Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-164

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Mr. Paul Johnston** **Mr. Robert Malazdrewich**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**September 19, 2007**
ISSUE(S):	**Entitlement to further Income Replacement Indemnity benefits**
RELEVANT SECTIONS:	**Sections 106(1), 107, 110(1)(a)&(e), 110(2)(d) and 117 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 PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

[The Appellant] was involved in an accident on September 23, 1995. The Appellant was injured when he lost control of a motorcycle he was operating on [text deleted].

The Internal Review decision, dated June 10, 2005, succinctly sets out the initial facts in this appeal as follows:

> According to the [Hospital] Case Summary, you sustained multiple injuries including a T5 burst fracture, a T4 laminar fracture, a right clavicle fracture, fractures to the right

third, fifth and sixth ribs, possible undisplaced sternal fracture and a right inferior orbital rim fracture. These injuries resulted in your hospitalization for approximately one month.

According to [Appellant's Orthopedic Surgeon's] Doctor's Report of January 2, 1996, you were unable to do any lifting for six months and prevented from heavy lifting for a period of nine to twelve months.

In a Health Care Provider Progress Report, [Appellant's Orthopedic Surgeon] indicated that while you were capable of modified duties, you were unable to do any heavy lifting until October 1, 1996. In a report dated November 11, 1996 [Appellant's Orthopedic Surgeon] then indicated that you were capable of full function with symptoms, that you could work full duties and that you should be able to return to graduated full activity. The file indicates that you attempted to return to work in October, 1996 but that you were unable to continue after only 3 days.

You were subsequently referred to physiotherapy as evidenced by the Initial Physiotherapy Report of [Appellant's Physiotherapist #1] dated January 7, 1997. According to that report, it was contemplated that you would require four to six months before you would be capable of heavy lifting over 20 pounds. The extent of your progress and resulting improvement was documented in the Subsequent Physiotherapy Report of March 21, 1997.

Two tasks were identified as being problematic in [Appellant's Physiotherapist #1's] narrative report of June 5, 1997. They included air dryer and hose installation and cylinder tank installation.

In a Physiotherapy Report of October 10, 1997 the following limitations were noted:

- Maximum ability floor to waist lifting of 47.5 lbs (no more than 5% of the day).
- Maximum lifting above shoulder level is 40 lbs.
- Maximum safe lifting floor to waist is 40 lbs.
- On repetitive basis maximum safe lifting ability floor to waist is 40 lbs and above shoulder level is 30 lbs.
- Limited maximum of 15 minutes standing in the same spot.
- Sustained overhead work is limited to five minutes without putting arms down.

Arrangements were made for you to return to work on a gradual basis on October 20, 1997. Your hours of work were increased from four hours per day to five hours per day in December, 1997. The increase to five hours a day (notwithstanding your ongoing difficulties) was discussed with the Case Manager on January 21, 1998 and approved by your physician, [Appellant's Doctor], effective February 2, 1998.

On February 11, 1998 you confirmed to the Case Manager that you were working six hours a day and although you were coping fairly well, you had to take the previous Friday off due to an intense flare-up. Your Case Manager was advised that your increasing your hours to six shifts a week was accompanied by your not working Fridays.

> A letter dated March 6, 1998 was received [text deleted] of [text deleted]. [Text deleted] confirmed as of February 2, 1998 your efforts to work six hours a day made it impossible for you to work five consecutive days. [Text deleted] went on to indicate:
>
> > "[Text deleted], your immediate supervisor and my self are very concerned about what you are having to put yourself through in order to attend to your job at [text deleted].
> >
> > I have requested [text deleted] to take you back under coverage and determine whatever additional assistance you require to allow you to return to regular duties.
> >
> > [Text deleted] has agreed and you should contact him as soon as possible."
>
> Arrangements were then met (sic) for you to be assessed by [Appellant's Physiatrist #1] as evidenced by his report of April 30, 1998. In his report [Appellant's Physiatrist #1] confirmed that your ongoing problems were "mainly related to the thoracic vertebral fractures". [Appellant's Physiatrist #1] indicated that although you did not have any medical restrictions related to potential harm occurring, your activities were limited because of your discomfort. In that regard, [Appellant's Physiatrist #1] felt that the limitations (indicated by [Appellant's Physiotherapist #1] which I have cited above) were reasonable although he felt there had been some improvement since October, 1997.

The Commission notes in its review of [Appellant's Physiatrist #1's] report that he stated:

> . . . He did return to work with [text deleted] for a few months but because his work does involve a great deal of heavy lifting and standing on concrete floors his back pain worsened quite significantly and he was unable to continue at work.
>
> . . . . .
>
> . . . [The Appellant] <u>seems to have his pain under fairly good control at the present time although his future employment is still questionable.</u> If he can possibly be employed in a job that does not require heavy lifting and does not require him to work on hard surfaces, he hopefully will not have ongoing exacerbations of pain. . . . (underlining added)

The Appellant's physician, [Appellant's Doctor], referred the Appellant to [Appellant's Physiatrist #2] for treatment. [Appellant's Physiatrist #2] provided a report to MPIC's case manager dated August 28, 1998 wherein he reported that the Appellant responded favourably to treatment and recommended that the Appellant would benefit from attending [Rehabilitation

(Rehab) Clinic] for strengthening and conditioning exercises with the "*purpose to be able to return to work after 4-6 weeks of recommended treatment"*.

In a report from [Rehab Clinic] to MPIC's case manager dated October 2, 1998, the occupational therapist and physiotherapist who conducted the assessment stated:

> [The Appellant] was discharged from the Work Hardening Program today. His occupational therapy results were as follows:
>
> - max front carry: 63 lbs. (for 50 ft)
> - max R hand carry: 48 lbs, max L hand carry: 41 lbs (50 ft);
> - max push force = 68 lbs, max pull force = 56 lbs (25 ft each);
> - max lifting capacity: 50 lbs (floor to shoulder level)
> - work demand level net: MEDIUM;
>
> It is recommended that he return to employment at [text deleted], within his functional capacities, outlined above. He should have follow-up with his vocational rehabilitation consultant. (Note: <u>He would likely have difficulty resuming a position that required sustained awkward positioning – ie overhead work</u>.) (cont'd) (underlining added)

[Rehab Clinic] provided a further report to MPIC's case manager dated October 8, 1998 and stated that the Appellant had attempted to return to work after his accident but was unsuccessful as "*he stated that* [text deleted] *did not follow the recommended return to work plan*". The report further stated:

> The client's work capabilities do not match the critical demands of the identified goal, to return to work as a Production Worker at a MEDIUM to HEAVY level of work. However, he is capable of working at a position at [text deleted] at a MEDIUM level, and within his functional capacities outlined in this report.
>
> **RECOMMENDATIONS**
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> . . .
>
> 3. [The Appellant] <u>should return to</u> [text deleted] <u>as a Production Worker at a MEDIUM level of work</u>. (underlining added)

[Appellant's Physiatrist #2] provided a medical report to MPIC's case manager dated October

13, 1998 and repeated the recommendation of [Rehab Clinic] that the Appellant would likely have difficulty resuming a position that required sustained upward positioning, ie overhead work. [Appellant's Physiatrist #2] further stated:

> Return to Employment: Before the accident, [the Appellant] was working as a production worker for 5 ½ years at the [text deleted]. I do not have details of his job description but on the basis of his functional capacity assessment October 2nd, 1998, he should be able to return to a medium level of work in activities. He may have difficulty in doing work which requires repetitive extension of the spine like overhead work and any work which requires repetitive bending and reaching out in awkward positions. (underlining added)

[Text deleted] the vocational rehabilitation consultant, employed by [Rehabilitation (Rehab) Consulting Service #1], was engaged by MPIC to assist the Appellant with his return to work. On March 1, 1999 [Appellant's Vocational Rehabilitation Consultant] wrote to [Appellant's Physiatrist #2] and stated that subsequent to the Appellant's discharge from [Rehab Clinic] on October 8, 1998 he had been attempting to initiate a return to work program for the Appellant with [text deleted]. He further advised [Appellant's Physiatrist #2] that [text deleted] was reluctant to accommodate the Appellant with a return to work program unless certain specific modifications were made to the program. In response to this inquiry, [Appellant's Physiatrist #2], on March 1, 1999, advised [Appellant's Vocational Rehabilitation Consultant] as follows:

> He should be able to do overhead work & any work which requires repetitive bending & reaching out in awkward positions. Now his strength & endurance has improved. He should avoid lifting of any objects weighing more than 50 lbs at this point.

On May 21, 1999 [Appellant's Physiatrist #2] provided a report to MPIC indicating that the Appellant was instructed to undertake a graduated return to work from May 10, 1999 with a limitation of a maximum lifting of weight up to 50 lbs. The Appellant was also instructed to make an appointment with [Appellant's Physiatrist #2] in the event that he had an exacerbation of any of his neck pain.

MPIC's file indicated that the Appellant returned to work on [text deleted]'s payroll on July 19, 1999.

[Appellant's Doctor], the Appellant's physician, between November 4, 1999 and December 30, 1999, provided three (3) medical notes in respect of the Appellant's absence from work as follows:

1. medical note dated November 4, 1999 which indicated that the Appellant had been away from work between October 25, 1999 to November 12, 1999 due to *"flare up of upper, mid and low back problems"* and that the Appellant would return to work on November 15, 1999.
2. medical note, undated, indicating the Appellant would be away November 15, 1999 to November 19, 1999 due to *"mid thoracic back problem exacerbation"*, returning to work on November 22, 1999.
3. medical note, dated December 30, 1999, indicating that the Appellant would return to work on January 4, 2000.

The Appellant, after returning to work on January 4, 2000, continued to have problems attending work on a regular basis. The Appellant's difficulties are outlined in the case manager's memo to file dated February 2, 2000 wherein he reports of a telephone discussion with the Appellant on January 27, 2000 and states:

> [The Appellant] called and left message
> "I'm phoning in regards to the letter my supervisor at [text deleted] received from you Um, saying my duties at work are non restricted and put me in a job doing work overhead all day. Causing my back pain its pretty unbareable at times I'm just phoning to see if Uh, if MPI is going to do anything about it or if I am going to have to get a lawyer involved, or whats going on. You can get a hold of me at [text deleted]"
> Thanks"
>
> . . .

> [The Appellant] says he has been having problems since returning from the plant shutdown. He was on small parts building and after shut down he went back to his old job. He is lifting 50 to 60 pounds (fire supressors) and now he is doing overhead work installing fuel tanks. He has been back to the doctor and has recieved (sic) notes for missing time off. His supervisor is giving him demerits for everytime he is off work but his back is in alot of pain. His supervisor is threatening to give him 30 demerits if he refuses a job assigned to him due to his pain complaints. Once he reaches 100 demerits he will be fired. He has gone to the Union and they say there is nothing they can do. They have another case the same. (underlining added)

[Appellant's Doctor] provided further medical notes, dated February 21, 2000, indicating that the Appellant would be away February 14, 2000 to February 16, 2000 due to current upper and mid-back pain. A further medical note dated March 27, 2000, indicating that the Appellant would be away March 20, 2000 to March 31, 2000 due to "*recurrent upper & mid back pain".*

[Appellant's Doctor], in response to the case manager's letter of February 3, 2000, wrote to the case manager on April 15, 2000 and stated:

> I did not see [the Appellant] between June 21, 1999 and September 16, 1999. At that time he was working 8 hours/day, 5 times a week. He stated that he rarely made it 5 times a week due to unbearable pain in his mid-thoracic area. The pain gradually worsened toward the end of the week. At that time he was taking 6 tablets of Tylenol #3 a day, and 20 mg of Amitryptylline at bedtime. He stated that Tylenol #3 helped the pain, but made him ill otherwise.
>
> The next visit was on November 4, 1999 when he was complaining of the upper back being sore for about two weeks since he lifted something heavy at work. Again, he stated that Tylenol #3 makes him nauseated. He was tender and spastic paraspinally at mid-thoracic spine, more on the right side. I asked him to contact [Appellant's Physiatrist #2] at [text deleted]. [The Appellant] was off work at that time, from 25/10 to 11/12 1999.
>
> I saw him again on December 28, 1999. He informed me that he did not return to work since October 25 because of the back pain. He felt better since he had been off work and said he was doing some exercises regularly. He had a scheduled appointment with [Appellant's Physiatrist #2].
>
> On 16/2/2000 he told me that he is still missing lot of time from work because of the mid-thoracic pain. He said that he was doing a lot of work with his arms above shoulder level, with neck and upper back extended, and that by the end of a shift he cannot move his neck and upper back because of stiffness and has difficulty sleeping because of pain.

> He complained that his concentration is impaired because of the lack of sleep. His neck and upper back were stiff due to muscle spasm and he had restricted ROM of neck and upper back. I found it ridiculous that he was doing this kind of work guaranteed to aggravated his problem and cause his absence from work. At that time hew (sic) was off work between February 14 and 16, 2000.
>
> Last time I saw [the Appellant] was on March 27, 2000. He was off work again as of 20/3 because of the same problem, still taking 6 tablets of Tylenol #3 and 20 mg of Amitryptylline at bedtime. He had an appointment with [Appellant's Physiatrist #2] scheduled for May 1, 2000.
>
> In summary, [the Appellant] is still suffering, in my opinion, from myofascial pain syndrome as a result of MVA on 23/9/95. In spite of therapy he continues to have pain and the job he is doing is certainly aggravating the problem. Unless his job is changed (either to a different task in his company or retraining) he will continue having problems indefinitely. I am sure [Appellant's Physiatrist #2] will give you his opinion regarding [the Appellant's] prognosis. (underlining added)

[Appellant's Physiatrist #2], in a letter dated May 15, 2000, responded to specific questions raised by MPIC's case manager as follows:

> [The Appellant], as per recommendation, returned to work on May 10th, 2000 as an [text deleted] mechanic at [text deleted]. According to [the Appellant], his work has been heavy and he has to push at times a cart weighing 800 to 1,000 pounds and he has to do overhead work in awkward positions. By the end of the shift, he starts experiencing pain in his back, pain in the legs, and his legs feel funny. He has required Tylenol No. 3 up to 9 to 12 tablets per day for pain control. He does do daily cervical and lumbar stabilization exercise program before he goes to work. He has been taking Amitriptyline 20 mgs. p.o. h.s. for restoration of his sleep. He has been sleeping reasonably good but the pain wakes him up on an average of 2 to 3 nights in a week. He has been missing work on average one day per week and has now 60 demerit points. (underlining added)
>
> . . . . .
>
> **1. [The Appellant's] current complaints and their relationship to the motor vehicle accident.**
>
> He has developed reoccurrence and exacerbation of his soft tissue, neck and thoracic pain syndrome, has developed interspinous ligamentous strain at T6-T7 and mechanical pain resulting from further static and dynamic strain on his spine. His present symptoms are attributable to his original motor vehicle accident in which he suffered multiple fractures and the soft tissue injuries.
>
> **4. Please advise if there are any restrictions that should be placed on [the Appellant] at the present time with regards to his ability to work.**
>
> He should avoid any lifting, pushing or carrying of objects weighing more than 50 pounds. He should also avoid any repetitive dynamic strain on his neck and upper back.

> **6. <u>Any comments you may feel relevant with regards to [the Appellant's] present status would be greatly appreciated.</u>**
>
> <u>He should undergo workplace assessment to assess his working environment and what level and degree of work, he is doing at [text deleted].</u> (underlining added)

[Appellant's Physiatrist #2], in response to a further inquiry from the case manager, in a letter dated August 28, 2000, stated:

> <u>July 20, 2000, [the Appellant] in the Clinic stated that he is able to continue his full-time work, but by the end of his shift and particularly in the evening, he starts experiencing in the left side of the neck. In the morning he wakes up with mild soreness and stiffness in the neck, but the pain is bearable. He took four days off from work last week. He has worked this week and is doing evening shifts. He has been taking TTylenol#3, (sic) six to eight tablets per day, which has caused dyspepsia and vomiting on two occasions about two weeks ago</u>. (underlining added)
>
> . . .
>
> <u>In summary, [the Appellant] is experiencing recurrent neck strain related to his job-related activities. As you have stated in your letter of July 28, 2000, you are conducting a work site assessment, I would appreciate it if you could send me your assessment and recommendations. On reviewing the report I will be pleased to make further recommendations regarding his job modifications or restrictions</u>. (underlining added)

On September 8, 2000 [text deleted], a certified athletic therapist with [Rehabilitation (Rehab) Consulting Service #2] wrote to the Appellant indicating that [Rehab Consulting Service #2] had been requested by MPIC to assist with the co-ordination of the Appellant's rehabilitation subsequent to the Appellant's motor vehicle accident.

On September 15, 2000 [Appellant's Athletic Therapist] provided an initial assessment to MPIC and made the following recommendations:

> **<u>RECOMMENDATIONS</u>**
>
> 1. Perform a Physical Demands Analysis (PDA) of [the Appellant's] current job to quantify and qualify [the Appellant's] physical demands at work.

2. Provide a copy of the PDA to [Appellant's Physiatrist #2] and ask him to comment on [the Appellant's] ability to perform the demands of his current job. If no objective measures are available ask [Appellant's Physiatrist #2] to comment on the applicability of performing a Functional Capacity Evaluation on [the Appellant].

3. Perform a Functional Capacity Evaluation (FCE) on [the Appellant] and compare his demonstrated abilities in the FCE to the Physical Demands Analysis performed on his job.

4. If pain continues to be a limiting factor to [the Appellant's] overall function he may benefit from psychological sessions focusing on pain management strategies.

The report further stated:

> **a) Vocational Status**
> Working in his pre-accident position with [text deleted] but is missing on average 1 – 2 days per week because of pain complaints within his upper back. [The Appellant] stated that he is unsure of one particular part of his current job which creates his upper back pain. He has tried just performing bench work utilizing tools and assembling and disassembling parts but this caused a dramatic increase in his overall level of pain. (underlining added)

On September 28, 2000 [Rehab Consulting Service #2] provided a Physical Demands Analysis ('PDA') report to MPIC wherein they described the duties and tasks of the Appellant as follows:

> **DUTIES AND TASKS**
>
> A job description was not available to the evaluator for the purpose of this analysis. Based on the information obtained during this analysis, it is my understanding that an Assembly Worker is responsible for the following duties:
>
> 1. **Install Fuel Tanks – (20 – 30% of the shift).**
>
> - Position hyraulic (sic) lift with tank attached underneath bus, this involves pushing and pulling the cart until the holes on the tank are aligned with the bus frame holes.
> - Depending on the fit of the tank the worker may have to use a pry bar to further position the tank to ensure all bolts can be inserted.
> - Insert bolts and tighten nuts using an air gun to required torque specification.
>
> Smaller tanks sometimes require the use of a torque wrench to ensure nuts are tightened to the appropriate specification. The torque wrench is approximately 3 feet in length to allow more leverage when tightening the nuts.
>
> 2. **Install Brake / Fuel Lines – (20 – 30% of the shift).**

- Pushing lines along bus frame and attach using clips to the frame. All work is performed in the overhead work plane and requires the worker to reach into confined spaces to thread the line into the appropriate spot.
- This involved climbing a 4 step ladder to ensure the worker is able to see where the line needs to threaded.

3. **Apply Sealant – (10 – 20% of the shift).**
   - Using a caulking gun apply sealant around openings to complete work as required.
   - Work can be overhead and involve reaching into confined spaces to apply sealant.
   - sometimes requires getting into the bus shell and kneeling while applying sealant.

4. **Assemble Smaller Parts – (10 – 20%) of the shift).**
   - Insert fittings into a metal block and tighten fittings to appropriate specifications. This requires pushing and pulling on a 24" crescent wrench to tighten the main fitting, other fittings require less force to tighten.
   - Complete steering colums (sic) and smaller fuel tanks for installation into the bus.

5. **Complete Unfinished Work – (5 – 10% of the shift).**
   - Complete any minor task that the inspector has notices (sic) while the bus is within the underbody station. This may entail tightening up loose screws or nuts, applying sealant or paint to a particular part, etc.

PHYSICAL DEMANDS SUMMARY

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 activities were identified during this analysis as physical demands which were significant in completing the tasks of an Assembly Worker:

1.	Reaching Overhead	Frequent
2.	Standing	Constant
3.	Lifting above shoulder height	Frequent
4.	Manual dexterity	Constant

In a note to file dated October 4, 2000, the case manager indicated that he had received a PDA

from [Appellant's Athletic Therapist], [Rehab Consulting Service #2]. He further reported:

> [The Appellant] advised that he is taking up to 12 Tylenol 3 tablets per day, which is of some concern. As a result of increaing (sic) mechanical neck and back pain over the course of his work shift he further advised that it then becomes necessary to take time off from work, generally one or two days. Interestingly, [the Appellant] also reported to have tried doing bench assembly work which only resulted in a "dramatic" increase of pain. (underlining added)

The case manager further reported in this note to file that he intended to examine the Appellant's Application for Employment with [text deleted] to explore alternative positions, if practicable. As a result, the case manager contacted [Appellant's Athletic Therapist] to proceed with the Site Assessment and PDA and requested that [Appellant's Athletic Therapist] videotape the Appellant doing his job in order that whomever reviews the assessment will also have a visual aid.

In an undated medical note [Appellant's Doctor] certified that the Appellant had been away from work between October 3, 2000 and October 20, 2000 due to an "*Exacerbation of upper & mid back pain (related to MVA)"*. [Appellant's Doctor] further indicated that the Appellant may return to work on October 23, 2000.

On November 15, 2000 [Appellant's Physiatrist #2] wrote to the case manager indicating that he had examined the Appellant on August 31, 2000 and the Appellant reported that after completing a shift at work he felt stiffness and a sore neck and that the previous night he had to take three (3) Tylenol #3's to ease the pain and also took three (3) Tylenol on the date of his examination. [Appellant's Physiatrist #2] indicated that his clinical assessment revealed reoccurrence of the Appellant's regional myofascial trigger points and that he would receive an injection by him.

[Appellant's Physiatrist #2] further stated in his report to the case manager:

> [The Appellant] has not made complete recovery from his mechanical and regional myofascial neck pain syndrome. He does experience more pain by the end of the week and feels much better on the weekends. This indicates that most of the exacerbation of the pain is attributed by mechanical stresses at work.
>
> I recommend that he should undergo work-site assessment and should try to optimize his ergonomic environment to reduce further mechanical stresses on his neck. I look forward to receiving the work-site assessment report. (underlining added)

In a note to file dated November 16, 2000 the case manager reports that [Appellant's Athletic Therapist] advised him that it was no longer necessary to conduct a videotape as the Appellant was terminated from his employment for multiple fractions of safety rules. The case manager further stated that IRI had not been paid to the Appellant since July 1999, when the Appellant returned to full time duties with full remuneration.

The Appellant's Union filed a grievance on behalf of the Appellant dated November 22, 2000 in respect of an alleged unjust termination of the Appellant on November 8, 2000.

On January 24, 2001 the Appellant's Union wrote to the employer and advised them that the Union's grievance/arbitration committee had met and recommended to the local to proceed to arbitration with the Appellant's grievance. The Commission notes that the grievance did not proceed to arbitration and has no information as to the reason why this occurred.

On February 1, 2001 [Appellant's Physiatrist #2] provided a report to the case manager indicating that he had seen the Appellant on January 22, 2001. [Appellant's Physiatrist #2] reported that the Appellant informed him that he was terminated from his employment on November 8, 2000 because he was missing time and he had collected one hundred (100) demerit

points. The Appellant further stated:

> Since he is off work, he is feeling much better except he has mild tender area in the left scapular region. The tender area gets aggravated if he does any heavy work, particularly, he did snow shoveling last week and noticed left scapular and shoulder pain. He has been Tylenol plain 2 tablets every 3 to 4 days.
>
> . . .
>
> **Impression:** Clinically, [the Appellant] has regional myofascial trigger points of the left supraspinatus and trapezius muscles. He gets exacerbation of soft tissue pain after doing any heavy work or any repetitive activities with his upper extremities. (underlining added)

In respect of treatment, the Appellant received a local injection of the two (2) trigger points, was "*instructed to continue daily range of motion and stretch exercises and avoid any repetitive static and dynamic strain on his neck and left shoulder girdle muscles*." (underlining added)

In a memo to file dated May 25, 2001 the case manager reports that the Appellant advised him that in his view the dismissal was entirely due to symptoms and difficulties as a result of his motor vehicle accident injuries. The case manager contacted the Employee Relations Coordinator at [text deleted] and indicated that he intended to have the Appellant undergo a musculoskeletal examination to tie this together with his critical job demands with [text deleted]. The case manager further stated *"If there is any merit to the difficulties he had reported then it may be appropriate to complete a two year determination"*. (underlining added)

[Appellant's Physiotherapist #2] conducted the musculoskeletal examination on June 13, 2001 and provided a report to the case manager dated June 18, 2001

Case Manager's Decision

The case manager wrote to the Appellant on August 15, 2001 and stated:

> At the time of this dismissal, we had also begun a Physical Demands Analysis to determine what changes to your work site would better accommodate your ability to continue with your employment. The results of the Physical Demands Analysis were provided to [Appellant's Physiotherapist #2], who conducted a musculoskeletal examination of yourself on June 13, 2001. [Appellant's Physiotherapist #2] has concluded, that you are able to perform all of your duties and tasks, with the exception of installation of fuel tanks. This task, however, was performed by an assistant provided to you by [text deleted]. With all of this having been said, we have determined that you are able to hold the employment that you held at the time of this accident and, therefore, you are not entitled to an IRI.
>
> Furthermore, even though your specific job duties were modified somewhat, your Gross Yearly Employment Income (GYEI) was equal to or greater than the GYEI in which your IRI had been determined, which also ends your entitlement to an IRI.

The Appellant, on January 15, 2002, filed an Application for Review of the case manager's decision.

On September 24, 2002 [Appellant's Physiatrist #2] wrote to the Appellant's legal counsel, [text deleted], in response to her request to provide a narrative medical report regarding the Appellant's medical and functional status including the restrictions which were recommended in 1999 and 2000.

[Appellant's Physiatrist #2], in his report to [Appellant's Legal Counsel], stated:

> Because of his heavy work which included pushing a cart at times weighing 800-1000 lb, overhead work in awkward positions caused exacerbation of his neck and should pain and by the end of the shift he would experience pain in the neck, back and legs. He required Tylenol #3 up to 9-12 tablets per day for pain control.
>
> On October 30, 2002 in the clinic after examination, I recommended that he should undergo a work site assessment and should try to optimize his ergonomic involvement to reduce further mechanical stresses on his neck. These recommendations were made to MPIC but unfortunately there was no further correspondence received from Manitoba Public Insurance Corporation.
>
> Due to exacerbation of the neck and shoulder pain, [the Appellant] started missing time and according to him, he collected one hundred demerit points and his job was terminated on November 8, 2000. Since then he has not been able to return to any gainful

employment.

> In my opinion, he should have undergone further functional capacity evaluation and a workplace assessment to assess his working environment and what level and degree of work he could perform at [text deleted]. Unfortunately, this was not followed by Manitoba Public Insurance and I still feel that he should be able to return to work with some restrictions but this needs to be supported by a formal functional capacity evaluation and work site assessment. [The Appellant] is an individual who was totally disabled from September 23, 1995 and with the appropriate treatment prescribed to him by myself and self management home exercise program, he made a significant improvement and was able to return to work on May 10, 1999. (underlining added)

[Appellant's Doctor], in a report to a Claims Examiner at [text deleted] Insurance, dated January 2, 2003, states:

> 1/ Primary diagnosis: myofascial pain syndrome, regional mid-thoracic back, as a reaction to T4-T5 fracture. I am really not treating [the Appellant], except occasionally I renew his analgesics. I understand that he is still under [Appellant's Physiatrist #2].
>
> 2/ In my opinion, [the Appellant] should have never returned to his original job, or if he did he should have worked part-time only in a light duty job. (underlining added)

Internal Review Officer's Decision

On June 10, 2005 the Internal Review Officer issued a decision dismissing the Appellant's Application for Review and confirming the decision of the case manager dated August 15, 2001 which the Appellant received on November 30, 2001.

The Internal Review Officer provided an extensive review of the Appellant's physical problems, his absence from work, his medical treatments and the termination of his employment at [text deleted], and stated:

> The issue for me to determine is whether MPI is obliged to reinstate your IRI benefits following your dismissal from [text deleted] on November 8, 2000. Prior to your dismissal you had returned to [text deleted]'s payroll in July, 1999. The fact that you may have subsequently experienced accident-related symptoms resulting from work

activity is not determinative of the issue before me. During this 16 month period following your return, you were working at [text deleted] on a full-time basis. Although you would have been incapable of doing some of the heavier tasks, it is noted that arrangements were made for you to obtain assistance for those tasks.

In the meantime, your work status was put into a precarious position by the accumulation of 100 demerit points which ultimately let (sic) to your dismissal. During the course of the Internal Review process, [Appellant's Legal Counsel] endeavored to establish a relationship between your accident-related injuries and the demerits you accumulated. Giving you the benefit of the doubt, I am still unable to accept that all of the demerits are accident-related. For example, the 20 point demerit infraction (smoking in the bus shell) which led to your ultimate dismissal was clearly unrelated to the motor vehicle accident in question. It also seems less clear that the demerits for being late can be explained away by your statement that you must have had doctor appointments on those days.

Even with the remaining Offence #15 infractions, there is some question as to what extent you attempted to avoid the assessment of demerits by communicating with your employer and/or the Case Manager. Notwithstanding your statement that you called [text deleted], there is a lack of documentation indicating that he was made aware of the ongoing problems you were having with your employer. The file suggests that your employer was cooperative in your return to work. Your union did not pursue the issue of your termination as I indicated above. All of this is suggestive of something beyond problems arising from the accident contributing to your dismissal. The file indicates that you had also been assessed demerit points before the September 23, 1995 accident took place.

Therefore, I am unable to conclude that it has been established on a balance of probabilities that your accident-related problems contributed to your dismissal to the extent that would warrant reinstatement of your IRI benefits under the Personal Injury Protection Plan. Section 110(2)(d) would therefore have no application in these circumstances as in any event, I do not find that you lost your employment because of the accident. Furthermore the medical evidence would also not indicate that you suffered a relapse which would permit reinstatement of the payment of your IRI.

The decision to terminate your Income Replacement Indemnity benefits in accordance with Section 110(1)(e) of the Act, was made with you having clearly held "an employment" for the 16 month period prior to your dismissal. It was therefore in order for [text deleted] to confirm the termination of your Income Replacement Indemnity based upon the determination that your earnings equaled or exceeded the gross income upon which your Income Replacement Indemnity was based.

Therefore, for the reason outlined herein, I am dismissing your Application for Review and upholding the Case Manager's decision of November 30, 2001.

Appeal

The relevant provisions of the MPIC Act and Regulations in respect of this appeal are:

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.

MPIC Act:
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;
(e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;

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.
Factors for determining an employment
106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

New determination after second anniversary of accident
107 From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

The Appellant testified at the hearing and reviewed the duties he was required to perform as an assembly worker and stated that:

1. seventy (70%) percent of the work he was required to do was of a repetitive nature, reaching overhead and lifting above shoulder height.

2. thirty (30%) percent of his duties was collecting parts and getting these parts ready

for installation.

3. his essential duties were to install fuel tanks, air lines, steering box, air brake parts and suspension air bags.
4. the installation of the fuel tanks on the buses proceeded on an assembly line and were time sensitive.
5. as a result, he was required to work at a certain speed in order to successfully complete his task.
6. the portion of the bus in which the installation of fuel tanks took place was six and one-half (6 ½) to seven (7) feet off the ground, and the Appellant testified he was [text deleted].
7. In order to carry out his work, the Appellant was required to constantly reach over his head.

The Appellant further stated that:

1. he was initially provided with an assistant who pulled the heavy cart and who would help install the air lines and fuel tanks.
2. on many occasions the assistant was not available when he was required to push and pull the cart until the holes on the fuel tank were aligned with the bus frame holes which required a great deal of physical force.
3. when installing the brake and fuel lines he was required to twist his body in awkward positions in order to perform the overhead work and reach into confined spaces when threading the line into the appropriate spot.
4. on occasion he was required to contort his body and to crawl into bus frames.
5. he was required to exert a great deal of physical force, pushing or pulling on the twenty-four (24”) inch crescent wrench to tighten the main fitting.

The Appellant further testified that:

1. as a result of his work activities, there was an exacerbation of his back pain, which prevented him from working regular shifts, and he was required to be absent from work on many occasions.
2. he was never able to successfully return to his full time position, on a regular basis, as an assembly worker.
3. he regularly was unable to finish a normal shift or work five (5) consecutive days.
4. due to the company policy, his absences from work, due to the motor vehicle accident injuries, resulted in him being penalized with demerit points to a level of eighty (80).
5. he acknowledged that he had violated the company policy by smoking, which brought his demerit points to one hundred (100) and caused the termination of his employment in accordance with the provisions of the company policy.

MPIC did not call any witnesses to testify at the appeal proceedings to rebut the Appellant's testimony in respect of his work activities after the motor vehicle accident had occurred.

Submissions

The Appellant, in a brief submission to the Commission, reviewed his testimony and stated that, due to the motor vehicle accident injuries, he never made a successful return to work and that the primary reason for his termination was due to these absences which were related to the motor vehicle accident injuries that he sustained. The Appellant therefore requested that his IRI benefits be reinstated since he was unable to carry out his pre-accident employment due to the motor vehicle accident injuries.

MPIC's legal counsel submitted that:

1. the Appellant returned to the employer's payroll in July of 1999, even though he experienced some activity related symptoms which resulted from his work, and was able to continue his full time employment for sixteen (16) months working for [text deleted] on a full time basis.
2. although he was not capable of doing some of the heavier tasks, the employer had made arrangements to obtain assistance in respect of these tasks.
3. as a result of smoking in the bus shell, this constituted the ultimate reason for terminating his employment and this was not related to the motor vehicle accident.
4. in accordance with Section 110(1)(a) of the MPIC Act the Appellant was able to hold employment and did justify MPIC in terminating his IRI benefits.
5. in addition, under Section 110(1)(e) of the MPIC Act, the Appellant's gross income from his employment was equal to or greater than the gross income from his IRI benefits and this justified termination of his benefits.

MPIC's legal counsel further submitted that in respect of Section 110(2)(d) of the MPIC Act, MPIC adopted the decision of the Internal Review Officer who had concluded that the Appellant was not able to establish, on a balance of probabilities, that his accident related problems contributed to his dismissal to the extent that it warranted reinstatement of his IRI benefits through the Personal Injury Protection Act. As a result, MPIC's legal counsel submitted that Section 110(2)(d) had no application in the circumstances because the Appellant did not lose his employment because of the motor vehicle accident and requested that the appeal be dismissed.

Discussion

There are four (4) issues that the Commission must consider in this appeal:

1. Section 110(1)(a) of the MPIC Act and Section 8 of M.R. 37/94

The decision of the Internal Review Officer who determined that the case manager was correct in terminating the Appellant's IRI on the grounds that the Appellant was no longer unable to hold employment pursuant to Section 8 of Manitoba Regulation 37/94.

2. Section 110(1)(e) of the MPIC Act

The decision of the Internal Review Officer determined that the case manager was correct in terminating the Appellant's IRI in accordance with Section 110(1)(e) of the MPIC Act because the Appellant held "an employment for the sixteen (16) month period prior to his dismissal" and, as a result, MPIC was entitled to terminate the Appellant's IRI because his earnings equaled or exceeded the gross income upon which the Appellant's IRI was based.

3. Section 110(2)(d) of the MPIC Act

The decision of the Internal Review Officer concluded that the Appellant had failed to establish, on a balance of probabilities, that his accident-related problems contributed to the dismissal from his employment to the extent that it would warrant reinstatement of his IRI benefits under the Personal Injury Protection Plan. As a result the Internal Review Officer concluded that Section 110(2)(d) of the MPIC Act had no application in these circumstances since the Internal Review Officer did not find that the Appellant lost his employment because of the motor vehicle accident.

4. Section 117(1) of the MPIC Act

The Internal Review Officer determined that the medical evidence did not establish that the Appellant suffered a relapse which would permit reinstatement of the payment of the Appellant's IRI pursuant to Section 117 of the MPIC Act.

Sections 110(1)(a)&(e) and 110(2)(d) of the MPIC Act

The Commission finds that the Appellant was unable to hold his employment within the meaning of Section 8 of Manitoba Regulation 37/94 and, as a result, MPIC erred in terminating his IRI benefits pursuant to Sections 110(1)(a)&(e) of the MPIC Act.

September 23, 1995 to July 19, 1999

As a result of the motor vehicle accident on September 23, 1995 the Appellant sustained multiple injuries including a T5 burst fracture, a T4 laminar fracture, a right clavicle fracture, fractures to the right third, fifth and sixth ribs, possible undisplaced sternal fracture and a right inferior orbital rim fracture.

Prior to the motor vehicle accident the Appellant had been employed for a number of years as an assembly worker at [text deleted]. The PDA which was conducted by [Rehab Consulting Service #2] in September of 2000, indicated that as an assembly worker the Appellant was required to install fuel tanks, install brake/fuel lines, apply sealants, assemble smaller parts and do a variety of minor tasks to complete the work. This report indicated that significant physical demands of an assembly worker were:

1.	Reaching Overhead	Frequent
2.	Standing	Constant
3.	Lifting above shoulder height	Frequent
4.	Manual dexterity	Constant

The work demand level when carrying out these activities was medium/heavy.

The Appellant attempted to return to work in the month of October 1996, approximately thirteen

(13) months after the motor vehicle accident but was unable to continue this work after three (3) days.

The Appellant was referred for physiotherapy and, on October 10, 1997, the physiotherapist reported that the Appellant could return to work, with certain limitations in respect of his ability to lift and on a gradual basis. Approximately twelve (12) months after his initial attempt to return to work on October 20, 1996 the Appellant commenced working on a gradual basis of four (4) hours per day, which was increased to five (5) hours per day in December of 1997, and to six (6) hours per day in the month of February 1998.

However, three (3) months later [text deleted] reported to MPIC on March 6, 1998 that the Appellant's effort to work six (6) hours a day made it impossible for him to work five (5) consecutive days and, as a result, the Appellant no longer continued on his return to the work program.

The Commission therefore notes that between October 20, 1997 and March of 1998 the Appellant was employed by [text deleted] but was unable to return to his pre-accident employment of working eight (8) hours per day, five (5) days per week, on a continuous basis.

The Appellant was referred to [Appellant's Physiatrist #1] who, in a report to MPIC dated April 30, 1998, stated:

> . . . He did return to work with [text deleted] for a few months but because his work does involve a great deal of heavy lifting and standing on concrete floors his back pain worsened quite significantly and he was unable to continue at work.
>
> . . . . .

> . . . [The Appellant] seems to have his pain under fairly good control at the present time although his future employment is still questionable. If he can possibly be employed in a job that does not require heavy lifting and does not require him to work on hard surfaces, he hopefully will not have ongoing exacerbations of pain. . . . (underlining added)

The Appellant, who had been off work since on or about March 6, 1998, was referred to [Rehab Clinic] for strengthening and conditioning exercises for the purpose of having him return to work after four (4) to six (6) weeks of recommended treatment. Seven (7) months later [Rehab Clinic], in a report to MPIC dated October 2, 1998, stated:

> [The Appellant] was discharged from the Work Hardening Program today. His occupational therapy results were as follows:
>
> - max front carry: 63 lbs. (for 50 ft)
> - max R hand carry: 48 lbs, max L hand carry: 41 lbs (50 ft);
> - max push force = 68 lbs, max pull force = 56 lbs (25 ft each);
> - max lifting capacity: 50 lbs (floor to shoulder level)
> - work demand level net: MEDIUM;
>
> It is recommended that he return to employment at [text deleted], within his functional capacities, outlined above. He should have follow-up with his vocational rehabilitation consultant. (Note: He would likely have difficulty resuming a position that required sustained awkward positioning – ie overhead work.) (cont'd) (underlining added)

The Commission notes that six (6) days after [Rehab Clinic's] report of October 2, 1998, [Rehab Clinic] provided a further report to MPIC dated October 8, 1998 which stated that the Appellant had attempted to return to work but was unsuccessful as "*he stated that [text deleted] did not follow the recommended return to work plan*". The report further stated:

> The client's work capabilities do not match the critical demands of the identified goal, to return to work as a Production Worker at a MEDIUM to HEAVY level of work. However, he is capable of working at a position at [text deleted] at a MEDIUM level, and within his functional capacities outlined in this report.
>
> **RECOMMENDATIONS**
>
> . . .
>
> 3. [The Appellant] should return to [text deleted] as a Production Worker at a MEDIUM level of work. (underlining added)

Prior to the Appellant's return to work on October 8, 1998 he had been off work from approximately March 6, 1998 until October 8, 1998, a period of seven (7) months. The Commission notes that after the Appellant returned to work on October 8, 1998 he was off work again several days later.

[Appellant's Physiatrist #2] provided a medical report to MPIC dated October 13, 1998 and in response to MPIC's inquiries he stated:

> **4. Please advise if there are any restrictions that should be placed on [the Appellant] at the present time with regards to his ability to work.**
> He should avoid any lifting, pushing or carrying of objects weighing more than 50 pounds. He should also avoid any repetitive dynamic strain on his neck and upper back.
>
> **6. Any comments you may feel relevant with regards to [the Appellant's] present status would be greatly appreciated.**
> He should undergo workplace assessment to assess his working environment and what level and degree of work, he is doing at [text deleted]. (underlining added)

In respect of the Appellant he stated "*He may have difficulty in doing work which requires repetitive extension of the spine like overhead work and any work which requires repetitive bending and reaching out in awkward positions".*

On May 21, 1999 [Appellant's Physiatrist #2] provided a report to MPIC indicating that the Appellant was instructed to undertake a graduated return to work from May 10, 1999 with a limitation of maximum lifting of up to fifty (50) pounds. The Appellant returned to work on or about May 10, 1999 after being off work essentially since March 6, 1998, a period of approximately fourteen (14) months.

Case Manager's Decision

The Commission notes that in a letter dated August 15, 2001 to the Appellant, the case manager stated:

> As you will recall, a graduated return to work program was implemented in 1999 that successfully returned you to fulltime employment at [text deleted]. Your Income Replacement Indemnity (IRI) was terminated at that time, as you were no longer unable to hold employment as defined by Section 8 of the Manitoba Public Insurance Regulation 37/94.

Internal Review Officer's Decision

The Commission further notes that on June 10, 2005 the Internal Review Officer issued a decision dismissing the Appellant's Application for Review and confirming the case manager's decision dated August 15, 2001. In this decision the Internal Review Officer stated:

> The issue for me to determine is whether MPI is obliged to reinstate your IRI benefits following your dismissal from [text deleted] on November 8, 2000. Prior to your dismissal you had returned to [text deleted]'s payroll in July, 1999. The fact that you may have subsequently experienced accident-related symptoms resulting from work activity is not determinative of the issue before me. During this 16 month period following your return, you were working at [text deleted] on a full-time basis. Although you would have been incapable of doing some of the heavier tasks, it is noted that arrangements were made for you to obtain assistance for those tasks.

Discussion

The Commission also notes that from the date of the motor vehicle accident on September 23, 1995 to July 19, 1999 MPIC recognized that the Appellant was unable to hold his pre-accident employment pursuant to Section 8 of Manitoba Regulation 37/94. During this period of time the Appellant was unable, as he had done before the motor vehicle accident, to consistently work an eight (8) hour day, five (5) consecutive days a week due to his back pain caused by his motor vehicle accident injuries. However, subsequent to July 19, 1999 MPIC terminated the Appellant's entitlement to IRI on the grounds that the Appellant was no longer unable to hold

employment as defined in Section 8 of Manitoba Regulation 37/94. The Commission finds that MPIC erred in terminating the Appellant's IRI since the Appellant was never able to successfully return to his pre-accident employment.

July 19, 1999 – November 8, 2000
Section 110(1)(a) of the MPIC Act

The Commission notes that MPIC did not reinstate the Appellant's entitlement to IRI benefits as of November 8, 2000 following the Appellant's dismissal by [text deleted] on the grounds that the Appellant had successfully returned to work at [text deleted] in July of 1999, and had been working on a full time basis for [text deleted] for the sixteen (16) month period following his return to work. The Commission, however, finds, having regard to the testimony of the Appellant, the observations of the case manager, and the medical evidence subsequent to July 19, 1999, that the Appellant did not make a successful return to work as an assembly worker at [text deleted] as defined by Section 8 of M.R. 37/94. In the Commission's view there was no change in the physical capacity of the Appellant to carry out the essential duties of his job as an assembly worker before and after July 19, 1999. The medical reports of [Appellant's Doctor] and [Appellant's Physiatrist #2] consistently corroborate the testimony of the Appellant that, due to the motor vehicle accident injuries the Appellant sustained, he was unable to carry out the essential duties of his pre-accident employment after July 19, 1999. In the Commission's view the Appellant was terminated from his employment on November 8, 2000 primarily due to his absences from work, and late attendances as a result of his motor vehicle accident injuries.

The Appellant's personal physician, [Appellant's Doctor], in a report to MPIC dated April 15, 2000, contradicts MPIC's decision that the Appellant made a successful return to work after July 19, 1999 and that he continued, on a full time basis, with his employment until his termination of

employment on November 8, 2000. [Appellant's Doctor's] report graphically demonstrates that between June 21, 1999 until March 27, 2000 the Appellant did not, on a regular continuous basis, work eight (8) hours per day, five (5) days per week, as he did prior to the motor vehicle accident on September 23, 1995. [Appellant's Doctor] reports that the Appellant advised him that he rarely worked five (5) consecutive days due to the unbearable pain in his mid thoracic area. He further reported in respect of pain control the Appellant, on a daily basis, was taking six (6) tablets of Tylenol #3 each day and ten (10) to twenty (20) milligrams of Amitryptylline at bedtime in order to sleep. [Appellant's Doctor] further stated:

> . . . I found it ridiculous that he was doing this kind of work guaranteed to aggravated his problem and cause his absence from work. At that time hew (sic) was off work between February 14 and 16, 2000.

[Appellant's Doctor] concluded his letter by stating:

> In summary, [the Appellant] is still suffering, in my opinion, from myofascial pain syndrome as a result of MVA on 23/9/95. In spite of therapy he continues to have pain and the job he is doing is certainly aggravating the problem. Unless his job is changed (either to a different task in his company or retraining) he will continue having problems indefinitely. I am sure [Appellant's Physiatrist #2] will give you his opinion regarding [the Appellant's] prognosis. (underlining added)

[Appellant's Doctor], between November 4, 1999 and December 30, 1999 provided three (3) medical notes in respect of the Appellant's absences from work in October, November and December 1999.

The Commission notes that [Rehab Clinic], in its report to MPIC in October of 1998, recommended that the Appellant's lifting capacity from floor to shoulder level should be fifty (50) pounds and the work demand level be medium.

[Appellant's Physiatrist #2], in his letter dated May 15, 2000 to MPIC, also contradicts MPIC's assertion that the Appellant made a successful return to work after July 19, 1999 and continued to work, on a full time basis, until his termination on November 8, 2000. In his letter [Appellant's Physiatrist #2] noted that the Appellant returned to work on May 10, 2000 after a period of absence from work. In this letter [Appellant's Physiatrist #2] reported that the Appellant was complaining that his work was heavy and he was required to push, at times, a cart weighing eight hundred (800) to one thousand (1,000) pounds and that he had to do overhead work in awkward positions. He further reported that the Appellant advised him that he was required to take Tylenol #3, up to nine (9) to twelve (12) tablets per day for pain control and was taking Amitryptylline 20 mg for restoration of his sleep. The Appellant also advised [Appellant's Physiatrist #2] that he was missing work on an average of one (1) day per week.

[Appellant's Physiatrist #2], in this letter, also stated that the Appellant should avoid lifting or pushing or carrying objects weighing more than fifty (50) pounds and should also avoid any repetitive dynamic strain on his neck and upper back. [Appellant's Physiatrist #2] also recommended that the Appellant undergo a workplace assessment to assess his working environment and the level and degree of work he was doing at [text deleted]. [Appellant's Physiatrist #2], in his reports to MPIC dated October 13, 1998, as well as May 15, 2000, recommended MPIC conduct a workplace assessment at [text deleted]. MPIC's case manager ignored both of [Appellant's Physiatrist #2's] recommendations.

It is also unclear to the Commission why the case manager ignored the complaints of the Appellant, which were corroborated by the medical reports of [Appellant's Doctor] and [Appellant's Physiatrist #2], that [text deleted] was not complying with:

1. [Rehab Clinic's] report in the month of October 1998 which indicated that the

Appellant's work level should not be at heavy, but at medium.

2. The advice of [Appellant's Physiatrist #2] in the month of October 1998, and again in the month of May 2000, that a workplace assessment should be conducted and that the Appellant should not be lifting more than fifty (50) pounds or doing a variety of tasks which aggravated his motor vehicle accident injuries and caused the Appellant extreme pain.

It is the Commission's view that both [Appellant's Doctor's] report of April 15, 2000 and [Appellant's Physiatrist #2's] report of May 15, 2000 should have convinced the case manager not to proceed in attempting to have the Appellant return to his pre-accident employment as an assembly worker. Instead, the case manager should have immediately conducted a workplace assessment and, based on this assessment and the PDA MPIC received from [Rehab Consulting Service #2] at the end of September 2000, obtained an agreement from [text deleted] to modify the Appellant's job to light duties. The Commission further finds that if [text deleted] was not prepared to do so at that time, pursuant to Section 107 of the MPIC Act, MPIC should have concluded that the Appellant was unable to return to his pre-accident employment having regard to the principles set out in Section 106(1) of the MPIC Act and determined a different employment that the Appellant was capable of doing.

> **Factors for determining an employment**
> **106(1)** Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.
>
> **New determination after second anniversary of accident**
> **107** From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

If MPIC had acted in this fashion in April and May 2000, the Appellant would not have been compelled to return to a job that he was physically incapable of doing, which caused him a great deal of consistent pain, and which resulted in the Appellant consistently missing work on a daily and weekly basis and resulted in the termination of his employment.

[Appellant's Physiatrist #2], in a further report to the case manager dated August 28, 2000, indicated that the Appellant was continuing to have difficulty completing his work and that he had taken four (4) days off from work the previous week. He also stated the Appellant advised him that he continued to take Tylenol #3, six (6) to eight (8) tablets per day. [Appellant's Physiatrist #2] further stated:

> In summary, [the Appellant] is experiencing recurrent neck strain related to his job-related activities. As you have stated in your letter of July 28, 2000, you are conducting a work site assessment, I would appreciate it if you could send me your assessment and recommendations. On reviewing the report I will be pleased to make further recommendations regarding his job modifications or restrictions. (underlining added)

In a memo to file dated October 4, 2000, with respect to a telephone discussion the case manager had with the Appellant on August 12, 2000, the case manager indicates that he received [Appellant's Athletic Therapist's] report, dated September 28, 2000, in respect of a PDA. In this report [Appellant's Athletic Therapist] stated that:

> [The Appellant] advised that he taking up to 12 Tylenol 3 tablets per day, which is of some concern. As a result of increasing mechanical neck and back pain over the course of his work shift he further advised that it then becomes necessary to take time off from work, generally one or two days. . . .

The case manager further reported in this note to file that he intended to examine the Appellant's Application for Employment with [text deleted] to explore alternative positions, if practicable. As a result, the case manager contacted [Appellant's Athletic Therapist] to proceed with the

workplace assessment and PDA and requested that [Appellant's Athletic Therapist] videotape the Appellant doing his job in order that whomever reviews the assessment will also have a visual aid.

The Commission finds that the case manager acted too little, too late. The Commission determines that the case manager, having regard to the medical reports of [Appellant's Doctor] and [Appellant's Physiatrist #2], in a timely fashion, failed to recognize that there was no change in the physical capacity of the Appellant to carry out the essential duties of his pre-accident employment after July 19, 1999. The Commission further finds that the case manager should have recognized that [text deleted] had not modified the job duties of the Appellant to meet the Appellant's physical capacity and, as a result, the Appellant was unable to successfully return to his pre-accident employment.

The Commission also notes that it was not until October 4, 2000, approximately fifteen (15) months after the Appellant's IRI benefits were terminated (July 19, 1999), that the case manager started to consider conducting a two (2) year determination pursuant to Section 107 of the MPIC Act to determine new employment for the Appellant. In the Commission's view the case manager again failed, in a timely fashion, to seek a modification of the Appellant's job duties at [text deleted], in arranging for a workplace assessment and in determining the two (2) year employment of the Appellant pursuant to Section 107 of the MPIC Act.

The Commission further notes that after October 4, 2000 the Appellant continued to have significant problems performing his work. [Appellant's Doctor] provided a further medical note certifying that the Appellant has been away from work between October 3, 2000 to October 20, 2000 due to "*an exacerbation of upper & mid back pain (related to MVA)".*

On November 15, 2000 [Appellant's Physiatrist #2] wrote to the case manager and stated:

> [The Appellant] has not made complete recovery from his mechanical and regional myofascial neck pain syndrome. He does experience more pain by the end of the week and feels much better on the weekends. This indicates that most of the exacerbation of the pain is attributed by mechanical stresses at work.
>
> I recommend that he should undergo work-site assessment and should try to optimize his ergonomic environment to reduce further mechanical stresses on his neck. I look forward to receiving the work-site assessment report. (underlining added)

The workplace assessment which [Appellant's Physiatrist #2] had recommended in his reports dated October 13, 1998 and May 15, 2000 were not undertaken because the Appellant was terminated from his employment on November 8, 2000. The Appellant's termination was primarily due to his motor vehicle accident injuries which caused his absences from work, as well as late attendances and his violation of a company safety rule in respect of smoking on one (1) occasion.

In a memo to file dated May 25, 2001 the case manager reports that the Appellant advised him that in his view the dismissal was entirely due to symptoms and difficulties as a result of the motor vehicle accident injuries. The Appellant confirmed this view in his testimony and MPIC did not call any evidence to rebut the Appellant's testimony in this respect.

The case manager contacted the Employee Relations Coordinator at [text deleted] and indicated that he intended to have the Appellant undergo a musculoskeletal examination to tie this together with his critical job demands with [text deleted]. The case manager further stated *"If there is any merit to the difficulties he had reported then it may be appropriate to complete a two year*

determination". (underlining added)

The Commission finds that there was merit to the Appellant's complaints of his job difficulties as corroborated by the medical reports of [Appellant's Doctor] and [Appellant's Physiatrist #2] prior to the case manager concluding, several years later, that there may be merit to the Appellant's job difficulties which would have triggered a two (2) year determination pursuant to Section 107 of the MPIC Act. Such a determination by the case manager, upon receipt of [Appellant's Doctor] and [Appellant's Physiatrist #2's] reports in April and May 2000, would have caused the Appellant to be employed in a job in which he was physically capable of performing at that time.

The untimely response of the case manager is confirmed again by [Appellant's Doctor's] report to the claims examiner of [text deleted] dated January 2, 2003 wherein [Appellant's Doctor] stated:

> 2/ In my opinion, [the Appellant] should have never returned to his original job, or if he did he should have worked part-time only in a light duty job. (underlining added)

[Appellant's Physiotherapist #2] conducted the musculoskeletal examination on June 13, 2001 and provided a report to the case manager dated June 18, 2001 wherein he included that with the exclusion of the installation of fuel tanks the Appellant could perform four (4) of the five (5) duties as a task of his employment. [Appellant's Physiotherapist #2's] examination does not take into account the actual work the Appellant did at [text deleted] and, as a result, is of limited value.

The Commission finds that a much more accurate assessment of the Appellant's abilities to carry

out the work of an assembly worker could have occurred at a workplace assessment being conducted at the same time that [Appellant's Physiotherapist #2] was conducting a musculoskeletal investigation. Unfortunately, because of the case manager's significant delay, the Appellant was terminated before such a workplace assessment could take place.

The Appellant testified in a clear and unequivocal fashion as to his job complaints and his testimony is corroborated by the medical opinions of [Appellant's Doctor] and [Appellant's Physiatrist #2]. Unlike [Appellant's Physiotherapist #2], [Appellant's Doctor] and [Appellant's Physiatrist #2], over many years, saw the Appellant on a number of occasions and found the Appellant to be credible. There is no reference in any of the doctor's medical reports that the Appellant had exaggerated his complaints of pain which prevented him from working on a continuous basis, eight (8) hours per day, five (5) days per week.

The Commission notes that MPIC did not call any witnesses from [text deleted] to rebut the Appellant's testimony that he was unable to carry out his job duties at [text deleted], eight (8) hours per day, five (5) days per week. Having regard to the limited value of [Appellant's Physiotherapist #2's] examination of the Appellant, the Commission gives greater weight to the testimony of the Appellant and the medical reports of [Appellant's Physiatrist #2] and [Appellant's Doctor] that, due to motor vehicle accident injuries, the Appellant was incapable of carrying out the essential duties of employment after July 19, 1999 than it does to the contrary opinion of [Appellant's Physiotherapist #2].

The Appellant was terminated from his employment on November 8, 2000. The Commission finds that the primary reason for the Appellant's termination from his employment was due to his absences from work and late attendance as a result of his motor vehicle accident injuries.

On February 1, 2001 [Appellant's Physiatrist #2] provided a report to the case manager indicating he had seen the Appellant on January 22, 2001 and he reported that the Appellant informed him:

> Since he is off work, he is feeling much better except he has mild tender area in the left scapular region. The tender area gets aggravated if he does any heavy work, particularly, he did snow shoveling last week and noticed left scapular and shoulder pain. He has been Tylenol plain 2 tablets every 3 to 4 days.

[Appellant's Physiatrist #2's] report again confirms the physical incapacity of the Appellant to carry out the essential duties of his job at [text deleted].

The Commission therefore finds that, having regard to the testimony of the Appellant, as corroborated by the medical reports of [Appellant's Doctor] and [Appellant's Physiatrist #2], together with the documentary evidence on file, that the Appellant has established, on a balance of probabilities, that he was unable to hold employment subsequent to July 19, 1999. As a result, MPIC erred in terminating his entitlement to IRI benefits contrary to Section 110(1)(a) of the MPIC Act.

Section 110(1)(e) of the MPIC Act

The Internal Review Officer, in his decision dated June 10, 2005 stated:

> The decision to terminate your Income Replacement Indemnity benefits in accordance with Section 110(1)(e) of the Act, was made with you having clearly held "an employment" for the 16 month period prior to your dismissal. It was therefore in order for [text deleted] to confirm the termination of your Income Replacement Indemnity based upon the determination that your earnings equaled or exceeded the gross income upon which your Income Replacement Indemnity was based.

The Commission has found that the Appellant did not "hold an employment" for the sixteen (16) month period prior to the Appellant's dismissal on November 8, 2000 and, therefore, determined

that the Internal Review Officer erred in coming to a contrary conclusion. As a result, the Commission finds that the Internal Review Officer erred in confirming the termination of the Appellant's IRI by the case manager on the grounds that the Appellant's earnings equaled or exceeded the gross income upon which the Appellant's IRI was based pursuant to Section 110(1)(a) of the MPIC Act.

Section 110(2)(d) of the MPIC Act

The Appellant's legal counsel, in her submission to the Internal Review Officer, stated in the alternative that the Appellant was entitled to IRI for one (1) year from the date the Appellant was able to hold employment if entitlement to an IRI lasted for more than two (2) years. The Commission notes that the Internal Review Officer rejected the Appellant's legal counsel's submission in respect of Section 110(2)(d) on the grounds that the Appellant has failed to establish, on a balance of probabilities, that the Appellant's accident related problems contributed to his dismissal to the extent that it would warrant reinstatement of the Appellant's IRI benefits pursuant to Section 110(2)(d) of the MPIC Act.

Contrary to the Internal Review Officer's decision, the Commission finds that the primary reason why the Appellant was terminated from his employment by [text deleted] was primarily due to the Appellant's motor vehicle accident injuries. An examination of the reasons for the Appellant's dismissal, set out in [text deleted] letter dated April 8, 2002, as reported in the Internal Review Officer's decision dated June 10, 2005, clearly indicates that on four (4) occasions the Appellant was absent from work and provided [text deleted] with [Appellant's Doctor's] notes certifying that his absence was due to the motor vehicle accident injuries. The Appellant received sixty (60) demerit points from [text deleted] for these absences.

[Text deleted] letter further indicates that the Appellant was assessed twenty (20) demerits for being late on two (2) occasions. The Appellant's explanation for his late absences was that he had attended doctor appointments which were accident related. MPIC provided no evidence to rebut the Appellant's assertion as to the reasons why he was late on two (2) occasions at work. Since there is no evidence to the contrary the Commission accepts the Appellant's explanation as to the reasons why he was late for work. As a result of the Appellant's lateness at work his demerit level rose to eighty (80). The Commission finds that the eighty (80) demerit points the Appellant received from [text deleted] was by the Appellant's absences from work and his late attendance was due solely to his motor vehicle accident injuries.

The Appellant was subsequently assessed twenty (20) demerit points for smoking inside a bus shell, which was not motor vehicle accident related. Having accumulated one hundred (100) points [text deleted] was entitled, under the provisions of the collective agreement, to terminate the Appellant's employment. The Internal Review Officer, in his decision at page 10 states:

> You admitted that the smoking incident was unrelated to the motor vehicle accident.

Under the terms of the Collective Agreement Minor Infraction No. 15 is defined as:

> "Absenteeism – where an employee is absent for the same or various reasons, without leave of absence four (4) times in six (6) week period, he shall be subject to discipline under this infraction."

. . .

- Your counsel pointed out that according to the Collective Agreement, it did not matter whether you had an excuse for the absences noted. With respect to grieving the smoking demerit incident, apparently your union had determined that there was no merit in pursuing that particular infraction.

The Commission therefore agrees with the Internal Review Officer's decision that Section

110(2)(d) has no application to the circumstances of this appeal, but for very different reasons. Since the Commission found that the Appellant did not hold employment within the meaning of Section 8 of Manitoba Regulation 37/94, the Appellant was not entitled to receive IRI for one (1) year pursuant to Section 110(2)(d) of the MPIC Act.

Section 117 of the MPIC Act

The Internal Review Officer, in his decision dated June 10, 2005, found that the evidence did not indicate that the Appellant suffered a relapse which would have permitted reinstatement of payment of his IRI. The Commission, for different reasons, agrees with the Internal Review Officer. The Commission, in respect of the Application of Section 117 of the MPIC Act finds that the Appellant never recovered from his motor vehicle accident injuries, and this prevented him from holding his employment pursuant to Section 7 of Manitoba Regulation 37/94. As a result the Appellant never suffered from a relapse which prevented him from returning to his employment sometime after July 19, 1999, and which would have permitted reinstatement of the Appellant's IRI.

Decision

The Commission finds that the Appellant has established, on a balance of probabilities, that he never recovered from the injuries he sustained in the motor vehicle accident and, as a result, was never able to successfully return to his pre-accident employment as an assembly worker, and was unable to hold employment pursuant to Section 8 of Manitoba Regulation 37/94. The Commission therefore finds that the Internal Review Officer erred in his interpretation and application of Section 110(1)(a)&(e) of the MPIC Act in terminating the Appellant's IRI. The Commission therefore allows the Appellant's appeal, rescinds the decision of the Internal Review Officer dated June 10, 2005 and directs MPIC to reinstate the Appellant's IRI.

Dated at Winnipeg this 20th day of November, 2007.

MEL MYERS, Q.C.

PAUL JOHNSTON

ROBERT MALAZDREWICH