (underlining added)

On July 25, 2002 the case manager produced a note to file which stated:

> spoke with clmt – he will be picking up hot pack at [rehab clinic]. He says he is barley (sic) surviving at work. He was asked to lift some bigger units at work one day and told them he couldn't without assistance. Advised [Appellant's rehab doctor #1] was of the opinion that he is capable of doing his job so if he diecided (sic) not to go to work he would not be entitled to IRI. Clmt said he would continue at work but he wanted to mention the problem with lifting bigger window units.
>
> Spoke with [text de;eted] at [rehab clinic] – clmt has been calling their office almost daily for the last 2 weeks. He is requesting prescription and hot pack. He also is commenting that he can't to (sic) his job. He wanted [Appellant's rehab doctor #1] to give him a note

> indicating same. He was told their (sic) is no objcetive (sic) findings supporting why he can't work. I approved hot pack. (underlining added)

On August 2, 2002 the case manager produced a note to file which stated:

> spoke with clmt yesterday. He also called on Jan 31st and left a message. At work on July 30th he was having alot of pain in his arm, neck and hand and also having headaches. Almost passed out because of the pain. [Text deleted] from work took him to [hospital #2]. Apparently did an EKG. Apparently they told him to take it easy but he felt he should stay at work or he wouldn't get paid anything. So he got a note for light duties. He saw his own doctor, [text deleted], who also told him to stay on light duties. He stopped going to [rehab clinic] because he says all they say is to do his exercises. I suggested he return to [rehab clinic] for further treatment. He's considering going to see a chiropractor – [ext deleted]. Advised I would discuss with OT, [text deleted] and get back to him. (underlining added)

On September 12, 2002 [Appellant's occupational therapist] of [vocational rehab consulting company] reported to the case manager that he had spoken to the Appellant on September 12, 2002 and the Appellant informed him that his arm, back and neck were feeling numb, that he had missed work on the previous Monday and also stated that this was the first time he missed work since March 2002. He further informed [Appellant's occupational therapist] that on Monday he was unable to move his arm and his brother drove him to see [Appellant's doctor].

On January 30, 2003 the case manager produced a memo to file which indicates that the Appellant called him and advised that his arm was really hurting at work the day before and that he had attended at [rehab clinic] after work. He had seen a doctor at [rehab clinic] who gave him a prescription for medication to help him with his arm symptoms which he relates to the motor vehicle accident.

On February 12, 2003 [Appellant's occupational therapist] sent an e-mail to the case manager which indicates that he spoke to the Appellant on February 11, 2003 and the Appellant reported to him the following:

> . . . increased neck and back pain, arm pain, difficulty sleeping, redness in eye that comes and goes monthly, headaches, and increased stress. He is able to work but he comes home and does not do anything. Feels his life has changed since MVA. He lays in bed all night, does not fall asleep until 4 am, up at 5:30 to go to work. Takes Nitrazadoen and Celexa prescribed by family docotor (sic). His doctor told him his stress levels are increasing his pain. He attends [rehab clinic] every Wednesday to see [Appellant's physiotherapist #2]. I spoke with [Appellant's physiotherapist #2] today, gave him a heads up on what [the Appellant] told me. [Appellant's physiotherapist #2] said he sees [the Appellant] once a week for maintenance, [the Appellant] comes in says he's a wreck and then leaves beaming saying he's all better. [Appellant's physiotherapist #2] will see [the Appellnat] today and discuss possibility seeing [Appellant's psychologist] for a quick meeting. (underlining added)

An MPIC case manager produced a memo to file dated February 24, 2003 which indicates as follows:

> On Monday, Feb 24/03, at 3:10 p.m. I was asked to follow up with a message the claimant had left [Appellant's occupational therapist] around 9:00 am. this morning saying something about the claimant saying "maybe he should end it all". (underlining added)

The case manager further indicated, after discussing this matter with [Appellant's occupational therapist], she contacted the Appellant and in her memorandum stated:

> Claimant explained that he is so stressed from living his life the way he has been. Going to work all day and barely makes it though (sic) the day because of pain, coming home and not being able to do anything, he doesn't go out anywhere, he is not sleeping much, he has very little appetite, he loses out on jobs current and promotional jobs, he had lost money and he is not getting anywhere. (underlining added)

On May 1, 2003 [Appellant's psychologist] of [rehab clinic] wrote to [Appellant's occupational therapist] and stated:

> This letter is to notify you that the above named claimant has now completed a course of psychotherapy. He was seen for a total of four individual psychotherapy sessions on

> March 25, April 1, 8 & 15, 2003. He had initially returned to see me for problems he characterized as stress. He was displaying a tendency to obsess over his perceived losses due to his MVA including decreased income both current and future and loss of opportunity to advance in his career. (underlining added)

He further reported that the Appellant's general outlook had improved with a decrease in his tendency to ruminate/obsess over his symptoms.

The case manager prepared a memo to file dated June 9, 2003 and reported that:

> Clmt called June 4th – he's been off work since May 26th. On the 26th his rt arm went limp after he woke up. He tried to work on the 27th, but could only mange (sic) 4 hours. He's was sliding glass and couldn't do it. Arm felt like it was paralyzed. He reported it to [text deleted] at work. He didn't see [Appellant's doctor] until 8 days later on June 3. (underlining added)

On August 7, 2003 the Appellant provided a statement to MPIC as follows:

> My name is [the Appellant]. I reside at [text deleted] in [text deleted]. I had been working at [text deleted]. I was working the first week of July. I woke up on Sunday July 7, 2003 and I had numbness from the outer three fingers on my right arm. The numbness extended up my arm into the shoulder, into the upper back and back of my head. During the weekend, I did no physical activity that caused the condition to occur. During the Sunday, the symptoms got worse. I could only lift my arm up to shoulder height. It was difficult to move my head right or left very fast. I was not able to lift with my right arm. I would have to grab items with my right thumb and forefinger. The following Monday, I started getting muscle spasms in my right arm and then my right shoulder. I had never had the muscle spasms before. The muscle spasms went from the top of my upper neck near spine to my lower back along the spine. The muscle spasms went into both hip areas and down the back of both of my legs to my calfs (sic).
>
> The Monday, July 8, 2003 I was unable to work. I went and saw [Appellant's doctor] on July 8, 2003. [Appellant's doctor] indicated that right arm nerve problems were returning. My job involves a lot of repetitious work where I use my right arm. It appears the repetition (continued from page one) of the work I do and injury sustained is causing the difficulties that I am having. I have been followed weekly by [Appellant's doctor]. I was not able to see [Appellant's physiotherapist #2] for the first two weeks when this occurred as I could not move to (sic) far around. If I move around to (sic) much, I would feel dizzy/faint and nauseous. When I stood up, I would see little white lights and my body would get extremely hot. By the third week, the only difficulty I was having was with my right arm. The other symptoms went away. During the third week, I went and saw [Appellant's physiotherapist #2] at [rehab clinic]. During the second week, I went and saw [Appellant's rehab doctor #2] at [rehab clinic]. He looked at my hand & arm

> and provided a prescription for Codein Contin. [Appellant's rehab doctor #2] recommended that I continue to see my family physician and [Appellant's physiotherapist #2]. [Appellant's rehab doctor #2] felt that it was the soft tissue nerves that was causing the numbness and sharp pain in my right arm.
>
> When I saw [Appellant's physiotherapist #2], he provided therapy to my right hand, arm, neck and spine. The symptoms decreased to a point where they were barely there and I could return to my job on July 28, 2003. I was able to work from July 28, 2003 to August 1, 2003. The symptoms were the same during the weekend. (underlining added)

In a note to file by an MPIC case manager, dated August 7, 2003, the case manager reviewed the Appellant's statement and indicated that the Appellant did not return to work until July 28, 2003 and worked until August 1, 2003. In this note to file the case manager also indicated that the Appellant was assaulted and robbed on August 3, 2003 at 2:00 a.m., his jaw was broken and the Appellant was beaten on his body and head and therefore was not able to return to work at that time.

The MPIC case manager requested an MPIC Medical Consultant to assess the Appellant's medical status in relation to the August 27, 2001 motor vehicle accident.

The MPIC Medical Consultant Team of [MPIC's doctor #1] and [MPIC's doctor #2] reviewed the Appellant's entire file and provided a report to MPIC dated November 6, 2003. The Internal Review Officer, in her decision dated June 18, 2004, summarizes the findings of [MPIC's doctor #1] as follows:

> [MPIC's doctor #1] noted your accident at work on April 26, 2002 and that radiology identified soft tissue swelling in the right hand with no abnormalities of the right arm. [MPIC's doctor #1] wrote that a subsequent bone scan showed mildly increased up take of on a non-specific nature within several articulations of the right hand.
>
> On July 17, 2002, you were reassessed by [Appellant's rehab doctor #1] who noted that upon physical examination there is no muscle atrophy, there is normal joint range of motion of the neck, shoulder, elbow, wrist and IP joint and that muscle power was intact and no neurologic abnormality was detected. You were advised by [Appellant's rehab doctor #1] to continue working regularly.

> [MPIC's doctor #1] noted that you attended for psychotherapy sessions with [Appellant's psychologist] and according to [Appellant's psychologist's] report of May 1, 2003, your general outlook had improved with a decreased tendency to ruminate or obsess over your symptoms.
>
> [MPIC's doctor #1] noted that the diagnoses related to your motor vehicle accident of August 27, 2001 include contusion to your left ankle, left foot, left hip and left eyelid and aggravation to previous non-specific right hand and forearm pain.
>
> [MPIC's doctor #1] noted that for a medically probable relationship to exist there has to be a probable diagnosis probable by medical means. He wrote that without a medically probable diagnosis, there cannot be a medically probable cause and effect relationship. [MPIC's doctor #1] wrote that the medical documentation on your file does not indicate a medically probable diagnosis. As such, he concluded that no probable cause and effect relationship exists between your current right arm symptom and your motor vehicle accident of August 27, 2001.
>
> [MPIC's doctor #1] wrote that based on a review of the documents provided, it is his opinion that there is no objective evidence of an impairment of physical function which would have prevented you from working between July 7, and 28, 2003.

Case Manager's Decision

On March 16, 2004, the case manager wrote to the Appellant and relying on MPIC's Medical Consultants' report stated:

> The medical evidence on file indicates that the various injuries to the left side of your body, including bruises to the left ankle, left foot, left hip and left eyelid, have resolved.
>
> The Medical Review concluded that there is no objective evidence of an impairment of physical function which in turn would have prevented you from working your full-time occupational duties since your return to work to your full-time duties on March 6, 2002. This would also include the period you were off work from July 7 to 28, 2003.
>
> You are therefore not entitled to receive any further Income Replacement Indemnity benefits. This is in accordance with Section 110(1)(a) of the Manitoba Public Insurance Corporation Act, copy enclosed.

The case manager further indicated that as well MPIC would not fund any further therapeutic interventions or reimburse the Appellant for any medication effective March 31, 2004.

The Appellant made Application for Review of the Internal Review Officer's decision.

Internal Review Officer's Decision

The Internal Review hearing took place on June 10, 2004 and the Internal Review Officer, on June 18, 2004, forwarded a letter to the Appellant confirming the case manager's decision and rejecting the Appellant's Application for Review. In rejecting the request of the Appellant for IRI, the Internal Review Officer relied on the medical reports of MPIC's Medical Consultants, [MPIC's doctor #1] and [MPIC's doctor #2] and [Appellant's rehab doctor #1] of [rehab clinic]. The Internal Review Officer stated in her decision:

> [MPIC's doctor #1] noted that the diagnoses related to your motor vehicle accident of August 27, 2001 include contusion to your left ankle, left foot, left hip and left eyelid and aggravation to previous non-specific right hand and forearm pain.
>
> [MPIC's doctor #1] noted that for a medically probable relationship to exist there has to be a probable diagnosis probable by medical means. He wrote that without a medically probable diagnosis, there cannot be a medically probable cause and effect relationship. [MPIC's doctor #1] wrote that the medical documentation on your file does not indicate a medically probable diagnosis. As such, he concluded that no probable cause and effect relationship exists between your current right arm symptom and your motor vehicle accident of August 27, 2001.
>
> [MPIC's doctor #1] wrote that based on a review of the documents provided, it is his opinion that there is no objective evidence of an impairment of physical function which would have prevented you from working between July 7, and 28, 2003.
>
> **IRI**
> Section 81 (1) of the Act provides that a full-time earner is entitled to a Income Replacement Indemnity for the time that he or she is unable to continue the full-time employment as a result of the motor vehicle accident.
>
> The information on your file indicates that you returned to work full-time on March 6, 2002.
>
> Since the medical information on your file does not indicate that you suffer from a functional impairment that would prevent you from performing your work duties, I must confirm your Case Manager's decision that you are not entitled to a further Income Replacement Indemnity benefit.

The Internal Review Officer, also relying on the report of [MPIC's doctor #1], dated November 6, 2003, rejected reimbursement to the Appellant of his medical or paramedical care or for further funding of medications.

Appeal

On July 12, 2004 the Appellant filed a Notice of Appeal. The appeal hearing took place on March 17, 2005. The Appellant appeared on his own behalf and Mr. Terry Kumka appeared on behalf of MPIC.

The relevant provisions in respect of this appeal are Section 81(1)(a) of the MPIC Act and Section 8 of Manitoba Regulation 37/94:

> **Entitlement to I.R.I.**
> **81(1)** A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:
> (a) he or she is unable to continue the full-time employment;
>
> **Manitoba Regulation 37/94**
> **Meaning of unable to hold employment**
> **8** A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

The Appellant testified before the Commission and stated that:

1. in respect of the first motor vehicle accident of November 12, 2000 he suffered a number of injuries, including an extremely serious injury to his right shoulder and, as a result thereof, was unable to return to his work as a warehouseman and glass installer, a job which required a great deal of physical labour.
2. as a result of this motor vehicle accident, he suffered a great deal of pain to his arm and shoulder, received physiotherapy treatments and commenced to make a very slow

recovery from these injuries.

3. the Appellant was off work for approximately forty-one (41) weeks due to the injuries he sustained from the first motor vehicle accident when he was involved in the second motor vehicle accident on August 27, 2001.
4. he had not fully recovered from the motor vehicle accident injury to his right arm when the second motor vehicle accident occurred and, as a result of this accident, he reaggravated the injury to his right shoulder and arm.
5. as a result of this second motor vehicle accident injury there was a significant increase in the pain and numbness to his arm and hand, together with weakness, and this resulted in an increase in headaches, sleep disturbance and decreased appetite.

He further testified that:

1. notwithstanding that he had not recovered from his injury to his right arm, he was referred by MPIC to [rehab clinic] to participate in a work hardening program which took place in late January and which he continued until the beginning of March 2002.
2. when he returned to work he was unable to return to his pre-accident employment as a warehouseman and glass installer, which required a great deal of physical labour.
3. the only work he was able to perform was a small portion of the job of a Super Spacer Applicator. This function entailed the use of a super spacer gun to apply a spacer tape along the edge of a glass window.
4. he was unable to perform the other aspects of this job which required lifting of sheets of glass which were undertaken by a co-worker.
5. he had extreme difficulty in carrying out these light duties due to the extreme pain to his right arm and numbness in his fingers.
6. during the course of the work day there was an increase in the pain and fatigue and, as

a result, he missed work from time to time.

7. he complained about this pain to [Appellant's occupational therapist] on a number of occasions and as well to [Appellant's rehab doctor #1] of [rehab clinic].
8. he had worked for [text deleted] for many years, thoroughly enjoyed his employment and looked forward to going to work every day prior to the injuries he sustained in both motor vehicle accidents.
9. as a result of the motor vehicle accident injuries, he was unable to return to his pre-accident employment but was limited to performing a small portion of the functions of a Super Space Applicator.
10. as a result, he became extremely depressed and suffered from sleeplessness, loss of appetite and loss of weight.

The Appellant further testified that at the time of the hearing he was getting better, he wanted to continue with his employment at [text deleted] and was merely requesting that MPIC provide him with IRI for the days he lost at work due to his inability to work due to the injuries he sustained in the motor vehicle accidents.

MPIC's legal counsel, in his submission, submitted that having regard to the medical reports of [Appellant's rehab doctor #1] and MPIC's Medical Consultants that:

1. the Appellant had failed to establish, on the balance of probabilities, that the second motor vehicle accident which occurred on August 27, 2001 caused the physical complaints that the Appellant was reporting in respect of his right arm and, as a result, the Appellant was not entitled to reimbursement of IRI in respect of the days he lost from his employment.
2. the Appellant had recovered sufficiently from the injuries he sustained in the first

motor vehicle accident to return to his regular work on a graduated basis when the second accident occurred.

3. the Appellant had failed to establish, on a balance of probabilities, that there was a physical impediment arising out of the second motor vehicle accident of August 27, 2001 which prevented the Appellant from returning to work from time to time.
4. [Appellant's rehab doctor #1] had certified that the Appellant had recovered sufficiently to return to regular employment on March 4, 2002.
5. [Appellant's rehab doctor #1] had reassessed the Appellant in July of 2002 and found no physical impediment which would prevent the Appellant from returning to work on a regular basis.
6. there was no probable cause and effect relationship between the Appellant's current right arm symptoms and the motor vehicle accident of August 27, 2001.
7. a review of the documentation indicated that there was no objective evidence of an impairment of physical function which prevented the Appellant from returning to work.

MPIC's legal counsel further submitted that the Internal Review Officer, relying on the medical opinions of [Appellant's rehab doctor #1] and MPIC's Medical Consultants, correctly determined that the Appellant, pursuant to Section 81(1)(a) of the MPIC Act, was not entitled to IRI for the time the Appellant alleged he was unable to continue full time employment as a result of the injuries he sustained in the August 27, 2001 motor vehicle accident.

Discussion

The Internal Review Officer, in dismissing the Appellant's Application for Review and confirming the case manager's decision, relied primarily on the medical opinions of MPIC's

medical consultants, [MPIC's doctor #1] and [MPIC's doctor #2], who in turn relied on the medical opinions of [Appellant's rehab doctor #1] of [rehab clinic]. Based on these medical opinions the Internal Review Officer concluded that there was no causal relationship between the complaints the Appellant made in respect of his arm and the motor vehicle accident of August 27, 2001 and there was no objective evidence of any physical problems which prevented the Appellant from being absent from work as alleged by the Appellant.

Causal Relationship between the two motor vehicle accidents

The Commission notes that:

1. MPIC's Medical Consultants, in their report to the case manager dated November 6, 2003, were requested to determine the nature and extent of the Appellant's injuries sustained in the motor vehicle accident of August 27, 2001 and were provided with all of the relevant documents in respect to this accident.
2. however, MPIC did not provide MPIC's Medical Consultants with the majority of the relevant medical reports relating to injuries the Appellant sustained in the first motor vehicle accident on November 12, 2000.
3. MPIC's Medical Consultants were not requested to consider whether or not there was any connection between the injuries the Appellant sustained in the first motor vehicle accident on November 12, 2000 and the complaints the Appellant had subsequent to the second motor vehicle accident on August 7, 2001 and therefore did not consider this issue when providing their medical opinion to MPIC.
4. as a result, these Medical Consultants were not given an opportunity to determine whether or not there was a connection between the initial serious injuries the Appellant suffered in the first motor vehicle accident on November 12, 2000 and the injuries the Appellant sustained in the second motor vehicle accident.

5. in summary, MPIC's Medical Consultants were not requested nor provided with all of the relevant information in order to determine whether or not the Appellant, as a result of the second motor vehicle accident on August 27, 2001, reaggravated the injuries sustained to his right arm in the first motor vehicle accident of November 12, 2000.

First Motor Vehicle Accident – November 12, 2000

The Commission finds that, as a result of the motor vehicle accident which occurred on November 12, 2000, the Appellant suffered a serious injury to his right arm which was diagnosed by [Appellant's orthopaedic surgeon]. [Appellant's orthopaedic surgeon] in his report to MPIC dated December 20, 2000 indicates that he examined the Appellant after the motor vehicle accident on November 22nd and December 6th, 2000 and noted that the Appellant ". . . *sustained a soft tissue strain of his neck and right shoulder and right brachial plexus palsy. The prognosis is guarded."* In this report [Appellant's orthopaedic surgeon] further noted that the objective physical findings were consistent with the subjective complaints of weakness and pain and numbness of the right extremity.

The Commission further notes that, as a result of the injuries the Appellant sustained in this motor vehicle accident, the Appellant was off work for a period of approximately sixty-eight (68) weeks and during that period of time he received IRI from MPIC, and was also reimbursed by MPIC for physiotherapy treatments and medication. The Appellant testified that he consistently complained about this pain in his arm and shoulder after the motor vehicle accident had occurred. These complaints were noted by [Appellant's occupational therapist] of [vocational rehab consulting company] in his report to MPIC dated April 2, 2001 as follows:

l. Right arm pain/ dysfunction

2. Neck pain and headache
3. Sleep disturbance
4. Change in appetite
5. Financial stress

[Appellant's occupational therapist] further stated:

> [The Appellant] reported constant pain along his right arm. The pain is aggravated with movement or bumping the arm. When aggravated the pain shoots up his arm into the shoulder area. [The Appellant.] reported he cannot move his arm properly and his hand is very weak. [The Appellant] also reported that his ring and pinky finger of the right hand are the most effected. His limited right arm function currently prevents him from returning to work at [text deleted]. [The Appellant] needs good function of the right arm to complete his essential job duties. . . . .
>
> [The Appellant] reported he has pain in one spot in the back of his neck. This pain increases with right arm movement. [The Appellant] also has headaches associated with the neck pain: they occur at the base of the skull. They are not constant, but can become quite severe, making [the Appellant] feel like he is going to pass out. His neck pain and headaches do not limit his function, and are not a significant barrier to his return to work. (underlining added)

These complaints were also reported to [Appellant's psychologist] who provided a psychological assessment to [vocational rehab consulting company] in his report dated June 7, 2001. In this report [Appellant's psychologist] indicates that the Appellant reported extreme pain to his right arm and headaches, is experiencing a prolonged recovery from the motor vehicle accident injuries, is presenting with high levels of anxiety and depression and a strong tendency to somatize his emotional distress.

The Appellant continued to complain about the injury to his right arm up to a period shortly before the second motor vehicle accident of August 27, 2001. [Appellant's orthopaedic surgeon], in a report to [vocational rehab consulting company] dated September 10, 2001, indicates that he examined the Appellant on August 7, 2001, a period of approximately twenty (20) days prior to the August 27, 2001 motor vehicle accident and he states that the Appellant complained of numbness in the right fifth finger and right palm, and occasional paresthesia in his

neck and right arm.

[Appellant's occupational therapist], in a further report to MPIC dated August 20, 2001, approximately seven (7) days before the second motor vehicle accident, indicated that the [Appellant's physiotherapist #1] reported that the Appellant had improved significantly but that he was still experiencing pain when lifting and elevating his arm to greater ranges of motion, still having occasional shocking pain up his whole arm and into his back which he feels is causing his headaches.

The Commission determines that, having regard to the report of [Appellant's orthopaedic surgeon] on September 7, 2001, and the report of [Appellant's physiotherapist #1] in respect of her observations on August 27, 2001, the Appellant has established, on the balance of probabilities, that:

1. he had suffered a serious motor vehicle accident injury to his right arm as a result of the first motor vehicle accident on November 12, 2000;
2. at the time of the second motor vehicle accident on August 27, 2001 the Appellant had not fully recovered from the injury he had sustained to his right shoulder in the first motor vehicle accident of November 12, 2000.

Second Motor Vehicle Accident – August 27, 2001

The Appellant testified that as a result of the injuries he sustained in the second motor vehicle accident:

1. there was a substantial increase in the pain and numbness in his right arm and an increase in headaches, sleep disturbance and loss of appetite.
2. he reaggravated the injuries he sustained to his right arm as a result of the first motor

> vehicle accident, which prevented him from attending at work at [text deleted] from time to time.

The Appellant's testimony in respect of his complaints relating to his right arm pain is corroborated by the reports of [Appellant's orthopaedic surgeon], [Appellant's physiotherapist #1] and [Appellant's occupational therapist].

[Appellant's orthopaedic surgeon], in his report dated September 10, 2001, indicates that he examined the Appellant on September 7, 2001 regarding his second motor vehicle accident which occurred on August 27, 2001 and states that the Appellant was complaining of pain to his right hand and wrist and radial side of his right forearm. [Appellant's orthopaedic surgeon] also noted that [Appellant's doctor] had referred the Appellant for physiotherapy.

[Appellant's orthopaedic surgeon] further stated in response to questions put to him by [Appellant's occupational therapist]:

> 2. Prognosis is fair to good. He still has some numbness and slight weakness in the right hand, pertaining to this accident. This may clear with the passage of more time, up to one year further.
>
> 3. Continue with this regimen for one more month.
>
> 4. Since he has complaints in his right hand, I believe he would benefit from a gradual return to work on modified light duties for approximately two months.

[Appellant's physiotherapist #1] submitted an Initial Health Care Report in respect of the Appellant relating to the August 27, 2001 motor vehicle accident. In this report, dated September 6, 2001, [Appellant's physiotherapist #1] reported numerous physical findings including "*reaggravation of previous arm and hand symptoms".*

On October 23, 2001 [Appellant's occupational therapist] at [vocational rehab consulting company], indicated he saw the Appellant on October 10, 2001 and the Appellant reported to him the following complaints:

> Right arm pain/dysfunction. Increased pain since last report due to second MVA. [The Appellant] demonstrated shoulder flexion and abduction of slightly greater than 90 degrees. [The Appellant] reported he still has "shocks" of pain running up his arm, this occurs mostly during the night when he is sleeping. [The Appellant] has no feeling in his right pinky and ring finger, and poor strength and control in his right hand.

The Appellant further advised [Appellant's occupational therapist] that he continued to feel it was unsafe for him to return to work at that time because of weakness and poor motor control in respect of his right hand which may cause him to drop sheets of glass.

The Commission finds that the Appellant's complaints to [Appellant's orthopaedic surgeon], [Appellant's physiotherapist #1] and [Appellant's occupational therapist] are totally consistent with the complaints he made in respect of his right arm following the first motor vehicle accident. The Commission notes that the Appellant's testimony in respect of increased anxiety and depression was also consistent with a report of [Appellant's psychologist] dated October 24, 2001 which indicates that the Appellant underwent treatment for an Adjustment Disorder with Mixed Anxiety and Depressed Mood. This resulted in the Appellant entering a cognitive behavioural program and [Appellant's psychologist] reported that both the Appellant's sleep and appetite responded to this treatment and that the Adjustment Disorder had been resolved.

[Appellant's rehab doctor #1] also confirmed the initial diagnosis made by [Appellant's orthopaedic surgeon] in relating to the injury the Appellant sustained to his right arm in the first motor vehicle accident. [Appellant's rehab doctor #1], in the Work Hardening Discharge Report

which he provided to MPIC dated March 22, 2002, stated that as a result of the motor vehicle accident of August 27, 2001 the Appellant had sustained a right brachial plexus palsy, the same injury which the Commission notes that [Appellant's orthopaedic surgeon] determined the Appellant sustained in the first motor vehicle accident.

Unfortunately, MPIC's Medical Consultants were not given an opportunity to consider whether or not there was a relationship between the Appellant's injuries he sustained in the first motor vehicle accident and the complaints the Appellant made in respect of his right arm subsequent to the second motor vehicle accident. As a result, MPIC's Medical Consultants were in no position to determine that as a result of the August 27, 2001 motor vehicle accident the Appellant had reaggravated the injuries he sustained to his right arm in the first motor vehicle accident.

It is also unfortunate that MPIC never requested [Appellant's orthopaedic surgeon's] medical opinion in respect of the relationship between the injuries the Appellant sustained in the first motor vehicle accident and the injuries the Appellant sustained in the second motor vehicle accident. [Appellant's orthopaedic surgeon], unlike MPIC's Medical Consultants, had physically examined the Appellant after the first motor vehicle accident, shortly before and shortly after the second motor vehicle accident and was in the best position to provide a medical opinion to MPIC as to the causal relationship between the Appellant's injuries and the two motor vehicle accidents.

The Commission finds the Appellant testified in a clear, unequivocal fashion and was consistent throughout his testimony in respect of the reaggravation of his right arm injury as a result of the second motor vehicle accident. The Appellant's consistent complaints of right arm physical pain were corroborated by the reports of [Appellant's orthopaedic surgeon], [Appellant's

physiotherapist #1] and [Appellant's occupational therapist]. For these reasons the Commission gives greater weight to the testimony of the Appellant, and the reports of [Appellant's orthopaedic surgeon], [Appellant's physiotherapist #1] and [Appellant's occupational therapist] than it does to the medical opinions of MPIC's Medical Consultants. The Commission therefore finds that the Appellant has established, on a balance of probabilities, that as a result of the second motor vehicle accident of August 27, 2001 the Appellant reaggravated the motor vehicle accident injury to his right arm that he sustained in the first motor vehicle accident.

No Physical Impediments

The Internal Review Officer determined that MPIC was justified in terminating the Appellant's IRI benefits because at the time of his return to work there was no physical impediments as a result of the second motor vehicle accident which prevented the Appellant from either returning to work or being absent from work. In arriving at this conclusion the Internal Review Officer relied primarily on MPIC's Medical Consultant's report, who in turn primarily relied on the medical opinions of [Appellant's rehab doctor #1].

The Appellant had entered a work hardening program at [rehab clinic] on January 21, 2002 which continued until March 1, 2002 and he returned to work on March 6, 2002. [Appellant's rehab doctor #1] in his report to MPIC, dated March 22, 2002, stated:

> PHYSICAL RESTRICTIONS/FUNCTIONAL LIMITATIONS
>
> There are no physical restrictions or functional limitations that would prevent [the Appellant] in returning to his pre-accident occupation as a Super Spacer Applicator/Edger at full time, full duties.
>
> TEAM RECOMMENDATIONS
>
> 1. Return to pre-accident occupation full time, full duties with no restrictions.
>
> 2. No Graduated Return to Work (GRTW) is recommended as [the Appellant]

> performed 8 hours of exercises and work simulation tasks within this WHP at the [rehab clinic].

MPIC's Medical Consultants, in their report dated November 6, 2003, adopted [Appellant's rehab doctor #1's] opinion when they stated:

> . . . On March 1, 2002, [Appellant's rehab doctor] certified that [the Appellant] recovered sufficiently to return to regular duties on March 4, 2002.

The Internal Review, in coming to her decision, stated that MPIC's Medical Consultants, in their report dated November 6, 2003, noted that:

> . . . [Appellant's rehab doctor #1] certified you as recovered sufficiently to return to regular work duty on March 4, 2002.

Based on [Appellant's rehab doctor #1's] opinion, MPIC's Medical Consultants concluded that there was no objective evidence of an impairment of physical function which would have prevented the Appellant from working between July 7 – 28, 2003.

In his testimony the Appellant strongly disagreed with [Appellant's rehab doctor #1's] opinion that on March 6, 2002, when he was required to return to work, he had physically recovered from his motor vehicle accident injuries and would be able to return to his pre-accident employment without restrictions, full time. The Appellant further testified that:

1. [Appellant's rehab doctor #1] erred in concluding that the Appellant's occupation was solely that of a Super Spacer Applicator/Edger at [text deleted], which [Appellant's rehab doctor #1] so described in his report dated March 22, 2002.
2. his primary work at [text deleted] was that of a warehouseman which required the Appellant to do a variety of different physical labour tasks in the plant and occasionally to work as a Super Spacer Applicator/Edger.

3. he was unable, on his return to work on March 6, 2002, to carry out all of his job functions that he had performed prior to the first motor vehicle accident of November 12, 2000.

The Commission notes that the [vocational rehab consulting company] report to MPIC dated March 26, 2001 described the job functions of a Super Spacer Applicator/Edger was a job that involved both light and heavy duty work. The Appellant also testified that:

1. he was only able to do the light duty portion of his job, which involved using a super spacer gun to apply spacer tape along the edge of a glass window.
2. the carrying out the light duty responsibilities resulted in increased pain to his right arm and the work caused him a great deal of fatigue.
3. he was unable to perform the heavy duty aspects of this job which required the lifting of glass in order to perform the spacer tape application and that a co-worker was required to do this work.

The Appellant's testimony in respect of his inability to do the entire job of a Super Spacer Applicator/Edger, was consistent with his complaints that the Appellant made to [Appellant's occupational therapist]. [Appellant's occupational therapist], in his report to MPIC dated April 23, 2002, referred to a discussion he had with the Appellant who advised [Appellant's occupational therapist] he was having difficulty at work and had missed two days of work due to fatigue and increased pain to his arm. The Appellant further informed [Appellant's occupational therapist] that he was unable to lift heavy pieces at work and he was getting assistance from other workers.

[Appellant's occupational therapist], in a further report to [rehab clinic] dated May 9, 2002,

indicates that fellow workers have reported the Appellant did not appear to be the same person he had been before he was off work and that the Appellant had difficulty completing his regular work duties and that his effort and work performance were very poor.

In a note to file dated May 28, 2002 the case manager states that he spoke to the Appellant on May 21st who indicated he was finding the work hard.

[Appellant's rehab doctor #1] in his Discharge Report dated March 22, 2002 stated that the Appellant was capable of returning to his pre-accident employment full-time, without restrictions. However, the Appellant's testimony that he was unable to return to his pre-accident employment full time, without restrictions, is corroborated by the report of [Appellant's occupational therapist] dated May 9, 2002 and the reports of the Appellant's fellow workers in respect to the Appellant's job performance and these reports contradict [Appellant's rehab doctor #1's] medical opinion.

The Appellant's testimony in respect of his physical capacity to return to work was not challenged by MPIC. MPIC had an opportunity of calling witnesses from the [text deleted] workplace to testify that the Appellant was able to return to his pre-accident employment without any problems but MPIC failed to do so.

The Commission determines that:

1. [Appellant's rehab doctor #1] failed to comprehend the scope of the Appellant's function at his workplace;
2. having regard to the Appellant's testimony and the reports of [Appellant's occupational therapist], it gives greater weight to the testimony of the Appellant than

it does to the medical opinion of [Appellant's rehab doctor #1] in respect to the Appellant's capacity to return to work full time without restriction.

3. on a balance of probabilities the Appellant has established that he had not recovered sufficiently from his motor vehicle accident injuries to return full time without restriction to his regular duties.

The Commission also notes that [Appellant's rehab doctor #1] erred in his reassessment report, dated May 29, 2002, wherein he stated the Appellant had presented a new complaint of the right upper extremity pain of approximately two weeks in duration. In arriving at his conclusion, [Appellant's rehab doctor #1] stated:

> . . . He indicated that the pain begins in the right hand, in association with flexion movement of the fingers. He indicated that the pain radiates to the right shoulder, right side neck, and then to the scalp. He indicated that this pain is constant, but associated with an intermittent "jerking and shaking" of the right upper extremity. He also indicated that he is experiencing bilateral throbbing type of headache.

[Appellant's rehab doctor #1], in his report under the heading "Recommendation", states that the Appellant never reported to himself, his assistant or any of the therapists that he was experiencing sudden jerking motions of his right upper extremity while undergoing rehabilitation at [rehab clinic]. As a result, [Appellant's rehab doctor #1] concluded that there was no causal connection between the Appellant's complaints of May 9, 2002 in respect of his right shoulder and the motor vehicle accident of November 27, 2001.

The Appellant's complaints arising out of the first motor vehicle accident related not only to sudden jerking motions to his right upper extremity, but also related to chronic pain to his arm, neck and back, together with headaches and fatigue. [Appellant's rehab doctor #1], in his report, did not comment on whether or not the Appellant made any such complaints when he reassessed

the Appellant. It should further be noted that subsequent to [Appellant's rehab doctor #1's] reassessment on May 9, 2002 the Appellant continued to make complaints as follows:

1. the case manager's notes to file dated July 25, 2002 and August 2, 2002 wherein the Appellant was complaining about neck, arm and hand pain, and his inability to work;
2. further complaints in respect of arm, neck and back pain made by the Appellant to [Appellant's occupational therapist] on September 12, 2002;
3. complaint to the case manager in a note to file dated January 30, 2003;
4. complaint made by the Appellant to [Appellant's occupational therapist] in respect of neck, back and arm pain on February 11, 2003.

The Commission also notes that:

1. the case manager in a note to file dated July 18, 2002 indicates the Appellant's work is deteriorating, which observation corroborates the Appellant's complaint that he was unable to satisfactorily carry out his job functions.
2. as a result of the Appellant's stress MPIC referred the Appellant to [Appellant's psychologist] at [rehab clinic] who reported that the Appellant had commenced a course of physiotherapy in late March 2003 and completed the physiotherapy treatments during the month of April 2003.
3. MPIC recognized the Appellant had legitimate complaints in respect of his complaints by referring him to physiotherapy.
4. in June the Appellant reported to the case manager that he was unable to work several days as his right arm went limp and felt paralyzed.
5. the Appellant filed a lengthy report with MPIC dated August 7, 2003 outlining the severe problems he had with his right shoulder on July 7, 2003.

The Commission finds that, having regard to the Appellant's consistent complaints to [Appellant's occupational therapist], the case manager, [Appellant's psychologist] and the referral of the Appellant to physiotherapy were inconsistent with [Appellant's rehab doctor #1's] opinion that the Appellant, at the time of his reassessment on May 9, 2002, was making a new complaint in respect of the injury to his right arm.

The Commission has found that the Appellant was a credible witness and accepts his testimony that the pain to his right arm, neck and back was real and severe and is satisfied, on a balance of probabilities, that the Appellant's right arm pain resulted from the injuries he sustained in the motor vehicle accident of August 27, 2001 and has prevented the Appellant from returning to work from time to time.

The Commission finds that MPIC's Medical Consultants and [Appellant's rehab doctor #1] in arriving at their decision that the Appellant had the capacity to return full time, without restrictions, to his previous employment, failed to appreciate the nature and scope of the Appellant's chronic arm, neck and back pain while working and that this pain from time to time prevented the Appellant from attending at work.

Mr. [Appellant's physiotherapist #2] Hayles, in Disability Insurance, Canadian Law and Business Practice, states at p. 340:

> . . . Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary,* Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:
>
> > In my view it is not of any particular importance to determine the precise medical nature of the plaintiff's pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the

> sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.
>
> In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.
>
> *McCulloch v. Calgary (City)* (1985), 15 C.C.L.I. 222 (Alta. Q.B.)

The Commission finds, for the reasons set out above, that the Appellant has established, as a result of the motor vehicle accident of November 27, 2001, that the Appellant reaggravated his injury to his right shoulder, which resulted in extreme pain to arm, neck and back which physically prevented the Appellant from attending at work from time to time after March 6, 2002.

The Commission therefore concludes that:

1. MPIC's Medical Consultants were not given an opportunity to determine whether or not there was a causal connection between the initial serious motor vehicle accident injuries the Appellant suffered in the first motor vehicle accident and the injuries the Appellant sustained in the second motor vehicle accident. As a result, MPIC's Medical Consultants were not in a position to determine that, as a result of the August 27, 2001 motor vehicle accident, the Appellant had reaggravated the injuries he sustained to his right arm in the first motor vehicle accident.
2. [Appellant's orthopaedic surgeon], unlike the MPIC Medical Consultants, had physically examined the Appellant after the first motor vehicle accident and shortly before and shortly after the second motor vehicle accident, was in the best position to provide an opinion as to the causal relationship between the Appellant's injuries and

the two motor vehicle accidents but was never requested to provide a report to MPIC.

3. [Appellant's rehab doctor #1] never fully comprehended the nature and scope of the Appellant's pre-accident employment as a warehouseman and jack of all trades.
4. [Appellant's rehab doctor #1] wrongly concluded in his Discharge Report that the Appellant was physically capable of returning to his pre-accident employment, full time, and without restriction.
5. [Appellant's rehab doctor #1] erred in concluding that there was no connection between the Appellant's complaints on May 6, 2002 and the injuries the Appellant sustained in the August 27, 2001 motor vehicle accident.
6. [Appellant's rehab doctor #1] erred in his reassessment of the Appellant on March 9, 2002 in asserting that the Appellant had made a new complaint in respect of his right arm injury when the evidence before the Appeal Commission established that the Appellant made consistent complaints in respect of his arm, neck and back, both before and after [Appellant's rehab doctor #1]'s reassessment of the Appellant.
7. the Appellant's testimony as supported by his consistent complaints in the reports of [Appellant's orthopaedic surgeon], [Appellant's physiotherapist #1] and [Appellant's occupational therapist], and contradicts the medical opinion of [Appellant's rehab doctor #1] in respect of causation and the Appellant's ability to return to his full time employment, without restriction.
8. MPIC's Medical Consultants, who never personally examined the Appellant, relied primarily on [Appellant's rehab doctor #1's] medical opinion in concluding that there was no connection between the motor vehicle accident of August 27, 2001 and the Appellant's physical complaints, or that there were any physical impediments arising out of the motor vehicle accident which justified the Appellant from being absent after March 6, 2002 from work.

9. the Internal Review Officer, in her decision dated June 18, 2004, in dismissing the Appellant's Application for Review and confirming the case manager's decision, relied on the medical reports of [Appellant's rehab doctor #1] as well as the report of [MPIC's doctor #1] and [MPIC's doctor #2], MPIC's Health Care Services Team, dated November 6, 2003, who in turn relied on [Appellant's rehab doctor #1's] medical opinions.

The Commission, having regard to the totality of the medical evidence, the consistent and credible complaints of the Appellant in respect of his pain, which were corroborated by [Appellant's orthopaedic surgeon], [Appellant's physiotherapist #1] and [Appellant's occupational therapist], gives greater weight to the testimony of the Appellant than it does to the medical opinions of [Appellant's rehab doctor #1] and MPIC's Medical Consultants on all issues in dispute between the parties.

The Commission is satisfied that for these reasons the Appellant has established, on a balance of probabilities, that:

1. the motor vehicle accident of August 27, 2001 reaggravated the injuries to the Appellant's right arm that he sustained in the motor vehicle accident on November 12, 2000;
2. as a result of these injuries the Appellant was unable to continue on a continuous basis his full time employment and was absent from work from time to time after March 6, 2002;
3. therefore, the Appellant is entitled to IRI pursuant to Section 81(1)(a) of the MPIC Act and Section 8 of Manitoba Regulation 37/94.

The Commission therefore refers the matter of the computation of the amount of IRI back to the case manager for determination. If the parties are unable to resolve the amount of IRI payable to the Appellant within six (6) weeks of the date of this decision, either party may request this Commission panel to reconvene the appeal hearing to determine the amount of IRI. As a result, the decision of MPIC's Internal Review Officer, bearing date June 18, 2004, be rescinded and the foregoing substituted for it.

Dated at Winnipeg this 10th day of May, 2005.

MEL MYERS

DR. PATRICK DOYLE

HONOURABLE ARMAND DUREAULT