Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-007

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms Leona Barrett** **Ms Jacqueline Freedman**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted] of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Trevor Brown.**
HEARING DATE:	**November 6, 2012**
ISSUE(S):	**Whether the Appellant's Income Replacement Indemnity ("IRI") benefits were correctly terminated on November 18, 2007.**
RELEVANT SECTIONS:	**Section 110(1)(c) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

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

Reasons For Decision

[The Appellant] was involved in a motor vehicle accident on May 5, 2006. At the time of the motor vehicle accident the Appellant was driving at approximately 90 km per hour when he was rear-ended by another vehicle. In the Appellant's estimate the other vehicle was travelling at approximately 120 km per hour. The vehicle that hit him went under his van and his vehicle was propelled onto its front wheels before the van went onto its side.

The Appellant was working as a labourer in [text deleted] at the time of the collision and was employed by the [text deleted]. His job involved high pressure cleaning of tanks and he was required to work in confined spaces and to perform heavy lifting of hoses.

He was taken into the local hospital in [text deleted] and was assessed. The assessment included X-rays of his neck and back and did not indicate that any fractures were found. He complained of soreness to his neck, shoulders and lower back.

The Appellant was referred to [Appellant's physiotherapist], a physiotherapist in [text deleted]. [Appellant's physiotherapist]'s initial report of May 31, 2006, approximately three weeks after the accident, indicated a diagnosis of whiplash to c-spine and lumbar sprain. In a progress report on June 1, 2006 [Appellant's physiotherapist] indicated that the Appellant was complaining of neck pain, occipital headaches, low back pain and of mild restrictions in his back. In her report, [Appellant's physiotherapist] commented that the Appellant was seen for a total of 4 treatments which involved the application of heat, the TENS machine and gentle stretching. [Appellant's physiotherapist] indicated that the Appellant responded poorly and complained of pain and headaches and his diagnosis was one of myofascial pain.

On July 9, 2006 [Appellant's doctor #1], who treated the Appellant, stated:

> "The injuries that [the Appellant] sustained during this MVA prevents him from doing hard physical labor in the sense that he can't lift heavy weight or bend his back and neck properly. He would however, be capable of light duties or deskwork. It is impossible to say what permanent impairment may result from this accident until he has been seen by a specialist."

The Appellant was seen on August 14, 2006 by [Appellant's doctor #2] of [text deleted]. In his report on November 9, 2006 he diagnosed a whiplash associated disorder and indicated neck and back pain with associated headaches and tingling of fingers.

In a note to file on October 18, 2006 the case manager reported that she was informed by the Appellant that the injuries he sustained in the motor vehicle accident were:

1. WAD soft tissue injury to back (from the waist up, lower back pain and stiffness)
2. WAD soft tissue injury to neck (pain in neck and between shoulder blades)
3. Extreme chronic severe headaches
4. Right ankle pain (feels like sprained ankle)
5. Left knee pain
6. Hands and feet occasionally go numb

The case manager further reported that the Appellant stated that he had a [text deleted] business in his yard and his job duties included driving the truck, picking up, loading and unloading [text deleted]. However, the Appellant stated that although he was able to drive the truck, he suffered from severe headaches after driving the truck because he was jostled around while driving.

As a result of the injuries the Appellant sustained in the motor vehicle accident he was unable to return to work and was in receipt of IRI benefits.

Determined Employment:

On March 7, 2007 the case manager wrote to the Appellant indicating that a 180 day determination resulted in the Appellant being classified as a temporary earner and that his employment was that of a labourer, a position held by the Appellant within the 5 year reference

period. The case manager further indicated that the Appellant's IRI benefits would continue because of this classification.

On May 4, 2007 [Appellant's doctor #3], the Appellant's physician, described the injuries to the Appellant's neck and back as follows:

> "[The Appellant] had an injury to his neck and back. He has limited extension of his neck and limited rotation of neck to right and left side. He has limited forward and backward flexion of back. He has mild weakness of his left leg. He has tenderness over cervical spine region. The above limitations will prevent [the Appellant] from lifting heavy objects and labor work that demands forward and backward movement....
>
> [The Appellant] can stand and walk. Bending limited to complete forward and backward. Pushing creates electric sensations in his neck. He can't drive except with a collar on his neck, which limits his backward movement. [The Appellant] is suffering now of chronic pain syndrome of his neck and back that limits his ability to hand work, but he can do office work with no lifting or using fine hand movement..." (Underlining added)

[MPIC's doctor], MPIC's medical consultant, was requested to provide an opinion as to whether the Appellant's motor vehicle accident injuries prevented him from functioning at his determined employment as a labourer as of November 2, 2006. In response, [MPIC's doctor] provided an interdepartmental memorandum dated July 19, 2007 wherein she reviewed all of the medical reports and suggested that the Appellant's successful return to work based on his injuries would be more likely if the Appellant participated in a multi-disciplinary program to address chronic pain and management (psychological intervention) to address deconditioning. A work hardening program with added psychological pain management intervention appeared appropriate.

At the case manager's request the Appellant participated in a work hardening program performed by the [rehab clinic]. In a report dated September 6, 2007 [rehab clinic] indicated that the Appellant would participate in a 6 week Work Hardening Program between the hours of 8:30 a.m. to 4:00 p.m. Monday to Friday.

In an interdepartmental memorandum of November 8, 2011, [MPIC's doctor] indicated that she had reviewed documentation provided by [rehab clinic] (on September 6, 2007). She stated:

> "[Rehab clinic's doctor] submitted Claimant Weekly Progress Summary reports, daily exercise log sheets and Program note entries covering the period in which the Appellant participated in a conditioning/work hardening program (end of September to early November 2007). Program notes indicated that the claimant had good and bad days with regards to his symptoms of headache, neck and back pain. Variables being assessed weekly – notably strength and flexibility, improved; pain perception increased (worsened) during weeks one and two then leveled off. The claimant offered no comments in his Weekly Progress Summary reports."

[Rehab clinic's psychologist #1] and [rehab clinic's psychologist #2], provided a report to the case manager on September 17, 2007. The Appellant had been referred for a psychological assessment and they stated in their report:

> "[The Appellant] is clearly experiencing clinically important pain which causes some distress and impairs his work, social and personal functioning. He has concern for further pain as a result of activity and restricts activities accordingly. These concerns seem to contribute to a limited degree to the severity of his pain but not sufficiently to warrant a diagnosis of a Pain Disorder...
>
> [The Appellant] may still benefit from Cognitive Behavior Therapy sessions focusing on:
>
> 1. education regarding the relationship between psychological functioning and pain
> 2. return to work concerns
> 3. stress management – coping skills, relaxation, self care and problem solving."

On October 18, 2007 [rehab clinic's doctor] wrote to the case manager and stated:

> "[The Appellant] is still complaining of poor sleep (amitriptyline didn't help much). He is still stiff in the low back and mid back. Acupuncture not much help yet, and may be aggravating...
>
> [The Appellant] is difficult to communicate with, since he's a "man of few words". It is my impression that he is expecting faster resolution of his symptoms, and finds that some of the exercises are increasing his symptoms. I tried to reassure him, and have advised that it would be useful to take the Tylenol as indicated on the box (2 tablets every 4-6 hours). He could take 2 in the morning before rehab, 2 at lunch and 2 at supper. It is my impression that he's not satisfied with that advice and wants other interventions to be

done instead. I think the medications are a reasonable and appropriate intervention at this point to assist with further progression of his clinical situation. If you have any questions or concerns I would be happy to speak with you at any time."

On October 25, 2007 [rehab clinic's doctor] reported to the case manager that the Appellant:

1. Continued to complain of headaches and lower back pains.
2. Did not think he would be able to get back to his job [text deleted] as a labourer.
3. Still had trouble sleeping during the night, sometimes due to pain and at other times for no apparent reason.

On November 6, 2007 [rehab clinic] issued a Work Hardening Program Discharge Report and in summarizing their findings stated:

"**Diagnosis at time of Admission**
1. Myofascial Neck and Shoulder Pain – Moderate Severity.
2. Myomechanical Low Back Pain – Mild to Moderate Severity.
3. Elevated concerns regarding pain, activity and work.
4. Possible Depression – mild to moderate severity Beck's score (15/63)...

Status of Completion:
√ Improved

Demonstrated Strength Ability
Start of Program: **Medium** strength level
End of Program: **Medium** strength level

Vocational Recommendations
√ Fit for an immediate, unmodified return to pre-injury employment." (Underlining added)

On November 8, 2007 the Appellant attended MPIC's office with his wife. In the case manager's file notes for this meeting, the Appellant stated that the program at [rehab clinic] did not benefit him much and that "it wasn't a waste of time but it wasn't great".

One day after the Appellant was discharged from [rehab clinic]'s work hardening program the case manager noted, in a file note of November 9, 2007, a telephone discussion with the Appellant and that in the course of the discussion it was noted:

> "[The Appellant] said he can't work at the job he was doing before the accident. I stated that he can function at a medium strength level so he can function and he is not incapacitated. I stated that where he works and at what job is totally up to him and has nothing to do with MPI."

On November 9, 2007 the case manager sent a fax to [Appellant's doctor #3] and stated:

> "[The Appellant] completed a six week work hardening program on November 2, 2007 at the [rehab clinic] in [text deleted].
>
> I am forwarding a copy of the Discharge Report for your information and records. [The Appellant]'s status at the completion of the six week program was Improved and he demonstrated a Medium strength level.
>
> [Rehab clinic] has determined [the Appellant] is fit for an immediate, unmodified return to pre-injury employment. Their only recommendation is for [the Appellant] to continue with his home-based exercise program. This program is provided in an effort to assist him in maintaining the functional gains he has made to date and to facilitate future gains." (Underlining added)

Case Manager's Decision -November 9, 2007 – Terminating IRI benefits:

On November 9, 2007 the case manager wrote to the Appellant advising him that the Appellant's IRI benefits would terminate on November 18, 2007 and stated:

> "You have been discharged from a work hardening program at [rehab clinic], and their discharge report confirms you are capable of performing the duties of your determined employment of labourer. As you have the functional ability to complete the duties of your determined employment, your entitlement to Income Replacement Indemnity benefits will conclude. As I indicated, you will be paid Income Replacement Indemnity benefits to November 18, 2007...
>
> The discharge report further indicated no ongoing treatment other than your home program. Please provide any outstanding expense claims and your receipts for our consideration. There does not appear to be any other outstanding issues and we will be retiring your file." (Underlining added)

On December 21, 2007, [Appellant's physiotherapist] indicated that she saw the Appellant on November 14, 2007 to do an assessment of his complaints following the motor vehicle accident. [Appellant's physiotherapist] stated:

> "He reports continual pain in his lower back, mid back and neck. He rates his pain at 5/10 on the VAS, and at times, escalating to 10/10. He describes his low back and mid back pain as a steady ache which will increase with sitting greater than half an hour, with forward bending, or with any physical work such as sweeping or shovelling. He describes his neck pain as a steady ache which will increase with the same aggravating factors as his back and tends to be very much associated with his back pain. He complains of daily headaches in the occipital region with radiation to his right eye. These can be brought very suddenly with a forward bend of his low back and finds the only relief to be lying down with heat. He reports that his sleep is very restless despite taking a sedative and he always wakes with increased stiffness. His pain will worsen as the day goes on, and he reports, it depends on what type of activity he has been doing. The more active he is, generally the more pain that he experiences in his mid back, lower back and neck...
>
> Based on my assessment, it appears that [the Appellant] has fair ROM to his lumbar, thoracic and cervical spine with full strength of his shoulders and shoulder girdle. <u>His complaints of pain following any type of activity involving his arms of (sic) forward bending of his trunk could be consistent with myofascial pain to his thoracic and lumbar spine however with his broad complaints it is difficult to pin point which muscle group is the root cause of his complaints.</u> He was encouraged to try to correct his head forward and rounded shoulder posture in hopes that this would decrease the strain on his thoracic and cervical spine." (Underlining added)

On January 4, 2008 the Appellant made an Application for Review of the case manager's decision of November 9, 2007.

[Appellant's physiatrist] provided a report to [Appellant's doctor #3] on January 16, 2008 and indicated that he saw the Appellant and stated:

> "Since the collision he has had headaches on a daily basis and feels that there is some pressure at the back of his head all the time. He doesn't vomit with the headaches but the pain can be extremely severe. He notes that his right eye also is very painful when the headaches are there. He can do very little with his arms without triggering a headache. He also is not able to look up or down for long periods of time because of the pain.
>
> He has had a number of treatments with attempts to reduce some of the tightness in his neck but he finds acupuncture and mobilization to be very painful and aggravate his symptoms. <u>He was down for a six week assessment from October to November of 2007</u>

> at the [rehab clinic] but he feels that he was worse after that. He was, however, told that he could return to any type of job as a result of that assessment." (Underlining added)

In a report dated February 8, 2008, [Appellant's physiotherapist] indicated:

> "This letter is further to my letter of December 21, 2007 where I commented on [the Appellant]'s complaints of neck, mid back and low back pain.
>
> Based on his complaints, [the Appellant] would have a great deal of difficulty with any tasks involving lifting, especially repetitive lifting, sustained forward flexion, and pushing and pulling with his arms. Based on what [the Appellant] has reported that his duties are for his job, it's obvious that he would have a great deal of difficulty performing most his job as a labourer.
>
> Based on his complaints of pain, I do not feel that he is able at this time to return to his job as a labourer." (Underlining added)

On February 12, 2008 [Appellant's doctor #3] reported:

> "[The Appellant] was seen at the office on February 11, 2008 and his condition has been followed by me since February 2007.
>
> Through the last year, [the Appellant] has had physiotherapy treatment in [text deleted], which did not improve his situation. Currently he is being seen by [Appellant's physiotherapist], in [text deleted] for a trial to strengthen his neck and back muscles. He was seen by [Appellant's physiatrist] in January of 2008 who is a specialist of physical and rehabilitation medicine who (sic) be trying a trial of trigger point injections in March 2008.
>
> Currently [the Appellant] has headaches on a daily basis with tightness in his neck muscles and lower back pain due to hypertrophy of ligatmentum flavum of lumbar vertebrae and mild central stenosis. He finds difficulty in lifting and doing forward flexion with movement of his arms.
>
> Based on these findings [the Appellant] is unable to perform his daily job duties and he (sic) awaiting the treatment trial with [Appellant's physiatrist] for injections of his muscles." (Underlining added)

[Appellant's physiatrist] reported to [Appellant's doctor #3] that he saw the Appellant on March 12, 2008, April 16, 2008, May 21, 2008 and on June 11, 2008 noted that the Appellant continued

to complain about headaches, pain to his lower back and tingling in the tips of his middle and ring finger.

Internal Review Officer's Decision – August 15, 2008:

On August 15, 2008 the Internal Review Officer wrote to the Appellant advising him that she had rejected his Application for Review and confirmed the case manager's decision of November 9, 2007. In her reasons for decision the Internal Review Officer relied on the reports of [rehab clinic's doctor] and [MPIC's doctor]. In this decision, she stated:

> "The discharge report from [rehab clinic] is dated November 6, 2007. This report says that your condition had improved during the program although you had started at a medium strength level and ended at a medium strength level. The report goes on to say that you were fit for an immediate and modified return to your pre-injury employment but of course MPI only had to return you to your determined employment which was of a Labourer."

The Commission notes an error in the decision of the Internal Review Officer describing the Appellant's return to pre-injury employment upon termination of [rehab clinic]'s report of November 6, 2007 which indicates "fit for an immediate unmodified return to pre-injury employment".

In her report of July 6, 2007, [MPIC's doctor] indicated that although the Appellant complained of crippling pain at the time of his work hardening intake assessment, he proceeded to participate in an aggressive six week work hardening program which improved his pain status and physical capabilities.

The Internal Review Officer indicated that after reviewing all of the information she agreed with [MPIC's doctor]'s conclusion that the Appellant was able to work as a labourer as of November 18, 2007. As a result the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review.

The Appellant filed a Notice of Appeal on January 16, 2009.

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

> **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:
>
> (c) the victim is able to hold an employment determined for the victim under section 106;

On May 12, 2009, [Appellant's physiatrist] provided a report to [Appellant's doctor #3] describing the restricted range of motion of the Appellant's neck as follows:

> "He had restricted range of motion of his neck about 50% lateral rotation and bending bilaterally as well as flexion. He had literally no extension. His trapezius muscles were hard and firm, clearly visible in spasm. He had some spinal sensitivity at C6 and nearly the entire thoracic and thoracolumbar region was sensitive. He was also sensitive at L5. There was no specific weakness or wasting but he did have generalized stiffness and reduction in range of motion because of pain. Straight leg raising was at about 60 degrees causing pain in his legs and back. He had a very sensitive left palm from his surgery. His reflexes were definitely reduced in upper and lower extremities."

On September 16, 2009 [Appellant's physiatrist] reported to [Appellant's doctor #3] that the Appellant was having difficulty with pain in his neck and his lower back.

On August 16, 2010, [Appellant's physiatrist] wrote to the Claimant Adviser Office in reply to a request for information and stated that the Appellant had developed a significant pain syndrome

and was physically not able to perform the duties of his determined employment as of November 18, 2007. [Appellant's physiatrist] concluded that on a balance of probabilities the Appellant would not have been physically fit to work as a labourer as of November 18, 2007. [Appellant's physiatrist] outlined a number of tests he performed on the Appellant and stated:

> "The impression gained was that this [text deleted] year old man experienced a loss of functional ability due to ongoing pain in his neck and lower back as a result of a motor vehicle collision May 5, 2006. He had been able to perform a number of physically (sic) tasks prior to the collision while working in [text deleted]. The physical examination noted that he had a number of regions of soft tissue pain that were helping to create a loss of range of motion in his neck, shoulders and lower back. The trapezius and quadratus lumborum muscles seemed to be the most problematic as were the regions of spinal segmental sensitivity. As he had done relatively well with trigger point needling of tender taut bands in the past, arrangements were made for more treatment.
>
> [The Appellant] was re-assessed March 12, April 16, May 21 and June 11, 2008 and May 12 and September 9, 2009. He underwent trigger point needling of spinal ligaments (C3, C4, C5, T6, T7, T8, L3 and L5). He found all the treatments painful and difficult to manage. With the treatments, he noted mild improvement in but no resolution of his headaches. His back pain remained largely untouched. He continued to experience tingling in his hands. He was too sensitive to treat the trigger points in his muscles...
>
> [The Appellant] has developed a significant pain syndrome affecting his neck, shoulders and lower back since a motor vehicle collision May 5, 2006. He had had musculoskeletal pain prior to this event but, by his report, he had recovered such that he was able to drive truck on rough terrain and do a number of physically demanding jobs on a day to day basis without considerable difficulty. The condition witnessed [text deleted] would not have allowed him to maintain the work that he described at a competitive level. The employment duties that he discussed would not have been maintained if he had the symptoms he presented with to the clinic. Confirmation of the types of work he did and his attendance prior to the May 2006 collision from his employer would have to be reviewed to corroborate [the Appellant]'s description of his pre-collision health and functional ability.
>
> At the time [the Appellant] was last reviewed in September 2009, he essentially continued to have the same symptoms as when assessed in March 2008; almost 2 years after his injury occurred. The probability that the pain was and is arising from soft tissue pain generators is very high. He has not had evidence on CT scan or clinic examination that there has been injury to the bones of the spine. He also has not had evidence that a nerve has been entrapped within the spinal regions. Given the temporal relationship between the collision in 2006 and the finding of the aneurysm in the left wrist (2008), the probability appears to be low that the 2006 collision was the cause of the problem. The surgeon operating on his hand would be better able to discuss the potential correlations.
>
> The question at hand is whether [the Appellant] had the capacity to perform the duties of his determined employment (labourer) as of November 18, 2007. From the physical

> findings seen January 16, 2008, on a balance of probabilities, [the Appellant] would not have been physically fit to work as a labourer as of November 18, 2007." (Underlining added)

[Appellant's doctor #3] wrote to the Claimant Adviser Office on September 7, 2010 in response to their letter of August 30, 2010 where they requested [Appellant's doctor #3]'s opinion on whether the Appellant had the capacity to perform the duties of his determined employment (as a labourer) as of November 18, 2007. [Appellant's doctor #3] replied after reviewing the Appellant's file and stated:

> "According to these findings, I feel [the Appellant] was incapable of performing job duties of his determined employment of a labourer. Trusting this is sufficient for what you may need. If you require anything further, kindly let me know and I would be glad to help..." (Underlining added)

On February 24, 2011 [rehab clinic's doctor] replied to a letter from the Claimant Adviser Office and stated:

> "[The Appellant] had psychological interview and assessment as part of his multi-disciplinary evaluation, but did not have further appointments with the psychologist while in rehab. Ongoing visits with the psychologist are not a routine part of a rehab program, and provided as needed, or wanted by the person in rehab. [Rehab clinic's psychologist #1]'s evaluation did not identify a psychological disorder that required ongoing sessions with the psychologist during the rehab program, and did not make appointments to see [the Appellant]. [Rehab clinic's psychologist #1] did note that [the Appellant] may benefit from education about pain and coping, addressing return to work concerns and stress management...
>
> I am unable to provide a list of educational sessions [the Appellant] attended specifically. At the time of his rehab, our educational process was in the form of a series of daily 30-minute seminars on chronic pain, coping with stress, weight loss, proper diet, hurt versus harm, acute versus chronic pain, activity pacing, body weight management and smoking cessation, among others. These topics were provided on a 4-week rotating basis. Other topics are presented based upon requests from people who are in rehab so we can address specific interests of certain people."

On November 8, 2011 [MPIC's doctor] responded to a request by MPIC's legal counsel to comment on the Appellant's capability to return to work as of November 2007. [MPIC's doctor] indicated that she reviewed the reports of [Appellant's doctor #3], [Appellant's physiotherapist]

and [Appellant's physiatrist] who disagreed with [rehab clinic]'s assessment as to the Appellant's ability to return to work after a six week conditioning/work hardening program. [MPIC's doctor] noted that [Appellant's physiatrist] stated that the Appellant's chronic pain would not have allowed him to maintain the work he described at a competitive level.

In her conclusion, [MPIC's doctor] stated:

> "In my opinion, taking into consideration opposing viewpoints, there is sufficient objective evidence for the claimant being capable of returning to the workplace in his pre-determined position as labourer. It would be fair to state that the claimant was unwilling as opposed to unable to return to the workplace.
>
> [Appellant's physiatrist]'s comment (August 16, 2010 bullet above) that the claimant would not have been able to return to the workplace at a competitive level has validity in the short term. Successful return to the workplace is more likely when a graduated return to work strategy is in place, in particular when the primary diagnosis is chronic pain condition. Further, the appropriateness of graduated work return increases as the physical intensity of the work duties increases." (Underlining added)

Appeal Hearing:

The Appellant testified on his own behalf and stated that:

1. Prior to the motor vehicle accident he worked as a labourer in [text deleted], which involved a great deal of heavy work and high pressure cleaning of tanks, crawling into confined spaces and performing heavy lifting of hoses.
2. As a result of the motor vehicle accident the Appellant complained of neck pain, headaches and low back pain.
3. The pain had continued since that time and has rendered him incapable of returning to work as a labourer and doing medium strength work.
4. Prior to the motor vehicle accident he conducted a [text deleted] business which involved driving his truck and picking up, loading and unloading [text deleted].

5. However, as a result of the motor vehicle accident he was limited in his ability to carry out these activities and was only able to drive a truck and was restricted in the manner which he could load and unload [text deleted].
6. He was treated by [Appellant's physiotherapist] who treated him on four occasions by applying heat, TENS machine and gentle stretching, but this did not resolve the pain and headaches he was suffering from.
7. He subsequently saw several doctors but was unable to return to his employment.
8. He was in receipt of IRI benefits from MPIC.
9. In May of 2007 he saw [Appellant's doctor #3] with complaints of neck and back pain and the limited ability he had in these areas.
10. [Appellant's doctor #3] advised him that he could not return to work as a labourer and that he could only do light duties.

He further testified that:

1. He was referred to [rehab clinic] and participated in a work hardening program over a six week period.
2. Throughout the work hardening program he was in constant pain but persevered through all of the activities in the hope that he would recover and be free of his neck and back pain.
3. Notwithstanding his effort to participate in all of the activities his condition worsened rather than improved after the six week period. He also testified that he was required to attend a half-hour session each day, but found that he received no value from the group sessions where there was some discussion about how to cope with his pain.

4. After being discharged from the work hardening program he was unable to return to work as a labourer as he continued to have aches and pain to his neck and back which limited his ability to work as a labourer.
5. He was referred to [Appellant's physiatrist], a physiatrist, for treatment.
6. [Appellant's physiatrist] advised him that he would not be able to return to work as a labourer due to his complaints of pain.
7. He continued receiving treatments from [Appellant's physiatrist] by way of injections, but they were of limited success.
8. He continued to see [Appellant's doctor #3] and [Appellant's physiatrist] and was advised by both doctors that as a result of his pain in his neck and back, he was not physically fit to return to work as a labourer.
9. MPIC terminated his IRI benefits in November 2007.
10. He was unable to return to work as a labourer and was only able to carry on his [text deleted] business on a limited basis and on occasion work on light duties.

The Appellant was cross-examined by MPIC's legal counsel and maintained his position that because of the injuries sustained in the motor vehicle accident he had chronic pain to his neck and back and had limited flexion, and he was incapable of returning to work as a labourer.

MPIC did not call any witnesses.

Submission:

The Claimant Adviser reviewed the Appellant's testimony and the relevant medical reports and stated that:

1. [MPIC's doctor] had not personally examined the Appellant but had conducted a paper review in order to provide her medical opinion.
2. The medical opinions of [Appellant's doctor #2], [Appellant's doctor #3] and [Appellant's physiatrist] should be adopted in preference to the medical opinion of [MPIC's doctor] since they had a long-standing relationship with the Appellant, had examined him after the motor vehicle accident on a number of occasions, obtained his medical history, and found him to be a credible witness.
3. The Appellant was a credible witness, his testimony was consistent and was corroborated by the medical opinions of [Appellant's doctor #2], [Appellant's doctor #3] and [Appellant's physiatrist].
4. The Commission should reject the [rehab clinic] reports because they were inconsistent with the Appellant's testimony in respect of chronic pain and the medical opinions of [Appellant's doctor #3] and [Appellant's physiatrist] who corroborated the Appellant's testimony in this respect.
5. [rehab clinic's psychologist #1] and [rehab clinic's psychologist #2] examined the Appellant on one occasion for a short period of time. In these circumstances the reports of [Appellant's doctor #3] and [Appellant's physiatrist], who assessed the Appellant over a long period of time, should be accepted.
6. The [rehab clinic] program did not improve the Appellant's condition. [Rehab clinic]'s Discharge Report indicated that the Appellant started at a medium strength level and ended at a medium strength level.
7. The Appellant had established on a balance of probabilities that due to his chronic pain he was incapable of returning to work and that his IRI benefits should be reinstated.

In his submission, MPIC's legal counsel stated that:

1. The Appellant was personally observed by the members of [rehab clinic] in respect of the manner in which he participated in the rehabilitation program and [rehab clinic] concluded that the Appellant had physically recovered to a point where he was capable of returning to his pre-accident employment.
2. In support of [rehab clinic]'s position that the Appellant demonstrated a measurable improvement, the Discharge Report refers to the Revised Oswestry Disability Questionnaire, the Appellant's level of anxiety, capacity of lifting and poor core strength.
3. [MPIC's doctor] reviewed all of the medical reports and was justified in concluding that although the Appellant was complaining about pain, he was capable of returning to his pre-accident employment.
4. The Internal Review Officer was justified in relying on the reports of [rehab clinic] and [MPIC's doctor] in concluding that the Appellant was physically capable of returning to his pre-accident employment and as a result was justified in terminating his IRI benefits.

Subsequent to the conclusion of the hearing, MPIC's legal counsel provided a written submission to the Commission on November 16, 2012. MPIC's legal counsel submitted that [rehab clinic psychologist #1] and [rehab clinic's psychologist #2], both clinical psychologists, were the only persons qualified to make a diagnosis of a chronic pain syndrome. MPIC's legal counsel further submitted that if the Commission was considering such a finding, an independent psychological assessment should be ordered.

Discussion:

In their submissions to the Commission, both parties agreed that as a result of the motor vehicle accident the Appellant suffered an injury which caused him to complain of pain.

MPIC took the position that the Appellant's pain did not prevent him from returning to work. MPIC concluded, on the basis of the medical reports from [rehab clinic] and [MPIC's doctor], that the Appellant was functionally capable of returning to work and did not require any further medical treatment. As a result, MPIC was justified in terminating the IRI benefits.

On the other hand, the Claimant Adviser submitted that the Appellant's chronic pain complaints were supported by the medical reports of [Appellant's doctor #3], [Appellant's doctor #2] and [Appellant's physiatrist] and these complaints prevented him from returning to his pre-employment status. As a result the Appellant asserted that he was entitled to the reinstatement of his IRI benefits.

In a decision on [text deleted] (AC-03-195), the Commission stated:

> "The Commission has in the past recognized that as a result of chronic pain an Appellant could be entitled to receive IRI benefits. For example in the case of [text deleted] *(AC-03-66)* the Commission, in its decision dated August 11, 2004, stated:
>
> The Commission in the decision [text deleted] *(AC-03-07)* stated at page 9:
>
> Despite the Appellant's ongoing complaints of pain, little weight was given to her subjective concerns. Judicial treatment of subjective pain complaints in disability cases is considered by Richard Hayles in his book, Disability Insurance, Canadian Law and Business Practice, Canada: Thomson Canada Limited, 1998, at p. 340, where he notes that:
>
> > Courts have recognized that pain is subjective in nature. They have also acknowledged that there is often a psychological component in chronic pain cases. 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.

The Commission was referred to the case of *Nova Scotia (Worker's Compensation Board) v. Martin et al [2003]* S.C.J. No. 54, Mr. Justice Gonthier stated:

> 1 Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians. . ."

DECISION – IRI:

The Commission finds that the Appellant was a credible witness who testified in a straightforward and unequivocal fashion in respect of the impact caused by the injuries he sustained in the motor vehicle accident. The Appellant testified that subsequent to the motor vehicle accident he suffered constant pain to his neck and back and had limited extension of his neck and back and stated:

1. The Appellant's complaints of chronic pain to his neck and back and headaches were first reported approximately 2½ weeks after the motor vehicle accident in [Appellant's physiotherapist]'s report of May 31, 2006.

2. The Appellant consistently complained of chronic neck, back and shoulder pain and limited flexion which were set out in the reports of [Appellant's doctor #1] of July 9, 2006 and [Appellant's doctor #2] of November 9, 2006.
3. [Appellant's doctor #3] saw the Appellant on May 4, 2007, one year after the accident, and concluded that the Appellant was suffering from a chronic pain syndrome to his neck and back which limited his ability to do heavy work.
4. The Appellant reported on a number of occasions when he was participating in the [rehab clinic] program of pain to his neck and back.
5. Notwithstanding the Appellant's complaints of consistent pain during the work hardening program he was discharged on November 6, 2007 as fit for immediate unmodified return to work at his pre-injury employment.
6. On January 16, 2008 (two months after the work hardening program discharge), [Appellant's physiatrist], an experienced physiatrist, examined the Appellant and concluded that he was not capable of returning to work as a labourer.
7. On February 8, 2008, [Appellant's physiotherapist], the physiotherapist, reported that based on the Appellant's complaints of pain she did not feel the Appellant was capable of returning to work as a labourer.
8. On February 12, 2008 [Appellant's doctor #3] reported that the Appellant was complaining of headaches, tightness to his neck muscles and lower back pain. The Appellant was unable to perform his daily job duties.
9. On March 12, 2008 [Appellant's physiatrist] reported to [Appellant's doctor #3] that he saw the Appellant on April 16, 2008, May 21, 2008, and June 11, 2008 and noted that the Appellant continued to complain about headaches, pain to his lower back and tingling in the tips of his middle and ring finger.

10. On August 16, 2010 [Appellant's physiatrist] provided a narrative report to the Claimant Adviser Office indicating that the Appellant had developed a significant pain syndrome affecting his neck, shoulders and lower back since the motor vehicle accident. [Appellant's physiatrist] concluded that from the physical findings as seen on January 16, 2008 that, on a balance of probabilities, the Appellant would not have been physically fit to work as a labourer as of November 18, 2007.

The Appellant's testimony of consistent pain to his neck and back from the time of the motor vehicle accident is corroborated by the reports of [Appellant's doctor #1], [Appellant's doctor #3], [Appellant's physiatrist] and [Appellant's physiotherapist]. For these reasons the Commission accepts the Appellant's testimony in respect of his constant pain and in respect of all issues in dispute between himself and MPIC.

The Commission notes that the Internal Review Officer, in her decision dated August 15, 2008, relied on the reports of [rehab clinic's doctor] and [MPIC's doctor] that the Appellant was fit for an immediate and unmodified return to work. The [rehab clinic] Discharge Report indicated that the Appellant's condition had improved during the program. However, the Commission notes an examination of the report reveals that the Appellant had started at a medium strength level and ended at a medium strength level. The report does indicate that the Appellant had improved in some areas but also indicates that there was no improvement in other areas or a reduction in his ability to perform activities. This is illustrated in the report in respect of flexion in the right cervical spine, flexion and extension in the lumbar spine; sit and reach tasks; the right leg straight raise; and the maximum grip strength of the left hand.

The Commission finds that the Appellant was entered into the program to become physically able to return to work as a labourer. However, at the conclusion of the program there was no improvement in his physical capacity to perform the work of a labourer. The Commission therefore finds that the Internal Review Officer erred in relying on the [rehab clinic] Discharge Report to determine that the Appellant was physically capable of returning to work as a labourer.

The Commission further notes that in [MPIC's doctor]'s interdepartmental memorandum of July 19, 2007, she suggested that the Appellant's successful return to work, based on his injuries, would be more likely if he participated in a multi-disciplinary program to address chronic pain and management (psychological intervention) to address deconditioning. A work hardening program with added psychological pain management intervention would be appropriate.

The Commission finds that [rehab clinic] failed to comply with [MPIC's doctor]'s recommendation of a psychological intervention. [rehab clinic's psychologist #1] and [rehab clinic's psychologist #2] provided a psychological assessment in which they concluded that the Appellant's pain did not reach the level of a pain disorder. However, the Appellant testified that the examination by the two psychologists took approximately 15 minutes and the program to address his chronic pain was superficial. The Commission finds that MPIC did not challenge the Appellant's testimony in this respect during the course of the hearing.

The Commission notes that [Appellant's physiatrist], who is an experienced physiatrist, is trained to deal with chronic pain issues, examined the Appellant on numerous occasions over a number of years and concluded that he suffered from chronic pain. [Appellant's physiatrist]'s opinion is corroborated by the Appellant's personal physician, [Appellant's doctor #3] who also assessed

and examined the Appellant over a number of years. In these circumstances the Commission gives greater weight to the opinions of [Appellant's physiatrist] and [Appellant's doctor #3] than it does to the opinions of the two psychologists as to whether the Appellant was suffering from chronic pain.

The Commission further notes that after reviewing [Appellant's physiatrist]'s report of August 16, 2007, [MPIC's doctor] recognized the validity of [Appellant's physiatrist]'s opinion on chronic pain and she stated that a successful return to the workplace was more likely when a graduated return to work strategy was in place, in particular when the primary diagnosis is chronic pain condition. It is clear that MPIC did not put into place a graduated return to work strategy, in particular with a primary diagnosis of a chronic pain condition. [MPIC's doctor] was correct in concluding that without this program it was unlikely that there would be a successful return to the workplace by the Appellant.

The Commission concludes that [rehab clinic]'s failure to provide a program addressing chronic pain involving a psychological intervention and MPIC's failure to provide for a graduated return to work resulted in the Appellant's unsuccessful return to work as a labourer.

The Commission also finds that the Appellant has consistently complained about chronic pain to his neck and back and headaches since the date of the motor vehicle accident and that he was unable to return to his pre-accident employment. The opinions of [Appellant's doctor #3] and [Appellant's physiatrist] are based on obtaining personal history from the Appellant and a physical examination. None of the reports from [Appellant's doctor #3] or [Appellant's physiatrist] suggest that the Appellant was exaggerating or malingering. Unlike [MPIC's doctor], [Appellant's doctor #3] and [Appellant's physiatrist] had the opportunity of assessing

the Appellant's credibility. In these circumstances the Commission gives greater weight to the opinions of [Appellant's doctor #3] and [Appellant's physiatrist] that it does to the opinions of [MPIC's doctor].

MPIC's legal counsel provided a written submission subsequent to the hearing and indicated that the only people competent to assess the Appellant's psychological condition were the psychologists, [rehab clinic's psychologist #1] and [rehab clinic's psychologist #2] and that the Commission should accept their opinion. The Commission disagrees with the submission of MPIC's legal counsel that [Appellant's doctor #3] and [Appellant's physiatrist] were not qualified to make a diagnosis of chronic pain syndrome. The Commission notes that in the decision of Mr. Justice Gonthier in *Nova Scotia (Worker's Compensation Board) v. Martin et al* (supra) and stated that there is no authoritative definition of chronic pain, however, it is generally considered to be pain that persists beyond the normal healing time for the underlying injury or that it is disproportionate to such injury and its existence is not supported by objective findings at the site of the injury under current medical practices.

[Appellant's physiatrist], is an experienced physiatrist who deals with chronic pain as part of his medical practice. [Appellant's doctor #3], the Appellant's personal physician who treated the Appellant in respect of his motor vehicle accident over a long period of time was in a position to assess whether the Appellant was suffering from chronic pain. In the Commission's view, both doctors had the training and experience to determine that the Appellant's pain from his motor vehicle accident injuries persisted beyond the normal healing time. Both doctors had the training and experience to make such a judgment.

For these reasons, the Commission finds that the Appellant has established on a ba[the Appellant] of probabilities, that there was a causal connection between his chronic pain and the

motor vehicle accident, and as a result he was unable to return to his pre-accident employment. The Commission therefore finds that the Internal Review Officer erred in terminating his IRI benefits. The Appellant's appeal is allowed and the decision of the Internal Review Officer dated August 15, 2008 is rescinded.

Dated at Winnipeg this 20th day of December, 2012.

MEL MYERS, Q.C.

LEONA BARRETT

JACQUELINE FREEDMAN