Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-02-85

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Mr. Bill Joyce** **Mr. Wilson MacLennan**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**January 9, 2003**
ISSUE(S):	**Entitlement to Income Replacement Indemnity Benefits ("IRI")**
RELEVANT SECTIONS:	**Sections 110(1) and 110(2)(d) of the Manitoba Public Insurance Corporation act ("MPIC Act")**

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

Reasons For Decision

[The Appellant] was involved in a motor vehicle accident on October 9, 1997. As a result of the accident the Appellant suffered neck and back pain, received chiropractic treatment and continued to work. At the time of the accident the Appellant was employed for a period of approximately five years as a welder with [text deleted].

The Appellant's initial complaints in respect of the accident were soreness to the base of his neck and lower back pain. The Appellant returned to work after the motor vehicle accident but found that the constant bending and lifting of parts into bins exacerbated his neck and back and made it

extremely difficult for him to continue to work as a welder. As a result, the Appellant was referred by MPIC to [rehab clinic] for assessment. On February 23, 2000 [rehab clinic] advised MPIC that the Appellant's prognosis for complete resolution of pain was good and recommended:

1. a program of physical rehabilitation - 4 to 6 week stretching and strengthening program for his back and shoulder muscles complemented by acupuncture
2. work hardening program – 6 to 8 week structured, multidisciplinary program to facilitate his return to work

On August 24, 2000 MPIC's Case Manager met with the Appellant, [Appellant's rehab doctor #1] and [Appellant's physiotherapist] of [rehab clinic]. [Appellant's rehab doctor #1] confirmed that the Appellant had reached maximum medical improvement and, based on his functional limitations, [Appellant's rehab doctor #1] was of the opinion that the Appellant was unable to return to employment as a welder because of the physical demands of the job.

On January 19, 2001 [Appellant's rehab doctor #1] and [Appellant's physiotherapist] of [rehab clinic] wrote to the Appellant's Case Manager and reported that the Appellant had been involved in a work hardening program at [rehab clinic] since March 2000. They further stated *" . . a significant increase in overall physical function. However, [the Appellant] continues to experience ongoing extreme myospasms . . . . due to these subjective myospasms that [the Appellant] was unable to successfully complete his work hardening program, and demonstrate a physical capacity of that necessary to perform the occupation of a welder."* This report also refers to an [rehab clinic] team meeting which took place on August 24, 2000 which indicated that in the clinic's opinion ". . . . *due to injuries sustained in the motor vehicle accident of August*

17, 1998 [the Appellant] will not be able to return to his pre-accident occupation of a welder due to his inability to sustain functional positional tolerances."

On July 11, 2001 [Appellant's rehab doctor #1] provided a further report to MPIC and indicated that the Appellant was briefly examined on July 5, 2001 and advised that the Appellant was continuing to have the same chronic complaints and that he should be determined as being at maximum medical improvement with respect to the motor vehicle accident injuries.

On January 25, 2002 the Case Manager wrote to the Appellant and stated that MPIC had been informed by [rehab clinic] that the Appellant had made functional improvements in certain activities and that a second Functional Abilities Evaluation was completed by [rehab clinic] in respect to the Appellant on November 19, 2001. The Case Manager further informed the Appellant in this letter that in order to compare the results of this Functional Abilities Evaluation with the Appellant's pre-accident occupation, [vocational rehab consulting company] completed a Physical Demands Analysis in respect of the Appellant's occupation on December 5, 2001 and provided both of these reports to the Appellant.

The Case Manager advised the Appellant that [Appellant's rehab doctor #2] had confirmed, based on the Appellant's functional improvements when compared to the Physical Demands Analysis, that the Appellant was able to return to his pre-accident employment. The Case Manager stated, in his letter dated January 25, 2002:

> "The medical information provided by [Appellant's rehab doctor #2] confirms that there is no impairment of physical function that would preclude you from performing your pre-accident employment on a full time basis.
>
> As such pursuant to Section 110(1)(a) of the Manitoba Public Insurance Corporation Act, your entitlement to Income Replacement Indemnity (IRI) benefits concludes on January 23, 2002. For your information we quote the said section, which reads as follows:

> **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;

Based on information received from [text deleted] at [text deleted] there is currently no job available for you to return to.

Pursuant to Section 110(2)(d) of the Manitoba Public Insurance Corporation Act, this will confirm that you are entitled to a further one year of Income Replacement Indemnity (IRI) benefits as you have lost your employment as a result of the injuries sustained in the said accident. For your information, we quote Section 110(2)(d) as follows:

> **Temporary continuation of IRI after victim regains capacity**
> **110(2)** Notwithstanding clauses (1)(a) to (c), a full-time earner or 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.

As I advised you in our telephone conversation of January 23, 2002, pursuant to Section 110(2), your entitlement to Income Replacement indemnity (IRI) will conclude on January 23, 2003."

On March 12, 2002 the Appellant made an Application for Review of the Case Manager's decision and set out the following reasons for the review of the claim:

1. "Based on the medical reports up to the December 2001 ICE medical documents indicated I was at MMI.

2. How can 1 hour of functional testing provide an objective medical profile of my functional status?

3. How can in a 4-5 month period (from July to November) I functionally improved to my pre-accident status?

4. I don't believe that attending a gym facility approx. 8x per month at 40 min to an hour I significantly improved my functional status.

5. How can an ICE performed on one of my "better days" show a true functional profile?

6. The December 2001 ICE measured only <u>one component</u> of a <u>complete</u> ICE.

7. If I completed the entire ICE and then was measured for the physical activity of bending and stooping the reading for the bending and stooping would have been assessed as significantly lower (i.e. not reaching my pre-accident status)."

In addition, the Application for Review contained a letter from [Appellant's doctor] to [text deleted], dated January 31, 2002, which states:

> "I recently saw [the Appellant] and I understand that it is felt that he is fit to return to his previous occupation according to the report from [rehab clinic]. While I would not dispute their findings and believe him to be physically strong I suspect that a return to his former work, because of its repetitive nature, is likely to cause increasing problems with his back and neck. At present if he is bending over the bathtub playing with his son and then lifts him out having been in this position for sometime he has difficulty lifting his son from the tub. My feelings are that he should be in an occupation where any heavy work should be kept to a minimum. Thank you for your consideration."

The Internal Review Officer wrote to [Appellant's rehab doctor #1] on April 18, 2002 and referred to the [rehab clinic] reports dated January 19, 2001 and July 11, 2001, as well as the second Functional Abilities Evaluation received by MPIC on January 14, 2002. In respect of this second Functional Abilities Evaluation the Internal Review Officer states:

> "[The Appellant] underwent what he describes as being a much briefer evaluation recently. This resulted in a second Functional Abilities Evaluation. It was received by MPI on January 24, 2002, although, curiously enough, it bears a "start and finish date" of August 30, 2000. Much of the material in this report seems to be identical to that in the first report. On this occasion, however, [Appellant's rehab doctor #2] (who again is the person signing the report) says that [the Appellant] "has made functional improvements" which [Appellant's rehab doctor #2] suggests "will allow him to return to his previous occupation".
>
> I share some of the concerns which [the Appellant] expresses about the evaluation:
>
> 1. To the layman's eye at least, many of the findings in the two evaluations appear to be the same. In fact, in some cases the language used to express them is identical.
>
> 2. The first evaluation was an adjunct to an intensive work hardening program. Since then, [the Appellant] has been going to school. He advises that he has been able to make it to the gym approximately eight times per month in this period. Nevertheless, one would have expected his functional abilities to have deteriorated, rather than improved, given those facts.

3. The most recent evaluation does not appear to indicate much in the way of improved "sustained positional tolerance" which was a primary concern in your January 19, 2001 report. The recent evaluation, in particular, took a very short time, as I understand it. Is it a valid measure of [the Appellant's] ability to perform his pre-accident job eight hours a day, five days a week?

I would ask you to provide a report responding to the points raised above in this letter. I would ask you to indicate whether your opinion concerning [the Appellant's] ability to return to his pre-accident work has changed since your report of January 19, 2001, and, if so, please explain why. I have not copied this letter to [Appellant's rehab doctor #2]. Please feel free to discuss this request with him, if you wish. We would also welcome any input that [Appellant's physiotherapist] might have since he was one of the signatories to the January 19, 2001 report."

On June 18, 2002 [Appellant's rehab doctor #1] and [Appellant's rehab doctor #2] wrote to the Internal Review Officer wherein they explained why the conclusions differ in the two Functional Abilities Evaluations.

The Internal Review Officer, upon receipt of the letter from [rehab clinic] dated June 18, 2002, wrote to the Appellant by letter dated June 25, 2002 and stated:

"REVIEW DECISION

This Review has confirmed the decision of January 25, 2002. The evidence indicates that you are able to return to your pre-accident employment. Accordingly, Section 110(1)(a) of *The Manitoba Public Insurance Corporation Act* ("the Act") applies to end your entitlement to Income Replacement Indemnity ("IRI") benefits. Since you lost your employment because of the accident, Section 110(2)(d) applies to extend your benefits for one year from the date of the decision."

The Internal Review Officer further indicates:

"Attached is a copy of the response from [Appellant's rehab doctor #1] and [Appellant's rehab doctor #2] dated June 18, 2002. I think they have provided a satisfactory explanation for why the conclusions in the two FCE's differ. Their explanation has also satisfied me that the second FCE was a valid measure of your ability to function in the work place."

The Appellant filed a Notice of Appeal, dated July 30, 2002, wherein the Appellant states:

> "The reason for my appeal is, I'm not doubting the finding of [Appellant's rehab doctor #1] and [Appellant's rehab doctor #2]. What I am finding hard to understand is, if I wasn't doing anything to strain my back, it should be in better form. So when ask to do the FCE section that I did, I should perform at a higher standard. So my question is, if I wasn't at school, and I was placing some strain on my back, the test results would be different. Leading up to the FCE testing I wasn't doing anything but sitting in school, so my back was relaxed and wasn't under stress. I believe that my back couldn't hold up to the day to day strain of physical work. Yes, I wouldn't be welding for 8 hrs a day, but the constant stress put on my back would lead to the same result. Plus add in the life outside of work. Part of the reason I thought I should have done the full FCE, was it would have added some stress to my back. Up to the FCE test my back was in the ideal situation, I was in school for over a year."

The Commission heard the appeal by the Appellant on January 9, 2003 in respect of the decision by MPIC to terminate the Appellant's IRI benefits effective January 23, 2002. At this hearing, the Appellant testified under oath and was critical of the second Functional Abilities Evaluation conducted by [rehab clinic] and reiterated the reasons set out in the Notice of Appeal. The Appellant further stated that he was unable to continue to be employed as a welder, as the work required him to constantly bend and lift heavy loads during his work shift of 8 hours, and that this activity exacerbated the pain in his neck and back and rendered him unable to continue this employment.

The Appellant further indicated that at the time of the second evaluation he was not employed but was attending school. Subsequently, the Appellant undertook training to become a Primary Care Paramedic and at the time of the hearing was employed in that capacity.

The Appellant was cross-examined by counsel for MPIC, who suggested that if he was able to do the work of a paramedic in lifting patients that he would be able to continue to work as a welder. In reply, the Appellant testified that:

(a) during the course of employment as a paramedic, he would be required, from time to time during the course of the day, to lift a patient for a short period of time;

(b) as a welder, he was continuously required, during the course of an 8 hour shift, to lift objects from a bin for the purposes of welding;

(c) as a result, the constant bending and lifting of heavy loads during an 8 hour shift exacerbated the pain in his neck and back and prevented him from working as a welder;

(d) he was physically incapable, as of January 23, 2002, of resuming his employment as a welder.

MPIC's legal counsel submitted that the initial evaluation by [rehab clinic] had determined that the Appellant could meet certain demands of the job and that the second evaluation dealt with those tasks which the Appellant was unable to complete during the initial testing. MPIC's legal counsel further submitted that both evaluations were valid tests and, as of January 23, 2002, the Appellant was physically capable of resuming his employment as a welder.

At the conclusion of the hearing, the Commission recessed for a short period of time and upon reconvening the hearing informed the Appellant and MPIC's legal counsel that the Commission wished to consider whether it would seek an independent opinion from an occupational therapist in respect of the validity of the second Functional Abilities Evaluation conducted by [rehab clinic] on July 11, 2001.

The Commission determined that it would request an independent opinion from an occupational therapist. On January 29, 2003, the Commission wrote to [text deleted], an Occupational Therapist, and sent copies of this letter to both the Appellant and MPIC's legal counsel. In this letter the Commission provided [independent occupational therapist] with all the documents filed at the hearing and requested advice on the following issues:

1. "Whether the second evaluation performed by [rehab clinic] dated July 11, 2001, (document #43) was a valid functional abilities evaluation and whether together with the previous evaluations correctly measured [the Appellant's] ability to perform his pre-accident job 8 hours a day, 5 days a week.

2. If you are not satisfied that the functional abilities evaluations performed by [rehab clinic] measured [the Appellant's] ability to perform his pre-accident job 8 hours a day, 5 days a week, we would request that you conduct an appropriate functional abilities evaluation in order to determine whether as of January 23, 2002, [the Appellant] was able to perform his pre-accident employment as a welder, 8 hours a day, 5 days a week."

On February 15, 2003 [independent occupational therapist] wrote to the Commission and advised that she had reviewed the entire file and on February 12, 2003 met with the Appellant. In respect of the first question posed by the Commission to [independent occupational therapist], she indicated that there is a distinction between a Functional Capacity Evaluation test done between a work site based evaluation and a clinic based evaluation. [Independent occupational therapist] stated:

1. "The advantage of a work site based 'sample' is the valid representation of the actual functional demand. Disadvantages are that they are 'inefficient' for clinic based evaluators to set up and administer, require the participation of the employer, do not yield a standardized test result, and do not have a measure of voluntary effort built into the test. The merits of clinic based tests are that they allow an incremental (safe) presentation of workloads, help a practitioner to identify and address the component of function which is producing symptoms, and allow for privacy regarding health issues. The work samples are standardized, and performance can be measured using either industrial engineering (method-time-measurement) norms, or population norms. Each 'test' or work sample, follows a set protocol, and has strengths and limitations as a measurement tool. The 'test' may or may not provide a valid simulation of the work demand; the validity of the evaluator's conclusions relative to the job demands depends on the validity of the simulation. As a whole, a good evaluation helps to develop a rational regarding vocational direction (ie return to same job, alternate job etc.), but because the tests & test environment do not simulate the actual tasks, equipment & materials, or work environment, the evaluator cannot reasonably conclude that an individual can perform his job 8 hours a day, 5 days a week. Writer notes that conclusions were not stated in this way by the evaluators in either FCE.

The assessment of Sept. 2000, contained the components of a good functional evaluation. Most evaluators, when unable to conduct a work simulation, test relative to the work classification (ie in this case medium-heavy), and this was done by [rehab clinic]. <u>There</u>

> was an omission, as there was no assessment of the patient's tolerance for continuously wearing a welding helmet (however this was not the concern raised by [the Appellant]). An attempt was made to determine tolerance for stooping, **but the actual job demand for stooping while lowering weight was not tested.** The Job Demands Analysis (document 105) was well done, and on pg. 3, indicates a frequency for lifting (actually lowering) parts weighing 5-100 lbs. into bins at a rate of every 15 sec.-3 min. The lifting tests in the FCE measured [the Appellant's] tolerance for loading the spine, but these tests allow an individual to use correct lifting mechanics (bending the knees), whereas lowering into bins does not. There are no **standardized** tests available which directly simulate the job demands for stooping/lowering parts into a bin on a frequent or continuous basis, however, a non-standardized work simulation could have been set up. When [the Appellant] states he cannot perform the work of a welder, he refers specifically to poor tolerance for repetitive lowering of parts into bins. [Text deleted] contract indicates no modified duties, which means that [the Appellant] would be rotated to work-stations where frequent lowering into bins would be required." (underline added)

[Independent occupational therapist] further stated:

> "The assessment conducted Nov. 19, 2001 (document 26), was not a functional capacities evaluation, but the re-administration of a few work samples. The document itself was misleading. The re-administration of specific functional tests, would be reasonable, in terms of providing a billable service (it would be difficult to justify re-administering costly tests when there was no impairment in the previous assessment). As above, the problem was that the test determined tolerance for stooping, but not for repetitive stooping with a load." (underline added)

[Independent occupational therapist] concluded that the initial evaluation was flawed and that the second assessment was not a functional capacities evaluation, but the re-administration of a few work samples. In respect of this assessment, the test determined tolerance for stooping but not for repetitive stooping with a load. [Independent occupational therapist] noted that the Appellant's primary complaint that he was unable to work as a welder due to the repetitive requirement to bend over and lower parts into bins, and that this complaint was never examined by [rehab clinic] in either of its two evaluations.

The Commission therefore finds that in response to the first question posed by the Commission to [independent occupational therapist], she concluded that the second evaluation performed by

[rehab clinic] was not a valid functional capacities evaluation and that both evaluations did not correctly measure the Appellant's ability to perform his pre-accident job 8 hours per day, 5 days per week. [Independent occupational therapist], in her report, determined:

1. "The second evaluation by [rehab clinic] was not an FCE, but the previous FCE with amendments. The conclusions of the second evaluation were not completely valid, even though improved tolerance for crouching & stooping **suggested** that the client could return to work, because that the critical job demand for frequent stooping while lowering weight was not tested." (underline added)

In response to the second question posed by the Commission to [independent occupational therapist], [independent occupational therapist] indicates she would be unable to administer direct work simulation as the Appellant's employment with [text deleted] has been terminated. [Independent occupational therapist] does indicate that if a Functional Capacities Evaluation was to be conducted at this time that it be done by [rehab clinic] following the protocol of September 2000 with the simple addition of work simulations for frequently lowering parts into bins, and for wearing an automatic screen welding helmet.

The Commission notes that the Internal Review Officer raised significant concerns in respect of the second Functional Abilities Evaluation conducted by [rehab clinic]. However, [Appellant's rehab doctor #1's] explanation satisfied the Internal Review Officer as to the validity of the second Functional Abilities Evaluation. As a result, the Internal Review Officer confirmed the Case Manager's decision to terminate the Appellant's IRI benefits effective January 23, 2003. Relying on the two assessments, the Internal Review Officer concluded that pursuant to Section 110(1)(a) of the Act, the Appellant, as of January 23, 2002, was capable of returning to his previous employment as a welder and that the Case Manager was correct in terminating the Appellant's IRI benefits effective January 23, 2002.

Unfortunately, the Internal Review Officer, when rendering his decision to dismiss the Application for Review, did not have the advantage of reviewing the report of [independent occupational therapist], who concluded that the two evaluations conducted by [rehab clinic] were flawed and that the second evaluation was not a valid Functional Abilities Evaluation and did not test the validity of the Appellant's complaint relating to his inability to continue work as a welder.

[Independent occupational therapist's] report was provided to both MPIC's legal counsel and the Appellant. MPIC's legal counsel, in an e-mail to the Commission dated March 12, 2003, asserts that MPIC maintains its position that the Appellant was able to return to work but was choosing not to do so and further stated:

> "In addition to [the Appellant's] evidence that he would be prepared to try to scale a fence if it would help him get a job as a police officer but he wouldn't try to do welding for a day, we now have the commentary of [independent occupational therapist] found at page 2 of her report that "Sometimes a period of disability appears to become a period of opportunity rather than a period of rehabilitation." This is an additional suggestion that [the Appellant's] test results have a large subjective element to them.
>
> We submit that [the Appellant] has not adequately explained the increase in ability between the two evaluations from [rehab clinic]. The Commission will recall that [the Appellant] did not realize during his second test that the results of the testing could affect his benefits. [The Appellant] was able to squat for a lengthy period of time and, yet, has not tried to do the sort of work that he would do as a welder. His unsupported evidence was simply that he can't."

The Commission was impressed with the analysis conducted by [independent occupational therapist] in her assessment of the two evaluations conducted by [rehab clinic]. The Commission accepts [independent occupational therapist's] finding that both of [rehab clinic's] evaluations were flawed, that the second evaluation was not a bona fide Functional Abilities Evaluation and that neither evaluation addressed the Appellant's primary complaint as to why he was unable to work as a welder. Having regard to the opinion of [independent occupational therapist], the

Commission concludes that the response of [Appellant's rehab doctor #1] and [Appellant's rehab doctor #2], dated June 18, 2002, to the Internal Review Officer, does not provide a satisfactory explanation as to why there was a different conclusion between the first and second Functional Abilities Evaluations.

The Commission, therefore, rejects the explanation provided by [Appellant's rehab doctor #1] and [Appellant's rehab doctor #2] in their letter to the Internal Review Officer dated June 18, 2002 and accepts the findings of [independent occupational therapist] in this respect. As a result, the Commission concludes that the Internal Review Officer was mistaken in relying on the explanation of [Appellant's rehab doctor #1] and [Appellant's rehab doctor #2] in their letter to him dated June 18, 2002 and, as a result, erred in dismissing the Appellant's Application for Review and confirming the decision of the Case Manager.

The Commission finds that the Appellant was a credible witness who gave his evidence, both in examination-in-chief and in cross-examination, in a very direct and candid fashion. The Commission was impressed with the attitude and work ethic of the Appellant who, as a result of being unable to continue to work as a welder, returned to school in order to obtain employment in a new career and at the time of the appeal hearing was employed as a paramedic.

The Commission, therefore, finds that the Appellant has established, on the balance of probabilities, as of January 23, 2002, he was incapable of returning to work as a welder due to the injuries he sustained in the motor vehicle accident.

The Commission directs MPIC to reinstate the Appellant's IRI benefits from the date of their termination, together with interest at the statutory rate from that date to the date of actual

payment. The Commission retains jurisdiction in this matter and, if the parties are unable to agree as to the amount of compensation, then either party may refer the dispute back to the Commission for final determination.

Dated at Winnipeg this 4th day of April, 2003.

MEL MYERS, Q.C.

BILL JOYCE

WILSON MACLENNAN